

# Is Resisting Genocide a Human Right?

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No one has a legal duty to be a victim of genocide. The statement is 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 anti-genocide 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. 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 anti-genocide mechanisms currently favored by the United Nations.

The first half of this Article, Parts I through III, details the catastrophic inadequacy of current anti-genocide remedies. Part I shows how non-violent economic and other sanctions have failed. Part II examines the lack of success on the part of multilateral “peacekeeping” forces, such as the United Nations’ Standby 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 United Nations 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 anti-genocide remedy which is genuinely effective. Our alternative remedy focuses on empowering genocide victims, rather than

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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. (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, rather than to members who have already been murdered.)

Part IV points out that civilian armament has historically been very effective at preventing genocide. Indeed, genocide scholars have found that genocides 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 of a right to revolution against tyranny. 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. When the case of *Bosnia v. Yugoslavia* 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. 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 preemptory 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 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 United Nations 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 UN's Protocol against the Illicit Manufacture of and Trafficking in Firearms became legally binding on signatory states.<sup>4</sup> 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." 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 the 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 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 anti-genocide 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 anti-genocide 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 world-wide genocide would result in an extremely large net gain for personal security and human rights.

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<sup>4</sup> Protocol against the Illicit Manufacture of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/255, U.N. GAOR, May 31, 2001.

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. Non-Violent 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.<sup>5</sup>

Most of the rest of the world, however, has decided to continue commercial relationships with Sudan, notwithstanding the genocide. For example, several European airlines offer non-stop 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.

In Darfur, as innocent black Africans were under attack, and women and children were dying, the UN Security Council could not even agree to include the word "sanctions" in its resolution 1556 of July 30, 2004.<sup>6</sup> Because of the veto threats from China and Russia, the UN's September 18, 2004, Resolution 1564<sup>7</sup> took no action other than to merely threaten the use of sanctions against Sudan's oil industry and individual Sudanese officials.<sup>8</sup> Nor could the UN prioritize the \$200 million in funds estimated to be required "to save the lives of" the displaced population of Darfur.<sup>9</sup>

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

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<sup>5</sup> 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, 72.

<sup>6</sup> S. Res. 1556, U.N. SCOR, 5015<sup>th</sup> meeting, July 30, 2004, <http://www.un.org/News/Press/docs/2004/sc8160.doc.htm>.

<sup>7</sup> S. Res., 1564, U.N. SCOR, Sept. 18, 2004, <http://news.bbc.co.uk/1/hi/world/africa/3669978.stm#demands>. See also Thalif Deen, *N. Efforts on Sudan*, INTER PRESS SERVICE (Johannesburg), Nov. 5, 2004 (According to Ann-Louise Colgan, director for policy analysis and communications at Washington-based Africa Action, "On the U.N. Security Council, both Russia and China continue to oppose sanctions, for their own economic and political interests..."); *World 'ignoring' War torn Darfur*, BBC NEWS, Jan. 14, 2005 ("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.).

<sup>8</sup> Deen, *supra* note 7.

<sup>9</sup> *US Presents New Darfur UN Draft*, BBC NEWS, Sept. 14, 2004, <http://news.bbc.co.uk/2/hi/africa/3654196.stm>.

study argues that sanctions are *in general* an effective means of coercion, although individual sanctions regimes can and sometimes do succeed.”<sup>10</sup>

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 non-sanctioned states because of the reduction of trade.<sup>11</sup>

More recently, the UN has attempted to design specific “targeted” or “smart” sanctions which would affect only the wrong-doers. Thinking about sanctions has become a big business in the international community. The UN 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.<sup>12</sup> The sanctions advocates have done a 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, “the success record of selective measures is ambiguous.”<sup>13</sup>

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<sup>10</sup> *UN Sanctions: How Effective? How Necessary?*, Strategic Planning Unit, Executive Office of the Secretary General, United Nations (N.Y., Mar. 1999). See also Gary Clyde Hufbauer, Jeffrey J. Schott, and Kimberly Ann Elliott, *Executive Summary*, in *ECONOMIC SANCTIONS RECONSIDERED* (1990)(1998 update of Executive Summary), <http://www.iie.com/research/topics/sanctions/sanctions-summary.htm>.

Hufbauer, et al, examined 115 cases of economic sanctions and found that 34 percent were “at least partially successful.” *Id.* at \_\_\_\_\_. Robert Pape examined the 40 cases of sanctions that Hufbauer, et al, had claimed were successful, and found that only 5 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 (1998) 66. See also Arne Tostensen and Beate Bull, *Are Smart Sanctions Feasible?*, 54 *WORLD POL.* 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.”)

<sup>11</sup> See Gary Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, Symposium on “Sanctions Reform? Evaluating the Economic Weapon in Asia and the World,” Institute for International Economics, Feb. 23, 2000, <http://www.iie.com/publications/papers/hufbauer0200.htm> (visited Sept. 18, 2004). UN Secretary-General Kofi Annan stated: “It cannot be too strongly emphasized that sanctions are a tool of enforcement and, like other methods of enforcement, they will do harm.” Report of the Secretary-General on the Work of the Organization – 1998,” cited in Hufbauer. See also Joy Gordon, *Sanctions as Siege Warfare*, *THE NATION*, Mar. 22, 1999, p. 18 (“Although there is controversy over the precise extent of human damage, all sources agree that it is severe...no 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 10, at \_\_\_\_ (“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...The humanitarian suffering associated with some sanctions regimes has become a major political issue, both within the Organisation and in the wider international community.”).

<sup>12</sup> *About the Stockholm Process*, [http://www.smartsanctions.se/stockholm\\_process/stockholm\\_process.htm](http://www.smartsanctions.se/stockholm_process/stockholm_process.htm).

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

## A. The Interlaken Process

The Interlaken Process, named for its host town in Switzerland, is a UN-led program initiated in 1998 to refine knowledge on targeted sanctions, especially financial ones.<sup>14</sup> 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.”<sup>15</sup>

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.<sup>16</sup> If just one ordinary 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 alerted some guilty parties that they should diligently investigate novel ways of hiding their financial dealings. According to Elliott, “it seems likely that potential targets are already taking steps to protect themselves from any future sanctions.”<sup>17</sup>

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.”<sup>18</sup>

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.<sup>19</sup>

## B. The Bonn-Berlin Process

The Bonn-Berlin Process was intended to redesign travel sanctions and arms embargoes to ameliorate earlier failings. According to Michael Brozka, “Arms

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<sup>14</sup> See *Targeted Financial Sanctions: A Manual for Design and Implementation, Contributions from the Interlaken Process* (Thomas J. Watson Institute for International Studies, Brown University, 2001) for a general discussion of the Interlaken Process, [http://www.smartsanctions.ch/interlaken\\_manual.htm](http://www.smartsanctions.ch/interlaken_manual.htm).

<sup>15</sup> Kimberly Ann Elliott, *Analyzing the Effects of Targeted Sanctions*, in SMART SANCTIONS, *supra* note 13, at 179.

<sup>16</sup> See *Targeted Financial Sanctions*, *supra* note 14, at \_\_. (“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 13, at 62 (“...a sanctions fence is only as strong as its weakest link.”).

<sup>17</sup> Elliott, *supra* note 15, at 178.

<sup>18</sup> Cortright & Lopez, *supra* note 13, at 37.

<sup>19</sup> Arne Tostensen & Beate Bull, *Are Smart Sanctions Feasible?*, 54 WORLD POL. 373, 402 (2002).

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.”<sup>20</sup> 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.”<sup>21</sup> Thus, travel sanctions are 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.<sup>22</sup> 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...nor should travel sanctions be expected to work on their own.”<sup>23</sup> 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.<sup>24</sup>

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<sup>20</sup> *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the ‘Bonn-Berlin Process’*, Bonn International Center for Conversion (Michael Brzoska ed., 2001), at 10, [http://www.bicc.de/events/unsanc/2000/pdf/booklet/booklet\\_sanctions.pdf](http://www.bicc.de/events/unsanc/2000/pdf/booklet/booklet_sanctions.pdf).

<sup>21</sup> Laura Norris & Jacqueline Simon, Conference Discussion Summary Report, *Smart Sanctions, The Next Step: Arms Embargoes and Travel Sanctions – Improving their Effectiveness* (1999), at 3, Bonn International Center for Conversion, <http://www.bicc.de/events/unsanc/1999/pdf/sanctionssummary.pdf>.

<sup>22</sup> 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*, THE GUARDIAN, Feb. 21, 2003, <http://www.guardian.co.uk/zimbabwe/article/0,2763,900001,00.html>.

<sup>23</sup> Richard W. Conroy, *The UN Experience with Travel Sanctions: Selected Cases and Conclusions*, in SMART SANCTIONS, *supra* note 13, at 163-64.

<sup>24</sup> Hufbauer & Oegg, *supra* note 10. Hufbauer and Oegg elaborated:

The assumption that flight bans exert minimal humanitarian impact may not hold. In August 1996, the Security Council voted to impose a flight ban on the government of Sudan for its suspected support of international terrorism. Implementation of the ban was delayed, 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. Since the Sudanese 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 rely on the airline to reach remote areas of the country. Taking these considerations into account, the UN Security Council never implemented the flight ban.

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 sanctions.<sup>25</sup> After seven years of UN 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.”<sup>26</sup> One can understand why a UN official would “prefer to think” that the UN deserved credit. But Elliott disagreed that “the relatively minor inconveniences”<sup>27</sup> of UN travel sanctions changed Qaddafi’s heart after seven years. Rather, “His 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.”<sup>28</sup>

## 2. Arms Embargoes

On July 30, 2004, the United Nations Security Council imposed an arms embargo on non-government 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.<sup>29</sup> In March 2005, the Security Council affirmed the prior embargo and extended it to cover the central government in Khartoum.<sup>30</sup>

In general, arms embargoes have not been successful.<sup>31</sup> According to Cortright and Lopez, “arms embargoes have been empty gestures”<sup>32</sup> because of non-existent or weak enforcement. 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.”<sup>33</sup> 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

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<sup>25</sup> Conroy, *supra* note 23, at 150-51.

<sup>26</sup> *Id.* Annan was referring to sanctions applied in the hopes of forcing Libya to extradite two terrorist suspects.

<sup>27</sup> Elliott, *supra* note 15, at 174.

<sup>28</sup> Elliott, *supra* note 15 at 174. 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.

<sup>29</sup> S/Res./1556, U.N. SCOR, July 30, 2004.

<sup>30</sup> S/Res./1591, U.N. SCOR, Mar. 29, 2005.

<sup>31</sup> *See generally*, Brian Wood & Johan Peleman, *Making the Deal and Moving the Goods*, in *RUNNING GUNS: THE GLOBAL BLACK MARKET IN SMALL ARMS* 129-54 (Lora Lumpe ed., 2000); R. T. Naylor, *Gunsmoke and Mirrors: Financing the Illegal Trade*, in *RUNNING GUNS*, 155-82.

<sup>32</sup> Cortright & Lopez, *supra* note 13, at 15.

<sup>33</sup> Loretta Bondi, *Arms Embargoes: In Name Only*, in *SMART SANCTIONS*, *supra* note 10, at 113.

pessimism...Rather, this accumulated experience should pave the way to more radical innovations and courageous thinking.<sup>34</sup>

Others<sup>35</sup> have echoed this sentiment.<sup>36</sup>

However, the path is a dead end. As R. Richard Newcomb noted, “if money is available, goods will be smuggled.”<sup>37</sup> Elliott pointed out “the 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....”<sup>38</sup>

Bondi acknowledges that black markets in arms flourish because of the “flawed design” of embargoes.<sup>39</sup> 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.

Another flaw in arms embargoes is that they sometimes lead to inequities on the ground. In Bosnia, the UN 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). 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 their legitimate right to self-defense. In effect, the UN deprived Bosnia of its right to self-defense, a right guaranteed under Article 51 of the UN Charter.<sup>40</sup> Because the Serbs possessed most of the old Yugoslavian

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<sup>34</sup> *Id.* at 117.

<sup>35</sup> See Michael Brzoska, *Putting More Teeth in UN Arms Embargoes*, in SMART SANCTIONS, *supra* note 10, at 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 Jim Wurst, *Black Market Small Arms Readily Available Despite Global Efforts*, UN WIRE, June 30, 2004 (Reporting that Glenn McDonald, one of the authors of SMALL ARMS SURVEY 2004, stated that a solution to illicit small arms was to “give U.N. arms embargoes more teeth...The absence of verification betrays states’ lack of interest in abiding by their obligations.”); The Stockholm Process, Executive Summary, *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*, [http://www.smartsanctions.se/stockholm\\_process/reports/Exec\\_summary.pdf](http://www.smartsanctions.se/stockholm_process/reports/Exec_summary.pdf).

<sup>36</sup> The Stockholm Process was the sequel to the Interlaken and Bonn-Berlin Processes. According to a UN Press Release, “Its recommendations seek to increase sanctions’ efficiency by reforming and improving their implementation, while minimizing unintentional negative consequences.” See UN Press Release SC/7672, Feb. 25, 2003, *‘Stockholm Process’ Findings, Year-Long Study on Targeted Sanctions*, presented to Security Council, Feb. 25, 2003,

[http://www.smartsanctions.se/stockholm\\_process/reports/press%20release%20sc7672.htm](http://www.smartsanctions.se/stockholm_process/reports/press%20release%20sc7672.htm). See also Executive Summary, *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*, [http://www.smartsanctions.se/stockholm\\_process/reports/Exec\\_summary.pdf](http://www.smartsanctions.se/stockholm_process/reports/Exec_summary.pdf)

<sup>37</sup> R. Richard Newcomb, *Targeted Financial Sanctions: The U.S. Model*, in SMART SANCTIONS, *supra* note 10, at 62. See also Brzoska, *supra* note 35, 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.”).

<sup>38</sup> Elliott, *supra* note 15, at 175.

<sup>39</sup> Bondi, *supra* note 33 at \_\_.

<sup>40</sup> “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

army's weaponry, the embargo froze the *status quo* of their military superiority over the Bosnians, and thereby allowed the Serbs to perpetrate genocide against Bosnia.<sup>41</sup>

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. We will examine the issue in more detail, *infra*, in parts V-VI.

## II. Coercion Involving the Use of Force: A UN Constabulary

In Part V, we will discuss in detail The Convention on the Prevention and Punishment of the Crime of Genocide. The Convention obligates signatory states to “prevent” genocide. One of the ways a state may attempt to fulfill the obligation is specified in article VIII, 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 3.”<sup>42</sup>

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 United Nations Security Council to take action against a genocide.<sup>43</sup>

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 non-genocidal government. For example, Sudan itself is one of fifteen nations which currently has 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.<sup>44</sup> 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 record on human rights.

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any time such action as it deems necessary in order to maintain or restore international peace and security.” UN Charter, art. 51. *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).

<sup>41</sup> *See* Dave Kopel, Paul Gallant & Joanne Eisen, *When Policy Kills*, NAT’L REV. ONLINE, Jan 27, 2002, <http://www.nationalreview.com/kopel/kopel012703.asp>.

<sup>42</sup> 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. 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. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 453 (2000). Obviously none of the organs took the slightest *effective* action to save any of the genocide victims.

<sup>43</sup> Scott Straus, *What’s in a Name?* 84 FOR. AFF. 123 (Jan.-Feb. 2005).

<sup>44</sup> David B. Kopel, *Dailies ignoring Zimbabwe crisis*, ROCKY MTN. NEWS, Sept. 1, 2002, <http://www.davekopel.com/Media/RMN/2002/Zimbabwe.htm>; David B. Kopel, Paul Gallant & Joanne Eisen, *Ripe for Genocide*, NAT’L REV. ONLINE, Feb. 13, 2001, <http://www.nationalreview.com/kopel/kopel021301.shtml>.

Referring to Rwanda and Bosnia, UN 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 obligations.”<sup>45</sup> Yet by then, the genocide in Darfur had already commenced. Still, the United Nations refused to call it genocide by its name.<sup>46</sup> Other than the United States government, no other government in the world has used the word “genocide” to describe what is going on in Sudan.

A January 25, 2005 UN report<sup>47</sup> did admit that the atrocities rose to the level of “crimes against humanity” and suggested, among other things, reparations to the victims. 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 victims in Darfur and elsewhere.”<sup>48</sup>

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 UN evaded the affirmative duty of all signatories of the Genocide Convention, and of the UN 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<sup>49</sup> did not shy away from acknowledging the option of armed humanitarian intervention.<sup>50</sup>

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<sup>45</sup> See UN Press Release SG/SM/9126, *Genocide is Threat to Peace Requiring Strong, United Action, Secretary-General Tells Stockholm International Forum*, Jan. 26, 2004.

<sup>46</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004 (Jan. 25, 2005), [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf). The UN Report on Darfur stated, among other things: “it 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.” See also *UN Commission finds Sudanese Government responsible for crimes in Darfur*, UN NEWS CENTRE, Feb. 1, 2005 (“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’.”), <http://www.un.org/apps/news/printnews.asp?nid=13199>.

<sup>47</sup> *Id.*

<sup>48</sup> UN Press Release SG/SM/9700 AFR/1101, Feb. 01, 2005.

<sup>49</sup> See The Stockholm Process, Executive Summary, *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Option*, [http://www.smartsanctions.se/stockholm\\_process/reports/Exec\\_summary.pdf](http://www.smartsanctions.se/stockholm_process/reports/Exec_summary.pdf).

<sup>50</sup> See Saban Kardas, *Humanitarian Intervention: A Conceptual Analysis*, 2 ALTERNATIVES (2003), <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.

Unfortunately, previous UN peacekeeping<sup>51</sup> missions have not successfully protected victim populations, and they have occasionally failed even to protect themselves.<sup>52</sup> For example, Dutch peacekeepers under UN 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.<sup>53</sup>

The U.N. cannot 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 U.N. 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 troops left, including attempts to pretend to the refugees that they were not in fact leaving, was disgraceful,” a report later concluded.<sup>54</sup>

More recently, in the Democratic Republic of Congo, UN peacekeepers withdrew in the face of violence.<sup>55</sup> According to UN spokesman Fred Eckhard, “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

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<sup>51</sup> See What is Peacekeeping?, United Nations Peacekeeping: Meeting New Challenges, <http://www.un.org/Depts/dpko/dpko/faq/q1.htm>. The UN 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.

Note that “peacekeeping,” according to UN 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.

<sup>52</sup> See, e.g., DENNIS C. JETT, WHY PEACEKEEPING FAILS xii (1999). See also *Srebrenica: A ‘Safe Area’: Reconstruction, Background, Consequences and Analyses of the Fall of a Safe Area*, Netherlands Institute for War Documentation, [http://www.srebrenica.nl/en/a\\_index.htm](http://www.srebrenica.nl/en/a_index.htm).

<sup>53</sup> See Dave Kopel, Paul Gallant & Joanne Eisen, *When Policy Kills*, NAT’L REV. ONLINE, Jan. 27, 2003, <http://www.nationalreview.com/kopel/kopel012703.asp>. See also *Srebrenica: A ‘Safe Area’*, Netherlands Institute for War Documentation (2002), <http://www.srebrenica.nl/en/>; *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35*, U.N. GAOR, 54th Sess., Agenda Item 42, ¶ 490, U.N. Doc. A/54/549 (1999), <http://www.haverford.edu/relg/sells/reports/UNsrebrenicareport.htm>.

<sup>54</sup> Ingvar Carlsson, Han Sung-Joo & Rufus M. Kupolati, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, New York, Dec. 15, 1999, <http://www.ess.uwe.ac.uk/documents/RwandaReport1.htm> (visited May 17, 2005), §12.

<sup>55</sup> This led to an unfortunate occurrence. Because of civilian anger and an ensuing demonstration against the UN, three people were shot dead by UN peacekeepers. See *UN Troops Open Fire in Kinshasa*, BBC NEWS, Jun. 3, 2004 (According to UN peacekeeping chief Jean-Marie Guehenno, “Our troops had, as a last resort, to open fire.”). There are many disturbing reports of peacekeepers involved in the rape of women and the sexual exploitation of children. See, e.g., Kate Holt, *DR Congo’s Shameful Sex Secret*, BBC NEWS, June 3, 2004.

out their differences and reaffirm their peace agreement, then there's a role for the UN. When war breaks out, the role of peacekeepers ends."<sup>56</sup>

We cannot fault the Security Council's imperfect mandates; more forceful mandates would involve the UN in wars it could not hope to win. Although Kofi Annan requested an additional 13,100 troops for the Congo,<sup>57</sup> it is not likely he will get them because of monetary constraints. And even if the additional troops were deployed, it is unlikely that even the augmented troops would be able to take on a combat role and pacify the area.<sup>58</sup>

The oxymoron of "U.N. protection" was also illustrated in Sierra Leone in May 2000. As Dennis Jett explained in his book *Why Peacekeeping Fails*, Sierra Leone "nearly became the UN's biggest peacekeeping debacle" when 500 peacekeepers there were taken hostage by the barbaric rebels of the Revolutionary United Front (RUF).<sup>59</sup> 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." It was only the deployment of British troops to the former colony that saved civilian lives and averted a "complete U.N. defeat."

Lakhdar Brahimi analyzed the problems of the present system of UN peacekeeping operations and made numerous recommendations<sup>60</sup> that fall short of a permanent UN constabulary because the creation of such a force is problematic: big countries are reluctant to cede power to the UN, while smaller countries which abuse human rights are afraid that a UN force could be used against them.<sup>61</sup>

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<sup>56</sup> Susannah Price, *Peacekeepers 'Powerless' in DR Congo*, BBC NEWS, Jun. 3, 2004.

<sup>57</sup> See *Annan Gets Half the Peacekeepers He Needs for Congo*, BUS. DAY (Johannesburg), Oct. 4, 2004.

<sup>58</sup> Nor would one expect that the UN would be able to prevent the ongoing mini-genocide against the DR Congo's pygmies. See *DR Congo Pygmies 'Exterminated'*, BBC NEWS, Jul. 6, 2004. ("The International Criminal Court is being urged to investigate 'a campaign of extermination' against pygmies in the Democratic Republic of Congo.")

<sup>59</sup> DENNIS JETT, *WHY PEACEKEEPING FAILS* (N.Y.: Palgrave, 2001).

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. EUROPE, Aug. 2, 2000, <http://www.hrw.org/editorials/2000/ken-sl-aug.htm>.

<sup>60</sup> See Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809, [http://www.un.org/peace/reports/peace\\_operations/docs/full\\_report.htm](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"*, Oct. 2001 Revision, available at <http://www.stimson.org/fopo/pdf/peaceopsbr1001.pdf>.

<sup>61</sup> 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.

Question and Answer Session Following Statement (SG/SM/7741) at the United Services Institution of India, (unofficial transcript), Off the Cuff Remarks to the Press and the Public, New Delhi, Mar. 15, 2001, <http://www.un.org/apps/sg/offthecuff.asp?nid=158>. See also Saul Mendlovitz & John Fousek, *A UN*

Many people hope that a volunteer permanent rapid deployment force that would be available immediately might succeed,<sup>62</sup> 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 48 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 preparation, skills or enthusiasm to engage in robust operations.<sup>63</sup>

Peter Langille likened a UN constabulary force to a 911 emergency system.<sup>64</sup> 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’.” 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.<sup>65</sup>

Peter Langille’s UN-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 morning. As Langille himself admitted, “By their nature, emergencies usually require prompt, reliable and effective responses. Such a response is, alas, unlikely.”<sup>66</sup>

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*Constabulary to Enforce the Law on Genocide and Crimes Against Humanity*, in PROTECTION AGAINST GENOCIDE: MISSION IMPOSSIBLE? 118-20 (Neal Riemer ed., 2000)(discussion of some of the difficulties involved in creating a force under the direct control of the Security Council.).

<sup>62</sup> See Brian Urquhart, *For a UN Volunteer Military Force*, N.Y REV. OF BOOKS, JUNE 10, 1993 (“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 UN, admits that without such a force, the UN is merely a paper tiger. *Id.*

<sup>63</sup> Peter Langille, *Preventing Genocide: Time for a UN 911*, GLOBE & MAIL, Oct. 19, 2004, <http://www.globalpolicy.org/security/peacekpg/reform/2004/1019timefor.htm>. See also Brian Urquhart, *The United Nations’ Capacity for Peace Enforcement*, <http://www.iisd.org/security/unac/urqudoc.htm>; John G. Heidenrich, HOW TO PREVENT GENOCIDE: A GUIDE FOR POLICYMAKERS, SCHOLARS, AND THE CONCERNED CITIZEN 233-50 (2001); Michael J. Smith, *Humanitarian Intervention Revisited: Is There a Universal Policy?*, HARV. INT’L REV. (Fall 2000) 76 (“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.”).

In the United States, a person may make an emergency phone call to request police assistance by dialing the digits 9-1-1.

<sup>64</sup> See Peter Langille, *Preventing Genocide: Time for a UN 911*, GLOBE AND MAIL, Feb. 11, 2005.

<sup>65</sup> See David Kopel, Paul Gallant & Joanne Eisen, *911 Is a Joke... or Is It? Let's Find Out*, TECH CENT. STATION, Jan. 05, 2005, <http://www.techcentralstation.com/010505H.html>.

<sup>66</sup> See Langille, *Preventing Genocide*, *supra* note 64

Even if we hypothesize the creation of a directly controlled UN force, that force would only act when the UN decided. The track record of recent deployments of UN-directed forces should cause skepticism that the UN would actually use its military power to stop a genocide in progress.

## 1. SHIRBRIG

One UN force is SHIRBRIG (the United Nations' Standby High Readiness Brigade), created by a Dutch-Danish initiative in 1994.<sup>67</sup> SHIRBRIG was declared available to the UN in early 2000. Its first deployment came that year, after Ethiopia and Eritrea forged a peace agreement and consented to a UN 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."<sup>68</sup> The UN Mission in Ethiopia and Eritrea was authorized until September 15, 2005; its current strength is 3,345 military personnel.<sup>69</sup>

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 Ethiopia government was committing, with UN knowledge, genocide against the Anuak<sup>70</sup> people in the southwestern state of

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<sup>67</sup> See *Backgrounder: The Origins and Status of SHIRBRIG*, Feb. 10, 1999, Department of National Defence and the Canadian Forces (DND/CF),

[http://www.forces.gc.ca/site/newsroom/view\\_news\\_e.asp?id=792](http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=792). ("SHIRBRIG is an initiative for a multinational 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, Netherlands, Norway, Poland, Romania, Spain, and Sweden."). See also *SHIRBRIG: Multinational Stand-by High Readiness Brigade for United Nations Operations*, Presidency, SHIRBRIG Steering Committee, MOD Norway (undated document), for a more detailed description of SHIRBRIG and its operational components, <http://www.odin.dep.no/archive/fdvedlegg/01/01/Shirb044.pdf>.

<sup>68</sup> See *Ethiopia and Eritrea – UNMEE – Mandate*, United Nations Mission in Ethiopia and Eritrea, <http://www.un.org/Depts/dpko/missions/unmee/mandate.html>.

<sup>69</sup> See UNMEE: United Nations Mission in Ethiopia and Eritrea – Facts and Figures, <http://www.un.org/Depts/dpko/missions/unmee/facts.html> (visited 5/18/05).

<sup>70</sup> See Nyikaw Ochalla & Deidre D'Entremont, *Oil Development in Ethiopia: A Threat to the Anuak of Gambella*, CULTURAL SURVIVAL Q., Oct. 31, 2001 (brief history of the Anuak people). See also *Violence in Gambella: An Overview* (undated document),

[http://www.oxfamamerica.org/newsandpublications/news\\_updates/art7332.html](http://www.oxfamamerica.org/newsandpublications/news_updates/art7332.html) ("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."); Nyikaw Ochalla, *Ethnic Cleansing and Genocide Against the Anuak in Gambella State*, Ethiopia, July 16, 2003, [http://www.ethiomeia.com/release/anuak\\_genocide.html](http://www.ethiomeia.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 Gambella 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."); *Genocide Watch: The Anuak of Ethiopia*, GenocideWatch.org, 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.").

Gambella, Ethiopia.<sup>71</sup> According to Genocide Watch, “Additional reports indicate that the federal government of Ethiopia may have dispatched intelligence operatives to neighboring countries to assassinate exiled Anuak leaders...the massacres on 13-16 December 2003 were ordered by the commander of the Ethiopian army in Gambella, Nagu Beyene....”<sup>72</sup>

As is typical with genocides, the people most likely to protect the intended victims were first disarmed. Genocide Watch and Survivors’ Rights International observed: “disarmament of Anuak police in Gambella...preceded the genocidal massacres of December 13-16, 2003.”<sup>73</sup>

## 2. The African Union and its Forces

Another force currently available to the UN Security Council is the African Standby Force, established by the African Union.<sup>74</sup> A 1998 joint statement by African heads of state and President Clinton promised a “concerted effort” to prevent the resurgence of genocide in Africa.<sup>75</sup>

As of April 29, 2005, the African Standby Force in Darfur had grown to 2,200 troops and will, given sufficient foreign funding, eventually reach a total of more than

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<sup>71</sup> Gambella lies about 50 miles east of Sudan, and approximately 450 miles south of the border between Eritrea and Ethiopia. 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 SOCIAL RES. (1995).

<sup>72</sup> See *Survivor’s Rights International & Genocide Watch Call for Immediate Steps to Stop Massacres in Southwestern Ethiopia*, Genocide Watch and Survivors’ Rights Int’l, Feb. 28, 2004, <http://www.genocidewatch.org/PressReleaseAnuak022804.htm>.

<sup>73</sup> *Id.*

<sup>74</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union, [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Protocol\\_peace\\_and\\_security.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol_peace_and_security.pdf). According to the Protocol’s Article 13, African Standby Force, Composition:

1. In order to enable the Peace and Security Council [sic] 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?*, presented at a conference Convened by the Centre for International Political Studies, on: Keeping Peace in Tough Neighborhood: The Challenges Confronting Peacekeepers in Africa, or at the South African Defence College, Pretoria, Sept. 14, 2004, [http://www.up.ac.za/academic/cips/Publications/KTP\\_Dr\\_Peter\\_Kagwanja\\_ICG.pdf](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.”).

<sup>75</sup> SCHABAS, *supra* note 42, at 496-97, citing Entebbe Summit for Peace and Prosperity, Joint Declaration of Principles, [www.state.gov/www/regions/africa/entebbe\\_dop\\_9803.html](http://www.state.gov/www/regions/africa/entebbe_dop_9803.html) (Dec. 18, 1998).

7,700 troops.<sup>76</sup> The Sudanese government has slowed the entry of A.U. forces into Sudan, by changing its passport policy so that A.U. soldiers were suddenly required to obtain home-country passports and Sudanese visas.<sup>77</sup>

The UN Security Council supports the African Union activities in Darfur, and urges member states to donate the required resources.<sup>78</sup> However, the mandate for the African Standby Force is only to protect international aid workers, not to protect the people of Darfur.<sup>79</sup> As Human Rights Watch accurately predicted, “Without such a mandate, the A.U. force could be put in the position of watching helplessly while civilians are slaughtered.”<sup>80</sup>

By protecting aid workers, the A.U. forces are making an important contribution, because they facilitate the delivery of food aid to the refugee camps where over a million Darfurese 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 Ukrainian people, Mao Zedong against the Chinese people, and Pol Pot against the Cambodian people.

But the A.U. 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 Darfurese. At least sometimes, though, some A.U. soldiers go beyond their formal mandate, and help protect civilians. At the Abu Shouk camp for internally displaced persons, African Union soldiers have escorted women in their search for firewood once a week outside the camp, where they were at high risk of rape.<sup>81</sup>

Unfortunately, the *ad hoc* protection of civilians appears to contradict the African Union’s own mission statement for Sudan. That document states: “Protection of the

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<sup>76</sup> David Loyn, *Nato’s Role in Darfur*, BBC NEWS, Apr. 29, 2005. See also *African Union Says Force in Darfur Reaches 1,400*, Reuters, Feb. 4, 2005 (“The African Union force in Darfur is ultimately supposed [sic] have 3,320 troops, but it has grown slowly because the pan-African body is relying on foreign aid to pay for it.”).

<sup>77</sup> *South Africa Troop Deployment in Sudan’s Darfur Delayed*, SUDAN TRIB., Feb. 28, 2005, [http://www.sudantribune.com/article.php3?id\\_article=8278](http://www.sudantribune.com/article.php3?id_article=8278) (Col. Johan van der Walt complained: “the deployment was delayed because the troops did not have passports and visas, as now required by the Sudanese government.”). The Sudan Tribune is a dissident newspaper based in France.

<sup>78</sup> S.C. Res. 1574, Adopted by the Security Council at its 5082<sup>nd</sup> meeting on 19 November 2004, at ¶13:

*Strongly 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;

<sup>79</sup> *Mandate Unclear as AU Heads for Darfur*, BUS. DAY (Johannesburg), Oct. 29, 2004 (“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 not calling upon peacekeepers to protect civilians under threat in their ‘immediate vicinity’.”)

<sup>80</sup> *The African Union and Darfur*, Human Rights Watch (Jan. 2005), <http://www.hrw.org/wr2k5/darfur/5.htm>.

<sup>81</sup> See *Sudan: AU Protects Women from Attacks in North Darfur Camp*, May 18, 2005, IRINNEWS.ORG, <http://www.irinnews.org/survey/Survey2005.asp> (visited May 18, 2005).

civilian population is the responsibility of the GoS.” [Government of Sudan].<sup>82</sup> The A.U.’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.”<sup>83</sup> 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. UN 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.<sup>84</sup> Sudan is the only country in the world where chattel slavery still exists with government approval.<sup>85</sup>

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 UN Security Council voted to deploy 10,000 UN troops to monitor the recent peace in the south of Sudan.<sup>86</sup> The UN troops in the south will be monitoring a peace agreement—not protecting civilians.

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<sup>82</sup> Working Document on the Enhancement of the African Mission in the Sudan, 1<sup>st</sup> Meeting of the military Staff Committee of the Peace and Security and Security Council, Addis Ababa, Ethiopia, 18 October 2004, PSC/MSC/2(I), at 3.

<sup>83</sup> *Sudan Rejects AU Peace Force*, BBC NEWS, Aug. 9, 2004.

<sup>84</sup> JOK MADUT JOK, *WAR AND SLAVERY IN THE SUDAN* (2001).

<sup>85</sup> International Eminent Persons Group, *Slavery, Abduction, and Forced Servitude in Sudan* (U.S. State Dept., Bureau of African Affairs: May 22, 2002), <http://www.state.gov/p/af/rls/rpt/10445.htm>. British colonialists, such as Governor Charles Gordon, tried very hard to wipe out the slave trade, but were not successful.

<sup>86</sup> S/Res/1590, U.N. SCOR, Mar. 24, 2005. *See generally Introduction of the Secretary General’s Report on the Sudan by Jan Pronk to the Security Council*, UN NEWS CENTRE, Feb. 11, 2005, <http://www.un.org/News/dh/sudan/infocusnewssudan.asp?sID=23>. Pronk continued:

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).

*See also More than 10,000 Troops Proposed for UN Peace-Support Mission for Sudan*, UN NEWS CENTRE, Feb. 7, 2005:

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.”

However, 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.”<sup>87</sup>

It seems doubtful, though, that deploying ten thousand UN troops from southern Sudan to Darfur would stop the Darfur genocide. Moving forces inside Sudan without the consent of its dictatorship would violate Sudan’s sovereignty, and the UN has almost never authorized such actions.<sup>88</sup>

The Sudan can field an army of 115,000 troops;<sup>89</sup> and with the recent peace in the south, 91,000 troops have now become available for redeployment to Darfur.<sup>90</sup> Successful ground intervention in Darfur would almost certainly require vastly more than the 10,000 UN troops slated for southern Sudan.<sup>91</sup> An army of peacemakers (not just peacekeepers)<sup>92</sup> would need to be much larger,<sup>93</sup> better-trained, and better-supplied than any UN army ever has been.<sup>94</sup>

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*See also* Press Release SC/8120, *Security Council Endorses Establishment of 3-Month Advance Team in Sudan to Prepare for UN Peace Support Operation*, Nov. 6, 2004, Security Council 4988<sup>th</sup> Meeting, <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.”).

<sup>87</sup> Thalif Deen, *Politics: New U.N. Force for Sudan will Skirt Darfur Crisis*, INTER PRESS SERVICE, Feb. 8, 2005, <http://allafrica.com/stories/printable/200502090004.html>.

<sup>88</sup> *See* The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty (2001), at ¶4.41: “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* UN Press Release SG/SM/8125, Secretary-General Addresses International Peace Academy Seminar on ‘The Responsibility to Protect’ Feb. 15, 2002 (“Your title really describes what I was talking about: the fact that sovereignty implies responsibilities as well 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”).

<sup>89</sup> Sudan: Fielded Forces, MILNET, World Conflicts in 2001, <http://www.milnet.com/pentagon/centcom/sudan/sudff.htm>.

<sup>90</sup> Rodrique Ngowi, *Accord Calls for Troop Pullback*, WASH TIMES, Jan. 3, 2005.

<sup>91</sup> One estimate is that 50,000 soldiers would be required to suppress the Arab militias in Darfur. *Sudan*, Strategypage.com,

<http://www.strategypage.com/fyeo/qndguide/default.asp?target=sudan&base=sudan&Prev=0&BeginCnt=51> (Apr. 25, 2005 analysis). Marine Capt. Brian Steidle estimated that between 25,000 and 50,000 troops would be required, and Gen. Romeo Dallaire estimated 44,000. Bradford Plumer, *Do Something...But What?*, SUDAN TRIB., May 11, 2005.

<sup>92</sup> “Peacemaker” is a euphemism for soldier. Without an invitation by Khartoum, any inserted force would be considered at war with the regime.

<sup>93</sup> 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](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.

<sup>94</sup> Even the British army, the pre-eminent 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* (1989)(noting Gordon’s adamant determination to wipe out the slave trade).

As long as Khartoum is intent using genocide to “stabilize” Darfur, only a force willing to engage in combat can save the unarmed victims. The UN will not, in the foreseeable future, be able to field such a force,<sup>95</sup> 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.<sup>96</sup>

#### **E. Conclusion on Internationally-authorized Force**

Kofi Annan admitted “Quite frankly, our approach is not working,” and suggested that the UN ought to step up pressure on the Sudanese government.<sup>97</sup> Samantha Power correctly recognized that force, not sanctions, would be the most effective answer to the Darfur victims’ plight, noting that “The 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.” 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.<sup>98</sup>

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-

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<sup>95</sup> As of April 30, 2005, the UN was fielding 79,545 personnel in 17 peacekeeping operations. See Background Note - United Nations Peacekeeping Operations, <http://www.un.org/Depts/dpko/dpko/bnote.htm> (visited May 18, 2005). Although the bulk of the UN personnel are composed of troops, they also include military observers, civilian police, international civilian personnel and local staff. See also *What is Peacekeeping?*, United Nations Peacekeeping: Meeting New Challenges, <http://www.un.org/Depts/dpko/dpko/faq/q1.htm>. *UNSAS – Rapid Deployment Level, Terms of Reference*, United Nations Peacekeeping: Rapid Deployment, [http://www.un.org/Depts/dpko/milad/fgs2/unsas\\_files/rapid\\_deployment/torrldl.htm](http://www.un.org/Depts/dpko/milad/fgs2/unsas_files/rapid_deployment/torrldl.htm).

<sup>96</sup> <http://www.strategypage.com/ffyeo/qndguide/default.asp?target=SUDAN.HTM>

<sup>97</sup> *Annan Urges Security Council and UN to Rapidly Rethink Joint Approach to Sudan*, UN NEWS SERVICE, Dec. 22, 2004.

<sup>98</sup> Samantha Powers, *It’s Not Enough to Call it Genocide*, TIME, Oct. 4, 2004, at 63.

national force should be used as a last resort, and only with the authorization of the Security Council.<sup>99</sup>

The Stockholm Forum participants acknowledged a problem: “the UN Security Council’s record of paralysis in humanitarian crises.”<sup>100</sup> 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.<sup>101</sup>

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 genocide, is far too little. Indeed, if the Security Council actually acted as it “should” according to the hopes of the UN’s founders, then war would have long disappeared from the world.

### III. Fatal Flaw: The UN 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 by-product 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.<sup>102</sup>

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<sup>99</sup> Gareth Evans, Chair, Track 2: *Responsibilities: Individual, National and Multilateral*, at 13-14, in Option Papers Drafted for Conference Workshops at the Stockholm International Forum 2004: Preventing Genocide; Threats and Responsibilities,

<http://www.preventinggenocide.com/files/option%20paper%20forum04.pdf>.

<sup>100</sup> See Summary Report of the Stockholm International Forum 2004, <http://www.preventinggenocide.com/files/summaryreport.pdf>, at 5.

<sup>101</sup> Gareth Evans, Chair, Track 2: *Responsibilities: Individual, National and Multilateral*, at 14, ¶¶ (3)C-D, Option Papers Drafted for Conference Workshops at the Stockholm International Forum 2004: Preventing Genocide; Threats and Responsibilities,

<http://www.preventinggenocide.com/files/option%20paper%20forum04.pdf>.

<sup>102</sup> According to the June 22, 1940, armistice between France and Germany, most of metropolitan France was occupied by German military government, but a portion of southern France, with a capital at Vichy, retained independent self-government, and retained sovereignty over French colonies. 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.

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 1978-79.<sup>103</sup> The genocide perpetrated by the government of East Pakistan (now, "Pakistan") against the people of West Pakistan (now, "Bangladesh") was ended by Indian military intervention in 1971.<sup>104</sup>

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, "any decision to engage in a humanitarian intervention was to be made by the [Security] council alone...."<sup>105</sup> They explained: "The ordinary meaning of Article 2(4) [of the UN Charter] is clear: the use of force across borders is simply not permitted. This meaning is supported by the UN 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."<sup>106</sup>

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?"<sup>107</sup> Yet when referring to Rwanda, he also asked: "If, in those dark days

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<sup>103</sup> 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 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. If the Darfur mass murders are not a "genocide," then this Article's argument about the Genocide Convention taking precedence over local or international anti-gun laws (detailed in Part V) would still be valid as a general rule, but would not be applicable to the present situation in Sudan.

<sup>104</sup> SCHABAS, *supra* note 42, at 499.

<sup>105</sup> See 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 181 (J. L. Holzgrefe and Robert O. Keohane eds., 2003).

<sup>106</sup> *Id.*, at 181. The UN 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." There is an exception for self-defense. See also Adam Roberts, *The So-Called Right of Humanitarian Intervention*, Trinity Papers Number 13, [http://www.trinity.unimelb.edu.au/publications/papers/TP\\_13.pdf](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.

<sup>107</sup> Press Release, Secretary-General Presents His Annual Report to General Assembly, SG/SM/7136 GA/9596 (Sept. 20, 1999), <http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html>.

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?”<sup>108</sup>

Nicholas Wheeler argues that if the Security Council does not respond promptly, and a state or coalition of states illegally intervened, the intervention would be “morally justified” in instances where the humanitarian need was great.<sup>109</sup> Another set of principles for humanitarian intervention has been developed by Peter Baehr, in an address to the International Peace Academy.<sup>110</sup> 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.<sup>111</sup> Aquinas’s affirmative duty to “rescue” and “deliver” appear to authorize Just War for humanitarian purposes, not merely for reasons of national self-defense.<sup>112</sup>

Aquinas was the pre-eminent 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 human sacrifice.<sup>113</sup>

The Dutch philosopher Hugo Grotius, one of the major founders of modern international law, argued in favor of foreign intervention to “stop the maltreatment by a

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<sup>108</sup> *Id.*

<sup>109</sup> See NICHOLAS J. WHEELER, *SAVING STRANGERS* 294-95 (2000).

<sup>110</sup> Discussed in Tharoor & Daws, at 28.

<sup>111</sup> 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. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Second Part of the Second Part, Question 40, article 1 (Fathers of the English Dominican Province transl., Benziger Bros. ed., 1947), <http://www.ccel.org/a/aquinas/summa>.

<sup>112</sup> Aquinas quoted the *Book of Psalms*: “Rescue the poor: and deliver the needy out of the hand of the sinner.” Psalm 81:4.

<sup>113</sup> BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* (1997), citing FRANCISCO DE VITORIA, *DE TEMPERANTIA IN OBRAS DE FRANCISCO DE VITORIA* (T. Urdanoz ed., Madrid: 1960).

The priests of 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. Ross Hassig, *Aztec*, in *ENCYCLOPEDIA OF RELIGION AND WAR* 30 (Gabriel Palmer-Fernandez ed., 2004).

state of its own nationals when that conduct is so brutal and large-scale as to shock the conscience of the community of nations.”<sup>114</sup>

Even modern nations who profess the highest regard for United Nations procedures sometimes violate international law and, in doing so, save innocent lives. On November 4, 2004, Ivory Coast President Laurent Gbagbo broke an 18-month truce between his government and the rebels, the *Forces Nouvelles*, by attacking the rebel stronghold in the northern town of Bouake.<sup>115</sup> The attack killed several dozen civilians<sup>116</sup> and nine French peacekeepers.

The African Union asked the UN Security Council to enlarge the AU’s mandate in Sierra Leone, in order to protect civilians<sup>117</sup> 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.<sup>118</sup> A cynic might 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?<sup>119</sup>

Perhaps another example of the developing international norm came 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.<sup>120</sup>

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, “there 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.”<sup>121</sup>

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<sup>114</sup> Quoted in Sandall.

<sup>115</sup> *Côte d’Ivoire: Army Bombs French Military, Nine Killed*, UN INTEGRATED NEWS, Nov. 7, 2004.

<sup>116</sup> *UN Condemns Ivory Coast Bombing*, BBC NEWS, Nov. 5, 2004.

<sup>117</sup> Press Statement on Côte d’Ivoire, African Union, Nov. 6, 2004.

<sup>118</sup> For a brief description of the background to the rebellion in Ivory Coast, see *Restoring Peace to Ivory Coast*, N.Y. TIMES, Jan. 17, 2003. See also *Attack on Rebel-Held Ivorian City*, BBC NEWS, Nov. 4, 2004.

<sup>119</sup> Press Release, Secretary-General Presents His Annual Report to General Assembly, SG/SM/7136 GA/9596 (Sept. 20, 1999), <http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html>. See also *‘Never Again’ Has not Come to Pass*, Editorial, THE JOURNAL NEWS (New York), Feb. 1, 2005. (“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.”). Local suburban newspapers such as these are taking notice of victims and are helping to drive this developing norm.

<sup>120</sup> Schabas, *supra* note 42 at 447, 499; John M. Broder, *In Address to Nation, Clinton Explains Need to Take Action*, N.Y. TIMES, Mar. 25, 1999; Francis X. Clines, *NATO Refocuses Targets to Halt Serbian Attacks on Albanians in Kosovo*, N.Y. TIMES, Mar. 30, 1999. The Security Council voted 12-3 against a Russian-sponsored resolution to condemn the bombing; rejecting a measure to condemn the bombing, obviously, not the same as providing authorization for the bombing. Shashi Tuner & Sam Daws, *Humanitarian Intervention: Getting Past the Reefs*, WORLD POL. J. 21, 22 (Summer 2001).

<sup>121</sup> Joel Rosenthal, *Dilemmas of Humanitarian and Peace Operations*, Lecture #3, given during the 2000-2001 academic year,

<http://www.carnegiecouncil.org/printerfriendlymedia.php/prmID/720?PHPSESSID=a6cc505e9656d6d0a03b4f3c5d497db4> (visited Jan. 30, 2005). Fernando R. Tesón, who argues in favor of humanitarian

Kofi Annan observes “the developing international norm in favor of intervention to protect innocent civilians from wholesale slaughter.”<sup>122</sup> 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 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 been 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, non-defensive unilateral intervention is, by the dominant interpretation of international law, illegal.

We face an unacceptable contradiction:

1. As we will detail in Part V, *infra*, 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 UN 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 statements 1. and 2. 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.

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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 105.

<sup>122</sup> Kofi Annan, *Two Concepts of Sovereignty*, address to the 54<sup>th</sup> session of the U.N. General Assembly, Sept. 20, 1999, reprinted in THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY GENERAL 44 (U.N. 1999), quoted in Tharoor & Daws, at 29.

## IV. Defenseless Victims

Sudan is ruled by a racist, Islamist tyranny in Khartoum.

For many years, the Arab Sudanese dictatorship pursued a policy of genocide against the Christian and animist black Africans who live in southern Sudan. Victims who were not killed were often sold in slavery. Rape was extensively used as an instrument of state terror. 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.

The vast Darfur region consists of three states in western Sudan.<sup>123</sup> As in the south, much of the population is black African. Unlike in the south, the black Africans of Darfur are Muslims.<sup>124</sup> Also inhabiting Darfur are camel-riding Arab nomads, who have a long-standing conflict with black African pastoralists there. 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.”<sup>125</sup>

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.<sup>126</sup>

On the ground, the main force of the government’s attack on the black Africans of Darfur is Arab militia known as the Janjaweed (literally, “evil men on horseback” or “devil on a horse”).<sup>127</sup>

The Janjaweed have caused the deaths of up to 400,000 black Sudanese, have raped many thousands, and have forced two million black Sudanese into refugee

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<sup>123</sup> The states (*wilayat*) are Gharb Darfur, Janub Darfur, and Shamal Darfur.

<sup>124</sup> Scott Straus, *What’s in a Name?* 84 FOR. AFF. 123 (Jan.-Feb. 2005).

<sup>125</sup> Straus; *Darfur Rising: Sudan’s New Crisis*, International Crisis Group, Africa Report No. 76, Mar. 25, 2004, <http://www.crisisweb.org/home/getfile.cfm?id=1132&tid=2550>, at 18-19.

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 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.

*Id.*, at 19 (footnote marker deleted).

<sup>126</sup> *Targeting the Fur: Mass Killings in Darfur*, A Human Rights Watch Paper, Jan. 21, 2005, <http://hrw.org/backgrounder/africa/darfur0105/darfur0105.pdf>, at 6.

<sup>127</sup> Straus.

camps.<sup>128</sup> “When the janjaweed attack, they 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?’”<sup>129</sup>

The Janjaweed attacks on villages are supported with aerial bombing by the Sudan Air Force.<sup>130</sup> 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 anti-aircraft weapons, such as surface-to-air missiles. The rebels do possess small arms and light weapons, including firearms.<sup>131</sup>

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.”<sup>132</sup> Notably, the majority of villages bombed were villages where there were no armed rebels.<sup>133</sup> 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.

Although this is commonplace where the population supports an anti-government insurgency, it can also lead to deaths of innocent civilians on a large scale.<sup>134</sup> Intentionally targeting civilians has long been recognized as a violation of the laws of warfare. An Amnesty International report noted “international law also makes it clear that use of such tactics does not provide the other side with a license to kill civilians.”<sup>135</sup>

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 “Government forces not only participated and

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<sup>128</sup> Stuart Taylor, *Genocide in Darfur: Crime without Punishment?* NAT’L J., Feb. 21, 2005; The mayhem is widespread. See U.S. State Department Pub. 11182, Sept. 2004, <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.”); *Sudan Atrocities Under Spotlight*, BBC NEWS, Feb. 16, 2005 (“Tens of thousands of people have been killed and some two million have been forced from their homes.”); Jonathan Karl, *The Darfur Disaster*, THE WEEKLY STANDARD, May 2, 2005.

<sup>129</sup> Roger Sandall, *Can Sudan be Saved?* COMMENTARY, Dec. 2004, at 38.

<sup>130</sup> *Sudan ‘bombing Darfur villages’*, BBC NEWS, Jan. 27, 2005 (“The Sudanese air force has bombed villages in Darfur despite agreeing to stop using planes in the war-torn region, aid agencies say.”).

<sup>131</sup> See *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, Amnesty Int’l, Nov. 16, 2004, <http://web.amnesty.org/library/index/engafsr541392004>, at ¶8. (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.*, ¶ 8.

<sup>132</sup> *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, Amnesty Int’l, Nov. 16, 2004, <http://web.amnesty.org/library/index/engafsr541392004>, at ¶4.1. See also *Sudan - Darfur in Flames: Atrocities in Western Sudan*, Human Rights Watch, Apr. 2004 (Vol. 16, No. 5), at 19 (“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: Sudan’s New Crisis*, International Crisis Group, Africa Report No. 76, Mar. 25, 2004, <http://www.crisisweb.org/home/getfile.cfm?id=1132&tid=2550> (A recent visitor explained to ICG: “These were attempts to drain the population base supporting the rebels....”).

<sup>133</sup> Straus.

<sup>134</sup> See Benjamin Valentino, Paul Huth & Dylan Balch-Lindsay, “*Draining the Sea: Mass Killing, Genocide, and Guerrilla Warfare*,” 58 INT’L ORG. 375 (2004).

<sup>135</sup> See *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, Amnesty Int’l, Nov. 16, 2004, <http://web.amnesty.org/library/index/engafsr541392004>, at ¶4.1.

supported militia attacks on civilians, they also actively refused to provide security to civilians seeking protection from these militia attacks.”<sup>136</sup>

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.”<sup>137</sup> 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 in the past several months.” UN Undersecretary for Humanitarian Affairs Jan Egeland warns that the death rate might increase to 100,000 per month.<sup>138</sup>

Egeland notes: “The only thing in abundance in Darfur is weapons.”<sup>139</sup> However, these weapons are distributed unevenly among Darfur’s population. Despite the UN arms embargo,<sup>140</sup> Sudan has been funding its arms buildup using income from its oil sector to supply the Arab militia friendly to Khartoum.<sup>141</sup> According to Amnesty International, the Janjaweed are so well-supplied that the majority of them have five or six guns per person.<sup>142</sup>

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,<sup>143</sup>

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<sup>136</sup> See *Sudan - Darfur in Flames*, *supra* note 132. 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.* (footnote marker deleted). Jan Pronk, the UN 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.” See generally, *Targeting the Fur: Mass Killings in Darfur*, A Human Rights Watch Paper, Jan. 21, 2005,

<http://hrw.org/backgrounder/africa/darfur0105/darfur0105.pdf>. (Summary: “To date, the Sudanese government has neither improved security for civilians nor ended the impunity enjoyed by its own officials and allied militia leaders.”).

<sup>137</sup> Judy Aita, *Brutal Attacks Still Occurring in Darfur*, *United Nations Reports*, STATES NEWS SERVICE (Wash., May 12, 2005).

<sup>138</sup> Eric Reeves, *Darfur Mortality Update: April 30, 2005*, SUDAN TRIB., May 1, 2005.

<sup>139</sup> Amnesty International Press Release, Nov. 16, 2004, *Sudan: Arms Trade Fuelling Human Rights Abuse in Darfur*, <http://web.amnesty.org/library/index/engafsr541422004>. Egeland made the statement on July 1, 2004.

<sup>140</sup> S/Res./1556, U.N. SCOR, July 30, 2004, ¶7, <http://www.un.org/News/Press/docs/2004/sc8160.doc.htm>.

<sup>141</sup> *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, *supra* note 131. The Amnesty report additionally notes that “Oil now accounts for more than 11% of Sudan’s Gross Domestic Product (GDP).” *Id.* at ¶ 9.1. 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 and fund militias to fight its proxy war.” *Id.* at ¶ 9.2.

<sup>142</sup> See *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, *supra* note 131, ¶ 6.

<sup>143</sup> See Catherine Flew & Angus Urquhart, *Strengthening Small Arms Controls: An Audit of Small Arms Control In the Great lakes Region and the Horn of Africa*, Safer Africa and Saferworld, Feb. 2004, <http://www.saferworld.co.uk/publications/Horn%20narrative%20report.pdf>.

a gun licensee must be over 30 years of age, 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 15 rounds of ammunition a year. The penalties for violation of Sudan's firearms laws are severe, and can include capital punishment.

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.”<sup>144</sup> Meanwhile, there are many reports that the Arab militia have been armed and supplied by the government in Khartoum.<sup>145</sup>

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.<sup>146</sup> The victim villagers are generally unarmed.<sup>147</sup> Amnesty International reported the testimony of a villager who complained: “none of us had arms and we were not able to resist the attack.”<sup>148</sup> 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.”<sup>149</sup>

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<sup>144</sup> U.S. State Dept. Pub. 11182, Sept. 2004, <http://www.state.gov/g/drl/rls/36028.htm>.

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.” 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.” See also Peter Verney, *Darfur's Manmade Disaster*, MIDDLE EAST REP. ONLINE, July 22, 2004, <http://www.merip.org/mero/mero072204.html>. Verney”; see also *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, Amnesty Int'l, Nov. 16, 2004, ¶ 2, <http://web.amnesty.org/library/index/engaf541392004> (“Special Courts set up under a state of emergency declared in Darfur in 2001...have been handing down summary justice after flagrantly unfair trials.”).

<sup>145</sup> See generally *Sudan: Arming the Perpetrators*, *supra* note 131. See also *Armed Conflicts Report 2004*, Project Ploughshares, Sudan-Darfur, January 2004, <http://www.ploughshares.ca/content/ACR/ACR00/ACR00-SudanDarfur.html> (“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 engage non-Arab populations in Darfur.”); Verney, *supra* note 144 (“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.’”).

<sup>146</sup> See *Targeting the Fur: Mass Killings in Darfur*, A Human Rights Watch Paper, Jan. 21, 2005, <http://hrw.org/backgrounder/africa/darfur0105/darfur0105.pdf>, at 22. (Among the recommendations of Human Rights Watch was that the Government of Sudan, “Clearly 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, *Sudan: Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences*, Amnesty International, AI Index: AFR 54/076/2004, Jul. 19, 2004, <http://web.amnesty.org/library/index/engaf540762004>.

<sup>147</sup> See *Sudan: Arming the Perpetrators*, *supra* note 131, ¶ 6.

<sup>148</sup> *Id.*, ¶6.2.

<sup>149</sup> *Id.*

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.”<sup>150</sup>

The Pittsburgh *Tribune-Review* asked a U.S. State Department official why there were no reports of the Darfur victims fighting back. “Some do defend themselves,” he explained. But he added that the perpetrators have helicopters and automatic rifles, whereas the victims have only machetes.<sup>151</sup>

The *Tribune Review* asked an Amnesty International representative, Trish Katyoka, whether the Darfur victims should be armed.<sup>152</sup> 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.”<sup>153</sup> 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.<sup>154</sup>

“You are empowering (the victims) to create an element of retaliation.”<sup>155</sup> 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.”<sup>156</sup> 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—well in excess of 10,000 murders a month<sup>157</sup>—or over 300 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 genocide. It is a dangerous proposition to arm the minorities to fight back.”<sup>158</sup> Generic platitudes should rarely be dispositive when considering a life or death question. Besides, “fighting fire

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<sup>150</sup> See *Targeting the Fur: Mass Killings in Darfur*, A Human Rights Watch Paper, Jan. 21, 2005, <http://hrw.org/backgrounder/africa/darfur0105/darfur0105.pdf>, at 8.

<sup>151</sup> Dimitri Vassilaros, *Gun Control’s Best Friend*, Pittsburgh TRIBUNE-REVIEW, Apr. 1, 2005. The official was Bill Garvelink, Acting Assistant Administrator of the Bureau for Democracy, Conflict, and Humanitarian Development, which is part of the U.S. Agency for International Development.

<sup>152</sup> The official was Trish Katyoka, director of Africa Advocacy for Amnesty International.

<sup>153</sup> Vassilaros, *supra* note 151.

<sup>154</sup> Amnesty International is a member of IANSA (International Action Network on Small Arms), which is the consortium of international gun prohibition organizations. Amnesty International even has a special website dedicated to arms prohibition, <http://www.controlarms.org>.

<sup>155</sup> Vassilaros, *supra* note 151.

<sup>156</sup> *Id.*

<sup>157</sup> See text at notes \_\_\_\_.

<sup>158</sup> Vassilaros, *supra* note 151.

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 fire 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 nothing can be more dangerous to the victims than a continuing genocide. Accordingly, giving the victims firearms cannot possibly make the situation *more* dangerous for the victims; by making the situation more dangerous for the perpetrators, there is at least the possibility that some victims might be saved. Because genocide perpetrators have no moral or legal right to non-dangerous 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.<sup>159</sup> 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 U.N. 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.<sup>160</sup> On March 31, 2005, the U.N. Security Council referred the Sudanese situation to the prosecutors of the International Criminal Court.<sup>161</sup> The Genocide Convention requires signatory states to “punish” genocide. 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.<sup>162</sup>

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<sup>159</sup> Vassilaros, *supra* note 151.

<sup>160</sup> *Id.*

<sup>161</sup> S/Res. 1593, U.N. SCOR, Mar. 31, 2005.

<sup>162</sup> AARON ZELMAN & RICHARD W. STEVENS, DEATH BY “GUN CONTROL”: THE HUMAN COST OF VICTIM DISARMAMENT (Milwaukee: Jews for the Preservation of Firearms Ownership, 2001).

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.<sup>163</sup> 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, an ax, a sewer cover, a homemade bomb—they used it and often took Nazis with them to death.<sup>164</sup>

In 1967, the International Society for the Prevention of Crime held a 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.<sup>165</sup>

If the Darfurese 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 Darfurese family 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.<sup>166</sup>

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<sup>163</sup> 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* (Schmuel Beeri transl., 1987)(1<sup>st</sup> pub. in Israel 1965).

<sup>164</sup> ABRAM L. SACHAR, *THE REDEMPTION OF THE UNWANTED: FROM THE LIBERATION OF THE DEATH CAMPS TO THE FOUNDING OF ISRAEL* 47-48 (1983).

<sup>165</sup> V.V. Stanciu, *Reflections on the Congress for the Prevention of Genocide*, in 7 *YAD VASHEM STUDIES ON THE EUROPEAN JEWISH CATASTROPHE AND RESISTANCE* 187 (Livia Rothkirchen ed., Jerusalem, Israel: Yad Vashem, 1968).

<sup>166</sup> Elsewhere we have 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 David B. Kopel, Paul Gallant & Joanne D. Eisen, *Firearms Possession by 'Non-State Actors': the Question of Sovereignty*, 8 *TEX. REV. OF L. & POLITICS*.

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.<sup>167</sup> The Convention became legally binding on the Sudanese government on January 11, 2004.<sup>168</sup>

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 punish.*”<sup>169</sup> Neither the text of the Genocide Convention nor the drafting history provide guidance about the scope of the legal obligation to prevent genocide.<sup>170</sup> However, international law is clear that the duty to prevent is real, and is entirely distinct from the duty to punish.<sup>171</sup>

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.<sup>172</sup>

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.<sup>173</sup>

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.<sup>174</sup>

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373 (2004). In the instant 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.

<sup>167</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, 102 Stat. 3045, Oct. 9, 1948 (adopted by U.N. General Assembly 1948, entered into force 1951, ratified by United States 1981).

<sup>168</sup> <http://www.preventgenocide.org/law/convention/index.htm#ratifications>

<sup>169</sup> Genocide Convention, art. I (emphasis added). The affirmative duty is consistent with the long-established duty in Napoleonic Codes for an individual to act to rescue another person in danger. *E.g.*, C. Pén., art. 434-1 (France).

<sup>170</sup> SCHABAS, *supra* note 42, at 72. Article V requires states to enact legislation to enforce the Convention. States are clearly obliged to enact criminal laws against genocide, and to take additional steps, but the scope of those additional steps is uncertain. *Id.* at 74-75.

<sup>171</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Further Requests for the Indication of Provisional Measures, ICJ Reports 325, 443-44 (Sept. 13, 1993) (Lautherpacht, J.).

<sup>172</sup> Prosecutor v. Akayesu (Case No. ICTR-96-4-T), Judgment 2, Sept. 1998, ¶ 731.

<sup>173</sup> SCHABAS, *supra* note 42, at 170-71, citing United States of America v. von Weizaecker at al. (“Ministeries Case”), 14 T.W.C. 314, 557-58 (United States Military Tribunal, 1948)(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).

<sup>174</sup> Notably, the Genocide Convention abrogates the Head of State immunity which applies in most other applications of international law. Genocide Convention, art. IV; A-G Israel v. Eichmann, 36 I.L.R. 18, para. 28 (Dist. Ct., Jerusalem, 1968); A-G Israel v. Eichmann, 36 I.L.R. 277, ¶ 14 (S. Ct. 1968); Prosecutor v. Blaskic (Case No. IT-95-14-AR108*bis*), Judgment on the Request of the Republic of Croatia for Review of

## 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.

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.<sup>175</sup> Of course the right to life is recognized not just by the Universal Declaration, but also by several other international human rights instruments.<sup>176</sup>

Second, the Declaration affirms the right to personal security.<sup>177</sup> 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<sup>178</sup> and by the International Criminal Court.<sup>179</sup>

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...”<sup>180</sup> The *travaux* (drafting history) of the Universal Declaration clearly show that the Preamble was explicitly intended to recognize a pre-existing human right to revolution against tyranny.<sup>181</sup>

Finally, Article 8 of the Universal Declarations states that “Everyone has the right to an effective remedy.”<sup>182</sup> The Universal Declaration therefore comports with the long-established common law rule that there can be no right without a remedy.<sup>183</sup>

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the Decision of Trial Chamber II of July 18, 1997, ¶ 41 (Oct. 29, 1997); SCHABAS, *supra* note 42, 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.

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<sup>176</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc A/810, art. 3; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 1976, art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5, 1955, art. 2; American Convention on Human Rights, 1144 U.N.T.S. 123; O.A.S.T.S. 36, 1979, art. 4.

<sup>177</sup> Article III.

<sup>178</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5, 1955), art. 2 (2); Gilbert Guillaume, *Article 2* in LOUIS-EDMOND PETTITI, EMMANUEL DECAUX & PIERRE-HENRI IMBERT, *LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME: COMMENTAIRE 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 as President of the International Association of Penal Law).

<sup>179</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 31.

<sup>180</sup> *Universal Declaration of Human Rights*, adopted and proclaimed by G.A. Res. 217A (III) (1948) <<http://www.un.org/Overview/rights.html>>.

<sup>181</sup> JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT* 307-12 (1999).

<sup>182</sup> *Id.*

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.” Because “Everyone 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.”<sup>184</sup>

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.<sup>185</sup>

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, but rather derives “from those laws whose authority is

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<sup>183</sup> *Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (“where 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.”)

<sup>184</sup> The rights in the Declaration’s Articles 1-3, 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 other limitation of sovereignty.

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

*Id.*

<sup>185</sup> Statute of the International Court of Justice, art 138. “Publicists” in the statute means legal scholars and commentators.

acknowledged by civilized man throughout the world.’ It is found wherever civilization exists.”<sup>186</sup>

William Blackstone’s *Commentaries* on the common law are 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 where British law ruled. The *Commentaries* are 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. 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 it 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.<sup>187</sup>

### 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.<sup>188</sup> Many commentators agree that the duty to prevent genocide must be considered *jus cogens*.<sup>189</sup> Indeed, it would be difficult to articulate a more fundamental principle than the prevention of genocide.

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<sup>186</sup> United States v. Cruikshank, 92 U.S. 542, 551-53 (1875) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)).

<sup>187</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES, at \*143-44.

<sup>188</sup> 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. See also BLACK’S LAW DICTIONARY 864 (7th ed. 1999) (*Jus cogens* is “A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another”); Karen Parker & Lyn Beth Nelson, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411 (1989); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63 (1996); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VIR. J. INT’L L. 585 (1988).

<sup>189</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter’s note 6 (1987) (an international agreement that encourages, practices, or condones genocide is void under *jus cogens* principles); SCHABAS, *supra* note 42, at 500-01 (various sources), and also citing Malcolm N. Shaw, *Genocide and International Law* in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 797, 800 (Yoram Dinstein ed., Dordrecht, Martinus Nijhoff, 1989); Louis René Beres, *After the Gulf War: Prosecuting Iraqi Crimes under the Rule of Law*, 24 VAND. J. OF TRANSNAT’L L. 487, 490-91 (1991).

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, irrespective of protest, recognition or acquiescence. The Commission noted that commonly cited examples of rules of customary

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.<sup>190</sup> 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.<sup>191</sup> Self-defense, said Suárez, was “the greatest of rights,” a right which belonged to individuals and to communities. This right of self-defense included a right of defense against tyrants.<sup>192</sup> 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.<sup>193</sup>

Thus, it seems apparent that the prevention of genocide is *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 United Nations Charter sets on military action which is not authorized by the

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law that have attained the status of *jus cogens* norms include the prohibitions on genocide and slavery.”

Fausto Pocar, *Preventing Genocide and Crimes against Humanity*, 98 AM. SOC'Y INT'L L. PROC. 46 (2004)(Vice-President of the International Criminal Tribunal in Former Yugoslavia).

<sup>190</sup> Mark Toufayan, *The World Court's Distress when Facing Genocide: A Critical Commentary and on the Application of the Genocide Convention Case* (Bosnia & Herzegovina v. Yugoslavia (Serbia and Montenegro)), 40 TEX. INT'L L.J. 233, \_ n. 77 (2005); TIERNEY, at 301.

<sup>191</sup> 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 correlative a natural right to defend the things they used. TIERNEY, at 308, citing Suárez, *De Statu Perfectionis*, in OPERA OMNIA (L. Vivès ed., Paris: 1858). The Scholastics agreed that people were born free. Coffey, *Id.* at 158. 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. Simon, at 238, citing Suárez, 4 DE LEGIBUS AC DEO LEGISLATORE, § 2, at 123 (Coimbra: 1612),.

<sup>192</sup> TIERNEY, at 314. 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. *De Defensio* was publicly burned in London in 1614. Suárez's analysis of the right of revolution was so powerful that the Catholic *Parlement* in Paris burned the book the same year. Salmon, p. 252. 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. TIERNEY, at 314, citing *Defensio Fidei Catholicae* and *De Charitate*. 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 theycommunity's decision to exercise its own natural right of self-defense, and to enforce the king's contractual obligation to govern “politically not tyrannically.” A “public council” could assemble and authorize forceful removal of the tyrant. *Id.* at 314; Howell A. Lloyd, “Constitutionalism,” in *Cambridge 1450-1700*, p. 295.

<sup>193</sup> Alejandro A. Chafuen, *Book Review: Liberty, Right, and Nature: Individual Rights in Scholastic Thought*, MARKETS & MORALITY (Spr. 2000, no. 1), [http://www.action.org/publicat/m\\_and\\_m/2000\\_spring/chaufen.html](http://www.action.org/publicat/m_and_m/2000_spring/chaufen.html).

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 on-going 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 non-binding ruling on whether the "reservations" which some states attached to their ratification of the Genocide Convention were legally effective. The dissenting judges' words have often been quoted by human rights activists: "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation."<sup>194</sup>

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.

Yugoslavia had been created by the Treaty of Versailles in 1919, 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.

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).<sup>195</sup>

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 U.N. 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). The Bosnian Serbs received substantial military support from what remained of old

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<sup>194</sup> Reservations of the Convention on the Punishment and Prevention of Genocide, 1951 I.C.J. 15, 47 (May 28) (dissenting opinion of judges Guerrero, McNair, Read, and Hsu Mo).

<sup>195</sup> U.N. Doc. S/RES/713 (1991)

Yugoslavia (consisting of Serbia and Montenegro, and under the control of Slobodan Milosevic).

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 United Nations' International Court of Justice.<sup>196</sup> In April 1993, the International Court of Justice ruled, with only one dissenter, that Yugoslavia was perpetrating genocide, and ordered it to stop.<sup>197</sup>

A few months later, Bosnia brought forward additional legal claims. Among the new claims was a request to have the UN embargo declared illegal, as a violation of the Genocide Convention. The majority of the I.C.J. voted only to re-affirm 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."<sup>198</sup>

Normally, Security Council resolutions are unreviewable by the International Court of Justice. However, Judge Lauterpacht ruled that the prevention of genocide is *jus cogens*.<sup>199</sup> He concluded that the Security Council arms embargo became void once it made U.N. member-states "accessories to genocide."<sup>200</sup>

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 UN 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.A.'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.

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<sup>196</sup> For a history of the case, which has been before the I.C.J. in various settings ever since 1993, see [http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-37\\_bhy\\_20041208.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-37_bhy_20041208.htm)

<sup>197</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 3 (Request for the Indication of Provisional Measures Order of April 8) (hereinafter *Bosnia v. Serbia*).

<sup>198</sup> *Bosnia v. Yugoslavia*, at 438.

<sup>199</sup> *Bosnia v. Yugoslavia*, at 439-44.

<sup>200</sup> *Bosnia v. Yugoslavia*, at 501. Malaysia was among the voices which argued that the Security Council's enforcement of the arms embargo against Bosnia & Herzegovina made the Council's members accomplices in genocide. Craig Scott, *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).

## 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 so as to be *jus cogens*, than 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.
- 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 U.N. International Court of Justice was, understandably, reluctant to confront the U.N. Security Council by declaring a Security Council resolution to be unlawful. In this Article, though, we are not primarily concerned with whether the I.C.J. 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.

### 1. 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 anti-genocide rule does not affect the validity of Sudanese gun laws as applied in areas of the country, such as northeast Sudan, where no genocide is taking place.

The practical juridical 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 the Sudan, application of the extradition treaty, in the particular case of the anti-genocide arms smuggler, would make the host country complicit in genocide.

## **2. The Sudanese Arms Embargo**

As we have detailed *infra*, 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 movement in Darfur (the SLA and the JEM).

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.

## **3. Protocol against the Illicit Manufacturing of and Trafficking in Firearms**

In the Spring of 2005, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms 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. (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. The Protocol exempts Communist China from its requirements, even though China is a major international source of illegal firearms.

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 rights of self-defense and self-determination:

*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,

#### **4. Proposed Convention Prohibiting Transfer of Firearms to “Non-State 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. 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 United Nations headquarters in July 2006.

Among the most sought objectives of the treaty advocates is an international prohibition on the transfer of firearms to “non-state actors”—that is, to anyone not approved by government.<sup>201</sup> Should an international 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.

#### **5. The Precautionary Principle: The Right of Potential Genocide Victims to Possess Defensive Arms**

In all of the above applications of the anti-genocide 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*.

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.

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<sup>201</sup> See generally, David B. Kopel, Paul Gallant & Joanne D. Eisen, *Firearms Possession by “Non-State Actors”*: the Question of Sovereignty, 8 TEX. REV. OF L. & POLITICS 373 (2004), <http://www.davekopel.com/2A/LawRev/Non-state-actors.pdf>; 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?* SMALL ARMS & HUMAN SECURITY BULL., June 2004, at 6, <http://www.hdcentre.org/datastore/Bul3-English.pdf>; David B. Kopel, Paul Gallant & Joanne D. Eisen, *Gun Ownership and Human Rights* BROWN J. OF WORLD AFF. (Winter/Spring 2003, no. 2): 3-13, <http://www.davekopel.com/2A/Foreign/Brown-Journal-Kopel.pdf>. galleys.

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.<sup>202</sup>

Unlike all the other undergrounds in Europe, the Jewish partisans received no weapons from the Allies.<sup>203</sup> 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."<sup>204</sup> (The U.S. 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.)

According to Emmanuel Ringlebaum's history of the Warsaw Ghetto, "We state firmly that had the responsible Polish authorities extended moral 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.<sup>205</sup>

Holocaust historian Abram L. Sachar observed: "the 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."<sup>206</sup>

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."<sup>207</sup>

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

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<sup>202</sup> GROSSMAN, *supra* note 163, at p. 3

<sup>203</sup> Yuri Suhl, in *THEY FOUGHT BACK* 13 (Yuri Suhl ed., 1968)

<sup>204</sup> Nechama Tec, *Jewish Resistance: Facts, Omissions, Distortions* 17 (Washington, D.C.: United States Holocaust Museum, Center for Advanced Holocaust Studies, 1997).

<sup>205</sup> Quoted in SUHL, p. 14.

<sup>206</sup> *Id.*, at 60.

<sup>207</sup> ALAN J. KUPERMAN, *THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA* 100 (2001).

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.

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.<sup>208</sup> 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 United Nations peacekeeping mission was warned *well in advance* by a “well-placed informer” that the Rwandan government was planning a genocide. Yet the United Nations did nothing.<sup>209</sup>

However, 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,<sup>210</sup> the predictability of genocidal

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<sup>208</sup> <http://www.genocidewatch.org/8stages.htm>. 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, A52.

<sup>209</sup> SCHABAS, *supra* note 42, at 550-51. See also Pocar, *supra* note 189, at 47 (“[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.”)

<sup>210</sup> See Donald Krumm, *Early Warning: An Action Agenda*, in PREVENTIVE MEASURES: BUILDING RISK ASSESSMENT AND CRISIS EARLY WARNING SYSTEMS 248-49 (John L. Davies and Ted Gurr eds., 1998) (“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 and John A. Ausink, *State Collapse and Ethnic Violence: Toward a Predictive Model*, PARAMETERS, US ARMY WAR COLLEGE QUARTERLY 19-31 (Spring 1996), <http://carlisle-www.army.mil/usawc/parameters/96spring/baker.htm>.

activity remains poor.<sup>211</sup> 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.”<sup>212</sup>

According to Ted Gurr, “Geographer Bernard Nietshmann 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.”<sup>213</sup> Gurr identified at least 233 groups that may be at risk.<sup>214</sup> 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....”<sup>215</sup>

To illustrate the difficulty of predicting future genocides, Daniel 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?”

Among genocide scholars to whom this hypothetical question was posed were Ted Robert Gurr and Rudolf Rummel. But in no case was the Germany of 1900 predicted as the perpetrator of the Holocaust.<sup>216</sup> 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. 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. On the other hand, some cultures, such as the Swiss, have pervasive arms ownership, but very little violence.<sup>217</sup> 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

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<sup>211</sup> See Barbara Harff, *Early Warning of Humanitarian Crises: Sequential Models and the Role of Accelerators*, in PREVENTIVE MEASURES, *supra* note 210, at 71 (“At present, early warnings are rarely ‘early,’ seldom accurate, and moreover lack the capacity to distinguish among different kinds of conflict or crises.”).

<sup>212</sup> Harff at 70.

<sup>213</sup> TED ROBERT GURR, *MINORITIES AT RISK: A GLOBAL VIEW OF ETHNOPOLITICAL CONFLICT* x (1995).

<sup>214</sup> *Id.*

<sup>215</sup> JOHN G. HEIDENRICH, *HOW TO PREVENT GENOCIDE: A GUIDE FOR POLICYMAKERS, SCHOLARS, AND THE CONCERNED CITIZEN* 75 (2001).

<sup>216</sup> See Daniel D. Polsby and Don B. Kates, *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237 (1997).

<sup>217</sup> See DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* (1992).

killings require the kind of mass organization that only a government can provide; during the twentieth century, genocide killed over 170 million people.<sup>218</sup>

Yet although widespread armament might make sense as an anti-genocide *policy*, we do not in this Article argue that international anti-genocide 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 I.C.J. opinion, that “the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation.”<sup>219</sup> 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.

## VIII. 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.”<sup>220</sup>

Sadly, the anti-genocide promise “Never Again!” is 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 been collectively unwilling to take action which would stop the genocide.

The UN 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 UN will be apologizing for its failure in Darfur.<sup>221</sup>

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

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<sup>218</sup> Accepting the UN figure of 500,000 annual deaths from small arms and light weapons (SALW), and accepting the conservatively estimated 170 million genocidal deaths in the 20<sup>th</sup> 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. 114 (2003)(criticizing earlier estimates of global firearms deaths as not 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, 2<sup>nd</sup> paperback printing)(historical genocide data).

<sup>219</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) ICJ Rep. 16, 47 (1951) (Judges Guerrero, McNari, Read & Mo dissenting).

<sup>220</sup> *The Rule of Law Remains Elusive*, Address by Kofi Annan at the opening of the general debate of the fifty-ninth session of the General Assembly, New York, Sept. 21, 2004, UN CHRONICLE (No.3, 2004), at 4.

<sup>221</sup> See Editorial, JOURNAL NEWS (New York), Jan. 27, 2005. 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.

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.<sup>222</sup>

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.” Yet the civilized world has failed its legal obligation “to prevent” genocide. Accordingly, the world has a duty “not to impede whatever capability they [the genocide victims] may be able to muster in their own defense.”

When the Genocide Convention was being drafted, the Czechoslovak delegate noted with regret that the Convention could not really prevent genocide.<sup>223</sup> 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 victims have a fundamental human right to use armed force to resist genocide. Because the prohibition of genocide is a preemptory *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 UN 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.

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<sup>222</sup> Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 (1998) Srebrenica Report, <http://www.haverford.edu/relg/sells/reports/UNSrebrenicareport.htm>, ¶¶503-504.

<sup>223</sup> SCHABAS, *supra* note 42, at 79, citing U.N. Doc. A/C/SR. 133 (Augenthaler, Czechoslovakia).