ACTING *BEFORE* VICTIMS BECOME VICTIMS: PREVENTING AND ARRESTING MASS MURDER

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Whoever saves one life earns as much merit as though he had saved the entire world.

Talmud Yerushalmi, Tractate Sanhedrin 4:5

To save one life is to save all of humanity.

Qur'an, 5:32

Murder, the taking of life, is the ultimate and irrevocable violation of human dignity and, for each individual, the ultimate terror. Because each of us fears being murdered, we all look to our various communities for the protection of our individual lives; Hobbes laid motives of this sort at the very foundation of the state,[1] and H.L.A. Hart saw the inability of even the strongest among us to defend ourselves all the time as an imperative for the existence of a legal system. Even the most powerful person, Professor Hart observed, must sometimes sleep.[2] The *raison d'être* of the modern state, and

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[1] *See generally* LEO STRAUSS, THE POLITICAL PHILOSOPHY OF HOBBES: ITS BASIS AND ITS GENESIS 12 (1936) ("The second of the 'two most certain postulates of human nature' which Hobbes takes as basis of his political philosophy, along with the 'postulate of natural appetite', is 'the postulate of natural reason', 'qua quisque mortem violentam tanquam summum naturae malum studet evitare'. In accordance with naturalistic reasoning this postulate is reduced to the principle of self-preservation: since the preservation of life is the condition *sine qua non* for the satisfaction of any appetite, it is 'the primary good'. As a logical conclusion of this thought, Hobbes attempts to deduce natural right, natural law, and all the virtues—the four Platonic cardinal virtues—from the principle of self-preservation"); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 19–20 (1962) (The state of nature depicts the way in which men, being what they are, would necessarily behave if there were no authority to enforce law or contract. Given the appetitive and deliberative nature of man . . . this is the way they would necessarily behave if law-enforcement and contract-enforcement were entirely removed. This behavior would necessarily be an incessant struggle of every man with every man, a struggle of each for power over others.").

[2] H.L.A. HART, THE CONCEPT OF LAW 191 (1961).

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a major purpose of international law, is the provision of security, which means the protection of individual lives.

Yet, for all the urgency that each of us gives to this ultimate and most individualized form of personal security, and for all the intensity of our demands on our governments to guarantee it, there is little that any government, even the most authoritarian and controlling, can actually *do* to prevent single acts of murderous violence. Democratic governments, which must try to requite popular demands, face special obstacles here; for important policy reasons, they must resist proactive preventions and perforce look to other preventive methods, such as socialization. Socialization is a long-term strategy, cultivated at every level of social organization, that tries to redirect violent impulses into socially approved channels and, in particular, away from fellow group members. The fact that group members continue to murder one another, however, demonstrates that socialization is far from a perfect preventive strategy.

Whether the result of a momentary impulse or of a covert premeditation, murder is accomplished in a single, instantaneous and irrevocable act. By its very nature, no single institutional body is capable of preventing every murder. All any government can do to meet our demand for personal security is to provide some second-best remedies.

One of these remedies involves apprehending the perpetrator *after the fact* and punishing him via elaborate legal procedures and ceremonies. This may provide vengeful satisfaction to those who loved the victim and the illusory reassurance to the rest of us that, by punishing that particular murderer, each of us has somehow been made safer from suffering that crime. The debate rages over the deterrent value of punishment. But even assuming that *ex post* punishments do, in some statistical sense, deter the future commission of *many* of the same sort of crimes, that promise of deterrence suffers from the problem common to the individualization of all statistical projections: there can be no assurance that the punishments—no matter how notorious they may be and how high the *statistical* probability of deterrence—will deter their commission in our individual case!

In some traditional cultures, a murder can be expiated by the payment of blood money. In the United States, the national community may, under some circumstances, issue compensation for murders.[3] But what prospective victim would look eagerly to compensation as an attractive swap? We want to *avoid* being murder victims; yet, in terms of community remedies, neither punishment for murder nor compensation to survivors really provides us with what we want. These remedies are mere second-best solutions, which is about the most we can hope to get.

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[3] *See* Victims of Crime Act, 42 U.S.C § 10601 (1984). *See generally* W. Michael Reisman & Monica Hakimi, *Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561 (2003).

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In simple arithmetic terms, *mass* murders may seem to be merely an accumulation of many individual murders. But in terms of the preferred solution of prevention—an unattainable solution for individual murders—mass murders are different in that many of the individual murders that together comprise mass murder *are* preventable. Unless a mass murder is accomplished with a single devastating weapon of mass destruction, such as a nuclear bomb or a chemical or biological weapon, the business of killing a large group of people takes time, communication, and organization. It requires assembling the victims and delivering them to the killing grounds, in addition to recruiting, transporting, and maintaining both the killers and their tools. Also, one must provide for the killers' upkeep and arrange logistics, the maintenance and transportation of ammunition, and the disposal of corpses. In sum, there are many gritty details that go into setting about and murdering a great number of people.

Because mass murders are an organized social activity with a temporal extension that increases in proportion to the number of victims, others can quickly verify that the individual murders which have been perpetrated up until that moment of perception are only the beginnings of a series which is going to be repeated until the targeted group is annihilated to its last man, woman, or suckling babe.

This means that, unlike individual murders—the vast majority of which can only be punished after the fact—many of the individual murders that comprise a mass murder can be prevented. Prevention can be accomplished by arresting the killing process as soon as it becomes apparent that mass murder is imminent or underway, thereby restraining the number of victims from expanding and even reaching the totality the perpetrators are seeking. In short, if long-term socialization, punishment, and compensation are all a community can do when confronted with individual murders, those manifestly second-best remedies are *not* the only thing that can be done for mass murder. Even if the murders at the beginning of the series cannot be prevented and may prove just as instantaneous, irrevocable, and irremediable as any other individual murder, the remaining deaths that together comprise mass murder can be prevented.

Let me be clear: I have no objection whatsoever to prosecuting and convicting murderers, be they individual or mass killers. But if life is the most precious of things, then I ask you, should not acting to prevent *before* the fact, as opposed to acting to punish after the fact, be the primary technique of international law for dealing with mass murder?

I

Genocide is one form of mass murder that has been considered especially hideous. Yet from the time it was prohibited as a legitimate war strategy and was made an international crime, the global community has preferred to invest its efforts in punishment rather than prevention.

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The Holocaust, the systematic murder by Nazi Germany of six million Jews, extended over a span of three years. Hitler declared the "Final Solution" at Wannsee on January 20, 1942,[4] and the physical destruction of European Jewry concluded only with the defeat of the Reich in May 1945. We now know that President Roosevelt and Prime Minister Churchill learned about the genocide while it was being conducted.[5] Declarations of severe punishment for its perpetrators were solemnly issued, but not a single B-29 Flying Fortress was dispatched to either bomb the rail lines carrying victims to the gas chambers or destroy the gas chambers themselves in an effort to arrest the genocide. That was not for lack of resources. At the time, thousands of sorties were dispatched to destroy Dresden, a non-military target.

Instead of making the most minimal effort to prevent notorious and systematic mass murder, the Allied Powers took an easier course: punishment after the fact. Six months after Hitler had taken his own life and the German Armed Forces had issued their Instrument of Surrender to the Allied Powers, the first international war crimes trial was held in Nuremberg. In all, two-hundred war crimes defendants were tried, but only twenty-four members of Hitler's elite circle were prosecuted as "Major War Criminals" before the International Military Tribunal. Twelve men were sentenced to death.[6]

The international human rights movement has celebrated the trials at Nuremberg as a vindication of human rights and as a milestone on the road to installing a regime for international protection. The celebration tends to obscure the fact that no efforts were made to arrest or prevent the genocide that had led to the Nuremberg trials. Nor has the precedent laid at Nuremberg deterred later atrocities in the Balkans, Cambodia, Rwanda, and the Sudan, to name a few. Nuremberg has, however, set one ironic precedent. In each of those mass murders, little or no effort was made to prevent or arrest them; on the contrary, the preferred strategy has always been "Nurembergian"—to wait for the mass killings to play themselves out and *then* to establish criminal tribunals.

After the trials at Nuremberg, the belated international reaction to the Holocaust was, of course, the Convention on the Prevention and Punishment of the Crime of Genocide. The United Nations General Assembly

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[4] *See* Protocol of the Wannsee Conference, Jan. 20, 1942, *available at* http://www.ghwk.de/engl/protengl.htm.

[5] *See generally* ARTHUR MORSE, WHILE SIX MILLION DIED: A CHRONICLE OF AMERICAN APATHY (1968); HENRY L. FEINGOLD, THE POLITICS OF RESCUE: THE ROOSEVELT ADMINISTRATION AND THE HOLOCAUST, 1938–1945 170 (1970) (the first reports of the Final Solution reached State Department in 1942).

[6] *See* The Nuremberg Trial, 6 F.R.D. 69 (Int'l Mil. Trib. 1946).

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approved the Convention on December 9, 1948, and it was opened for signature on that day. It came into force on January 1951.

Genocide is defined in Article 2 of the Convention as

> any of the following acts committed with intent to destroy, in full or in part, a national, ethnical, racial or religious group as such:
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> (a) Killing members of the group;
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> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[7]

Article 3 of the Convention provides that:

> The following acts shall be punishable:
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> (a) Genocide;
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> (b) Conspiracy to commit genocide;
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> (c) Direct and public incitement to commit genocide;
>
> (d) Attempt to commit genocide;
>
> (e) Complicity in genocide.[8]

Genocide is considered a punishable act, but note the lack of emphasis on the prevention of preventable acts. To be sure, the title of the Convention is "the *prevention* and punishment of the crime of genocide" and Article 1 gives priority to prevention, stating "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to *prevent* and to punish."[9] Yet the apparent priority accorded the prevention of genocide in the title and in Article 1 is misleading. Most of the rest of the Convention deals with punishment *after* the crime has been committed. Article 4 obliges state parties to punish persons committing genocide "whether they are constitutionally responsible rulers, public officials, or private individuals."[10] *Punishment after the fact.* Article 5 requires state parties to enact the neces-

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[7] Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[8] *Id.* at art. III.

[9] *Id.* at art. I.

[10] *Id.* at art. IV.

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sary legislation to give effect to the Convention "and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3."[11] *Punishment after the fact.* Article 6 states that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties that have accepted its jurisdiction."[12] *Punishment after the fact.* Article 7 removes genocide from the category of "political crimes" for the purposes of extradition and the states' parties to the Convention commit themselves "to grant extradition in accordance with their laws and treaties in force."[13] *Punishment after the fact.*

Each of these provisions deals exclusively with punishment after the fact. Not one provision deals with prevention. The only provision in the entire Convention that is dedicated to prevention is Article 8:

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.[14]

Surely, there was more than one legal strabismus here. Mass murders are likely to be perpetrated by governments within their own territories, so obliging those same governments to prevent and punish genocide is on the order of solemnly assigning the proverbial fox to guard the henhouse, and then pretending that meaningful measures have been taken to protect the roost. As for the governments of other Contracting Parties that the Convention seemed to be enlisting to take action to prevent or arrest a mass killing, the duty assigned to them by the Convention is discretionary and, at that, remarkably light: they "*may* call upon the competent organs of the United Nations."[15] Not "they shall" or "they must." They *may*. And upon whom *may* they call? At the time, the only "competent" organ in the United Nations was the Security Council. What duty was assigned to the Contracting Parties who were members of the Security Council? To "take such action . . . *as they consider appropriate*" to prevent or suppress genocide.[16] The Genocide Convention did not even try to require the permanent and non-permanent members of the Security Council to exercise the powers the U.N. Charter accorded them to prevent or stop mass killing.

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11 *Id.* at art. V.

12 *Id.* at art. VI.

13 *Id.* at art. VII.

14 *Id.* at art. VIII.

15 *Id.*

16 *Id.*

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Article 8 was a timid and contingent treatment of the issue of preventing genocide. In the universe of the Genocide Convention, all that any state party could do was to "call upon" the Security Council. Considering the gravity of the offense, it is astonishing that no provision in the Genocide Convention imposed an obligation *erga omnes* on each state party to act meaningfully to prevent or suppress acts of genocide.

II

The mantra endlessly intoned at the time of the conclusion of the Genocide Convention was "never again." This mantra notwithstanding, since the Convention entered into force, there have been many mass murders. In international law and politics, the remedy *du jour* for virtually every mass murder has not been to try to prevent them or to arrest the murders as they were occurring but to wring our hands, utter condemnations and issue resolutions, allow them to run their course, and *then* to establish international tribunals and punish a few of the perpetrators. There is no evidence that any prosecution has served to prevent any subsequent mass killing. Consider only a few examples:

The murder in Kampuchea (Cambodia) of an estimated 1.7 million people—twenty percent of the country's population—between 1975 and 1979 was accomplished as the world looked on. The facts—massive expulsions from cities, forced labor, and inhumane living conditions—were appalling.

Hundreds of thousands of people were brought to killing fields where they were forced to dig their own graves. They were then either shot or beaten to death with iron bars, or were buried alive to save bullets. In the notorious "S-21" camp, 14,000 prisoners were killed; seven survived.[17] The media reported many of the incidents but until 1978, when Vietnam invaded Cambodia, no foreign government made any attempt to stop the mass murder.

On the contrary, some of the leading states in the world community seemed more concerned with protecting Cambodian sovereignty than with preventing that sovereignty from being used to murder over a million human beings. When Vietnam invaded Cambodia, drove Pol Pot's forces from power, and finally stopped the killings, the United States led a group of states within the United Nations in a move to deny the new Cambodian government its seat in the General Assembly, insisting that the Khmer Rouge was still the legitimate government! Even more, during the 1980s the

[17] DAVID CHANDLER, VOICES FROM TERROR AND HISTORY IN POL POT'S SECRET PRISON 5–21 (1999).

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United States reportedly gave $80 million in aid to the Khmer Rouge to fight against the Heng Samrin government.[18]

The international community neither prevented the mass killings nor arrested the killers. Now, almost thirty years later, and almost a decade after the death of Pol Pot, the United Nations has set up a hybrid tribunal to punish the few surviving leaders of the Khmer Rouge.[19] By the time the trials begin to pick up pace, the defendants, many of whom are well into their eighties, may no longer be alive (One senior member of the Khmer Rouge died in custody last year without ever having delivered any testimony).[20] Whether or not the trials actually take place, the point of emphasis is that, as the international human rights movement focuses its attention on the trials, it ignores the real lesson to be drawn: the international community had done nothing to prevent the mass killing or to arrest the killers.

In Rwanda in 1994, from April 6 through mid-July—little more than three months—500,000 Tutsis and thousands of moderate Hutus were murdered. The United Nations, which had a force in the country, had been forewarned that mass murder was being planned; yet it elected to withdraw its presence over the protest of General Romeo Dallaire, the leader of the peacekeeping force.[21] The United States, France, and Belgium, along with the United Nations Security Council all had advance warning and all refused to make any effort to prevent or stop the massacre. It was not until *after* the massacre that the United Nations established a special international tribunal to try those responsible for the genocide.[22]

The most devastating part of this account concerns the mass killing currently being perpetrated in the Darfur region of the Sudan. This conflict,

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[18] *See* KENTON CLYMER, THE UNITED STATES AND CAMBODIA, 1969–2000: A TROUBLED RELATIONSHIP 142 (2004).

[19] *See Judges Sworn in for Khmer Rouge*, BBC NEWS, July 3, 2006, http://news.bbc.co.uk/2/hi/asia-pacific/5140032.stm. As of November 2007, when the first defendant made his initial appearance in court, there were only five suspects in custody. Charges against them include war crimes and crimes against humanity, such as managing the Tuol Sleng prison mentioned earlier, where nearly 14,000 people died. Originally scheduled to conclude its proceedings in 2009, the tribunal is now projected to exceed that date by at least three years due to the need to address internal conflicts over law and procedure. Indeed, divisions between local and international staff have threatened to derail the entire process. *See* Guy De Launey, *Khmer Rouge Trial Raises Hope of Justice*, BBC NEWS, Nov. 20, 2007, http://news.bbc.co.uk/2/hi/asia-pacific/7103955.stm.

[20] Guy De Launey, *Rocky Road to Khmer Rouge Trial*, BBC NEWS, Feb. 26, 2007, http://news.bbc.co.uk/2/hi/asia-pacific/6389721.stm.

[21] ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA 290–93 (2004).

[22] Between the first trial in 1997 and June 2006, only twenty-five persons had been convicted (and three acquitted). INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, ACHIEVEMENTS OF THE ICTR, http://69.94.11.53/ENGLISH/factsheets/achievements.htm (last visited Feb. 24, 2008).

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which began more than five years ago in 2003, has claimed over 200,000 lives and displaced almost 2.5 million people.[23] An estimated 4.2 million people in Darfur are in dire need of humanitarian assistance as a result of the conflict. The government of the Sudan has broken repeated promises to rein in its militia allies in the region, and Darfur rebels have shown little interest in negotiating a peace agreement. Meanwhile, Darfur's people continue to suffer.[24]

Of course, there has been no dearth of declarations. The U.S. Congress declared the fighting in Darfur genocide on July 22, 2004;[25] then-Secretary of State Colin Powell followed suit on September 9, 2004.[26] Other countries have referred to the mass killings as "ethnic cleansing" rather than "genocide"—a rather frivolous semantic debate given the circumstances. A woefully inadequate military force was dispatched.[27] But despite widespread international denunciations of the Sudanese government's role in what are clearly mass killings, the killings have continued.

As for the Security Council, the repository of responsibility for prevention under Article 8 of the Genocide Convention, it has passed Resolutions on Darfur. Once again, however, the emphasis was placed on punishment after the fact and not on prevention.[28] In March 2005, by which time the scope of the continuing atrocities was well known, the Security Council passed resolution 1593, referring the matter to the International Criminal Court (ICC) for investigation and prosecution.[29] The United Nations congratulated itself for finally establishing an "accountability mechanism" to end

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[23] *Darfur Conflict*, REUTERS, Oct. 24, 2007, http://www.alertnet.org/db/crisisprofiles/SD_DAR.htm (reporting that the United Nations estimates 200,000 dead, and 2.2 million persons displaced in Darfur, with over 200,000 refugees displaced to Chad).

[24] The OHCHR has consistently reported publicly on sexual violence in Darfur in periodic reports. *See* UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, ACCESS TO JUSTICE FOR VICTIMS OF SEXUAL VIOLENCE 2 (2005), *available at* http://www.ohchr.org/Documents/Countries/darfur29july05.pdf.

[25] CHARLES COREY, U.S. CONGRESS TERMS SITUATION IN DARFUR 'GENOCIDE:' SENATE, HOUSE PASS CONCURRENT RESOLUTIONS ON DARFUR, *available at* http://usinfo.state.gov/is/Archive/2004/Jul/26-233176.html (last visited February 26, 2008).

[26] *Powell Calls Sudan Killings Genocide*, CNN.COM, Sept. 9, 2004, http://www.cnn.com/2004/WORLD/africa/09/09/sudan.powell/index.html.

[27] In early 2008 a joint U.N.-African Union peacekeeping mission was deployed in Darfur, seeking to end almost five years of fighting. Most experts agree, however, that the number of forces currently on the ground is woefully insufficient and is therefore unlikely to bring any meaningful change. *See* Louis Charbonneau, *Too Few Troops Deployed in Darfur—UN's Ban*, REUTERS, Jan. 8, 2008, http://africa.reuters.com/top/news/usnBAN824830.html.

[28] In July 2004, Resolution 1556 was passed, demanding that the Sudanese government disarm, apprehend, and try the janjaweed. In September 2004, Resolution 1591 strengthened an arms embargo, asset freeze and travel ban.

[29] S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

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the culture of impunity for perpetrators of the mass killings that continued to take place as the resolution was drafted and passed.[30]

Very few saw or, at least, acknowledged the irony of these international institutional responses. The Catholic Archdiocese's Justice and Peace Commission in Northern Uganda, examining comparable actions in Uganda, observed wryly: "[t]o start war crimes investigations for the sake of justice at a time when the war is not yet over, risks having, in the end, neither justice nor peace delivered."[31] That is certainly the situation in the Sudan. Sudanese authorities have repeatedly refused to cooperate with the ICC, arguing that Sudan is capable of trying the cases in Darfur.[32]

Sudan is a case of neither effective prevention nor effective punishment. Following the announcement of the summons, Eric Reeves wrote in the *Sudan Tribune*:

> What we have at present, then, is the public naming of two particularly vicious actors in the Darfur genocide, but with no prospect of extradition, justice—or deterrence. It is a very small step . . . [and it] does nothing to address the overwhelmingly urgent issue of the moment: protection for

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[30] Press Release, Security Council, Security Council Refers to Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 3, 2005), *available at* http://www.un.org/News/Press/docs/2005/sc8351.doc.htm. This was not the most rapid of the United Nations' responses. The U.N. World Summit of September 2005 produced an "outcome document" (unanimously endorsed) committing the international community to a "responsibility to protect" civilians who are victims of genocide, ethnic cleansing, or crimes against humanity and asserting that such a responsibility supersedes claims of national sovereignty. Nevertheless, the National Islamic Front (NIF) regime in Khartoum, which is made up of the same men who orchestrated the systematic destruction of Darfur's tribal populations, was told that there would be no U.N. peacemaking force without its consent. Eric Reeves, *Accommodating Genocide*, WASH. POST, Sept. 3, 2006, at B07, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/01/AR2006090101453.html?sub=new.

[31] Mahnoush H. Arsanjani & W. Michael Reisman, *Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 385 (2005).

[32] *See* HUMAN RIGHTS WATCH, LACK OF CONVICTION: THE SPECIAL CRIMINAL COURT ON THE EVENTS IN DARFUR 1 (2006), *available at* http://hrw.org/backgrounder/ij/sudan0606/sudan0606.pdf. On February 27, 2007, the ICC's Prosecutor filed the Application required by Article 58 of the Rome Statute, requesting the Chamber to summon Ahmad Muhammad Harun, Sudan's former Minister of State for the Interior, and Ali Kushayb, a Janjaweed leader in West Darfur, to appear before the Court. *See* Situation in Darfur, the Sudan, ICC-02/05, Prosecutor's Application Under Article 58(7), 4 (Feb. 27, 2007). The Prosecutor chose to issue "summons" versus arrest warrants, in hopes that the Sudanese government would choose to cooperate if served with a "less intrusive" procedure. Article 58 of the Rome Statute specifically permits the Pre-Trial Chamber to issue arrest warrants instead of summonses to appear. *See* Rome Statute of the International Criminal Court art. 58(1)(b), July 17, 1998, 37 I.L.M. 999, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf. Not surprisingly, the summonses have been ignored.

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> vulnerable civilians and for humanitarian organizations operating in Darfur.[33]

Certainly there has been no prevention.

Given the timidity and indecision I have described, it is not at all surprising that, since the beginning of the ICC's involvement in 2005, the Sudanese government has not ceased its aerial bombardment of Darfurian villages. Ethnically targeted violence in Darfur—murder, rape, and pillaging—has continued unabated. It was not until 2007, after receiving the long-awaited permission of the Sudanese government, that the Security Council agreed to deploy a peacekeeping force of up to 26,000 military and police personnel to Darfur to supplement the largely ineffective African Union forces.[34] Even before the deployment, which began this winter, there were already indications that the peacekeeping mission lacks sufficient funding and technology to be effective on the ground.[35] To date, only one-third of the forces have actually been sent to Darfur, a number far too small to stop a conflict that has persisted for the past five years.[36]

If it seems that I have painted a somber picture, keep in mind that the cases I have mentioned are among the few instances in which states have come together to attempt to remedy the act of mass murder at all—even if largely through declarations and threats of punishment rather than prevention. Many such atrocities go virtually unacknowledged by the international community.

Here is an example: In January 1971, only a few years before the mass killings began in Cambodia, Idi Amin, the commander of the Ugandan army, overthrew the elected president, Milton Obote. During his eight years in power, the number of people killed by Amin's government is estimated to have ranged from 80,000 to 500,000. The mass murders were widely reported. Despite this extended period of mass murder, Idi Amin was elected head of the Organization of African Unity in 1975, and from 1977 to 1979

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[33] Eric Reeves, *The ICC "Application" Concerning Int'l Crimes in Darfur*, SUDAN TRIB., Feb. 28, 2007, http://www.sudantribune.com/spip.php?article20496.

[34] *See Security Council Authorizes Hybrid UN-African Operation in Darfur*, UN NEWS CENTRE, July 31, 2007 (reporting that the new hybrid force, UNAMID, will take over peacekeeping operations from the existing African Union Mission in Sudan). Unfortunately, only roughly one third of the Mission's soldiers have been deployed thus far due to the lack of sufficient helicopters and other heavy transport vehicles. *See* Charbonneau, *supra* note 27.

[35] *See* Edith M. Lederer, *UN Chief Warns that Without 24 Helicopters New Darfur Peacekeeping Force is at Risk*, ABC NEWS, Dec. 6, 2007, *available at* http://abcnews.go.com/International/wireStory?id=3966207 (reporting that the U.N.-African Union force, set to begin deployment in late December of 2007, has been unable to acquire enough helicopters to make the mission effective).

[36] *See* Charbonneau, *supra* note 27.

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Uganda, *mirabile dictu*, was elected to the United Nations Commission on Human Rights.[37]

The killing would likely have gone unabated, had Tanzania not invaded Uganda in late 1978 and overthrown Amin's government.[38] Amin fled to Libya and then to Saudi Arabia, where he was given asylum, as voices were raised over Tanzania's violation of Uganda's sovereignty. Amin died in 2003 in a Saudi hospital without ever standing trial for mass murder.[39] The score in Uganda: no prevention, woefully belated arresting (with its lawfulness actually challenged), *and* no punishment.[40]

III

As strange as it may seem, many international lawyers take issue with the lawfulness of the few effective efforts to stop ongoing mass murders. Consider the reaction to NATO's action to stop the mass killing that occurred in Kosovo in 1999. NATO bombed Serbia into submission without the authorization of the Security Council prescribed by the U.N. Charter. Kosovo is currently under United Nations supervision. What is fascinating about this one case of relatively rapid international action to stop mass killing is that it aroused great disquiet and even criticism of many of the international legal custodians of the world community.

The Danish Institute of International Affairs published its study of the Kosovo intervention in 1999 and opined that the U.N. Charter prohibits such unilateral humanitarian interventions. Similarly, the Dutch Advisory Committee on issues of public international law and the Dutch Advisory Council on International Affairs stated in 2000 that "Article 2(4) of the Charter lays down a peremptory ban (jus cogens) on the use or threat of force and hence does not leave any legal latitude for armed intervention on

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[37] *See Idi Amin: A Byword for Brutality*, NEWS24.COM, July 21, 2003, *available at* http://www.ugandamission.net/aboutug/articles/amin.html#03-0721.

[38] TONY AVIRGAN & MARTHA HONEY, WAR IN UGANDA: THE LEGACY OF IDI AMIN (1982).

[39] *See, e.g.*, Ethan Bronner, *Editorial Notebook; The Obscenely Easy Exile of Idi Amin*, N.Y. TIMES, Aug. 19, 2003, http://query.nytimes.com/gst/fullpage.html?res=9A07E5D71030F93AA2575BC0A9659C8B63; *see also Ugandan dictator Idi Amin buried*, CNN INT'L, Aug. 17, 2003, http://edition.cnn.com/2003/WORLD/africa/08/17/saudi.amin/index.html.

[40] The humanitarian crises mentioned thus far do not include mass killings that have not even reached the international punishment stage, let alone international efforts at arresting or preventing. Take, for example, the pogroms in Indonesia between 1965 and 1967, when more than one-half million ethnic Chinese were murdered under the pretext that they were Communists. *See generally* JOHN ROOSA, PRETEXT FOR MASS MURDER: THE SEPTEMBER 30TH MOVEMENT AND SUHARTO'S COUP D'ETAT IN INDONESIA (2006). Consider also the 2002 riots in Gujarat, India, where over a thousand Muslims (human rights groups claim many more) were killed by Hindu nationalists. *See generally* GUJARAT: THE MAKING OF A TRAGEDY 9 (Siddharth Varadarajan ed., 2007).

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the territory of another state without the latter's consent."[41] The House of Commons' Foreign Affairs Committee issued its Fourth Report in 2000 on the NATO military action and concluded that, although the intervention may have been moral, it was "of dubious legality in the current state of international law."[42] The Kosovo Report, which was prepared on the initiative of the Prime Minister of Sweden in 2000, also stated that NATO's intervention was illegal because of the lack of prior approval by the Security Council but, in a way comically disrespectful of international law, conceded that "the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule."[43]

In response to the international lawyers' disquiet over taking action to prevent further mass killings in Kosovo, then Secretary General Kofi Annan created a High Level Panel (HLP) in 2004 to prepare a report on "our State Responsibility." The report stated:

> We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[44]

This statement, which has been celebrated in some quarters as a major step forward, is at once conservative, radical, and vacuous. The conservative element of the HLP statement is that it merely confirms an authority that was already clearly within the Security Council's domain. The Council has the competence to authorize military action under the broad "threat to the peace" contingency of Article 39 of the Charter and has done so for hu-

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[41] ADVISORY COUNCIL ON INT'L AFFAIRS, HUMANITARIAN INTERVENTION NO. 13, 18 (2000), *available at* http://www.aiv-advice.nl/ContentSuite/upload/aiv/doc/AIV_13_Eng.pdf.

[42] HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, FOURTH REPORT, 1999–2000, H.C. 28-I, para. 138.

[43] THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 4 (2000).

[44] Report from the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, para. 203, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter High-level Panel Report]. Of course, the High-level Panel was not an international law-making body nor is the Secretary-General, who established the Panel, someone who can contribute to "state practice." Yet, the process of international law making has certainly expanded to include many non-state participants. *See* W. Michael Reisman, *The Democratization of International Law-Making Processes and the Differentiation of Their Application*, *in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 23 (Rüdiger Wolfrum & Volker Röben eds., 2005).

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man rights matters since 1965. This is why Article 8 of the Genocide Convention logically reposed responsibility for prevention in the Council. The HLP report actually shifts into reverse gear, reducing clear law to the status of an "emerging norm" reinserted, as it were, into the law-making womb, from which the HLP predicts it will emerge at some indeterminate moment in the future. The notion of an emerging "norm" is itself rather slippery, especially with respect to the right or obligation to use force to stop mass killing. It is not obvious at what point an "emerging" norm can be relied upon, nor who is authorized to determine and to announce its formal "emergence."

The apparently radical element of the HLP report is that the heretofore discretionary vote of non-permanent members of the Council and the *librum veto* of the permanent members are supposedly being transformed into a "responsibility" to take action when faced with mass killings and other severe human rights deprivations occurring within a state that is unwilling or unable to stop them. The soft "may" in Article 8 of the Genocide Convention might seem to be developing into a hard "must." But, here again, there is less in the HLP report than meets the eye. "Responsibility" is not a "duty" to act.[45] Even if it were a "duty" incumbent on each member of the Security Council, who is to enforce it, and what is the sanction for non-compliance? Although the HLP report leaves critical questions unanswered, the answers are clear: no one will enforce such a "responsibility" and there will be no sanction for non-compliance.

Furthermore, the contingency that the use of force be employed only as a "last resort" to arrest mass murders such as genocide will not mean much to prospective victims. Is the implication that, even if the members of the Security Council were really inclined to act, they must patiently wend their way through diplomatic measures and economic sanctions before bombing gas chambers, crematoria, or Janjaweed militias?

The most constricting part of the HLP Report, however, is its implication that only the Security Council has the legal competence to take actions or authorize others to take action to stop mass murders. Is that still a legally correct or practicable solution? To consider that question, we must look more closely at the constitutional structure of the United Nations.

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[45] Benedetto Conforti suggested that a "responsibility" or "duty" to protect is meaningless with reference to positive international law because there is no means of enforcement or remedies for inaction. There is only a *moral* duty to arrest serious violations of human rights. BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 166–71 (1993).

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IV

You will recall that when the Genocide Convention finally turns, in Article 8, to action to prevent and suppress genocide, it looks to the "competent organs" of the United Nations. At the time, the only organ competent to undertake prevention was the Security Council. That monopoly in the constitutional system of the United Nations may have since ended. As such, it is now necessary to consider, along with the Security Council itself, the potential competence of a number of other U.N. agencies. Let us review them briefly.

A. The Security Council

When the Genocide Convention was concluded, there was no *legal* uncertainty with respect to the competence of the Security Council to engage in or to authorize action in a case of genocide or mass killing. Both the language of the Charter and a limited amount of subsequent practice confirm that the Security Council continues to be competent to conduct or to authorize either regional organizations or other states to conduct military operations *within* a state to arrest severe human rights violations.

Charter Chapter VII contains the powers that the Security Council may use to discharge its primary responsibility to "maintain and restore international peace and security." The Security Council itself determines whether a situation or an event threatens international peace and security. The trigger-contingency of a "threat to the peace" in Article 39 is undefined and hence, open-textured. To be sure, Charter Article 2(7) prohibits the United Nations' interference in matters "which are essentially within the domestic jurisdiction of any state." It is hard to imagine that anyone is actually possessed with some sort of grotesque Westphalian notion where a government's murdering large groups of its people is solely a matter of domestic jurisdiction.[46] Even such sovereignty-crazed elites will be disappointed, for Article 2(7) makes an explicit exception for "the application of enforcement measures under Chapter VII." The Rhodesian incident in 1967 made clear that the Council can find that severe human rights violations *within* a state, caused by the actions of its government, can constitute a threat to the peace and serve as a basis for Security Council action—even when there are no manifest external consequences.

At the time, Rhodesia was a controversial exception; the practice of the United Nations in the 1990s, however, has "shifted to a perception that internal violations of human rights could threaten international peace and

[46] U.N. Charter, art. 2, para. 7, 59 Stat. 1031, T.S. 993 (Dec. 9, 1948).

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security."[47] Large-scale human rights violations are no longer buffered from international concern on the ground that they are "essentially within the jurisdiction" of the perpetrator-state.

The fact that the Security Council has the authority to act in cases of genocide and mass murder does not mean that the Council *will* act. For reasons that are too familiar to require elaboration, the Security Council has proved itself on many occasions unable to secure the agreement of all of its permanent members, which is a prerequisite for the Council to exercise its compulsory powers. On those occasions, either the Council has not acted, or the compromises necessary for securing unanimity have produced ineffective or anodyne resolutions. The Genocide Convention's effort to recruit the Security Council to prevent mass killings has not worked, and the omens of the future are not promising.

B. The General Assembly

In the so-called "Uniting for Peace" Resolution, the General Assembly stated that when there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly

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[47] SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY 238 (2005). The first clear link between human rights violations within a state and international peace and security was Security Council Resolution 688 in the Iraq/Kuwait crisis, though it did not authorize a Chapter VII action. S.C. Res. 688, para. 1, U.N. Doc. S/RES/688 (Apr. 5, 1991). The operation in Somalia was the first in which the Security Council authorized intervention in an internal conflict under the terms of Chapter VII of the U.N. Charter without invoking possible cross-border dimensions of the conflict. S.C. Res. 794, para. 10, U.N. Doc. S/RES/794 (Dec. 3, 1992). Nevertheless, even for the Security Council, the responsibility is not to protect, but rather to maintain peace. Security Council Resolutions for Somalia, Bosnia and Herzegovina, and Kosovo mention a responsibility to maintain peace and security and a grave concern for the violations of human rights and loss of material property, but never speak in terms of responsibility to halt the human rights violations per se or a responsibility to protect. The Resolution on Somalia recalls the Security Council's "primary responsibility . . . for the maintenance of international peace and security" and links the loss of human life and material damage to peace and security in the region. S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992). The Resolution on Bosnia and Herzegovina recalls the Security Council's "primary responsibility . . . for the maintenance of international peace and security" and links the loss of human life and material damage to peace and security in the region. S.C. Res. 713, U.N. Doc. S/RES/713 (Sept. 25, 1991). J. Frowein and N. Krisch find that an "evolution of the concept of a threat to the peace to include violations of human rights reflects the increased importance of the individual in the international legal order but it does not warrant the conclusion that any severe violation of human rights could give rise to [Security Council] action under Chapter VII." Jochen Frowein & Nico Krisch, *Introduction to Chapter VII*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 701, 725 (Bruno Simma et al. eds., 2002). "The [Security Council] enjoys its far-reaching powers only for matters of peace and security; it is not set up to enforce all overarching values of the international community." *Id.*

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> shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[48]

In the *Certain Expenses* Opinion[49] and, more recently, the *Wall* Opinion[50] the International Court has confirmed the Assembly's competence to exercise Chapter VII-type powers in circumstances that require such action, but the Security Council proves paralyzed.

In *Certain Expenses*, the Court found that, as "each organ must, in the first place at least, determine its own jurisdiction" within the bounds of the Charter,[51] Assembly deployment of peacekeeping forces was not *ultra vires* if it is carried out for the fulfillment of one of the stated purposes of the United Nations. In the *Wall* opinion, the Court went so far as to equate the Assembly and the Council by saying that the United Nations, "especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation" the Court had found existed.[52]

The General Assembly commands no forces of its own. May the General Assembly, then, in implementation of this so-called "required"

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[48] G.A. Res. 377 (V), para. 1, U.N. Doc. A/1775 (Nov. 3, 1950). This authority has been used only rarely, notably in the 1950s during the Korean crisis and to establish the United Nations Emergency Force (UNEF) to secure and supervise the cessation of hostilities between Egypt and Israel in 1950. Soon it became clear that financial and military support of the major powers of the world were imperative for any successful enforcement action. More importantly, there was a lack of will—"those [major] powers were not willing to see the General Assembly lead in this area; thus, the General Assembly simply could not go it alone." Sean Murphy, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 120 (1996).

[49] The jurisprudence of the International Court of Justice suggests that the Court is likely to find issues of human rights abuses within the scope of U.N. competence. In *Peace Treaties*, the Court's decision implied that questions of international law cannot be considered matters essentially within the jurisdiction of a state. Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, First Phase, 1950 I.C.J. 65, 70 (Mar. 30) (finding that the interpretation of the terms of an international treaty could not be considered as a question essentially within the domestic jurisdiction of a state). A similar implication was made in *Norwegian Loans*.Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 51–52 (July 6) (separate opinion of Judge Lauterpacht) (noting that though, prima facie, the conduct of a state may be within its domestic jurisdiction, numerous matters, such as the treatment of its citizens, are now the subject of treaties and customary rules of international law).

[50] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 148–51 (July 9).

[51] *See* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 163–71 (July 20).

[52] Construction of a Wall, 2004 I.C.J. 136, 200.

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"further action," authorize a state or coalition of states to act to stop genocide or mass killing when it is occurring within a state whose government is either responsible for or unable to halt it? The answer might be that the Assembly may so authorize by certifying that, in its view, (i) there is a need to act under Chapter VII, and (ii) the Council has proved itself unable to do so. In the *Wall* Opinion, the International Court's rather permissive approach to the Assembly's competence to make such findings suggests that these matters are not objective but rather fall to the judgment of the General Assembly itself.[53] If the Assembly is competent to issue authorizations to either regional organizations or individual states to act to arrest mass killers in a particular case, it would appear that the action taken by these delegates would not constitute a violation of international law, as long as it was not conducted in ways that violated the *jus in bello*.

That said, analyses of this sort are redolent of the speculations of medieval scholars on the number of angels on the head of a pin. The men and women of the General Assembly must have been aware of the cases of mass killing since 1945, yet the Assembly has never done anything effective about any of them. The chances of the Assembly actually agreeing to authorize an action in the future are remote.

C. Regional Organizations

Chapter VIII of the U.N. Charter envisions a contingent role for regional arrangements in matters relating to the maintenance of international peace and security. Other than making an effort "to achieve pacific settlement of local disputes,"[54] regional organizations may be, ". . . where appropriate, utilize[d by the Security Council] for enforcement action under its authority."[55] Nevertheless, regional organizations have no unilateral enforcement power, as "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state. . . ."[56]

A regional organization could be authorized by the Security Council or, under the theory explored in the preceding pages, by the General Assembly acting under *Uniting for Peace* to undertake an action to prevent or arrest an ongoing mass killing. Without such authorization, a regional organization's conduct of such an action would constitute a violation of inter-

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[53] As noted in the *Certain Expenses* case, the General Assembly may determine its own jurisdiction.

[54] U.N. Charter, *supra* note 46, at art. 52, para. 2.

[55] *Id.* at art. 53, para 1.

[56] *Id.*

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national law, in the absence of a persuasive theory under which unilateral action could be deemed lawful.

Some interesting developments may intimate constitutive changes. Article 4(h), of the Constitutive Act of the newly formed African Union prohibits any one member state from intervening in the domestic affairs of another member state. But the Act establishes "the right of the Union to intervene in a member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity."[57] According to the Act, decisions of the Assembly are taken by consensus, "failing which, by a two-thirds majority."[58] Further, "the Assembly may delegate any of its powers and functions to any organ of the Union."[59] Article 4 is thus a contingent invitation to intervene in instances of genocide. It may be inconsistent with the U.N. Charter but, of course, new customary international law is made through violations of existing law to which other states acquiesce. It remains to be seen if the Security Council will "acquiesce" to the African Union claim and, more important, whether it will prove an effective means of preventing mass killing. If, in 1948 the authors of the Genocide Convention really thought that they were providing for an effective means of preventing or arresting genocide by referring the matter to the competent organs of the United Nations, they were mistaken. The competent organs of the United Nations have failed to prevent genocide.

V

In 1995, in the Supplement to the Agenda for Peace, then-U.N. Secretary-General Boutros Boutros-Ghali, observed that

> One of the achievements of the Charter of the United Nations was to empower the Organization to take enforcement action against those responsible for threats to the peace, breaches of the peace or acts of aggression. However, neither the Security Council nor the Secretary-General at present has the capacity to deploy, direct, command and control operations for this purpose, except perhaps on a very limited scale.[60]

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[57] Constitutive Act of the African Union, art. 4(h), July 11, 2000, 2158 U.N.T.S. 33, 37. The Constitutive Act also provides for the "non-interference by any Member State in the internal affairs of another." *Id.* at art. 4(g).

[58] *Id.* at art. 7.

[59] *Id.* at art. 9, para. 2.

[60] The Secretary-General, *Report of the Secretary-General on the Work of the Organization*, para. 77, *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fifteenth Anniversary of the United Nations*, U.N. Doc. A/50/60–S/1995/1 (Jan. 3, 1995).

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After reviewing the modalities available to the United Nations, including "preventive diplomacy and peacemaking; peace-keeping; peace-building disarmament; sanctions and peace enforcement," Boutros-Ghali went on to say that

> The United Nations does not have or claim a monopoly of any of these instruments. All can be, and most of them have been, employed by regional organizations, by ad hoc groups of States or by individual States . . .[61]

Boutros-Ghali's observation is particularly pertinent to actions to prevent mass murders or to arrest killers. Assuming that the "responsibility to protect" has reached parity with the principle of state sovereignty, when formally authorized international institutions fail to respond to events that are the predicate of this responsibility, may states, acting individually or in coalitions, be deemed to be contingently empowered under international law to act unilaterally to stop a mass killing?

The High Level Panel Report referred to earlier does not state that such a secondary, contingent competence now exists. In paragraph 207, however, it tantalizingly recommends that the prudential considerations it proposes for Security Council actions for implementing the responsibility to protect should also be principles of general application: "[w]e also believe it would be valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them."[62] Why should other states be urged to subscribe to them if they are not going to be exercising them?

There is a great gulf here between international law's formal *structures* on unilateral action to prevent mass killings and the implication of Boutros-Ghali's observation. The U.N. Charter codified a prohibition of threats or the use of a state's unilateral force, only allowing some very narrow exceptions. Article 2(4) enjoins members to "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." Some scholars, myself included, have argued that implicit grounds upon which to base such action may be found in the language of the Charter. Specifically, an action whose only purpose was to prevent or arrest mass killing would neither constitute a violation of the territorial integrity or political independence of a state, nor be in a "manner inconsistent with the Purposes of the United Nations." These arguments have failed to win a consensus.[63]

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[61] *Id.* at para. 23.

[62] High-level Panel Report, *supra* note 44, at para. 209.

[63] ALBRECHT RANDELZHOFER, *Article 2(4)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 130–31 (Bruno Simma et al. eds., 2002).

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The General Assembly has passed three resolutions on the issue of intervention by states.[64] While indicating a general animus against it, all of the resolutions acknowledge that certain special situations may justify military intervention. So far, "special situations" have been limited to decolonization, as the General Assembly has not extended its consensus to cover mass killings.

On various occasions, the International Court of Justice (ICJ) has addressed Article 2(4)'s prohibition on the threat or use of force. In each of these cases, the ICJ has very narrowly construed the legal uses of armed force, leaving little or no room for the inclusion of unilateral humanitarian action. In *Corfu Channel*,[65] the Court interpreted the prohibition on the use of force broadly, leaving the impression that under the U.N. Charter there are no implicit exceptions to Article 2(4). In particular, the Court held that the inability of an international organization to discharge a function assigned to it could not justify noncompliance with the prohibition on the use of force and allow the organization to resort to unilateral action.[66] In *Nicaragua*[67] the Court reaffirmed the general character of the prohibition on the use of force—a rule which it held to be part of customary international law, and thus independent of the operability of the collective security system of Chapter VII of the Charter.[68] The Court also held that international law does not permit the use of armed force to redress violations of human rights in another state.[69] In *Nuclear Weapons*[70] the Court seemed to confirm that it still regarded both self-defense against an armed attack and Chapter VII Security Council military enforcement actions as the only exceptions to the

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[64] The first Resolution, entitled "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Their Independence and Sovereignty," declared that "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." G.A. Res. 2131 (XX), para. 1, U.N. Doc. A/6014 (Dec. 21, 1965). The second Resolution was titled "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations." G.A. Res 2625 (XXV), U.N. Doc. A/8028 (Oct. 24, 1970). The third Resolution, entitled "Definition of Aggression," stated that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression." G.A. Res. 3314 (XXIV), art. 5, U.N. Doc. A/9631 (Dec. 14, 1974). However, the third Resolution contains an exception in order not to "prejudice [a people's] right to self-determination, freedom, and independence . . . nor the right of these peoples to struggle to that end and to seek and receive support." G.A. Res. 3314 (XXIV), art. 7, U.N. Doc. A/9631 (Dec. 14, 1974).

[65] *See* Corfu Channel Case (Alb. v. U.K.), 1949 I.C.J. 4 (Apr. 9).

[66] *Id.* at 34–35.

[67] Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14 (June 27).

[68] *Id.* at 99–100.

[69] *Id.* at 134–35.

[70] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (Jul. 8).

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prohibition on the use of force.[71] The Court noted in *DRC v. Uganda*[72] that, though Security Council Resolutions recognized that all states in the region bear responsibility for securing peace and stability, "this widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda."[73]

VI

For anyone who is horrified by the prevalence of mass killing on our planet and expects the institutions of international law in the twenty-first century to act—or to authorize someone to act—to prevent or arrest it, the legal situation is not encouraging. Notably, the explicit language of the U.N. Charter, as repeatedly and authoritatively construed, does not allow actions to prevent or arrest mass killings without Security Council authorization, and the Security Council is unlikely to authorize such an action. The legal uncertainty of the scope of lawfulness of a secondary authorization by the General Assembly persists; the Assembly is also unlikely to take such action. There is no consensus on a *right* of unilateral "humanitarian intervention" to protect victims of large-scale human rights violations, including genocides and mass killings.

Three recent cases, however, may suggest the emergence of a more nuanced customary international law regime. Liberia was the scene of a bloody civil war with large-scale human rights violations. By August 1990, a group of West African nations, under the auspices of the Economic Community of West African States (ECOWAS), established a Standing Mediation Committee for the purpose of investigating disputes and conflicts within the community. The Committee concluded that

> These developments have traumatized the Liberian population and greatly shocked the people of the sub-region and the rest of the international community. They have also led to hundreds of thousands of Liberians being displaced and made refugees in neighbouring countries, and the spilling of hostilities into neighbouring countries.[74]

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[71] *Id.* at 244.

[72] Case Concerning Armed Activities on the Territory of The Congo (Dem. Rep. of The Congo v. Uganda) (Judgment of Dec. 19, 2005), para. 152, *available at* http://www.icj-cij.org/docket/files/116/10455.pdf (last visited Feb. 18, 2005).

[73] *Id.* at para. 152. This is a curious statement, as Uganda never claimed its actions to be excused on the basis of Security Council Resolutions, but rather on the basis of self-defense.

[74] Economic Community of West African States [ECOWAS], Standing Mediation Committee, *Final Communique of the First Session*, para. 8 (Aug. 7, 1990), *reprinted in* 6 CAMBRIDGE INT'L DOCUMENT SERIES, REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 73 (M. Weller ed., 1994).

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In view of these internal and external effects, ECOWAS dispatched the Economic Community Cease-Fire Monitoring Group (ECOMOG). It was a military expedition, and it succeeded in temporarily stopping the bloodshed and ethnic killing.

The Security Council never authorized the ECOMOG intervention, but after its initial successes the President of the Security Council did "commend" the Committee's efforts. Even at this point, the Security Council did not authorize ECOMOG to use "all necessary means," despite the fact that there was a transboundary "threat to the peace." Nonetheless, the reaction of the international community to the ECOMOG intervention was almost universally favorable.

Consider also the aforementioned NATO intervention in Kosovo, which provides a different lens for examining what may be an emerging *opinio juris* on this issue. The large-scale and manifest human rights violations then occurring in Kosovo might have been invoked as the sole basis of justification for the unilateral action. Yet no major participating government relied exclusively or primarily on some sort of theory of humanitarian intervention, or on an international responsibility to act to arrest mass killing. Most participants portray the intervention as relying on Security Council Resolutions 1199 and 1203, which condemned Belgrade's violations of human rights in Kosovo, even though none of the Resolutions included an authorization to act, whether through the Organization or unilaterally.

For example, France relied on Former Yugoslavia's noncompliance with Resolutions 1199 and 1203, arguing that "the legitimacy of NATO's action lies in the authority of the Security Council."[75] Germany, by contrast, emphasized the humanitarian disaster that made military intervention necessary, but still argued that NATO's action, though unauthorized by the Security Council, was nevertheless consistent with the "sense and logic" of Council Resolutions.[76] The United States focused on particular factual circumstances, foreshadowing a humanitarian catastrophe of immense proportions,[77] and submitted that the NATO military intervention "[i]n this context . . . [was] justified and necessary to stop the violence and prevent an

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[75] Press Release, French Foreign Ministry (Mar. 25, 1999), *quoted in* Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 235 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter HUMANITARIAN INTERVENTION].

[76] Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 12 (1999).

[77] Press Release, Security Council, Statement of Ambassador A. Peter Burleigh, U.N. Doc. SC/6657 (Mar. 24, 1999). The United States "believed it was necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo." *Id.*

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even greater humanitarian disaster."[78] Nevertheless, as a formal legal matter, President Clinton, like the government of France (and President George W. Bush in Iraq), relied primarily on the Former Yugoslavia's noncompliance with Resolutions 1199 and 1203. In March 1999, the United Kingdom came closer to invoking humanitarian intervention as a distinct legal basis for NATO's military action.[79] One month later, Prime Minister Tony Blair expressed a more conditional position:

> Under international law a limited use of force can be justifiable in support of purposes laid down by the Security Council but without the Council's express authorization when that is the only means to avert an immediate and overwhelming humanitarian catastrophe. Any such case would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.[80]

Subsequent British statements linked the justification for NATO's military action more directly to purposes articulated in Security Council Resolutions.[81] Even when humanitarian reasons *were* invoked by states, they were cast as an exception rather than as part of an emerging rule. Only Belgium defended NATO's action as a "lawful armed humanitarian intervention," taken to protect fundamental *jus cogens* values and to forestall a humanitarian catastrophe acknowledged by the Security Council.[82]

VII

The International Court of Justice provided a welcome reverse of the trend just reviewed on February 26, 2007. The *Case Concerning the Application of the Convention on the Prevention and Punishment of the*

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[78] *Id.*

[79] *See* U.K. Foreign and Commonwealth Office note of Oct. 7, 1998 (arguing that force could be justified "on the grounds of overwhelming humanitarian necessity" without Security Council authorization, but that certain criteria "would need to be applied"), *quoted in* Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, *in* HUMANITARIAN INTERVENTION, *supra* note 76, at 236. *See also* U.N. SCOR, 54th Sess., 3988th mtg. at 12, U.N. Doc. S/PV.3988 (Mar. 23, 1999) (statement of Sir Jeremy Greenstock on behalf of the United Kingdom) (arguing "[i]n these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable").

[80] 330 PARL. DEB., H.C. (6th ser.) (1999) 240, *quoted in* Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION, *supra* note 76, at 232, 236–37.

[81] *Id.* at 236.

[82] Legality of Use of Force at 13 (Serb. & Mont. v. Belg.) (transcript of Oral Argument May 10, 1999), *available at* http://www.icj-cij.org/docket/files/105/4513.pdf.

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Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)[83] was initiated by Bosnia and Herzegovina against Serbia and Montenegro. The disposition of the Court's judgment has disappointed many, but to its credit, the judgment expanded the responsibility of individual states to act to prevent and arrest genocide.

The Court did not begin its consideration of this aspect of the case very auspiciously. It noted what it called "the clear links between the duty to prevent genocide and the duty to punish its perpetrators, which it sees as "distinct yet connected obligations." In the Court's view,

> [O]ne of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent.[84]

With respect, that has long been an excuse for *not* acting to prevent or arrest mass killing. It is an elevation of the familiar second-best remedy for individual murders in domestic systems, but it makes little sense in cases of mass murder. We have already noted that, as an empirical matter, there is no evidence that punishment has been an effective deterrent in national or international settings. Then again, one would hardly expect the Court to have raised doubts about the efficacy of the institutional judicial network of which it is the principal organ.

Despite this inauspicious beginning, the Court then proceeded to surprise us by distinguishing a "distinct" obligation to prevent. "[I]t is not the case," the Court says,

> [T]hat the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. *It has its own scope, which extends beyond the particular case envisaged in Article VIII*, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. *Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations*

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[83] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 169 (Feb. 26, 2007), *available at* http://www.icj-cij.org/docket/index.php?p1=3&k=f4&case=91&code=bhy&p3=4. [hereinafter Genocide Case].

[84] *Id.* at para. 426.

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> *Charter and any decisions that may have been taken by its competent organs.*[85]

Some human rights prescriptions are essentially exercises in momentary euphoria: they install obligations which manifestly cannot be fulfilled, and which none of the prescribers even expect to be fulfilled. They embroider the myth system of international law but not its operational code.[86] It is clear that the Court is not involved here in such an exercise, for it has crafted the duty to prevent in a realistic and practicable fashion. The Court explains that:

> [I]t is clear that the obligation in question is one of *conduct* and *not one of result*, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: *the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.* A State does not incur responsibility simply because the desired result is not achieved; *responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.* In this area the notion of "due diligence," which calls for an assessment *in concreto*, is of critical importance.[87]

How then shall international law determine whether a State has actually fulfilled its duty to prevent? The Court eschews a "one-size-fits-all" duty, making the duty instead a function of relative and relevant power. Among the parameters taken into account in assessing whether a State has an obligation to prevent genocide is "the capacity to influence effectively the action of persons likely to commit, or already committing, genocide," which "depends . . . on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links . . . between the authorities of that State and the main actors in the events."[88]

Nevertheless, if one's duty is a function of one's ability, the obligation to prevent may not be sloughed off by concluding in advance that it would not have availed the victims of a prospective or ongoing genocide. The Court explains that:

> As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with

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[85] *Id.* at para. 427 (italics in original).

[86] *See* W. Michael Reisman, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 15–18 (1979).

[87] Genocide Case, *supra* note 83, at para. 430 (italics in original).

[88] *Id.*

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> its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce.[89]

Given the serial character of mass murder, the obligation to prevent commences at a very early stage. While that obligation does not necessarily come into being at the onset of the genocide itself, it and the accompanying duty to act do begin "at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed." At that point, the State bears a duty to use all means available to it to prevent or to stop the genocide "as the circumstances permit."[90]

The failure to prevent is a violation of the obligation on parties to the Genocide Convention, but it does not necessarily constitute a crime of complicity, which "always requires that positive action has been taken to furnish aid or assistance to the perpetrators of the genocide while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed."[91]

Yet in some circumstances, a failure to prevent *can* be construed as complicity.

> there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. *By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.*[92]

In light of these legal principles, the Court found that Serbia and Montenegro had failed to prevent the genocide at Srebenica, "whose scale, though it could not have been foreseen with certainty, might at least have been surmised." The Court based its decision on the Yugoslav federal authorities'

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89 *Id.*

90 *Id.* at para. 431.

91 *Id.* at para. 432.

92 *Id.*

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"undeniable influence and [on] the information, voicing serious concern, in their possession."[93]

Ironically, the finding of failure to prevent was probably greeted with relief in Belgrade, as it was the lesser of the charges and, in the Court's view, did not incur liability for damages. The implication of the Court's theory of the duty to prevent, however, could have implications for other genocides, one of which is being carried out as we speak.

VIII

Sixty years after the conclusion of the Genocide Convention, the shadowy obligation the Convention imposed on individual states to prevent or arrest genocide is beginning to acquire *some* legal substance. The Court's handiwork is creative and realistic. It goes about as far as one could expect an international tribunal, especially the International Court, to go in a law-making excursus. But, lest we slip into the self-gratifying and premature chorus of congratulation that has been such a recurring feature of international law's efforts to deal with mass murder, let us take careful stock of what has actually been achieved and what *remains* to be achieved.

Genocide is only one form of premeditated mass murder. As a result, the Court's amplification of the duty to prevent genocide is likely to lead to scholastic debate about whether an imminent or ongoing instance of mass murder "qualifies" as genocide, when the debate *should* be about how to avert or arrest it as soon as possible. We have already had an example of this type of hair-splitting in the initial international reaction to the mass killing in Darfur.

Given the Court's continued and considered resistance to the lawfulness of any unilateral military action, the reiteration of the restraint on what is usually the most effective method of stopping mass killing in a state—some form of military intervention—will not be relaxed, leaving a broad range of lawful strategies for prevention.

For better or for worse, contemporary international law imposes no limits on the use of the economic instrument. Thus, the obligation to prevent should, under the Court's theory, "kick-in" with meaningful programs of economic sanctions as soon as it becomes apparent that a specific genocide is being prepared and, *a fortiori*, as soon as it becomes clear that it is actually underway. It would seem that, under the Court's theory, continued provision of economic assistance to a state engaged in genocide could transform a failure to prevent genocide into complicity in genocide.

Nor does international law impose limits on the proactive use of the diplomatic instrument. Thus, an obligation to undertake various modes of diplomatic pressure, and even isolation, that hold some promise of effec-

[93] *Id.* at para. 438.

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tiveness would seem to come into operation as soon as it becomes apparent that an act of genocide is imminent or underway.

The decision of the International Court has begun to shift attention to, and to provide substance for, the Genocide Convention's obligation to prevent and to arrest genocide. But its innovation alone is hardly likely to shift international law's focus on mass killing to prevention rather than punishment. Facts are social constructs, and bringing the facts to the attention of politically relevant strata will depend upon the agitation of groups in civil society. Even when the facts have become notorious, the sad case of Darfur demonstrates that many international lawyers, even those most committed to the advancement of human rights, still seem to prefer the creation of more courts, the appointment or election of more judges, and the promise of a few *ex post* convictions over actually trying to stop, if not *stopping*, mass killings.

I understand their reticence and fear of abuse of the law. Each assignment of new powers should consider the possibility of its becoming a *détournement de pouvoir*. Unquestionably, preventing and arresting mass killing is a much more difficult and untidy process than a judicial proceeding after the fact. When prevention requires intervention in interstate affairs, it becomes fraught with its own moral problems and thorny policy questions. But does not the prospect of saving lives—of acting before victims become victims—make it worth that trouble?

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