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**The Criminalized State:
The International Criminal Court, the Responsibility to Protect,
and Darfur, Republic of Sudan**

MATTHEW H. CHARITY*

ABSTRACT

The international community continues to struggle with the question of what to do when a nation fails to protect its own people from systemic neglect, mistreatment, or even genocide. For many years, this debate pitted proponents of humanitarian intervention by a third-party against those who believe that all others must defer to the sovereign right of the state to control its own affairs and the affairs of its people. In the midst of this debate, the international community has adopted a middle road: insisting that states must acknowledge their responsibility to protect their populations and if the state manifestly fails to protect its population, empowering the United Nations Security Council to act for the United Nations and intervene.

This “Responsibility to Protect,” recognized and adopted in the U.N. 2005 World Summit Outcome and reaffirmed by the Security Council in 2006, faces its most serious test when the Security Council has recognized that a state has failed to protect its population from crimes against humanity but has also resisted Security Council steps of intervention. Where the authorities have thus failed, individual government agents have opened themselves to criminal liability for a failure to protect over and above any direct liability for involvement in crimes against humanity. This article argues that this additional liability creates a necessary incentive for cooperation with the international community to prevent further harms and has the potential to positively change the discourse on intervention, sovereignty, and protection of persons.

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“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”¹

“Complicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law.”²

INTRODUCTION

The United Nations Security Council has referred only one case to the International Criminal Court (“ICC”) since the ICC’s inception in 2002: the humanitarian and political crisis in Darfur, Sudan.³ The crisis in Darfur involves the widespread and systemic murder and displacement of much of Darfur’s civilian populations, the responsibility of rebel groups and government-allied militias for those killings, and attacks allegedly perpetrated by the Government of Sudan. In particular, because of criminal liability’s application to natural persons, liability for acts attributable to the Government of Sudan would apply to the government actors responsible for those acts.⁴

The International Commission of Inquiry on Darfur⁵ presented a list of individuals, including government actors, recommending their prosecution

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

2. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle VII*, [1950] Y.B. Int’l L. Comm’n 377, U.N. Doc. A/CN.4/SER.A/1950/Add.1., [hereinafter *Nuremburg Principles*]. As for preventing those acts and complicity in them, the International Court of Justice has noted, “[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.” *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 91 (Feb. 26) at 152.

3. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring “the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court”).

4. *See, e.g.*, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), [hereinafter *Rome Statute*] Art. 27 (“Irrelevance of Official Capacity”), Art. 28 (“Responsibility of Commanders and Other Superiors”); *see also Report of the International Law Commission on the Work of its Fiftieth Session*, [1998] Y.B. Int’l L. Comm’n 69, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 2), ¶ 275 (noting the belief of some ILC members that “[a] State acted through its organs, consisting of natural persons. The individuals who planned and executed the heinous acts of States, including the leaders of the States, must be held criminally responsible.”).

5. Through G.A. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004), the Security Council asked the Secretary-General to “rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable”.

before the ICC for involvement in crimes against humanity⁶ and war crimes.⁷ The ICC has thus far issued warrants of arrest for or a summons to appear to four individuals, including a militia leader,⁸ a rebel leader,⁹ a Government of Sudan Minister for Humanitarian Affairs,¹⁰ and the head of state, President Omar Al-Bashir.¹¹ The fate of these warrants, summons, and possible prosecutions before the ICC will set the stage for future international responses to humanitarian crises and the level of state sovereignty, or the limitation on international involvement, that the international community will respect.

In protecting the rights of those accused of international crimes, including states accused of responsibility for such acts, the International Court of Justice has rendered decisions limiting the reach of liability for government actors for acts by non-governmental militias. Absent a showing of effective control over the particular criminal acts of the militia or individual at issue, a government might evade responsibility even where it arms, trains, and otherwise provides for the ongoing actions of the militia. Considering the general disparity in authority and control between a state and the victim of an international crime in which the state is alleged to have engaged in widespread and systemic crimes against its own population, such a stringent standard will far too often expand state impunity rather than engage state responsibility for crimes undertaken with the state's tacit approval. Where interventions have occurred with, at the least, arguable lawfulness, these interventions have recognized either the failure of the authority of the state or the failure in what might be a presumption of the state's responsiveness to its own population. What the international community has recently formulated as a State and International Responsibility to Protect might also be considered within the realm of just war thinking with the additional benefit of engaging state responsibility without resorting to war or regime change. It is essential to consider the

6. See Rome Statute, *supra* note 4, at Art. 7; Neuremburg Principles, *supra* note 2, ¶ 97, Principle VI (c).

7. See Rome Statute, *supra* note 4, at Art. 8; Nuremberg Principles, Principle VI (b).

8. Warrant of Arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/07-3, (Apr. 27, 2007) available at <http://www2.icc-cpi.int/iccdocs/doc/doc279860.PDF>. (last visited Sep. 29, 2010).

9. Summons to Appear for Bahr Idriss Abu Garda, ICC-02/05-02/09, (May 7, 2009) available at <http://www.icc-cpi.int/iccdocs/doc/doc689342.pdf>. (last visited Sep. 29, 2010).

10. Warrant of Arrest for Ahmad Muhammad Harun ("Ahmad Harun"), ICC-02/05-01/07-2-Corr., (Apr. 27, 2007) available at <http://www.icc-cpi.int/iccdocs/doc/doc279814.pdf>. (last visited Sep. 29, 2010).

11. See, e.g., Trial Chamber's Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09, (March 4, 2009) available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>. (last visited Sep. 29, 2010).

context of the formulation of Responsibility to Protect, its likely pitfalls, and its potential utility as a negotiating tool toward the cessation of widespread harm to civilian populations and an international or universal interest in peace and security.

Part I of this Article offers background on the humanitarian and political crisis in Darfur, Sudan in August 2006, the point at which the Government of Sudan refused a Security Council resolution that would have engaged international peacekeeping/enforcing troops in the prevention of attacks on civilian populations after the Security Council had determined that the Government of Sudan had failed to disarm the militias. This creates a factual framework for discussion of an international response toward prevention of crimes against humanity, including crimes of persecution and extermination which the International Commission of Inquiry on Darfur noted “*may be no less serious and heinous than genocide.*”¹²

Part II examines current discord in findings of state responsibility for acts undertaken by state-funded, armed, or trained militias prior to the application of the Responsibility to Protect resolution. In reviewing the standards applied to state responsibility for militias, the International Court of Justice (“ICJ”) reveals a strain in international law in the expectations of a remedy against the state for support of militias allied to the state apparatus. Part II also contextualizes the international response in recognizing that the international community must give pause in assuming the effect of a finding of genocide. Interpreting the facts under ICJ jurisprudence gives reason to question the potential impact of allegations of responsibility for crimes attributable to the Government of Sudan.¹³

12. Int’l Comm’n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to S.C. Res. 1564*, U.N. Doc. S/RES/1564 (Sept. 18, 2004), (Geneva 2005) (hereinafter ICID Report), ¶ 522 (emphasis in original).

13. Importantly, the *Bosnia v. Serbia* case sets a standard in trials between States where State-sponsored genocide is alleged. The ICJ decision, therefore, does not speak to individual criminal liability, but does suggest that government actors might make further arguments limiting liability for acts or omissions for which the state is not entirely responsible. As with other interpretations of State responsibility that States may put into practice, the actions taken by States may reflect their interpretation of what the law is or how the States would hope the law might be applied in their cases. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987), Reporter’s Note 2; Myres McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT’L L. 356, 357-58 (1955) (“development of customary international law has been described as part of a ‘process of continuous interaction, of continuous demand and response,’ among decision makers of different states. These ‘create expectations that effective power will be restrained and exercised in certain uniformities of pattern The reciprocal tolerances . . . create the expectations of patterns and uniformity in decision, of practice in accord with rule, commonly regarded as law.’”) A narrow interpretation of a rule expands the practices States may engage in without derogating from that rule. That narrow interpretation is therefore more problematic where the rule so interpreted does not allow a right of derogation. *See* International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), 6 I.L.M. 368 (1967), Art. 4(2), precluding derogation from articles against arbitrary deprivation of life, genocide, torture, and

Analysis would differ depending on whether the Government of Sudan: (1) orchestrated attacks on civilian populations; (2) negligently permitted former soldiers or allies to have the appearance of state authority through old uniforms or arms not collected after service to the government had been completed; or (3) recklessly armed and unleashed those likely to attack civilian populations not favored by the Government. Responsibility for lack of control would likely require an analysis of intent and acts by the Government that would reasonably lead to the outcome of harm to the civilian population.

A second—but arguably more important—question is the extent of Sudan’s responsibility for its failure to act once the international community alerted the Government to its inability or unwillingness to prevent large-scale killings and displacement of populations. This is particularly the case when the government has access to international peacekeeping/enforcing troops¹⁴ but forbids entry for some time to those troops while crimes against humanity continue with the appearance of impunity.¹⁵ When the proposed support in preventing crimes comes from outside the state, does the government’s purported control or lack of control over the perpetrators of crimes matter?

Part III considers the effect of the Responsibility to Protect Resolution on the liability of state authorities, analyzing how criminal liability under the Responsibility to Protect ought to be viewed in terms of customary international law. Although an open question exists regarding the extent of control and dependence required for a finding of control over militia groups, over the past several years the international community has communicated support for a finding of responsibility for governments that fail to protect their populations.¹⁶ The Responsibility to Protect resolution, as recognized in the 2005 World Summit Outcome by the General Assembly of the United Nations¹⁷ and reiterated by the Security Council in an April 2006

slavery, among other things, even in time of emergency; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 “Customary International Law of Human Rights,” recognizing that “[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones” genocide, slavery, murder or disappearance, torture, prolonged arbitrary detention, systematic racial discrimination, or “a consistent pattern of gross violations of [other] internationally recognized human rights.”

14. S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

15. *See* U.N. Sec. Council, *Report of the Panel of Experts Established Pursuant to Resolution 1591 (2005) Concerning the Sudan Prepared in Accordance with Paragraph 2 of Resolution 1665 (2006)*, U.N. Doc. S/2006/795 (2006) [hereinafter Panel of Experts Report] (“the proposed United Nations deployment has been categorically rejected by President Omar al-Bashir.”).

16. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1, (Oct. 24, 2005).

17. *Id.*

resolution,¹⁸ represents customary international law¹⁹ requiring states to support international efforts, through the Security Council, to prevent crimes against humanity, genocide, ethnic cleansing, and war crimes.²⁰ By preventing the Security Council from sending in peacekeepers that might otherwise have prevented those crimes, government authorities take on responsibility for the effects of that refusal. That responsibility merges with the concept of criminal liability in which the government's failure allows for foreseeable criminal action by those the government—theoretically—controls through its police power.²¹

Finally, this article considers the potential effects—both positive and negative—of criminal liability on the future prevention of crimes against humanity. By recognizing a government omission earlier, the international community has an opportunity to respond more quickly and more effectively to the next humanitarian crisis.

PART I: DARFUR AS OF AUGUST 2006

The history of the conflict in Darfur can be discussed through various lenses and perspectives: a central Sudan previously under British/Egyptian control versus a western Sudan (Darfur) with a longer history of independence; a state seeking to maintain stability leading up to elections that could potentially grant some autonomy for oil-rich southern Sudan, exhibiting its strength against a comparably weak Darfur; or even a state fighting to remain a cohesive and more powerful unit where western or neo-colonial interests seek to decentralize its authority following twenty years of fighting in southern Sudan.²² Whatever the historical roots, long turmoil in

18. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006), (reaffirming paragraphs 138-39 of the 2005 World Summit Outcome in the context of the protection of civilians in armed conflict (together, the "Responsibility to Protect Resolution")).

19. See Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215, (1945) [hereinafter ICJ Statute]. See *id.* at Art. 38(b) and (c) as to customs and principles of law, and *id.* at Art. 38(d) as to judicial decisions and writings as subsidiary means for determination of rules of law. This both reiterates past practices of states, and represents current practices of states through the States' leaders expressing the States' view of applicable law.

20. Although the Responsibility to Protect Resolution, *supra* note 18, does not define these terms, definitions are found in sources such as, but not limited to: (1) Rome Statute, *supra* note 4, at Arts. 6 (Genocide), 7 (Crimes Against Humanity, including Persecution and forcible transfer of a population that might constitute ethnic cleansing), and 8 (War Crimes); (2) the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948); and (3) *The International Law Commission Draft Code of Crimes against the Peace and Security of Mankind*, [1996] Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), Arts. 17 (Crime of Genocide), 18 (Crimes Against Humanity), and 20 (War Crimes).

21. See, e.g., Rome Statute, *supra* note 4, at Art. 28(2).

22. See, e.g., R.S. O'Fahey, *Does Darfur Have a Future in the Sudan?*, 30:1 Fletcher Forum of World Affairs 27, 27-29 (2006); ICID Report, *supra* note 12, ¶¶ 40-72. Some have also argued that the

Sudan, combined with the potential for political instability and the growth of differing interests in different segments of the population, paved the way toward the current humanitarian crisis.

Although military activities of rebel groups in Darfur commenced in late 2002 to early 2003,²³ the Government of Sudan had armed militias years before,²⁴ increasing the number of weapons in the area with only partial control over the consequences.²⁵ In addition to the use of the armed forces and police in the conflict commencing in Darfur in 2003, the Government of Sudan engaged tribal militias and individuals that might either join Government-formed Popular Defence Forces (PDF) or fight alongside the Government.²⁶ These militias, and sometimes the paramilitary PDF and Border Security, were often collectively called “Janjaweed.”²⁷ Reports alleged that the Janjaweed, along with the

Arab/African divide came about during fighting in the 1980s to support policies of Arab Supremacy. See JULIE A. FLINT, *BEYOND ‘JANJAWEED’: UNDERSTANDING THE MILITIAS OF DARFUR* 11-13 (2009).

23. ICID Report, *supra* note 12, ¶¶ 62-63.

24. FLINT, *supra* note 22, at 16; ICID Report, *supra* note 12, ¶ 203 (reporting that the Government of Sudan Committee on Darfur suggested seven factors for the current conflict in Darfur, including tribal competition for resources, weak local government infrastructure, a weak police presence in the region, the interference of foreign actors in the Darfur region, and “the wide availability of weapons and military uniforms due to other previous conflicts in the region, particularly the Libya-Chad war, and the war in the South.”).

25. See ICID Report, *supra* note 12, ¶ 203; see also *id.* ¶¶ 67-68 (on mobilization of militias in Darfur in 2003).

26. See, e.g., *id.* ¶119, quoting President al-Bashir (“Our priority from now on is to eliminate the rebellion, and any outlaw element is our target ... We will use the army, the police, the mujahedeen, the horsemen to get rid of the rebellion.”); *id.* ¶¶ 65-68 (the Government exploited existing tensions between different tribes, with mostly “Arab” nomadic tribes responding to the call for troops, with tribal leaders receiving grants and gifts on the basis of recruitment efforts and PDF staff salaries sometimes being paid through tribal leaders). See also FLINT, *supra* note 22, at 24 (“When Arab and Masalit village leaders were asked to identify volunteers in West Darfur in June 2003, Arabs were accepted and armed—but Masalit were turned away.”); *id.* at 23 (claiming Government of Sudan manipulated Arab tribes by saying that rebel groups, particularly of the Zaghawa tribe, had “a grand plan to push Arabs from Darfur”).

27. ICID Report, *supra* note 12, ¶¶ 69, 103-110 (“victims report that the Janjaweed attackers are from Arab tribes and, in most instances, attacked on horseback or on camels and were armed with automatic weapons of various types;” “Where victims describe their attackers as Janjaweed, these persons might be from a tribal Arab militia, from the PDF or from some other entity;” “There are links between all three categories [(1) tribal militias only loosely affiliated with the government; (2) paramilitary militias (the Fursan (horsemen), Mujahedeen, or “Strike Force”) that fight alongside the army with a defined command structure, but without a de jure basis under Sudanese law; and (3) PDF and Border Intelligence militias, with a legislative basis in Sudanese law.). For example, the Commission has received independent testimony that the PDF has supplied uniforms, weapons, ammunition and payments to Arab tribal militia from the first category. The leaders of these tribes meet regularly with the PDF Civilian Coordinator, who takes their concerns to the Security Committee of the locality.”); see also S.C. Res. 1556, ¶ 6, U.N. Doc. S/RES/1556 (July 30, 2004) (where the Security Council “demands that the Government of Sudan fulfil its commitments to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and international humanitarian law violations and other atrocities...[.]”).

Government of Sudan, were responsible for most of the harms to the civilian population.²⁸

By August 31, 2006, international consensus recognized the crisis situation in the Darfur region of Sudan.²⁹ With some estimates of hundreds of thousands dead in the region and some two and a half million Darfuris displaced,³⁰ no naturally occurring turning point that might stem the danger to Darfur's population appeared. Militia attacks against villages including rape, murder, and water contamination continued³¹ while aid organizations found roads unsafe or impassable,³² potentially leading to tens of thousands of more deaths from starvation, malnutrition, and unavailability of medical treatment.³³

Although the Security Council continued to monitor on-going harms, it appears to have brought little strength to bear in its discussions with the Government of Sudan. It sought a mediated or negotiated solution with the Government to allow for the deployment of a peacekeeping force, approved by the Security Council in August 2006, while allowing the International Criminal Court to continue its investigation.³⁴ In the meantime, the population in Darfur has continued to suffer through the effects of large-scale displacements, the rape of women and girls in attacked villages and internally displaced persons camps, and large-scale murder, much of which

28. ICID Report, *supra* note 12, at Executive Summary (“In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity.”).

29. *See, e.g.*, S.C. Res. 1556, *supra* note 27 (noting that the Security Council had determined that the situation in Sudan “constitutes a threat to international peace and security and to stability in the region,” leading to Security Council acts under Chapter VII of the U.N. Charter); *see also* S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sep. 18, 2004); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005); S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); S.C. Res. 1663, U.N. Doc. S/RES/1663 (Mar. 24, 2006); S.C. Res. 1665, U.N. Doc. S/RES/1665 (Mar. 29, 2006); S.C. Res. 1679, U.N. Doc. S/RES/1679 (May 16, 2006); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

30. Lydia Polgreen, *With Little Authority, African Union Force Struggles With Its Mission in Darfur*, N.Y. TIMES, Sep. 9, 2006, at A8.

31. ICID Report, *supra* note 12, at Executive Summary, ¶ 311. Militias also maintained presences near internally displaced persons (“IDP”) camps, delaying return of IDPs to villages, and creating a greater sense of unrest in the IDP camps. *See* Panel of Experts Report, *supra* note 15.

32. Panel of Experts Report, *supra* note 15, ¶¶ 25, 153-161 (noting attacks on and carjackings of NGO employees); *id.* ¶ 158 (as of August 2006, “[t]he state of insecurity is increasingly hampering and sometimes paralyzing humanitarian relief programmes”).

33. *See* Evans, *Darfur and the Responsibility to Protect*, THE DIPLOMAT, Aug. 1, 2004; *see also* Kofi A. Annan, *Darfur Descending; No Time for Apathy on Sudan*, WASHINGTON POST, Jan. 25, 2006, at A19; *World ‘Not Living Up’ to Its Responsibility to Protect in Darfur, Iraq, Gaza: UN Aid Chief*, U.N. News Service, Nov. 29, 2006, available at <http://www.un.org/apps/news/printnewsAr.asp?nid=20781>.

34. *See* Gareth Evans, *supra* note 33.

reportedly occurred with the support of the Government of Sudan.³⁵ The lack of immediate international action to prevent further harms to the population of Sudan has baffled and frustrated many³⁶ who thought that the international community had agreed to act through the Security Council under the Council's Chapter VII authority under the United Nations Charter.

An International Commission of Inquiry³⁷ under the auspices of the Security Council visited Sudan,³⁸ reviewed and verified governmental and non-governmental organization reports, and interviewed politicians, refugees and others.³⁹ The Commission of Inquiry determined that crimes against humanity had occurred and continued to occur in the region.⁴⁰ The Commission also stated that even in situations where the militias acted without the direction of the Government of Sudan, government actors might be liable under a theory of joint criminal enterprise by using the Janjaweed as a "tactic of war" if the government had encouraged the Janjaweed generally in an atmosphere of impunity and could have foreseen serious criminal acts.⁴¹

In 2005, the United Nations Security Council referred the situation in Darfur to the International Criminal Court, the entity responsible for investigating and prosecuting the international crimes of genocide,

35. Reports to the U.N. Security Council often refer to "Government forces and militias" acting in concert, stating, for example, that the "Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law." ICID Report, *supra* note 12, at Executive Summary.

36. See, e.g., Editorial, *The Genocide Continues*, N.Y. TIMES, June 17, 2008, at A20.

37. See S.C. Res. 1564, *supra* note 29, ¶ 12 (requesting "that the Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable, calls on all parties to cooperate fully with such a commission, and further requests the Secretary-General, in conjunction with the Office of the High Commissioner for Human Rights, to take appropriate steps to increase the number of human rights monitors deployed to Darfur.").

38. The Commission included a former president and judge of the International Criminal Tribunal for Yugoslavia, a former Commissioner of the South African Truth and Reconciliation Commission, a Special Representative of the Secretary-General on Human Rights Defenders, the Secretary-General of the Arab Organization for Human Rights, and a former ambassador and high-court judge of Ghana. Press Release, U.N. Headquarters, Secretary-General Establishes International Commission of Inquiry for Darfur, U.N. Doc SG/A/890 (Oct. 8, 2004), available at <http://www.unis.unvienna.org/unis/pressrels/2004/sga890.html>. The Commission's inquiry into the situation in Darfur focused on incidents between February 2003 and mid-January 2005, with the Commission and its investigative team visiting Sudan from November 2004 to January 2005. ICID Report, *supra* note 12, at Executive Summary.

39. ICID Report, *supra* note 12, at Annexes 2-4.

40. *Id.* at Executive Summary; see also Panel of Experts Report, *supra* note 15, at Summary.

41. ICID Report, *supra* note 12, ¶ 126.

aggression, crimes against humanity, and war crimes.⁴² The 7,000 African Union⁴³ peacekeepers stationed in Darfur, a region the size of France, sought relief and additional international support.⁴⁴

On August 31, 2006, following more than three years of fighting in Darfur, the U.N. Security Council approved a measure intended to provide additional support to the overstretched African Union peacekeeping force, protection to aid workers, and relief from rape, mass murder, and dislocation to the population of Darfur.⁴⁵ When the Government of Sudan refused to accept the U.N. peacekeepers that the Security Council voted to send, Secretary-General Kofi Annan warned that the governmental actors in their collective and individual capacities would be responsible for any further harm to Darfur's population.⁴⁶

As of this writing, six indictments have been issued against individuals – one militia leader, three individuals associated with the United Resistance Front, one high-ranking Cabinet official, and the President of Sudan. The ICC has not yet initiated a trial and the Security Council continues to debate whether the Responsibility to Protect reflects a lack of appropriate respect for state sovereignty.⁴⁷ The violence in Darfur has diminished by many accounts, but not to a point where internally displaced persons feel safe to return to villages that have been taken by government-allied militias.

The notion of government responsibility for an omission in protecting its populations from crimes against humanity is not entirely novel;⁴⁸ that

42. S.C. Res. 1593, *supra* note 29, ¶ 1. The preamble to the Rome Statute notes the purpose of the ICC is to “put an end to impunity” for the perpetrators of those crimes threatening “the peace, security, and well-being of the world,” in order “to contribute to the prevention of such crimes.” Rome Statute, *supra* note 4, Preamble.

43. See S.C. Res. 1556, *supra* note 27, ¶ 2 (endorsing “the deployment of international monitors, including the protection force envisioned by the African Union, to the Darfur region of Sudan under the leadership of the African Union”).

44. See, e.g., Polgreen, *supra* note 30; Panel of Experts Report, *supra* note 15, ¶¶ 22-23.

45. S.C. Res. 1706, *supra* note 29, ¶¶ 2-12.

46. See, e.g., *Sudanese May Be Held Responsible for Darfur – Annan*, SUDAN TRIB., Sep. 9, 2006 (Kofi Annan told reporters that if the African Union troops withdrew and Government of Sudan officials continued to reject U.N. troops, “they are placing themselves in a situation where the leadership may be held collectively and individually responsible for what happens to the population in Darfur.”).

47. See, e.g., Neil MacFarquhar, *When to Step In to Stop War Crimes Causes Fissures*, N.Y. TIMES, July 23, 2009, at A10 (noting the discussion of the Responsibility to Protect by Noam Chomsky in his critique of “humanitarian imperialism”).

48. See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND OF NATIONS 386 (A.C. Campbell trans., M. Walter Dunne 1901) (1625) Grotius noted that: kingdoms are not so much a patrimony. . . as a trust, placed in the hands of the sovereign for the benefit of his people. . . [a] whole people may in the case of extreme necessity transfer themselves to the dominion of another, a right which undoubtedly was reserved at the original formation of society.

By 1991 there was recognition of a limited right to intervene for the humanitarian purpose of rescuing individuals whose lives were endangered and where the local authorities were unwilling or unable to

responsibility stands above and beyond any liability for direct actions, plans, or support that may have been given to those harming its population prior to the government's refusal to allow the entry of U.N. peacekeepers. The first issue is whether direct government accountability for the actions of militias that may or may not serve the government or act toward government ends is appropriate.

PART II: INTERNATIONAL LAW GOVERNING STATE AUTHORITIES LIABILITY FOR MILITIAS PRIOR TO THE RESPONSIBILITY TO PROTECT RESOLUTION

The ICJ, the International Criminal Tribunal for the former Yugoslavia, and other entities have reviewed the standards for government or state responsibility based in government control over militia groups in a number of cases. The international community has made a firm distinction between finding criminal liability against a state—which many have argued cannot be found⁴⁹—and finding that an individual member of a nation's government has engaged in criminal behavior.

A. Interpretations of State Responsibility for Militias' Crimes Against Humanity and Genocide

International law has made clear that a claim that someone engaged in criminal acts for the benefit of the state does not absolve the actor of individual liability.⁵⁰ Rather, the criminal acts constitute *ultra vires*⁵¹

protect them. See, e.g., David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq, and the New World Order*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 118 (2d ed., 1991); Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 41-42 (2d ed., Council on Foreign Relations, Inc. 1991) (noting a right to intervene to save hostages where the host nation cannot or will not do so). See, also Mary Ann Glendon, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 60(2001) (citing Verbatim Record, June 12, 1947, Drafting Committee Meeting (Charles Malik Papers, Library of Congress, Manuscript Division)) (René Cassin stated on the Universal Declaration of Human Rights, "The right of interference is here; it is here . . . Why? Because we do not want a repetition of what happened in 1933, where Germany began to massacre its own nationals, and everybody . . . bowed, saying 'Thou art sovereign and master in thine own house.'").

49. See, e.g., *Report of the International Law Commission to the General Assembly*, U.N. Doc A/53/10 (1998), reprinted in [1998] 2 (Part 2) Y.B. Int'l L. Comm'n 77, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 2) (noting that "at the current stage of the development of international law the notion of 'State crimes' in the penal sense was hardly recognized."). The ILC did not preclude the possibility of State criminality, but removed language in an earlier draft of the Articles on State Responsibility based in lack of consensus. See *id.*

50. *Id.* at 69 (noting the belief of some ILC members that "[a] State acted through its organs, consisting of natural persons. The individuals who planned and executed the heinous acts of States, including the leaders of the States, must be held criminally responsible." As the "principle of individual criminal responsibility applied even to heads of State or Government, which made it possible to deal with the people at the very highest level who planned and executed crimes, . . . [such principle] obviated

behavior: no actions that contravene peremptory norms⁵² of international law can be absolved by a sovereign state.⁵³ Therefore, the protections of sovereignty are not assignable to the individuals taking action on behalf of the sovereign;⁵⁴ the natural persons⁵⁵ taking control of state actions would be held responsible for those actions that contravene international law, particularly those laws now considered peremptory under international law without requirement of agreement to an international treaty or convention.

Three international cases involving national support of militia groups suggest an international recognition that state actors must have control over the specific actions taken in violation of international law for the commission of the crime to be attributable to the state.⁵⁶ The first, *Military and Paramilitary Activities in and Against Nicaragua* (“*Nicar. v. U.S.*”),⁵⁷ involved the actions of the United States in support of revolutionaries

any need for the notion of State crimes, which [need] would be further reduced by the establishment of the international criminal court.”).

51. Any internationally wrongful act of a State, whether consisting of an action or omission, entails the international responsibility of that State, where the act is attributable to the State and the act constitutes a breach of an international obligation of the State. *See* ILC Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 U.N. Doc. A/RES/53/83 (Dec. 12, 2001), Annex I; Action beyond the legitimate power of the state is beyond the power of the individual party purporting to act for the state. *See id.*

52. *See, e.g., Draft Articles on the Law of Treaties*, Art. 37, *Report of the Commission the General Assembly*, U.N. Doc. A/5509 (1963), *reprinted in* [1963] 2 Y.B. Int’l L. Comm’n 198, U.N. Doc. A/CN.4/SER.A/1963/ADD.1 (noting that “a treaty is void if it conflicts with a peremptory norm of general international law”).

53. *See Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 26, *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 (Part 2) Y.B. Int’l L. Comm’n 84, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (noting that no provision can preclude “the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”); *see also* Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), Art. 53 (voiding any agreement between States where the agreement “conflicts with a peremptory norm of general international law.”). This is true regardless of whether that sovereignty lies in the people of a state or in a power recognized as exercising authority for the state. CITE ???

54. *See* 1998 *Report of the International Law Commission to the General Assembly*, *supra* note 49, at 69.

55. *See, e.g., Rome Statute*, *supra* note 4, at Art. 25(1), on Individual Criminal Responsibility (“The Court shall have jurisdiction over natural persons pursuant to this Statute.”); *The International Law Commission Draft Code of Crimes against the Peace and Security of Mankind*, *supra* note 20, at Art. 4 (“The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.”).

56. This is a fairly narrow interpretation of the customary law as expressed in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 53, at Art. 8: (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

57. 1986 I.C.J. 14 (June 27) (*Nicar. v. United States*).

against the Sandinista government of Nicaragua.⁵⁸ As discussed below, the case set a high standard for effective control of a militia for attribution of its actions to a government.⁵⁹

In a second case, *Prosecutor v. Duško Tadić*,⁶⁰ the International Criminal Tribunal for the former Yugoslavia (“ICTY”) referred back to the ICJ the *Nicaragua v. United States* decision.⁶¹ In examining individual criminal liability following the expulsions and murders, i.e., ethnic cleansing, stemming from the dissolution of Yugoslavia and the establishment of boundaries between the former Yugoslav republics, the ICTY Appeals Chamber recognized that the standard for effective control had to give regard to the realities of government authority and found that the effective control test read too narrowly might be insufficient.⁶²

Finally, in *Bosnia and Herzegovina v. Federal Republic of Yugoslavia* decided in February 2007,⁶³ the ICJ⁶⁴ clarified its decision in *Nicaragua* in determining that Serbia could not be held accountable for the genocide of approximately seven thousand men and boys at Srebrenica because the decision to commit genocide was not made until after the forces of the Bosnian-Serb Army, receiving orders from and acting on behalf of the Government of the Republika Srpska,⁶⁵ had taken Srebrenica.⁶⁶ As such, there was no indication that Serbia had genocidal intent in its support of the Republika Srpska army.⁶⁷ As discussed below, Serbia was still found to have failed in its responsibilities to prevent and punish the crime of genocide,⁶⁸ but its lack of control over the Bosnian-Serb Army – despite provisions of materiel, payment of certain officers, issuing of currency, and shared military strategies of a general and, at times, specific nature – prevented a finding of commission of genocide.⁶⁹

58. *Id.* at 16, 20-21.

59. *See id.* at 64-65.

60. Case No. IT-94-1-A (July 15, 1999) (*Tadić (Appeal)*).

61. *Id.* ¶¶ 99-145.

62. *See id.* ¶¶ 115-37.

63. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 2007 I.C.J. 20 (Feb. 26).

64. The International Court of Justice was established by the Charter of the United Nations as the principal judicial organ of the United Nations. *See* ICJ Statute, *supra* note 19, at Art. 1. Only states may be parties before the ICJ. The International Criminal Court has jurisdiction over natural persons, and derives its authority from the Rome Statute and its signatories, in relationship with the United Nations system. *See* Rome Statute, *supra* note 4, at Art. 2; Relationship Agreement between the United Nations and the International Criminal Court, available at untreaty.un.org/unts/144078_158780/7/5/14358.pdf.

65. *See Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. 20, ¶¶ 231-34 (Bosnian-Serb politicians had created the Republika Srpska as a Bosnian-Serb government within Bosnia).

66. *Id.* ¶¶ 278, 297, 387-88, 396-400.

67. *Id.* ¶ 413.

68. *Id.* ¶¶ 430, 448-50.

69. *Id.* ¶¶ 387-88, 413-15.

Nicaragua v. United States

In April 1984, the Government of Nicaragua filed a claim against the United States before the ICJ.⁷⁰ Nicaragua claimed that the United States was engaged in the use of force against the territorial integrity and political independence of Nicaragua in violation of Art. 2(4) of the United Nations Charter.⁷¹ The United States Government engaged in a wide range of activities in support of a challenge to the Sandinista regime in Nicaragua in the 1980s. The United States participated in the mining of certain ports,⁷² placed intelligence agents in Nicaragua, and trained anti-government revolutionary forces known as the “Contras.”⁷³ The United States also provided tactical material to be used by rebel forces in support of acts that would be illegal under international law including the murder of adversaries and refusal to allow free movement of civilians who wished to leave a rebel-controlled area.⁷⁴ The Government of Nicaragua claimed that the acts of the Central Intelligence Agency as well as the crimes undertaken by the United States funded and trained Contra soldiers constituted interference with the internal affairs of a state.⁷⁵ The Government of Nicaragua further argued that the United States should be held liable for any war crimes or crimes against humanity performed by these U.S.-funded troops.⁷⁶ The key question of attribution of acts performed by the Contras or military and paramilitary groups using armed force against the Government of Nicaragua to the United States Government hinged on whether the United States exercised control over the Contras.⁷⁷

The ICJ held that the acts undertaken by the Contras could not be attributed to the United States as the United States lacked control over the Contras with regard to those acts.⁷⁸

The Court found that the United States through its Central Intelligence Agency had trained the Contras in “guerrilla warfare, sabotage, demolitions, and in the use of a variety of weapons, including assault rifles, machine

70. *Nicar. v. U. S.*, 1986 I.C.J. 14, 16 (June 27).

71. *Id.* at 22.

72. *Id.* at 21-22.

73. *Id.* (for proposition of giving U.S. government support to two revolutionary groups known as the “contras”).

74. *Id.* at 18-19.

75. *Nicar. v. U.S.*, 1986 I.C.J. at 19.

76. *Id.* at 20.

77. *See id.* at 45, 47-51. Central Intelligence Agency operatives that were not U.S. nationals also acted on behalf of the United States government, but as paid CIA operatives that the CIA itself referred to as “Unilaterally Controlled Latino Assets,” or “UCLAs,” the ICJ easily determined those operatives to be under the *de jure* control of the United States.

78. *Id.* at 64-65.

guns, mortars, grenade launchers, and explosives,” as well as the transmission of communications that would be difficult for the Government of Nicaragua to decipher.⁷⁹ The United States also provided “regular salaries from the CIA, and . . . arms (FAL and AK-47 assault rifles and mortars), ammunition, equipment and food,” including uniforms, boots, etc.⁸⁰ The ICJ determined that the President of the United States had engaged in the training and provision of arms to the Contras as part of a covert operation in the interest of the United States.⁸¹

Despite the provision of salaries, food, equipment, arms, and training, the ICJ recognized that the United States Government lacked de jure control over the Contra forces and examined two factors to determine de facto control:

[W]hether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.⁸²

First, the ICJ found that proof of complete dependence on the United States Government was lacking as the contras continued to function even after the United States Government officially stopped providing anything but humanitarian aid on September 30, 1984.⁸³ Thus, the contras were not dependent on the United States Government for their existence and continued actions.⁸⁴

The Court then determined that United States’ participation in “financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself,” absent evidence “that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by [Nicaragua].”⁸⁵ Although the United States was found by the court to have interfered in Nicaragua’s

79. *See id.* at 59, 61. The ICJ also noted that, “[t]he Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the contras by the United States.” *Nicar. v. U.S.*, 1986 I.C.J. at 61.

80. *Id.* at 59.

81. *Id.* at 49.

82. *Id.* at 62.

83. *Id.*

84. *Nicar. v. U.S.*, 1986 I.C.J. at 62.

85. *Id.* at 64.

internal affairs, the control test failed to evidence the United States' de jure control over the Contras as well as de facto control over specific operations or over the militia groups generally.⁸⁶

The lack of proof of either de jure or de facto control over the militia group prevented a decision against the United States for state responsibility for the acts undertaken by the Contras.⁸⁷

Prosecutor v. Duško Tadić (Appeal)

The international community revisited the attribution of militia action to a state in the trial before the ICTY of Duško Tadić.⁸⁸ Before the ICTY was the question of culpability for crimes under the Geneva Conventions and whether the accused and the victims were "nationals" of different states despite having lived in the same geographic area.⁸⁹ Specifically, the ICTY analyzed whether a Bosnian-Serb who, as part of a "greater Serbia" movement and in conjunction with a Bosnian-Serb army, attacks Bosnian-Muslims after Serbia officially recognized the separation of Bosnia from Yugoslavia represents an agent of a Serbian force or merely an individual who has broken the laws of the Bosnian-Serb republic.⁹⁰ The Trial Chamber and later the Appeals Chamber looked to the *Nicaragua* control test as applied to the Contras and stated that the control test for state responsibility was the same standard that would be applied to determine the applicability of the Geneva Conventions' "grave breaches"⁹¹ regime protecting civilians "in the hands of a party to the conflict of which they are

86. *Id.* at 62. Of note, the decision was rendered on June 27, 1986, and the then-ongoing provision of funds and arms to the contras by the United States was not disclosed until the crash of a supply plane in the Fall of 1986. See generally H.R. REP. NO. 100-433 (1987) (the Congressional Committee Investigating Iran-Contra majority report, issued November 18, 1987).

87. *Nicar. v. U.S.*, 1986 I.C.J. at 64.

88. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, ¶ 117 (July 15, 1999). As discussed further below, despite similarities in some portion of the legal analyses, there exist important differences in the criminal trial of an individual under international law (here, the ICTY) and a conflict between states adjudicated by the I.C.J.

89. *Id.* ¶ 163-64.

90. *Id.* ¶ 167. If both perpetrator and victim were bound by the laws of the same country (if Tadić were not acting for Serbia), the victim would not be a "protected person" under the Fourth Geneva Convention.

91. *Id.* ¶ 134, 138, 163; Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War arts. 147, Aug. 12, 1949, 6 U.S.T. 3516., 75 U.N.T.S. 135 (defining grave breaches of protections to be given to protected persons, including "willful killing, torture ... willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person."); *Id.* art. 4 (defining persons protected by the Convention as those who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."). Add note explaining what this is.

not nationals.”⁹² The Trial Chamber reasoned that the claims of breach of humanitarian law under the Fourth Geneva Convention included as protected persons “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁹³ In order to establish a breach of humanitarian law pursuant to the ICTY statute, the Court first had to decide whether the actions of the defendant working with the Bosnian-Serb Army (“VRS”) could be attributed to the Federal Republic of Yugoslavia, (present-day Serbia).⁹⁴ If the actions were attributable to the Bosnian-Serb administration, then the victims would have shared nationality with the accused and state criminal law would apply instead of the Fourth Geneva Convention.

On appeal, the court looked to the effective control of Serbia over the VRS. The Appeals Chamber found effective control over the VRS by the Government of Yugoslavia until May 1991: the VRS had been part of the Yugoslavian People’s Army (“JNA”), the VRS leaders were still meeting with Serbian leaders for instructions, and the VRS leaders were receiving payment from the JNA.⁹⁵ Although the leaders of the VRS legally reported to an entity within Bosnia-Herzegovina, the VRS funds, direction, and goals were under the control of the government in Belgrade, Serbia.⁹⁶

The ICTY’s Appeals Chamber found that the VRS did not constitute a separate entity, but instead remained part of the JNA.⁹⁷ The JNA and government of the Federal Republic of Yugoslavia (present-day Serbia)

92. *Tadić*, Case No. IT-94-1-A ¶ 163-64 (quoting Geneva Convention art. 4, *supra* note 4).

93. Geneva Convention, *supra* note 94, at art. 4.

94. *Tadić*, Case No. IT-94-1-A ¶ 147.

95. *Id.* ¶ 150.

96. *Id.* The Appeals court noted in footnote 180 that its application of a control test aligned with those in the dissenting trial court opinion of Judge Macdonald: ‘As Judge McDonald noted:

[t]he creation of the VRS [after 19 May 1992] was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same . . . The VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. . . . The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. . . . Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them onto Belgrade.

Id. (Separate and Dissenting Opinion of Judge McDonald, paras. 7-8).

97. *Id.* ¶ 151.

directed and supervised the activities and operations of the VRS.⁹⁸ The VRS was, therefore, a de facto arm of the Serbian government and the actions of the VRS could be attributed to the Serbian government.⁹⁹

Despite finding that the *Nicaragua* test was not necessarily dispositive in state practice, the Appeals Chamber applied the same standards of “effective control” over the militia.¹⁰⁰ The Appeals Chamber reasoned that effective control was synonymous with “overall control” of a state, where an organized group, engaging in a series of activities, would necessarily “engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State.*”¹⁰¹

Bosnia and Herzegovina v. Federal Republic of Yugoslavia

In 2007, the ICJ again reviewed state responsibility for actions taken by militias in breach of humanitarian law. Bosnia-Herzegovina claimed that the Federal Republic of Yugoslavia had itself engaged in genocide and failed to prevent or punish genocide in contravention of the Convention for the Prevention and Punishment of the Crime of Genocide.¹⁰² Bosnia-Herzegovina claimed that Serbia had financially and strategically supported the VRS, which had, among other things, engaged in the killing of approximately eight thousand men and boys between sixteen and sixty-five years old in the United Nations protected area of Srebrenica.¹⁰³

The court examined the International Law Commission’s¹⁰⁴ Draft articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles on State Responsibility”)¹⁰⁵ as well as previous determinations by courts reflecting state responsibility¹⁰⁶ to determine whether Serbia had

98. *Tadić*, Case No. IT-94-1-A.

99. *Id.* ¶ 151. Although the court required an analysis of state responsibility to determine applicable law, the issue of state responsibility was not before the ICTY; rather, the analysis only sought to determine the application of international humanitarian law to individuals who might otherwise be found to be nationals of the same country.

100. *Id.* ¶ 124.

101. *Id.* ¶ 122-23.

102. *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. 20.

103. *Id.* at 98-99. Srebrenica served as a protected area for Bosnian-Muslims, guarded by U.N. peacekeepers in an area between two larger Serbian populations.

104. G.A. Res. 174(II), at 105, U.N. Doc. A/RES/504 (Nov. 21, 1947). Created by the General Assembly in 1947, the ILC has “for its object the promotion of the progressive development of international law and its codification.” Codification entails “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.” *Id.* at 107. Thus, the ILC both codifies existing law and suggests the direction law might take for continued development of customary and treaty-based law.

105. *Responsibility of States for Internationally Wrongful Acts*, 2001 Y.B. on Int’l L. Comm’n, U.N. Doc. A/56/10.

106. ICJ Statute, *supra* note 19, at Art. 38, 59 (1945), references “judicial decisions and the teachings of the most highly qualified publicists . . . as subsidiary means for the determination of rules of law,”

acted either through a de jure organ of the state, i.e., an institution that has complete dependence on the state for its existence, or whether it exercised effective control over a militia when the militia performed specific acts.¹⁰⁷ The court determined that, for instances determined to constitute genocide, Bosnia-Herzegovina had not proven that the Bosnian-Serb forces were either a de jure arm of Serbia, as opposed to of the Bosnian Republika Srpska,¹⁰⁸ or that Serbia had de facto control over the acts by the Bosnian-Serb forces and the so-called Scorpions, a Serbian militia group that engaged in killings of Bosnian Muslims near Srebrenica.¹⁰⁹

The court distinguished the *Tadić* decision, noting that the references in the ICTY *Tadić* appellate judgment to state responsibility were not necessary to the ICTY's determination as the jurisdiction of the ICTY extends only to crimes committed by natural persons¹¹⁰ and the ICTY need not have reached the question of state responsibility to determine an international nexus for individual criminal acts. Furthermore, the "overall control" test had what the ICJ referred to as "the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf."¹¹¹ Where the persons allegedly acting for the state lack de jure recognition, that de facto determination of state responsibility occurs:

where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking

notwithstanding the lack of binding precedential effect. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (noting that the legal opinions issued by international jurists, analyses in legal scholarship, and state practice all may reflect that particular duties or rights might exist as law in the opinion of the international community.).

107. *See generally* *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. 20, 137. For effective control, the paramilitary group or militia would have to act either at the direction of the state in the specific operation, or under the direction or control of the state during the operation. *See generally id.* ¶¶ 398-407.

108. *Id.* at 138, 141.

109. *Id.* at 141. Under the ICJ evidentiary rules, (1) it is the litigant seeking to establish a fact who bears the burden of proving it through the evidence, and (2) any claims against a state involving charges of exceptional gravity must be proved by evidence that is "fully conclusive." *See id.* at 139-40.

110. *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 144. *See also* S.C. Res. 1166, ¶ 3, U.N. Doc. S/RES/1166 (May 13, 1998).

111. *Id.* at 144.

point, the connection which must exist between the conduct of a State's organs and its international responsibility.¹¹²

Despite a finding that genocide had indeed occurred, the court found that the applicant had failed to show that “the massacres were committed on the instructions, or under the direction of organs of [Serbia]” or that Serbia “exercised effective control over the operations in the course of which those massacres . . . were perpetrated.”¹¹³ In addition to proof of control, Bosnia-Herzegovina would also have had to show that those in authority in Serbia had the specific intent (*dolus specialis*) required under the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).¹¹⁴

The court went on to analyze complicity in the perpetration of genocide under Convention Art. III(e).¹¹⁵ Without determining whether the accomplice would need the same specific intent as the perpetrator, the court noted that the accomplice would need to be aware of the perpetrator's intent, not only that massacres had taken place or were about to be under way, but that the perpetrators intended to destroy a protected group in whole or in part.¹¹⁶

Despite a finding that Bosnia-Herzegovina lacked proof of Serbia's control over the killings at Srebrenica, the court did find that the government in Belgrade failed to exercise whatever authority it might have applied to prevent the killings at Srebrenica¹¹⁷ and that it had not turned over Bosnian-Serb General Ratko Mladic despite indications that General Mladic remained in Serbia and was revered and protected by a group of Serbian intelligence officers.¹¹⁸ This *omission* constituted a failure to prevent and punish the crime of genocide.¹¹⁹

Unfortunately, the court could not determine what damage had been sustained by the State of Bosnia-Herzegovina, as no determination had been made regarding how the exercise of Serbia's authority might have prevented the genocide.¹²⁰ Without such evidence, the court decided that a declaration

112. *Id.* at 145.

113. *Id.* at 148.

114. *Id.*

115. *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 149.

116. *Id.* at 151.

117. *Id.* at 157-58.

118. *Id.* at 160-61.

119. *Id.* at 161.

120. *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 165.

of failure to comply with the Genocide Convention was a more appropriate form of relief than financial compensation.¹²¹

B. Applicability of the Law on Militias to the Sudanese Government as of 2004—Prior to Obligations Recognized by States in the Responsibility to Protect

Assuming the truth of allegations regarding the actions of Janjaweed militias against the Sudanese population and those militias' relationships to the government, what is the effect of a Security Council determination that the Government of Sudan has failed to disarm these militias and has manifestly failed to protect its population in Darfur from crimes against humanity? Rather than argue this, the Office of the Prosecutor focused on the complete control of President Omar Al-Bashir;¹²² however, one might argue that under the analyses of courts in the cases discussed above, such a finding would have little or no effect. Such an allegation does not indicate that the government engaged in a plan to harm the civilian population, unlike legislators drafting laws requiring the murder of civilians, nor does it require a finding that the government sought to assist those in the militia acting out against the civilian population.¹²³ The failure to arrest militia leaders and either prosecute claims against them or allow an international

121. *Id.* at 165-66.

122. *See, e.g.,* Marlise Simons et al., *Arrest is Sought of Sudan Leader in Genocide Case*, NY TIMES, July 15, 2008, at A1, where Prosecutor Moreno-Ocampo stated that President al-Bashir had “masterminded and implemented” the crime of genocide. One reason to focus on an individual government leader is the gravity threshold to bring a case before the ICC. The Trial Chamber recognized questions that would allow for the Court’s jurisdiction: (1) is the conduct of the situation under investigation systematic or large scale, giving consideration to alarm caused to the international community; (2) whether the person is one of the most senior leaders of the State entity, organization, or armed group in the situation under investigation; and (3) whether the role of the person in the organization and the role of the organization in acts and omissions suggest the responsibility of the person in the situation under the court’s consideration. *See* Prosecutor v. Omar Hassan Ahmed Al Bashir, ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmed Al Bashir (Mar. 4, 2009).

123. Prosecutor v. Ahmad Muhammad Harun, ICC- 02/05-01/07, Warrant of Arrest for Ahmad harun (Apr. 27, 2007); Prosecutor v. Omar Hassan Ahmed Al Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmed Al Bashir (Mar. 4, 2009). The I.C.C. Office of the Prosecutor has now made allegations of direct assistance in its indictments of Minister of Interior Ahmad Harun and President Omar Al-Bashir (under the theory that President al-Bashir exercises complete control over the apparatus of the State). Although the ICC Office of the Prosecutor appeals at the time of this writing the Trial Court’s refusal to include charges of genocide in the warrant of arrest for President al-Bashir (on the theory that the Government of Sudan extends beyond al-Bashir), the court’s finding may prevent a finding that other officials lacked authority to sway or countermand decisions purportedly made by President al-Bashir. However, this is a far cry from allegations against government actors who may have prevented peace-keeping or enforcing groups from entering the Darfur region to prevent an on-going humanitarian crisis.

tribunal to prosecute is a failure that may not have any penalty in international courts or within the internal laws of a state.

Alternatively, without proof of a consolidated effort in which the government is taking part, any action taken by the international community would be in violation of the sovereignty of the state when states understand sovereignty to encompass unilateral and unchecked control of all matters within the state. As such, the role of the ICC Office of the Prosecutor may be limited: it can gather evidence of specific acts constituting crimes against humanity and testimony regarding government officials' roles in planning and supporting those acts.¹²⁴ Indeed, the Office of the Prosecutor has done so in Darfur through the International Commission of Inquiry instituted by the Security Council, the Panel of Experts constituted by the Security Council, the National Commission of Inquiry instituted by the Sudanese government, and the Office of the Prosecutor's own investigations and information collected by humanitarian organizations.¹²⁵

The ICC Office of the Prosecutor can also gather evidence as to the role of government funding and support in continued actions taken by the militias; again, the Office of the Prosecutor has done so, including information regarding the government's failure to disarm the militias and its continued arming of the militias through the use of unmarked white airplanes, disguised as airplanes that might otherwise be delivering aid to outlying communities.¹²⁶ Nevertheless, the lessons from *Nicaragua*, *Duško Tadic*, and *Bosnia and Herzegovina* make clear that for an international body to find governmental responsibility for the militia's actions, the government would have had to have done more than influence the militias; the government must have controlled the specific militia actions.¹²⁷ In Sudan, the Government publicly disavows the Janjaweed militias¹²⁸ and, absent admissions through government records or interviews, proof of government planning or advance knowledge of specific Janjaweed activities

124. ICC Frequently Asked Questions, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/FAQ/FAQ.htm> (last visited Oct. 4, 2010).

125. Press Release, ICC, The Prosecutor of the ICC opens investigation in Darfur ICC-OTP-0606-104 (Jan. 25, 2005).

126. See Security Council Committee, *Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan*, ¶ 89-91, 96, U.N. Doc. S/2008/647, (Nov. 11, 2008).

127. As discussed further below in section IV, if there is proof that the government knows of the militia's acts and, exercising general control, evidences an intent for the militia to continue its performance of those acts and protects the militias from repercussions, there may be an argument for aiding and abetting liability even without control over the specific militia atrocities for which the militia members could be charged.

128. See ICID Report, *supra* note 12, ¶¶ 98, 117.

stems from witness testimony on specific government actors present, or helicopters or planes to which only government troops had access.

The dilemma of sovereign refusal to act or the inability to identify sovereign power for attribution of responsibility for decisions in aid of, or omissions harming, a population in a catastrophic situation leads to the question: how do we enable immediate action when a government has manifestly failed to protect its people from the very worst catastrophes? The arguments surrounding sovereignty had for too long been both a sword and shield in international diplomacy. For those arguing against sovereignty, the allowing for aggression against another state power under the guise of humanitarian intervention. For those demanding respect for sovereignty, the delaying of an international response while allowing internal populations or regional organizations to bear the harms of an internal catastrophe with tremendous repercussions.

Some have called this view of intervention—those who can intervene at their own will when they have an interest—Hobbesian, or descended from the Peace of Westphalia.¹²⁹ It denotes a sense of power in the hands of a few, exercised for the good of the many, but only when the few might have an interest. The Member States of the United Nations have moved away from this notion throughout the twentieth century¹³⁰ and continue to do so into the twenty-first century.¹³¹ The question raised by the international community at the close of the twentieth century was how to move toward a more equitable recognition of responsibility and state authority with greater support for rule of law and with continued attention to international peace and security for all peoples.¹³² The international community has responded thus far through official recognition of the Responsibility to Protect.

129. See, e.g., M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541, 544-45 (2006); Louis Henkin, *That 'S' Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 3-4 (1999) (considering that the twentieth century created the transformative development in which "sovereign" states gave up their "sovereign" right to go to war, and stating that "how a state treats its own citizens even in its own territory has become a matter of international concern and international law."). In the Peace of Westphalia, the local princes demanded that power devolve from the Holy Roman Empire to the principalities, based on the actual control exercised by the princes.

130. For example, in recognizing human rights norms as international law, the universality of jurisdiction for international crimes, etc.

131. See Rome Statute, *supra* note 4; The Int'l Commission On Intervention and State Sovereignty [ICISS], *The Responsibility to Protect*, (2001), available at <http://www.iciss.ca/report-en.asp> [Hereinafter ICISS Report].

132. See, e.g., Scheffer, *supra* note 48, at 154-155 (noting a move toward collective decision making and military action, even where the violation of international law may not have a direct bearing on a specific United States national interest).

PART III: “WE THE PEOPLES:” THE RESPONSIBILITY TO PROTECT AND A JUST APPROACH TO INTERVENTION

The arguments between a call for military intervention and the rights of a state to maintain its sovereignty have played out over a number of years in different contexts. In an address to the United Nations General Assembly in 2000, Secretary General Kofi Annan asked how the international community could get past the impasse between those states that feared encroachment on their sovereignty and those states calling for immediate action to prevent or respond to catastrophes that shocked the conscience, calling for the urgency of humanity.¹³³

A. *The ICISS*

1. *Articulation of a Responsibility to Protect*

The Canadian Government, along with a group of nongovernmental foundations, responded to this call by Secretary Annan by sponsoring an independent consortium, the International Commission on Intervention and State Sovereignty (“ICISS”), to research this question and offer recommendations.¹³⁴ Made up of scholars, practitioners, and diplomats engaging in discussion roundtables in states around the world, the ICISS spent more than a year in the development of a consensus document reflecting the understanding of where the issues of sovereignty and intervention stood, and where many in the international community believe they need to go.¹³⁵

In December 2001, the ICISS presented a report that shifted the discussion between the humanitarian interventionists on the one hand and the sovereign rightists on the other, to the interests of a third side: the individuals at risk or, at least, the interest of the international community in the protection of individuals through the application of a responsibility to protect.¹³⁶ In signing the U.N. Charter, Member States recharacterized their sovereignty from the concept of sovereignty as control to the broader idea of sovereignty as responsibility, at least as to the obligations of customary international law.¹³⁷ The ICISS noted:

The defence of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do

133. ICISS Report, *supra* note 131, ¶ 1.6.

134. *Id.* ¶ 1.7.

135. *See id.* at vii-viii.

136. *Id.* ¶ 2.29.

137. *Id.* ¶¶ 2.14-2.15.

what it wants to its own people. . . . It is acknowledged that sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship.¹³⁸

As contemplated by the ICISS, the language shift from “the right to humanitarian intervention” to “the responsibility to protect” also shifts the focus from parties claiming a right to act, whether in good faith or not, to the communities suffering from a lack of protection.¹³⁹ The need for what some had previously conceived as a permissive right of intervention would transform into:

a residual responsibility [that] lies with the broader community of states . . . when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or where people living outside a particular state are directly threatened by actions taking place there.¹⁴⁰

Of considerable note, the ICISS Report reminds us that, in the arc of the state, and residual international, responsibility to protect—which ranges in obligation from the prevention of an avoidable catastrophe, to providing a timely and appropriate reaction to the catastrophe, to rebuilding following that state or international reaction—prevention is the most important dimension, to which far more resources must be dedicated.¹⁴¹ However, approximately two-thirds of the ICISS synopsis and a majority of the report focuses on “the most controversial” means of intervening “against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective” military intervention for human protection purposes—a small but likely vital component of the responsibility to

138. ICISS Report, *supra* note 131, ¶1.35; *see id.* at ¶ 2.18 (following on a discussion on the UDHR, ICCPR and ICESCR reflecting a shift from a culture of violence to a more enlightened culture of peace, the Commission noted: “What has been gradually emerging is a parallel transition from a culture of sovereign impunity to a culture of national and international accountability.”).

139. *Id.* ¶ 2.29.

140. *Id.* ¶ 2.31.

141. *Id.*, ¶¶ 3.1-3.3.

protect.¹⁴² It is in the context of the processes necessary to ensure a just and reasonable purpose and authority in going to war (*jus ad bellum*) in an international military response that the ICISS suggested parameters on intervention. The ICISS Report, however, is “very much concerned with alternatives to military action, including all forms of preventive measures, and coercive intervention measures – sanctions and criminal prosecutions – falling short of military intervention.”¹⁴³ Such coercive measures would serve either a preventive purpose “to avoid the need for military intervention arising” or a reactive purpose “as an alternative to military force.”¹⁴⁴ As discussed below, reference to the International Criminal Court, which had not yet come into operation as of the release of the ICISS Report, might serve both the preventive and reactive function, depending on the perceived need for military intervention.

2. Intervention Under the ICISS Report

The ICISS would ultimately provide the blueprint for the United Nations’ Responsibility to Protect. As such, some of the salient features of the ICISS Report, particularly with regard to intervention, humanitarian relief, and issues of sovereignty, provide the analytical context for the uses and application of the Responsibility to Protect.

In drafting the ICISS Report, the ICISS recognized a number of decisions that would need to be made on appropriate military intervention in support of the international community’s residual responsibility to protect, starting with the limited occurrence of intervention. Military intervention

142. ICISS Report, *supra* note 131, ¶ 1.38. (This article adopts the use of the term “intervention” as defined by the Commission for the purpose of the perceived competing notions of intervention and sovereignty. It is in this context that the Commissioners discuss “intervention against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective.” Intervention against the *will* of state actors undermines the sovereignty of the state as exercised through its government, in that intervening actions are taken contrary to those who purport to govern just what actions may take place. However, the intervention purports to be in resolution of a crisis, and not specifically to undermine the government. The notion that military intervention to protect a population (such as a peace-enforcing force) necessarily stands against the government reintroduces a conflict—intervention versus sovereign authority—that much of the rest of the report deftly diminishes in its focus on the safety of endangered populations. A government seeking to maintain its sovereignty might wish to withhold judgment on a proposed limited international intervention, if that international cohort can reestablish order toward negotiations with the government by insurgents, or reintroduction of a recognizable and respected government police power in an area under looser government control, where either side to the conflict feels it benefits from the disorder.)

143. *Id.* ¶ 1.35.

144. *Id.* ¶ 1.38.

was to follow principles of *jus ad bellum*¹⁴⁵ and only to occur under “exceptional circumstances in which the very interest that all states have in maintaining a stable international order requires them to react . . . when civil conflict and repression are so violent that civilians are threatened with massacre, genocide or ethnic cleansing on a large scale.”¹⁴⁶ In those circumstances, the international community must recognize that “the aim of the human protection operation is to enforce compliance with human rights and the rule of law as quickly and as comprehensively as possible, but it is not to defeat the state.”¹⁴⁷

It is important to consider what the responsibility to protect is and what it is not. The ICISS states quite often that reaction through military coercion is a last resort and suggested that “[c]easefires, followed, if necessary, by the deployment of international peacekeepers and observers are always a better option, if possible, than coercive military responses.”¹⁴⁸ With regard to proportional means the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question[.] The effect on the political system of the country targeted should be limited, again, to what is strictly necessary to accomplish the purpose of the intervention.”¹⁴⁹

The ICISS also suggests that the parameters of international humanitarian law should be more strictly observed in an international military intervention “since military intervention involves a form of military action significantly more narrowly focused and targeted than all out warfighting[.]”¹⁵⁰

Finally, the concept of reasonable prospects creates certain limitations on military intervention: (1) “intervention is not justified where actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all”¹⁵¹ and (2) the ICISS recognizes that “on purely utilitarian grounds [the precautionary principle would] be likely to preclude military action against any one of the five members of the Security Council [and other major powers who are not permanent members of the Security Council] even if all other conditions for intervention . . . were met.”¹⁵² Despite this gap in the

145. *Id.* ¶ 4.16. (Criteria for military intervention were to include: “right authority, just cause, right intention, last resort, proportional means and reasonable prospects.”)

146. *Id.* ¶ 4.13.

147. ICISS Report, *supra* note 131, ¶ 7.51.

148. *Id.* ¶ 4.38.

149. *Id.* ¶ 4.39.

150. *Id.* ¶ 4.40.

151. *Id.* ¶ 4.41.

152. ICISS Report, *supra* note 131, ¶ 4.42.

implementation of the Responsibility to Protect caused by certain powerful states, the ICISS recommended that interventions be used in the few necessary situations where possible and that other collective actions be considered as part of the responsibility to protect where interventions had limited prospects for success.¹⁵³

After any intervention, the contemplated responsibility to protect would include a responsibility to rebuild and, assuming limited loss of de facto control of the government in internal affairs, reestablishment of the internal apparatus of the state.¹⁵⁴ In prevention, reaction, and rebuilding, it is critical that “those wanting to help from outside recognize and respect the sovereignty and territorial integrity of the countries concerned.”¹⁵⁵ Next, it is critical that the intervention endeavors “to sustain forms of government compatible with the sovereignty of the state in which the enforcement has occurred – not undermin[e] that sovereignty.”¹⁵⁶ Finally, it is critical that “the responsibility to rebuild, which derives from the obligation to react, must be directed towards returning the society in question to those who live in it, and who, in the last instance, must take responsibility together for its future destiny.”¹⁵⁷

Another major component of the ICISS Report reviews “The Question of Authority.” The ICISS acknowledges that the U.N. Charter specifically prohibits “the threat or use of force against the territorial integrity or political independence of any state” and intervention “in matters which are essentially within the domestic jurisdiction of any state.”¹⁵⁸ Only Security Council recognition of a “threat to the peace, breach of the peace, or act of aggression” allows for measures such as embargoes, sanctions, the severance of diplomatic relations, and where those measures are likely to be inadequate, the taking of “such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.”¹⁵⁹ Other than “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the U.N.,”¹⁶⁰ the Charter includes no language overcoming domestic jurisdiction of the state as reflected in Articles 2.4 and 2.7. Thus, the best way to move forward would require some type of Security Council approval. That Security Council decision would require evidence of some kind, ideally from a “universally respected

153. *Id.* ¶¶ 4.42-4.43.

154. *Id.* ¶ 5.31.

155. *Id.* ¶ 3.35.

156. *Id.* ¶ 5.26.

157. ICISS Report, *supra* note 131, ¶ 5.31.

158. U.N. Charter art. 2, ¶¶ 4, 7.

159. ICISS Report, *supra* note 131, ¶ 6.3; U.N. Charter arts. 39, 41, 42.

160. ICISS Report, *supra* note 131, ¶ 6.4; U.N. Charter art. 51.

and impartial non-government source.”¹⁶¹ However, as independent, nongovernmental organizations seek to remain absolutely removed from political decision making, the ICISS suggests reliance on reports prepared by U.N. organs and agencies “in the normal course of their operations”¹⁶² or an independent special fact-finding mission sent by the Security Council or Secretary-General.¹⁶³

When there is no Security Council approval and the matter is not under Security Council consideration, the ICISS recognizes two other possibilities: (1) action by the General Assembly of the United Nations under an Emergency Special Session pursuant to the Uniting for Peace resolution of 1950¹⁶⁴ or (2) action by states or regional organizations, perhaps seeking Security Council authorization *ex post facto*.¹⁶⁵ The ICISS Report makes clear that any action taken outside of the United Nations framework relating to international peace and security “run[s] the risk of eroding [the United Nations’] authority in general and also undermining the principle of a world order based on international law and universal norms.”¹⁶⁶

However, lack of action where unauthorized *ad hoc* coalitions actually intervene successfully, observing and respecting the parameters laid out in the responsibility to protect would have “enduringly serious consequences for the stature and credibility of the U.N. itself.”¹⁶⁷ That said, the ICISS saw its task as “not to find alternatives to the Security Council as a source of authority, but to make it work much better than it has,”¹⁶⁸ stressing that the Commission “ha[s] made abundantly clear our view that the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes.”¹⁶⁹

The High-Level Panel Report Articulating a Responsibility to Protect

The issue of the responsibility to protect was again taken up by the U.N. Secretary General’s High-Level Panel on Threats, Challenges and Change (“Panel”) in the 2004 report entitled “A more secure world: Our shared

161. ICISS Report, *supra* note 131, ¶ 4.29.

162. *Id.* ¶ 4.30.

163. *Id.* ¶ 4.31.

164. G.A. Res. 377(V), ¶ A(1), U.N. Doc. A/RES/377(V) (Nov. 3, 1950).

165. *See* ICISS Report, *supra* note 131, ¶ 6.7.

166. *Id.*, ¶ 6.9.

167. *Id.* ¶ 6.40.

168. *Id.*, ¶ 8.4.

169. *Id.* ¶ 6.28.

responsibility” (the “High-level Panel Report”).¹⁷⁰ While operating with a broader mandate than the ICISS, the Panel recognized – or adopted – the idea:

In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community.¹⁷¹

This report focused more on the collective security concerns when a state is not “able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbours.”¹⁷² The Panel called for the involvement of the international community, “acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be.”¹⁷³ While the Panel recognized that “the multilateral system as we now know it . . . has shown that it can perform,” the High-level Panel Report sought to strengthen the collective security of the international community.¹⁷⁴

The Panel spoke to the breadth of the Security Council’s authority in cases of states posing threats to other states, people outside its borders, or to international order generally:

[T]he language of Chapter VII is inherently broad enough, and has been interpreted broadly enough, to allow the Security Council to approve any coercive action at all, including military action, against a State when it deems this ‘necessary to maintain or restore international peace and security’. That is the case whether the threat is occurring now, in the imminent future or more distant future; whether it involves the State’s own actions or those of non-State actors it harbours or supports; or whether it takes the form of

170. The Secretary-General, *Follow-up to the outcome of the Millennium Summit*, ¶ 201, U.N. Doc. A/59/565 (Dec. 2, 2004). [Hereinafter High-Level Panel Report].

171. *Id.* ¶ 29.

172. *Id.* ¶ 29.

173. *Id.*

174. *Id.* ¶ 31.. See also High-Level Panel Report, *supra* note 170, Synopsis, at 3 (“The task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has.”).

an act or omission, an actual or potential act of violence or simply a challenge to the Council's authority.¹⁷⁵

With that breadth comes a limitation on certain individual states' expectations:

It may be that some States will always feel that they have the obligation to their own citizens, and the capacity, to do whatever they feel they need to do, unburdened by the constraints of collective Security Council process. But however understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, the world has now changed and expectations about legal compliance are very much higher.¹⁷⁶

Recognizing arguments for bypassing a Security Council perceived as inconsistent and not fully responsive to "very real State and human security needs," the Panel suggests that "the solution is not to reduce the Council to impotence and irrelevance: it is to work from within to reform it, including in the ways we propose in the present report."¹⁷⁷

The Report looks to the active participation of the Security Council in military interventions in which a state engages in or fails to prevent humanitarian harms against the state's citizens.¹⁷⁸ While recognizing that there has been

a long-standing argument in the international community between those who insist on a 'right to intervene' in man-made catastrophes and those who argue that the Security Council, for all its powers under Chapter VII [of the U.N. Charter] to 'maintain or restore international security', is prohibited from authorizing any coercive action against sovereign States for whatever happens within their borders, the Panel recognized the *jus cogens* authority of the Genocide Convention, and the expansions and limitations on sovereignty imposed by it.¹⁷⁹ States, both as signatories to the Genocide

175. High-Level Panel Report, *supra* note 170, ¶ 193.

176. *Id.* ¶ 196.

177. *Id.* ¶ 197.

178. High-Level Panel Report, *supra* note 170, ¶ 201. Of particular note, "avoidable catastrophe" for which every state is responsible includes "mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease." The "avoidable catastrophe" aligns itself in this report with the intentional acts of genocide, war crimes, and crimes against humanity with which the International Criminal Court occupies itself. This reading distances the High-Level Panel Report from a broader reading of a responsibility to protect in the ICISS report. *See generally*, ICISS Report, *supra* note 131, at 11-18.

179. High-Level Panel Report, *supra* note 170, ¶ 199. The expansion of sovereignty would stem from protections of sovereign peoples against State leaders allowing or instigating harms against popula-

Convention and under international peremptory norms, “have agreed 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.”¹⁸⁰ Because genocide, wherever it occurs, is a:

threat to the security of all and should never be tolerated, . . . [t]he principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council.¹⁸¹

The Panel recognized blanket authority for Security Council action:

the [Security] Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, [the Security Council] can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a ‘threat to international peace and security’, not especially difficult when breaches of international law are involved.¹⁸²

This serves not just to legitimate actions taken purporting to be humanitarian, but to slow actions that would be taken without proper authority: “That [armed military] force *can* legally be used does not always mean that, as a matter of good conscience and good sense, it *should* be used.”¹⁸³ Following the 2003 United States intervention into Iraq,¹⁸⁴ the

tions, while the limitation on sovereignty would prevent State leaders as holders in trust of the peoples’ sovereign rights, from maintaining primary jurisdiction over situations where large-scale atrocities occur to their populations.

180. *Id.* ¶ 200. See also International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966) Arts. 4(2) and 6(3).

181. Quoting High-Level Panel Report, *supra* note 170, ¶ 200.

182. *Id.* ¶ 202. The “emerging norm” seems not to stem from a growth or change in authority with the Security Council, but rather in Security Council consistency in applying an international responsibility to intervene for human protection, creating less room for other actors to claim Security Council inertia or lack of political will.

183. *Id.* at Synopsis, 3 (emphasis in original). See also *id.* ¶ 205.

184. See *Id.* ¶ 186 (“There is little evident international acceptance of the idea of security being best preserved by a balance of power, or by any single – even benignly motivated – superpower.”); High-level Panel Report, *supra* note 170, Annex II, Terms of Reference 1: “The past year has shaken the foundations of collective security and undermined confidence in the possibility of collective responses to our common problems and challenges. It has also brought to the fore deep divergences of opinion on the range and nature of the challenges we face and are likely to face in the future.” See also, *Id.* -, Annex I ¶ 53, noting that “Article 51 of the Charter of the United Nations should be neither rewritten nor reinter-

Report takes special care to focus on multilateralism and the presumption that even a unilateral power with proper information should look toward the imprimatur of the Security Council as allowing even a well-intentioned power to act unilaterally as it sees fit would set a precedent for all powers to act in the same way.¹⁸⁵

Although like the ICISS in speaking to the importance of action taken by the Security Council in support of the Responsibility to Protect and despite the Report being addressed to the Secretary-General, the Panel noted, “many of our recommendations will require commitment from and action by heads of Government. Only through their leadership can we realistically forge the new consensus required to meet the threats described in our report.”¹⁸⁶

The Security Council would be the primary mover in engaging in interventions when there have been findings from impartial sources such as the International Committee of the Red Cross that a state has failed to protect its population. By being a first actor, the Security Council would both prevent unilateral action by establishing the Security Council as the “primary body in the collective security system,”¹⁸⁷ and create respect for rule of law and *jus ad bellum* in military interventions, so that the analysis can go “directly not to whether force *can* legally be used but whether, as a matter of good conscience and good sense, it *should* be.”¹⁸⁸ The Panel recognized a set of guidelines or “five criteria of legitimacy” for the use of the Security Council and any others involved in consideration of authorization or application of military force: (1) seriousness of threat; (2) proper purpose; (3) last resort; (4) proportional means; and (5) balance of consequences.¹⁸⁹

The Report focuses on a range of issues and the use of force as part of collective security presumes attempts at peaceful prevention and substantial resources and planning toward peace-building and civilian protection after

preted, either to extend its long-established scope (so as to allow preventive measures to non-imminent threats) or to restrict it (so as to allow its application only to actual attacks).” Again, this follows on arguments that no such collective action was required as part of a potential New World Order following the 1991 Iraq war, and end of the cold war. Scheffer, *supra*, note. 48, 126-127; High-Level Panel Report, *supra* note 170, ¶ 191 (“For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.”).

185. *Id.* ¶¶ 190-192.

186. *Id.* at Transmission Letter, xi.

187. High-Level Panel Report, *supra* note 170, ¶ 205.

188. *Id.* (emphasis in original).

189. *Id.* ¶ 207 (emphasis in original).

use of force.¹⁹⁰ In applying the five basic criteria of legitimacy, the Panel sought to do three things: “[1] to maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force; [2] to maximize international support for whatever the Security Council decides; and [3] to minimize the possibility of individual Member States bypassing the Security Council.”¹⁹¹ The Panel sought the endorsement of the Security Council, General Assembly, and individual Member States not on the norm of a responsibility to protect, but on the standard for application of that responsibility to the last resort of armed force through the Security Council.

The Panel also endorsed 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.¹⁹² In addition to use of military force, the Panel also noted that toward prevention of international or interstate conflicts, the Security Council “should stand ready to use the authority it has under the Rome Statute to refer cases to the International Criminal Court.”¹⁹³ The Panel stated that, from a legal process perspective, “there have been few more important recent developments than the Rome Statute creating the International Criminal Court,” and where conflict is mounting, “early indication by the Security Council that it is carefully monitoring the conflict in question and that it is willing to use its powers under the Rome Statute might deter parties from committing crimes against humanity and violating the laws of war.”¹⁹⁴

After being informed by the reports of the ICISS and the Panel, the Secretary-General addressed the General Assembly¹⁹⁵ in March 2005 and reported on the Responsibility to Protect. Among his comments, he sought recognition by the Security Council of the basic criteria for legitimacy of approved military force in response to international threats to peace and security such as genocide, ethnic cleansing, and other crimes against

190. *See generally, id.* ¶¶ 224-236.

191. *Id.* ¶ 206.

192. High-Level Panel Report, *supra* note 170, ¶ 203.

193. *Id.* ¶ 90. Again, the Security Council may use coercive action under its Chapter VII authority, including, but not limited to, armed force. Reference to the International Criminal Court is one such use of coercive power.

194. *Id.*

195. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter 2005 S.G. Report].

humanity.¹⁹⁶ He also recognized that sovereignty should never shield genocide, crimes against humanity, and mass human suffering.¹⁹⁷ Finally, he suggested the international community take concrete steps to reduce selective application, arbitrary enforcement, and breach without consequence, including “mov[ing] towards embracing and acting on the ‘responsibility to protect’ potential or actual victims of massive atrocities”¹⁹⁸.

The United Nations General Assembly and World Leaders’ Articulation of a Responsibility to Protect

In September 2005, the United Nations General Assembly presented the 2005 World Summit Outcome,¹⁹⁹ a document reflecting agreement from the world leaders that had participated in a historic summit at the U.N. on behalf of their states following the Millennium Summit of 2000.²⁰⁰

Among the points recognized at the 2005 summit was the responsibility of each government to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing.²⁰¹ Again, the notion that one function of government is the protection of groups and individuals subject to the law of the state was not new; the International Commission of Inquiry for Darfur argued in January 2005 that the responsibility is found in human rights law and humanitarian law.²⁰²

In his 2000 address to the General Assembly, then Secretary-General Kofi Annan brought attention to the founding documents of the United Nations as signed by governments, but only as representatives of “the peoples” of the United Nations.²⁰³ However, the 2005 and 2006 resolutions of the U.N. General Assembly and Security Council coalesced in one

196. *Id.* ¶¶ 125-26.

197. *Id.* ¶ 129.

198. *Id.* ¶¶ 131-32.

199. G.A. Res. 60/1, ¶ 1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

200. *Id.* at ¶ 3 (reaffirming G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000)).

201. The prohibitions of these crimes are often recognized as peremptory norms binding on all states, and national laws recognizing, and implementing state punishments against these crimes are commonplace. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide requires that all signatories undertake the implementation of laws to punish génocidaires; all states are obligated to proceed against these gross violations of human rights. *See* G.A. Res. 3/260, art. 1, U.N. Doc. A/RES/3/260 (Dec. 9, 1948).

202. *See* ICID Report, *supra*, note 12, ¶ 143-144. In his RIGHTS OF WAR AND PEACE, Hugo Grotius observed “that kingdoms are not so much a patrimony . . . as a trust, placed in the hands of the sovereign for the benefit of his people. Indeed kings themselves are aware of this, even before the crown descends upon their heads, and they receive it upon condition of adhering to such sacred obligations.” GROTIUS, *supra* note 48, at 386.

203. KOFI ANNAN, ‘WE THE PEOPLES:’ THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 6 (2000).

recognizable document the large-scale international recognition of the ability—or responsibility—of the United Nations to act when a government has failed to protect its populations from genocide, crimes against humanity, ethnic cleansing, or war crimes.²⁰⁴ The resolutions further expand on a responsibility that is the logical conclusion of reading international treaties like the Rome Statute²⁰⁵ in acting to limit the harm caused by those atrocities, even when such harm does not have an ostensible and immediate nexus with others in the international community.²⁰⁶ Such a shift moves from an idealistic perspective of human rights as enforceable through sovereign allowance toward a functional use of international peacekeepers to eliminate the greatest harms to the international community.²⁰⁷

PART IV: APPLICATION OF THE RESPONSIBILITY TO PROTECT TO THE SITUATION OF DARFUR, SUDAN

Numerous people have called on the international community to act in response to the continuing conflict in Darfur, citing the Responsibility to Protect resolution as one basis for the necessity of an immediate response by the United Nations Security Council.²⁰⁸ The lack of armed military intervention by the United Nations has caused many to question whether the Responsibility to Protect resolution remains primarily aspirational and lacks the necessary strength to prevent the crimes the resolution purports to address.²⁰⁹ By combining the attributed responsibility for the support of militias with the obligations to protect the human rights of their populations and apply humanitarian law as most fully recognized in the Responsibility to Protect resolution, the ICC can investigate and prosecute government

204. U.N. Doc. A/59/2005 ¶¶ 7(b), 129, 134; U.N. Doc. S/RES/1674 (2006) ¶4 (citing A/RES/60/1 Paragraphs 138-139).

205. Rome Statute, *supra* note 4, at Preamble; *see id.* at arts. 5-8.

206. *See* S.C. Res. 1674, *supra* note 18, at art. 1 where the Security Council reaffirmed the World Summit Outcome provisions on the “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmts. b and c, and Reporters’ Note 2: A resolution, declaration, or other statement of principles contributes to the making of customary international law, as both (1) the statements and votes of governments are kinds of state practice, and (2) states follow it from a sense of legal obligation (*opinio juris sive necessitates*).

207. Indeed, as previously noted, the Rome Statute recognizes that in ending impunity for perpetrators of the crimes within the court’s jurisdiction, “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, [and] that the international Criminal Court . . . shall be complementary to national criminal jurisdictions.” Rome Statute, *supra* note 4, at Preamble.

208. *See* UN News Service, *supra*, note 33; Evans, *supra* note 33. It should be noted that Gareth Evans served both as a co-chair of the ICISS, and as a member of the High-level Panel.

209. *See, e.g.*, Evans, *supra* note 33; *cf.* Mai-Linh K. Hong, *A Genocide by Any Other Name: Language, Law, and the Response to Darfur*, 49 VA. J. INT’L L. 235, 270 (2008), suggesting the Responsibility to Protect makes the “moral obligation to act more difficult to ignore when atrocities are occurring.”

actors for aiding, or complicity with, militias when a government fails to protect its population from genocide, war crimes, crimes against humanity, or ethnic cleansing.

If effectively enforced, the potential for prosecution of individuals in governmental authority for crimes, by entities like the International Criminal Court, will give those leaders incentives to deter further crimes even if the international community lacks the resources or the will to challenge the actions or inaction of the state engaging in, or allowing others to engage in, crimes against humanity. The potential prosecution of government actors for the refusal to allow, or the substantial delay in allowing, an international force for the limited purpose of protecting populations affected by crimes against humanity, genocide, ethnic cleansing, or war crimes can be an important incentive for leaders to protect their own populations if for no other reason than to avoid potential prosecution before the ICC.²¹⁰

Government Control over the Janjaweed Militias

The ICID provided the Security Council with information of joint attacks on villages by Janjaweed militias with Government of Sudan air support, by militias with Popular Defence Forces insignias on their uniforms, and Janjaweed militias of which local police officers were members.²¹¹ The ICID, however, relied on the analysis in the *Tadić* (Appeal) judgment that related to state responsibility for actions of militias over which the state has general control. By incorporating the Janjaweed

210. Deterrence of violations requires some degree of enforcement. *See Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. 91, ¶ 426 (Feb. 26) (“one 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.”). Previous judicial decisions evidence international enforcement of and concern with acts that states have declared violations of international law. For example, though Article 59 of the Statute of the International Court of Justice states, “the decision of the Court has no binding force except between the parties and in respect of that particular case,” the pronouncement of an interpretation of international law will likely be reviewed and looked to as a statement of the law in a future proceeding with similar circumstances. ICJ Statute, *supra* note 19, at Art. 59. *See, e.g., Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. 91, in which the court distinguished between government liability for the purposes of finding an international act (which the ICTY did in the 1999 *Tadić* decision), and the ICJ decision on the denial of liability by a government in the dispute between Nicaragua and the United States in 1986, where the United States lacked operation control over the Contras’ acts violating human rights norms. *See generally Nicar. v. U.S.*, 1986 I.C.J. 14 (June 27). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 103, on Evidence of International Law: “. . . (2) In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals. . . .”

211. *See, e.g., ICID Report, supra* note 12, ¶¶ 116, 125.

militias into the PDF, the Commission stated that the Government of Sudan had incurred the responsibility for the militias' actions.²¹²

However, as noted previously, in order to attribute Janjaweed acts to the Government of Sudan, international jurists following the ICJ decision in *Bosnia v. Serbia*²¹³ may require greater proof of control over the militias to conform to the ICJ understanding of Article 8 of the Articles of State Responsibility. The ICC would need to determine whether the militias were de jure organs of the state that were controlled by the Government, allied with the Government, and whether the relationship changed over time. As of August 2006, the Government of Sudan continued to ship weapons into Darfur that might assist the militias and allow for their continued existence. Such provision of arms would suggest either: (1) complicity or aiding and abetting liability; (2) a failure to prevent or repress crimes against humanity or genocide; or (3) actions taken by the Government where it lacks police powers to control the population.

The Provision of Weapons: Aiding and Abetting Crimes, Failure to Protect Against Crimes, or Actions within a Region Outside the Government's Control

The ICID notes that the Government of Sudan had undertaken to disarm the Janjaweed militias and had failed to do so.²¹⁴ The ICID and Panel of Experts did, however, present evidence of the Government of Sudan arming the militias through the local governments' recruiting efforts for the PDF.²¹⁵ If the Janjaweed were determined to be an entity separate from the PDF and not to have been coordinated through the central government, the Government's alleged permissive attitude toward the Janjaweed's access to weapons might indicate: (1) aiding and abetting of the Janjaweed militias' crimes if the Government had reason to believe those crimes would occur; (2) the failure to protect the population by not reacting once the militias' crimes were occurring; or (3) a failed or weakened state situation in which the actions of the militias were not within the Government's control. On the premise that punishment or an end to impunity is one manner to prevent a criminal act, the ability to punish for each of the stated possibilities would further limit the harms stemming from such acts. The Rome Statute not only limits the jurisdictional timeframe of the Office of the Prosecutor for the ICC but also requires that crimes be adjudicated as drafted in the Rome

212. *Id.* ¶ 125.

213. *See Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at ¶¶ 391-394.

214. *See* ICID Report, *supra* note 12, ¶¶ 98, 118, 126.

215. *See id.* ¶ 111.

Statute, that crimes not be extended by analogy, and that ambiguity be interpreted in favor of the accused.²¹⁶ Thus, any interpretation of the statute must adhere to the language of the statute and reflect existing international law.

a. Aiding and Abetting or Complicity

An aiding and abetting analysis, other than one based on a failure to protect, would be based on an act taken by the Government actors. Did the Government actors engage their liability by committing crimes alongside the Janjaweed militias? Did the Government actors order, solicit, or induce the crimes? Either of these acts would make the Government actor a co-perpetrator directly responsible for the crimes of the Janjaweed.²¹⁷ Prosecutions of such actions would engage the responsibility of commanders and other superiors²¹⁸ as the command structure would have knowledge of the subordinates' actions.²¹⁹ However, criminal responsibility requires the mental elements of intent and knowledge of the underlying crimes—the government actor must have knowledge that the circumstance exists or that a consequence will occur in the ordinary course of events, and must intend to engage in the conduct, or cause the consequence to occur.²²⁰ Direct participation in crimes against humanity or genocide would certainly allow for a finding of command responsibility.²²¹

However, an individual's responsibility might also be incurred if the individual, "for the purpose of facilitating commission of the crime, aids, abets, or otherwise assists in [the crime's] commission or attempted commission, including [by] providing means for [the crime's] commission."²²² As stated previously, proof of aiding and abetting liability may be difficult in the first instance based on the number of arms and uniforms provided to disbanded militias from previous wars over previous decades.²²³ Even with regard to the conflict in Darfur, the provision of

216. See Rome Statute, *supra* note 4, at Art. 22(2): "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

217. See *id.* at Art. 25(3)(a-b).

218. *Id.* at Art. 28. The forces would be under the effective control of the military commander, and a superior (military or civilian) with responsibility for the action of subordinates with the knowledge that the subordinates are committing or are about to commit such crimes would be individually responsible.

219. See *id.* at Art. 30, (3).

220. See *id.* at Art. 30.

221. See *id.* at Art. 28.

222. *Id.* at Art. 25(3)(c).

223. See *id.* at Art. 30.

weapons has certainly occurred but for the purpose of counter-insurgency²²⁴ and not to militias that government actors believed to be active in crimes against humanity.²²⁵

Similarly, the type of joint criminal enterprise analysis suggested by the ICID Report and possible under another reading of complicity in the Rome Statute requires that the accused intentionally “contribute to the commission or attempted commission of a crime under the statute by a group of persons acting with a common purpose.”²²⁶ Such a contribution can be made without the accused sharing the criminal purpose if the accused contributes to the group’s goal.²²⁷ If the government actors providing weapons to the Janjaweed militia groups believe they are supporting legal militias, the contribution would not necessarily entail criminal liability.²²⁸

b. Failure to Protect: Allowing Populations to Suffer from Militia Attacks

Even where no proof of widespread government involvement exists, assuming the numbers alleged by the Office of the Prosecutor of 35,000 civilians killed between 2003 and 2005 with another 80,000 to 265,000 dying slow deaths based on conditions brought on by Janjaweed and government attacks, certainly the Government of Sudan would have a responsibility to prevent and repress harms.²²⁹ From a standard incurring criminal liability before the ICC, superior responsibility would be implicated only if the superior knew or consciously disregarded the crimes or potential crimes, the militias’ activities were within the effective responsibility and control of the Government, and the Government failed to take actions within its power to prevent or repress the criminal acts of the militias.²³⁰ Assuming knowledge of the crimes allegedly perpetrated against

224. See Simons et al., *supra* n. 122, (quoting ICC Prosecutor Moreno-Ocampo: “[President al-Bashir’s] motives were largely political,” the prosecutor said. ‘His alibi was a “counterinsurgency.” His intent was genocide.”’).

225. See ICID Report, *supra* note 12, ¶ 117 (distancing government from outlaw Janjaweed groups).

226. See Rome Statute, *supra* note 4, at Art. 25(3)(d).

227. See *id.*

228. See *id.*; See also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 187-188(Oxford University Press 2003) (s 9.4.2: Participation Entailing Responsibility for the Foreseeable Crimes of Other Participants).

229. Prosecutor v. Omar Hasan al-Bashir, ICC-02/05-01/09 OA, Prosecution Document in Support of Appeal against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (July 6, 2009), ¶ 17(a).

230. See Rome Statute, *supra* note 4, at Art. 28(b), superior responsibility not of a military nature may be invoked where:

the civilian population in Darfur, the Government of Sudan would either (1) have failed to take actions to prevent or repress militia crimes or (2) lack effective control over the militias in Darfur.²³¹ If the state failed to act to protect its population, the question of the extent of the state's culpability and of the state actors' culpability arises.²³² Thus, even if a state, through its actors, is culpable in failing to act to prevent harms, such a failure does not preclude an argument that the state effectively lacked sufficient power to actually prevent crimes.²³³

c. The Failed or Weakened State: Lack of Control over Militias

Lack of control over the militias where the state lacks authority might previously have led to a determination that the acts of the militia could not be attributable to the state.²³⁴ However, the Responsibility to Protect Resolution reintroduces the superior responsibility of government actors.

The international community promises to act through the Security Council and in accordance with the Charter, including Security Council coercion to maintain international peace and security, "should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."²³⁵ Such a failure to protect may be intentional or may relate to a lack of control over those committing the crimes enumerated in the Responsibility to Protect Resolution.²³⁶ In either case, the Security Council's responsive action requires a determination of failure to protect

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes [within the mandate of the ICC];

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

231. *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. 91, ¶ 4 (Feb. 26).

232. *Id.*, ¶ 460. (In a slightly different context, the ICJ noted in the *Bosnia v. Serbia* case that it must determine "what were the consequences of the failure of [Serbia] to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.")

233. *Id.*, ¶ 462 ("The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, [Serbia]'s breach of the obligation to prevent genocide, and the injury suffered by [Bosnia and Herzegovina], consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if [Serbia] had acted in compliance with its legal obligations. However, the Court clearly cannot do so.")

234. See ICISS Report, *supra* note 131, viii.

235. 2005 World Summit Outcome, *supra* note 16, ¶ 139.

236. See generally ICISS Report, *supra* note 131.

from ongoing crimes subject to the mandate of the ICC, suggesting that the state actor must know of or consciously disregard information concerning crimes committed in the state's territory.²³⁷ Again, the Responsibility to Protect Resolution recognizes that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”²³⁸ Therefore, the crimes would have concerned activities that were within the effective responsibility and, in the first instance, at least presumptive control of the state.²³⁹ It is only in the responsibility to prevent crimes “through appropriate and necessary means”²⁴⁰ that a state's failure diverges from a prima facie case of superior responsibility for that failure: under the Rome Statute, superior responsibility is incurred if the superior “failed to take all necessary and reasonable measures *within his or her power* to prevent or repress their commission *or to submit the matter to the competent authorities for investigation and prosecution.*”²⁴¹ It is at the point of convergence of a failure in the power or will of the state actor to take all necessary and reasonable measures to prevent or suppress the commission of these international crimes—genocide, crimes against humanity (including ethnic cleansing), and war crimes—that the international community acts as an additional authority in the investigation, amelioration, and prosecution of the crimes through referral by the Security Council to the ICC²⁴².

Although a lack of power to prevent genocide, crimes against humanity, or war crimes would allow for international intervention, this same lack of power would not create criminal responsibility for those crimes.²⁴³ If the state is provided with additional power to prevent or suppress the commission of crimes or is provided with means to submit the matter to competent authorities but fails to do so, state actors, collectively or in their individual capacities, incur criminal responsibility for the reasonably foreseeable consequences of their actions.²⁴⁴

237. See Rome Statute, *supra* note 4, at Art. 28(b)(1).

238. 2005 World Summit Outcome, *supra* note 16, ¶ 138.

239. See Rome Statute, *supra* note 4, at Art. 28(b)(2).

240. 2005 World Summit Outcome, *supra* note 16, ¶ 138.

241. See Rome Statute, *supra* note 4, at Art. 28(b)(3) (emphasis added).

242. See *id.* at Art. 13(b).

243. See *id.* at Art. 28(b), 25.

244. See *id.* at Arts. 28(b) and 25. See also *Prosecutor v. Tadić (Appeals)*, Case No. IT-94-1-A ¶ 220 (July 15, 1999) (accomplice liability for “concentration camp” cases, where knowledge of the nature of a system of ill-treatment and an intent to further that common design of ill-treatment evidences *mens rea* for crimes against humanity); *Id.* atn.351 (collecting cases of German Supreme Court for the British Zone on culpability by German State actors (judges, service members), based in turning other

By failing to allow for international troops to enter, and stating that their point of entry would become a graveyard based on the reaction of Sudanese forces,²⁴⁵ the Government of Sudan aided the continued actions of the Janjaweed militias that would otherwise be prevented through the application of customary international law—here, the Responsibility to Protect. To the extent the Government of Sudan’s prevention enables or facilitates further crimes against humanity by the Janjaweed militias, the responsible government authorities would be liable for complicity.²⁴⁶ As noted earlier, this is so even when the general approval of the acts would typically not be included as a state action.²⁴⁷

CONCLUSION

The Security Council recalled in agreeing to send troops to Sudan the exercise of its power under the Responsibility to Protect Resolution.²⁴⁸ The exercise of that responsibility may require the Government of Sudan consider the interplay between the various Chapter VII powers that the Security Council utilizes.

Threats of harm to peacekeepers may allow for continued harm to civilian populations for some time—but only after the Security Council has recognized and publicized the harm Sudan has allowed against its population in Darfur. The government authorities in Sudan cannot deny their knowledge of the alleged crimes against humanity reported by the ICID, nor the attempts made by the international community to assist in preventing harm through the Security Council, pursuant to the Responsibility to Protect resolution. The humanitarian intervention proffered by the Security Council attempts to follow a best practice in preventing unilateral interventions, and the Secretary-General gave many assurances that the force would assist the Government of Sudan in preventing further harms.

individuals to the “uncontrollable power structure of the [Nazi] party and state,” such that the victim is “likely to be caught in an arbitrary and violent system.”)

245. Anne Penketh, *Sudan blocks UN troops in fear Darfur could become ‘graveyard’*, INDEPENDENT, Mar. 11, 2006, at 27. available at <http://www.independent.co.uk/news/world/africa/sudan-blocks-un-troops-in-fear-darfur-could-become-graveyard-469396.html>.

246. See Rome Statute, *supra* note 4, at Art. 25(3)(d)(ii).

247. Prosecutor v. Nikolic, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, ¶ 63 (Oct. 9, 2002). (Acknowledgement of approval as opposed to adoption of the acts, “as a general matter . . . will not be attributable to a State under [ILC Draft articles on

Responsibility of States for Internationally Wrongful Acts] article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it.”)

248. S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

The failure to allow for intervention may create state actor liability for government support of militias and complicity in any crimes against humanity those militias cause. The prosecution for complicity does not create new law, but builds on the international support for the enforcement of a Responsibility to Protect as well as other prosecutions for crimes against humanity following the Second World War. In investigating the situation in Darfur, Sudan, and prosecuting perpetrators of genocide, crimes against humanity, or war crimes, the ICC may focus on a limited number of individuals; however, should the ICC successfully prosecute government actors on the basis of manifestly failing to protect their civilian populations, leaders will respond more quickly to international concerns and the concerns of their least protected populations.