

**IGNORING THE LESSONS OF THE PAST: THE CRISIS IN  
DARFUR AND THE CASE FOR HUMANITARIAN  
INTERVENTION**

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[L]et us, by what we do in one single minute, send a  
message – a message of remorse for the past, resolve to  
prevent such a tragedy from ever happening again – and  
let’s make it resound for years to come.<sup>1</sup>

International Day of Reflection on the Genocide in Rwanda  
April 7, 2004

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1. U.N. Secretary-General Kofi Annan, International Day of Reflection on the Genocide in Rwanda (Apr. 7, 2004).

## I. INTRODUCTION

On January 9, 2005, the Islamic government of Sudan signed a peace agreement with a mostly Christian and animist rebel group in the south that called for an end to one of the world's longest running civil wars.<sup>2</sup> Since 1983, nearly two million people have died from starvation, disease and violence in Sudan and more than four million have been forced to leave their homes and villages.<sup>3</sup> Much of the violence was caused by the Arab-dominated government in Khartoum who orchestrated a campaign of mass murder, rape, and other war crimes against rebel groups in the southern and western portions of the country.<sup>4</sup> As a result of the peace deal, government and rebel forces are expected to put down their arms and allow refugees to return to their homes in the south.<sup>5</sup> However, there are still more than a million refugees in the western Darfur region of the country who are not part of the peace deal and who remain vulnerable to attacks.

A recent report authorized by the United Nations (UN) Security Council and produced for the UN Secretary-General by the International Commission of Inquiry in Darfur, details the atrocities that have been committed by the Sudanese military and the Jingaweit militia (the "Janjaweed") against civilians in Darfur.<sup>6</sup> Over the past two years, nearly 300,000 people in Darfur have been killed and close to two million have been forcibly expelled from the region. The Commission found that government forces and the Janjaweed conducted "indiscriminate attacks" against civilians throughout Darfur, including murder, rape and torture.<sup>7</sup> According to the report, "[t]hese acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity."<sup>8</sup> The Commission concluded that though the Government of Sudan has not pursued a policy of genocide in Darfur, crimes against humanity and war crimes have

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2. Marc Lacey, *Sudan and Southern Rebels Sign Pact to End Civil War*, N.Y. TIMES, Jan. 1, 2005, at A3.

3. *Id.*

4. *Id.*

5. *See id.* According to the United Nations, nearly 600,000 refugees and internally displaced people have returned to southern Sudan, and there is also evidence that the government in Khartoum has evicted southerners from northern camps, forcing them to go home. Guy Dinmore & El Fasher, *Zoellick Looks to Sudan's South for Blueprint to End Darfur's Conflict*, FIN. TIMES, Apr. 16, 2005, at 7.

6. *See* Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Jan. 25, 2005, available at [http://www.ohchr.org/english/docs/darfur\\_report.doc](http://www.ohchr.org/english/docs/darfur_report.doc) [hereinafter *Commission Report*].

7. *Id.* at 3.

8. *Id.*

been committed that “may be no less serious and heinous than genocide.”<sup>9</sup>

The international community has done little to stop the violence in Darfur. The Security Council has condemned the violence and handed over the names of suspected war crimes suspects to the chief prosecutor of the International Criminal Court, but no collective military action has been authorized to prevent violence and protect civilians. By refusing to authorize the use of force in Darfur, the Security Council has failed to live up to its obligations under international law. This failure is inconsistent with the pattern of humanitarian interventions supported by the UN during the 1990s and its moral commitment to ensure that the mass slaughter of civilians evident in Rwanda and Kosovo, where the UN failed to respond, never happens again.

It is true that the UN’s role in protecting human rights is a delicate one. The decision to violate the national sovereignty of a nation to protect basic human rights is a controversial issue in international law. The credibility of international law and the UN hinges on the willingness of nations to respect the sovereignty of all nations and the principle of nonintervention enshrined in Article 2 of the UN Charter.<sup>10</sup> This deference to national sovereignty is crucial to maintaining international support for the UN and transnational cooperation in other areas. At the same time, the UN Charter calls upon all Members to promote “universal respect for, and observance of, human rights” and to take action to achieve this purpose when necessary.<sup>11</sup> The humanitarian crisis in Darfur has called into question the importance of these principles. Should the international community intervene in Darfur to prevent human rights violations against civilians? Would infringing upon Sudan’s national sovereignty to protect civilians violate international law? Is the situation in Darfur a case for collective humanitarian intervention with or without Security Council approval under international law?

The purpose of this article is to examine the Darfur crisis and the legal basis for humanitarian intervention under international law. Specifically, this article will focus on the UN’s refusal to authorize collective military intervention in Darfur despite evidence of mass killing, rape, and torture, among other war crimes, by Sudanese forces and argue that the moral and legal imperative to intervene outweighs the political concern for

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9. *Id.* at 4.

10. *See* U.N. Charter, art. 2, para. 7.

11. *Id.* arts. 55(e), 56.

national sovereignty under the UN Charter. Part II will discuss the principles of national sovereignty and nonintervention incorporated in Article 2(7) of the UN Charter and the rare instances in which violating these principles can be justified under international law. Part III will examine the origins of the doctrine of humanitarian intervention and trace the application of this doctrine to justify military interventions to protect human rights during the Cold War period. Part IV will examine the major humanitarian crises of the post-Cold War period and show how the Security Council has become more proactive in authorizing the use of force to prevent governments from abusing their own people. Part V will discuss the current crisis in Darfur and explain how the UN has failed to live up to its legal obligations by refusing to authorize the use of force to prevent grave violations of human rights in this ongoing conflict. The 2005 Commission Report provides a strong case for humanitarian intervention in Darfur, even though there was no finding of genocide. The UN's failure to heed the lessons of the past and do more to prevent the violence is a major setback for human rights and, specifically, the doctrine of humanitarian intervention.

## II. NATIONAL SOVEREIGNTY AND NONINTERVENTION IN INTERNATIONAL LAW

### A. *The Origins of National Sovereignty and the Principle of Nonintervention*

The origins of national sovereignty date back to the Treaty of Westphalia in 1648.<sup>12</sup> At that time, a law of nations was forming out of the Grotian idea that states, like people, are basically rational entities capable of cooperating to achieve common goals under a system of international rules.<sup>13</sup> State sovereignty – the idea that states have exclusive control within their own borders – became the cornerstone of the European state system as each state recognized the other's right to govern all matters within its territorial jurisdiction.<sup>14</sup> The eventual convergence of the Westphalian and Grotian ideas of national sovereignty and the rule of law helped to establish the collective diplomacy of the

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12. KAREN A. MINGST & MARGARET P. KARNS, *THE UNITED NATIONS IN THE POST-COLD WAR ERA* 17 (George A. Lopez ed., 2000).

13. *See id.* at 16-17.

14. *Id.* at 17. Each state possesses plenary power over persons, territory and property within its borders.

Concert of Europe in 1815,<sup>15</sup> the legal mechanisms of the Hague system<sup>16</sup> and the principles of universality and equal treatment under the League of Nations Covenant and UN Charter.

Today, the idea of national sovereignty is well-established in international law. Professor Branimir Jankovic, of the Center for International Studies at the University of Belgrade, describes sovereignty as follows: “The sovereignty of a state means today its independence from external intervention. This is the supreme authority inherent in every independent state, limited only by the universally adopted and currently valid rules of international law.”<sup>17</sup> Black’s Law Dictionary defines “sovereignty” as “the supreme, absolute, and uncontrollable power by which any independent state is governed; . . . the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.”<sup>18</sup> In essence, a state possesses the exclusive right to the use of its territory and to exclude other states from interfering in its affairs without its consent.

Underpinning the concept of national sovereignty is the principle of nonintervention. Nonintervention “obliges other states . . . not to intervene in matters within the internal or domestic jurisdiction of a sovereign state.”<sup>19</sup> This principle is considered customary international law and is codified in a number of treaties.<sup>20</sup> Following World War I, the ideas of sovereignty and nonintervention were formalized in Article 10 of the Covenant of the League of Nations. Under Article 10, the Members of the League agreed to “respect and preserve as against external aggression the territorial integrity and existing political independence of all Members . . . .”<sup>21</sup> This agreement to prohibit

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15. Under the Concert of Europe, or Concert System, the major European powers came together in multilateral meetings to settle problems and coordinate actions. The European powers met more than thirty times between 1815 and 1879 and introduced some important practices, including multilateral consultation and collective diplomacy, which were later adopted by international organizations. *Id.* at 17-18.

16. The Hague Conferences of 1899 and 1907 led to the Convention for the Pacific Settlement of International Disputes and the Permanent Court of Arbitration, which still exists today. *Id.* at 18-19.

17. BRANIMIR M. JANKOVIC, *PUBLIC INTERNATIONAL LAW* (1983).

18. BLACK’S LAW DICTIONARY 1396 (6TH ED. 1990).

19. MINGST & KARNS, *Supra* note 12, AT 10.

20. See James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 9 (Lori F. Damrosch ed., 1993).

21. LEAGUE OF NATIONS COVENANT part. 10, June 28, 1919. In 1918, President Woodrow Wilson gave his famous Fourteen Points speech to the U.S. Congress, calling for “a general association of nations . . . formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small States alike.” F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* 20 (1952).

intervention in the affairs of other nations also was enshrined in the Kellogg Briand Pact of 1928, also known as the “Pact of Paris.”<sup>22</sup> The Pact of Paris sought to eliminate war as an instrument of national policy.<sup>23</sup>

The failure of the League of Nations to act decisively to counter acts of aggression during its existence undercut the legitimacy of international law and called into question the League’s ability to maintain international peace and security. Japan’s invasion of Manchuria in 1931,<sup>24</sup> Italy’s invasion of Ethiopia in 1935,<sup>25</sup> and Hitler’s annexation of Austria and Czechoslovakia in 1938<sup>26</sup> were potent reminders to the international community that covenants or pacts can only do so much to prevent aggression. Though the League could not prevent the outbreak of World War II, it still represented an important step in the development of international law and organizations. It laid the foundation for collective security and the incorporation of the principles of sovereignty and nonintervention in the UN Charter after the Second World War.

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22. See Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. 796, IV *Trenwith* 5130, 2 *Bevans* 732 (entered into force July 24, 1929).

23. *Id.*

24. China appealed to the League of Nations immediately after Japan invaded Manchuria in September 1931. The League delayed action while officials sailed to the Far East to investigate the invasion. In September of 1932, a report was issued recommending that Japan return Manchuria to China. Japan refused and withdrew from the League in protest. The League discussed sanctions but was powerless to act without U.S. involvement in the League and cooperation from the rest of the League’s members. See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 333-34 (1987); MARIUS B. JANSEN, *THE MAKING OF MODERN JAPAN* 584-85 (2000); R.H.P. MASON & J.G. CAIGER, *A HISTORY OF JAPAN* 334-37 (1997).

25. In 1934, Ethiopia (Abyssinia) was one of the few states not subject to European control. In December of 1934, a border war erupted between Ethiopia and Italian Somaliland which gave Benito Mussolini an excuse to intervene. The Italians invaded Ethiopia on Oct. 3, 1935. The Italo-Ethiopian War lasted nearly a year and resulted in Ethiopia’s subjection to Italian rule. Historically, Italy’s invasion of Ethiopia is seen as one of the crucial episodes that prepared the way for World War II. In addition to the Japanese invasion of Manchuria, the Italian invasion of Ethiopia demonstrated the ineffectiveness of the League of Nations when League efforts at collective security were not supported by the great powers. See KENNEDY, *supra* note 24, at 336; HARRY HEARDER, *ITALY: A SHORT HISTORY* 233-35 (2d ed. 2001).

26. On the morning of March 12, 1938, German troops entered Austria to assume power over the Austrian state. The next day, Hitler announced in Linz the legislation on the “Anschluss” (Annexation) of Austria into the German Reich. In the summer of 1938, Hitler demanded the Sudetenland from Czechoslovakian President Eduard Benes. Benes refused Hitler’s demands and asked Britain to intervene. But Prime Minister Neville Chamberlain sought to appease Hitler rather than stand up to Hitler’s demands. On March 15, 1939, German troops entered Prague and Czechoslovakia ceased to exist. See KENNEDY, *supra* note 24, at 338-39; IAN KERSHAW, *HITLER 1936-1945: NEMESIS* 64, 170-73 (2000).

*B. National Sovereignty and Nonintervention under the UN Charter*

Following the Second World War, the victorious allied powers were determined to create a permanent system of collective security. In view of the League's failure and the return to traditional balance of power politics in the 1930s, the framers of a new covenant sought to balance the goal of preserving state sovereignty with that of collective security. The UN Charter was established in 1945 to prevent states from using force against other states and to provide a legal framework for collective action when conflicts erupted.<sup>27</sup> The primary purposes of the UN are set forth in the Preamble to the Charter, which calls upon all peoples "to save succeeding generations from the scourge of war," to unite in maintaining international peace and security, and to promote social and economic progress as well as human rights for men and women of all nations large and small.<sup>28</sup>

The UN is first and foremost a club or league designed to protect the political integrity and territorial sovereignty of its individual member states. Article 2(1) of the Charter incorporates the principles of sovereignty, universality and equality, providing that the UN is based on "the sovereign equality of all its Members."<sup>29</sup> Sovereign equality is the basis for each member state having one vote in the General Assembly. Although the Charter accords special status to five of its Members – the United States, Russia, China, Great Britain and France – with respect to security,<sup>30</sup> the UN is still an instrument of its member states, directed and controlled by its Members, and created to serve the interests of its Members.<sup>31</sup>

Article 2(4) addresses aggression, stating that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>32</sup> The inclusion of "threat" to use force, in

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27. The UN was officially established on October 24, 1945. The UN Charter was drawn up by representatives from fifty countries in San Francisco from April through June 1945. The chief aim of the Charter is to succeed where the League of Nations failed; that is to maintain international peace and security through the means of collective security. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma ed., 1994).

28. U.N. Charter, preamble.

29. *Id.* art. 2, para. 1.

30. *Id.* art. 23, para. 1.

31. *Id.* art. 24, para. 1. Under Article 24(1), the Security Council has primary responsibility for maintaining international peace and security and the authority to act on behalf of all Members of the U.N. See *id.*

32. *Id.* art. 2, para. 4.

addition to the “actual” use of force, under Article 2(4) is an innovative feature of the Charter which broadens the League Covenant’s prohibition against external intervention in the affairs of other states. Article 2(3) further provides that Member States “shall settle their international disputes by peaceful means.”<sup>33</sup>

The Charter also prohibits Members from intervening in the internal affairs of other Members. Article 2(7) provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>34</sup>

The inclusion of Article 2(7) in the Charter was essential to gaining the support of nations, such as the United States, who were concerned about the loss of sovereignty and the emergence of a powerful transnational organization to oversee global security. The U.S. Senate refused to ratify the League of Nations Covenant due in part to its concern over the loss of sovereignty in security matters.<sup>35</sup> However, it is important to note that the reference to “enforcement measures under Chapter VII” at the end of Article 2(7) was included to provide the UN with some flexibility to intervene in the internal affairs of a Member State in certain circumstances.

Chapter VI of the Charter provides for the peaceful settlement of disputes among the member states. The Security Council, under Article 34, is authorized to “investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”<sup>36</sup> Since the creation of the Charter, the Security Council has relied on the authority granted to it under Chapter VI to facilitate the peaceful settlement of numerous international disputes.

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33. *Id.* art. 2, para. 3.

34. *Id.* art. 2, para. 7.

35. See JIM POWELL, WILSON’S WAR 152 (2005). Several senators feared that joining the League would compromise U.S. sovereignty and possibly draw the United States into future wars. See *id.*

36. U.N. Charter, art. 34.

Chapter VII of the Charter provides the enforcement authority for the UN to carry out its mission. Chapter VII permits the Security Council to take any measures necessary, including the use of force, to “maintain or restore international peace and security.”<sup>37</sup> Article 39 grants the Security Council discretion to determine when a breach, or threat to breach, of the peace occurs in international relations.<sup>38</sup> If a breach of the peace is determined to have occurred, the Security Council may authorize member states to impose sanctions under Article 41 or the use of force under Article 42 against a state.<sup>39</sup> In authorizing the use of force under Article 42, the Security Council may call upon all Members to furnish “armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.”<sup>40</sup> The Security Council also may call upon regional groups, such as the North Atlantic Treaty Organization (NATO) or the Organization of American States (OAS), to use force to maintain international peace and security under Article 42. Article 42 has been invoked on rare occasions in the Charter’s history, but increasingly since the end of the Cold War.<sup>41</sup>

The inherent right of self-defense is embodied in Article 51 of the Charter. Article 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>42</sup> The threshold for the right to use force in self-defense is the presence of an armed attack or a threat of immediate or imminent harm to the state. The latter is covered under the doctrine of “anticipatory self defense,” or in more modern parlance, the “pre-emptive strike”

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37. *Id.* art. 42.

38. *See id.* art. 39.

39. *See id.* arts. 41, 42.

40. *Id.* art. 43, para. 1.

41. Between 1945 and 1990, the Security Council authorized the use of force on three occasions: (1) the Korean War (resolution 83), (2) the 1961 Belgian intervention in the Congo (resolution 161), and (3) to enforce the 1966 oil embargo of Rhodesia (Resolution 221). U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/RES/83 (June 27, 1950); U.N. SCOR, 16th Sess., 942d mtg. at 2, U.N. Doc. S/RES/161 (Feb. 21, 1961) [hereinafter S.C. RES. 161]; U.N. SCOR, 21st Sess., 1277th mtg. at 5, U.N. Doc. S/RES/221 (April 9, 1966). After the Cold War ended, the Security Council authorized the use of force in Iraq, Somalia, Haiti, Yugoslavia, and east Timor, among other countries. U.N. SCOR, 45th Sess., 2963d mtg. at 27-28, U.N. Doc. S/RES/678 (Nov. 29, 1990); U.N. SCOR, 47th Sess., 3145th mtg. at 2, U.N. Doc. S/RES/794 (Dec. 3, 1992); U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (July 31, 1994); U.N. SCOR 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/770 (Aug. 13, 1992); S.C. RES. 1264, U.N. SCOR 54th Sess., 4045th mtg. at 2, U.N. Doc. S/RES/1264 (1999).

42. U.N. Charter, art. 51.

doctrine.<sup>43</sup> The International Court of Justice has stated that a state may only use "self-defence . . . measures which are proportional to the armed attack and necessary to respond to it."<sup>44</sup> This exception to the prohibition against the use of force is well-established under customary international law.

### III. HUMANITARIAN INTERVENTION DURING THE COLD WAR

Two areas of UN law have emerged since the founding of the Charter to deal with the management of interstate behavior: (1) the law of peace and security and (2) the law of human rights.<sup>45</sup> The former, according to Oscar Schachter, has been the "raison d'être of the UN Charter" from its birth.<sup>46</sup> Maintaining international peace and security was, and still is, the primary purpose of the United Nations. The law of human rights was not a major focus in the early years of the UN Charter: however it has emerged in importance over the years alongside the global human rights movement. Since 1945, the international human rights movement, which includes NGOs, corporations and individuals, has influenced governments to adopt human rights norms and conventions and to recognize the obligation to defend human rights.<sup>47</sup> Today, the idea that governments should protect basic human rights, an idea that knows no political or territorial boundaries, challenges certain long-standing principles of international law, particularly the notions of national sovereignty and nonintervention.

#### A. *The Role of the UN in Promoting Human Rights*

The legal basis for collective action in defense of basic human rights can be found in the human rights clauses of the UN Charter, the 1948 Universal Declaration of Human Rights (the "Declaration")<sup>48</sup> and the 1948 Convention on the Prevention and

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43. In 1842, the conditions required to trigger the right of "anticipatory" self-defense were set forth by U.S. Secretary of State Daniel Webster in a diplomatic note to Lord Ashburton of Britain following the infamous Caroline incident. Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906). Webster wrote that self-defense "must be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." *Id.*

44. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94 (June 27).

45. Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 17 (1994).

46. *Id.* at 16-23.

47. MINGST & KARNS, *supra* note 12, at 159.

48. See U.N. GAOR, 3d Sess., 67th plen. mtg. U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter *Universal Declaration*].

Punishment of the Crime of Genocide (the “Genocide Convention”),<sup>49</sup> among other sources of international law. The Charter makes reference to the phrase “human rights” in several places, indicating its salience in the post-war international legal framework.<sup>50</sup> The Preamble to the Charter calls upon all Members to reaffirm their “faith in fundamental human rights,”<sup>51</sup> and Article 1(3) highlights the importance of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>52</sup> Article 55(c) also provides that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>53</sup> This article is followed by Article 56 which states that Members “pledge themselves to take joint and separate action” to achieve that respect.<sup>54</sup>

Although the term “human rights” is not specifically defined in the Charter, Members are expected to promote such human rights norms that are established by the Commission on Human Rights and widely accepted by the international community.<sup>55</sup> The Commission on Human Rights is responsible for drafting the Universal Declaration on Human Rights (the “Declaration”), which was adopted by the UN General Assembly in 1948.<sup>56</sup> The Preamble to the Declaration states that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”<sup>57</sup> The Declaration enumerates several basic rights, including “the right to life, liberty and security of person” (Art. 3),<sup>58</sup> “the right to recognition . . . as a person before the law” (Art. 6),<sup>59</sup> the right to “full equality” and to a “fair and public hearing” under the law (Art. 10),<sup>60</sup> the “right to freedom of movement” and to leave and return to one’s country

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49. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

50. Mingst & Karns point out that the *League of Nations Covenant* made little mention of human rights other than a provision for the protection of “minorities, women, children, and dependent peoples.” See MINGST & KARNS, *supra* note 12, at 159.

51. U.N. Charter, preamble.

52. *Id.* art. 1, para. 3.

53. *Id.* art. 55, para. c.

54. *Id.* art. 56.

55. See MINGST & KARNS, *supra* note 12, at 160.

56. See *id.* at 160-61.

57. *Universal Declaration*, *supra* note 48, preamble.

58. *Id.* art. 3.

59. *Id.* art. 6.

60. *Id.* art. 10.

(Art. 13),<sup>61</sup> “the right to freedom of thought, conscience and religion” (Art. 18),<sup>62</sup> among other affirmative rights. The Declaration also guards against numerous forms of government abuse, including degrading or inhumane treatment (Art. 5),<sup>63</sup> discrimination (Art. 7),<sup>64</sup> arbitrary arrest and detention (Art. 9),<sup>65</sup> arbitrary interference with or attacks on one’s privacy, family, home or reputation (Art. 12),<sup>66</sup> and “destruction of any of the rights and freedoms set forth” in the Declaration (Art. 30).<sup>67</sup> These rights and guarantees are not binding on signatories to the Declaration, but do serve as principles or “aspirations” for governments to respect and promote.

The Genocide Convention is the result of UN efforts to prohibit the worst form of human rights violations and establish beyond a doubt that genocide is a matter of international concern. The Convention characterizes genocide as an international crime and requires a number of specific objective and subjective elements.<sup>68</sup> The objective or *actus reas* elements are twofold. First, the act or offense must take the form of (a) killing; (b) “causing serious bodily or mental harm;” (c) “inflicting on the group conditions of life calculated to bring about its physical destruction;” (d) “[i]mposing measures intended to prevent births within the group;” or (e) “[f]orcibly transferring children of the group to another group.”<sup>69</sup> The second objective element provides that the above acts must be directed or targeted at “a national, ethnical, racial or religious group.”<sup>70</sup>

The subjective or *mens rea* elements of genocide also contain two prongs. First, there must be a criminal intent required for the underlying offense (killing, causing serious bodily or mental harm, etc.).<sup>71</sup> Second, there must be the “intent to destroy, in whole or in part,” the group as such.<sup>72</sup> The intent to destroy the group “in part” requires the intention to destroy a considerable number of individuals or a substantial part, but not necessarily an important part of the group.<sup>73</sup> Examples of genocide in the historical

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61. *Id.* art. 13

62. *Id.* art. 18.

63. *Id.* art. 5.

64. *Id.* art. 7.

65. *Id.* art. 9.

66. *Id.* art. 12.

67. *Id.* art. 30.

68. *Genocide Convention*, *supra* note 49, art. 1.

69. *Id.* art. 2.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

literature include the Nazi intent to destroy all the Jews in Europe during the Second World War and the Turkish Government's attempt to destroy all the Armenians in Turkey during World War I.<sup>74</sup>

The obligation imposed upon Member States in the UN Charter to respect human rights and "take joint and separate action" to achieve that respect<sup>75</sup> often comes into conflict with the Charter's affirmation of the principles of sovereignty and nonintervention contained in Article 2(7). Not all states recognize the same human rights norms, and many are unwilling to have their human rights records investigated.<sup>76</sup> For example, the principle of equal treatment of women before the law is not recognized in many Islamic countries, but it is enshrined in Article 55(c) of the Charter.<sup>77</sup> Does this mean that western nations can "take joint and separate action" pursuant to Article 56 to achieve respect for this principle by intervening in the internal affairs of Islamic countries? The framers of the Charter did not envision Members interfering in the internal affairs of other Members to prevent human rights violations short of genocide. The principles of sovereignty and nonintervention were deemed to be inviolable and essential to encourage state support for the UN system. However, as human rights have emerged as a major issue in world politics over the years, international law has evolved to accommodate exceptions to the principles of national sovereignty and nonintervention in international law. The next section describes the evolution of one of these exceptions, the doctrine of humanitarian intervention, and the idea that states should not be allowed to hide behind the veil of sovereignty when committing grave violations of human rights.

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74. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2000). During World War II, more than six million Jews and Romans were murdered by the Nazis in an attempt to wipe out the Jewish race and other minorities in Europe. In 1915, 1.5 million Armenians were slaughtered by the Ottoman Turks in what western governments regard as one of the worst "genocides" in history. The Turkish Government to this day denies the charge of "genocide" as western "spin" and argues instead that the death toll was far less than 1.5 million and the result of "civil war, starvation and deportation." Vincent Boland, *Turkey Challenges 'Genocide Fraud'*, FIN. TIMES, Apr. 22, 2005, at 8.

75. U.N. Charter, art. 56.

76. Many governments in developing countries fear major power interference in their affairs and therefore oppose arguments tending to legitimize intervention. See John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 290 (2003).

77. U.N. Charter, art. 55(c).

B. *The Doctrine of Humanitarian Intervention and the Cold War*

Humanitarian intervention involves the unilateral or collective use of military force across national borders to protect individuals from violence or the threat of imminent harm. The express purposes of humanitarian intervention include (1) rescuing the population at large or (2) rescuing hostages or those trapped in an internal conflict who possess the nationality of the intervening state. There is no specific provision in the Charter authorizing a state to intervene in the internal affairs of another state to prevent a humanitarian tragedy. However, it is arguable that a right to intervene in the internal affairs of a state to prevent grave human rights violations now exists under customary international law. The road to recognition of such a right under customary international law has been controversial and paved with the blood of millions of innocent civilians.

1. *The 1961 Belgian Action in the Congo*

The first humanitarian intervention involving the UN did not occur until more than fifteen years after the creation of the Charter. In 1961, the Security Council authorized Belgium to intervene militarily in the Republic of the Congo to protect Belgian nationals from the Congolese army. The former Belgian colony had just won its independence and the Congolese army had been attacking Belgian civilians and looting their homes and businesses. A year earlier, the Security Council authorized the UN Secretary-General “to provide the [Congolese] Government with such military assistance” to help remove Belgian troops from Congolese soil.<sup>78</sup> By 1961, however, internal violence in the Congo had reached an alarming level, and the Security Council approved Resolution 161 authorizing the United Nations to take all appropriate measures, including “the use of force,” to restore control over the Congolese army and stem the “systematic violations of human rights” in the Congo.<sup>79</sup> The Congolese Government claimed that the Belgian intervention constituted an act of aggression and a violation of its national sovereignty.<sup>80</sup>

The Belgian intervention was justified under Article 51 – the self-defense doctrine – of the Charter.<sup>81</sup> The purpose of the

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78. U.N. SCOR, 15th Sess., 873d mtg. at 5, U.N. Doc. S/RES/143 (July 14, 1960).

79. S.C. RES. 161, *supra* note 42.

80. See Michael J. Mattler, *The Distinction Between Civil Wars and International Wars and Its Legal Implications*, 26 N.Y.U. J. INT'L L. & POL. 655, 661 (1994).

81. U.N. Charter, art. 51.

intervention was to rescue Belgian nationals from a volatile political situation and the possibility of being killed or injured.<sup>82</sup> Though the mission was never defined as a “humanitarian intervention,” the Belgian government interpreted the doctrine of self-defense rather loosely to include the protection of nationals who were located within the territorial jurisdiction of the Congo.<sup>83</sup> This was the first time since the adoption of the Charter that the Security Council authorized the use of military force to intervene in the internal affairs of a member state to prevent serious human rights violations.<sup>84</sup>

Other than the 1961 Belgian action in the Congo, there were no further actions taken by the Security Council under its Chapter VII enforcement powers to protect human rights during the Cold War period. The veto dilemma pitted the two most powerful Members of the Security Council against one another in a way that severely limited the Council’s ability to respond to humanitarian crises.<sup>85</sup> Thus, from a legal standpoint, the Belgian intervention in the Congo was not a violation of the Congo’s sovereignty because it took place with the Security Council’s approval and in compliance with the Charter’s provision for self-defense. Subsequent humanitarian interventions would not have the blessing of the Security Council until the wall separating East and West was dismantled.

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82. See S.C. RES. 161, *supra* note 42.79.

83. See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 41-42 (1991) [hereinafter Henkin, *Use of Force*].

84. Prior to the Belgian intervention in the Congo, the Security Council had only authorized the use of force on one previous occasion. In 1950, the USSR temporarily boycotted Security Council meetings over the issue of the People’s Republic of China’s (mainland China’s) failed bid to occupy the “China” seat on the Council rather than the Republic of China (the Nationalist government that had fled to Formosa in the wake of Mao’s successful communist revolution on the mainland) which then had the seat. The historic absence of the USSR from the Security Council allowed the Council to vote in favor of the use of force to counter North Korea’s invasion of South Korea that same year under the direction of a U.S. military command. The Security Council recommended that Members “furnish such assistance as may be necessary to repel the armed attack” from North Korea. This more than likely would not have happened if the Soviet representative had been present for the vote. See MICHAEL HICKEY, *THE KOREAN WAR: THE WEST CONFRONTS OF COMMUNISM* 38 (1999).

85. The Security Council incorporates both permanent and nonpermanent members. U.N. Charter art. 23. The five permanent members – the United States, Great Britain, France, Russia, and the Peoples Republic of China (which replaced the Republic of China in 1971) – have the most influence since each possesses veto power. See *id.* Any one of these five could block Security Council action by exercising its right to veto a proposed action. See *id.* art. 27. The ten nonpermanent members, originally six in number but expanded to ten in 1965, do not have veto power and may not serve successive terms. See *id.* arts. 23, 27.

## 2. *The 1971 Indian Action in East Pakistan*

In December of 1971, the East Pakistani Army slaughtered thousands of civilians in Bangladesh during a government crackdown. Nearly a million Pakistanis died or were forced to flee their homes during the crisis.<sup>86</sup> The Security Council failed to authorize military intervention to prevent the crisis. The Indian army eventually intervened to prevent further killings and to stem the flow of refugees across its border with East Pakistan. During the Indian invasion of East Pakistan, no Pakistani territory was taken nor was the Government of East Pakistan removed from power.<sup>87</sup> The International Commission of Jurists concluded that India's actions were justified under the doctrine of humanitarian intervention.<sup>88</sup> The Indian invasion of East Pakistan was the first unilateral military intervention on behalf of non-nationals since the birth of the Charter.

## 3. *The 1976 "Entebbe Incident" in Uganda*

The first unilateral military intervention to protect one's own nationals in the absence of Security Council approval occurred in 1976 and involved the State of Israel. In July of 1976, an Air France commercial airliner carrying Israeli passengers was hijacked and forced to land at Entebbe Airport in Uganda.<sup>89</sup> The Israeli Government, having failed to obtain the required consent from the government of Idi Amin to intervene, sent Israeli special forces to Uganda in a clandestine effort to rescue the hostages.<sup>90</sup> Israeli special forces flew all the way to Entebbe Airport under Ugandan radar, where they forcibly boarded the hijacked plane and rescued the hostages.<sup>91</sup> During the rescue, three hostages died

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86. See generally Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 286 (1994) (reviewing the doctrine of humanitarian intervention using the events of Bangladesh, Cambodia and Uganda as case studies).

87. See *id.* at 288.

88. See RICHARD B. LILICH & FRANK C. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW & POLICY* 495 (1979) (concluding that in view of UN reluctance to become involved in the Pakistani violence and the fact that Indian military involvement was limited in scope, resulting in the acquisition of no territory, the invasion did appear to be underscored primarily by a humanitarian purpose). The Indian intervention was also justified under the doctrine of self-defense, given the fact that Pakistan had launched a preemptive strike against Indian airfields. See *id.* at 486, 495.

89. See Eleanor C. McDowell, *Introductory Note, United Nations: Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport*, 15 I.L.M. 1224, 1224 (1976).

90. See *id.* at 1224-29.

91. See *id.* at 1224.

in the brief exchange of fire aboard the plane.<sup>92</sup> The Israeli rescue operation was a success, but it came at great cost to those civilians who lost their lives.

Israel's unilateral military intervention at Entebbe was a clear violation of Uganda's sovereignty and the principle of nonintervention under Article 2(7) of the Charter. The Israeli Government claimed that the inherent right of self-defense embodied in Article 51 of the Charter extended to the protection of nationals being held hostage within another country's borders.<sup>93</sup> There is no mentioning in the Charter, however, as to whether Article 51 includes the protection of one's own nationals in a hostage situation.<sup>94</sup> In what would later become known as the "Entebbe Principle," the Israeli Government maintained that there may be a limited right of self-defense in hostage situations where the territorial state cannot or will not act to save the hostages.<sup>95</sup> This exception to the principle of nonintervention is recognized today under customary international law.

#### 4. *The Cambodian Genocide and Vietnam's Intervention*

The Vietnamese invasion of Cambodia in 1978 was another example of unilateral humanitarian intervention in the absence of Security Council approval. In the late-1970s, the Khmer Rouge, led by Pol Pot, orchestrated a campaign of genocide against the Cambodian people. More than a million people died of starvation, disease or execution.<sup>96</sup> The Cambodian genocide was one of the worst episodes of systematic mass murder in human history. Similar to the crisis in East Pakistan, the Security Council failed to act to prevent the killing of innocent civilians. In response to the violence, the Vietnamese Army invaded Cambodia and overthrew Pol Pot and the Khmer Rouge in 1978.<sup>97</sup> Vietnam installed a puppet government that remained in power for several years.

Vietnam's invasion of Cambodia was controversial at the time. The United States opposed the invasion as a violation of Cambodia's sovereignty.<sup>98</sup> Other nations were willing to overlook

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92. *See id.*

93. *See id.* at 1229.

94. *See* Henkin, *Use of Force*, *supra* note 83, at 39.

95. *See id.* at 41-42.

96. Seth Mydans, *Skulls Haunt Cambodia, Demanding Belated Justice*, N.Y. TIMES, Mar. 20, 2005, at A4. According to the most recent statistics, 1.7 million people died during the Khmer Rouge era, from 1975-1979. *Id.*

97. Burmester, *supra* note 86, at 293.

98. *See* Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 597 n. 24 (2003). "Most Americans greeted the news that Vietnam

the obvious violations of Articles 2(4) and 2(7) of the UN Charter on the grounds that the invasion saved the lives of countless civilians who were headed for the Khmer Rouge “Killing Fields.” Andrew Young, the U.S. Ambassador to the UN, described the uncertainty over the issue at the time:

I almost always think it’s always wrong for a country to transgress the borders of another country, but in the case of Cambodia I’m not terribly upset .... It is a country that has killed so many of its own people, I don’t know if any American can have a clear opinion of it .... It’s such a terribly ambiguous moral situation.<sup>99</sup>

In the end, the Vietnamese invasion of Cambodia was not viewed by the international community as a violation of Cambodia’s national sovereignty because of the numerous atrocities committed by the Khmer Rouge. This is evidenced by the fact that several Security Council resolutions denouncing the invasion were never implemented.<sup>100</sup> Even though the Khmer Rouge eventually returned to power in Cambodia, the Vietnamese effort to halt the genocide in the absence of Security Council approval was a progressive step in the evolution of humanitarian intervention as an exception to the principle of nonintervention.<sup>101</sup>

##### 5. *The 1979 Tanzanian Overthrow of Ugandan Leader Idi Amin*

Another milestone in the development of humanitarian intervention was the Tanzanian invasion of Uganda in 1979. At the time, Uganda had been ruled by Idi Amin, a ruthless dictator who ordered the systematic slaughter of more than 300,000 people during his seven year reign of terror.<sup>102</sup> Again, the Security Council failed to authorize the use of force to prevent mass

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had invaded Cambodia with distress, hearing only that an enemy of America had invaded another country.” SAMANTHA POWER, *A PROBLEM FROM HELL, AMERICA AND THE AGE OF GENOCIDE* 146 (2002).

99. POWER, *supra* note 98, at 146; *see also* Naomi Kaplan, *A Failure of Perspective: Moral Assumptions and Genocide*, 23 B.C. THIRD WORLD L.J. 359, 360 n.9 (2003).

100. *See Democratic Kampuchea and Vietnam*, 1979 ANN. REV. U.N. AFF. 72-73 (citing U.N. Docs. S/13022, S/13027, and S/13162).

101. In 2003, after years of negotiations and delays, the UN agreed to establish an international tribunal in Cambodia to try members of the Khmer Rouge responsible for the genocide. Pol Pot died in 1998, but the skulls remain today as tangible proof of the mass killings. *See Mydans, supra* note 96.

102. *See Burmester, supra* note 86, at 289-90.

murder.<sup>103</sup> However, the Government of Tanzania ordered its troops to intervene in Uganda to prevent further bloodshed and to drive Amin from power.<sup>104</sup> During the intervention, Tanzanian forces forcibly removed Amin from power, but caused only limited destruction in Uganda.<sup>105</sup> Tanzania's motives were primarily humanitarian in nature. With the overthrow of Amin, the Tanzanian intervention further legitimized the use of force to protect non-nationals from abusive regimes.

#### 6. *The U.S. Invasions of Grenada and Panama*

The decision to unilaterally intervene in the internal affairs of a sovereign state to prevent serious human rights violations was taken by the United States on two occasions during the Cold War period. In 1983, a multinational invasion was launched against the People's Revolutionary Army ("PRA") of Grenada to protect U.S. citizens from political violence.<sup>106</sup> The PRA had imposed a curfew on the island and warned that "[a]nyone who seeks to demonstrate or disturb the peace . . . will be shot."<sup>107</sup> The United States responded by sending in troops without UN approval. The Reagan Administration reasoned that it was legal to intervene in the internal affairs of another state to protect American citizens from the imminent threat of harm.<sup>108</sup> The international community, however, condemned the U.S. invasion as a blatant violation of Grenada's sovereignty and Articles 2(4) and 2(7) of the UN Charter.<sup>109</sup>

In 1989, the United States invaded Panama to capture Manuel Noriega, a brutal dictator and drug trafficker who had taken control of the country by overthrowing the democratically-elected government of President Guillermo Endara. Noriega declared war on U.S. forces in Panama and was responsible for numerous violent acts against American troops stationed in the Panama

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103. *See id.* at 290.

104. *Id.*

105. *See id.* at 290-91.

106. *See* Christopher C. Joyner, *The United States Action in Grenada, Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 131-33 (1984).

107. Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 776 (1993) (quoting Mary Grieves et al., *The Grenada Document: The Bitter, Epic Struggle for the Isle of Spice*, NATION (Barbados), Feb. 1984, at 25).

108. *See* Kenneth Regensberg, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agendas of Western Europe and the United States*, 29 CORNELL INT'L L.J. 225, 248-50 (documenting the invasions of Panama and Grenada).

109. *See* Joyner, *supra* note 106, at 141. *See also* Burns H. Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES. INT'L L. 295, 296 (1987) (the invasion of Grenada probably violated international law).

Canal Zone.<sup>110</sup> The alleged purpose of the U.S. invasion was to protect American military personnel and their families and defend the integrity of U.S. rights under the Panama Canal Treaties.<sup>111</sup> The U.S. Government claimed that it had a right to intervene militarily in Panama under Article 51 of the UN Charter.<sup>112</sup> Professor Louis Henkin argued that the claim of self-defense used by the U.S. Government to justify its military intervention in Panama was misplaced because Article 51 of the Charter requires that an armed attack occur against the intervening state.<sup>113</sup>

International legal experts have long debated the question of whether a state can use force to intervene in the internal affairs of another state to protect the intervening state's nationals. The Belgian action in the Congo, the "Entebbe Incident" in Uganda, and the U.S. invasions of Grenada and Panama were based on the theory that a state has a right under the self-defense doctrine to protect its nationals from imminent harm. However, Oxford legal scholar Ian Brownlie wrote that "intervention to protect nationals has no legal basis under international law."<sup>114</sup> To permit a state to intervene militarily in another state's internal affairs under the pretext of protecting one's own nationals would create great uncertainty in the law and likely dismantle the pillars, or those core principles of nonintervention and national sovereignty, upon which the UN Charter stands. Perhaps recognizing this problem, neither Belgium, Israel, nor the United States claimed the doctrine of humanitarian intervention to justify acting on behalf of their own nationals.

However, the Vietnamese invasion of Cambodia in 1978 and the Tanzanian invasion of Uganda in 1979 are instructive in examining the emergence of the doctrine of humanitarian intervention in international law. These interventions, unlike the interventions to protect one's own nationals, involved the

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110. See Regensberg, *supra* note 108, at 250-51 (reporting that forces under Noriega shot and killed one American serviceman, wounded another, brutally beat a third, and threatened sexual abuse against the wife of another serviceman during a brutal interrogation).

111. See Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 536, 546 (1990).

112. See *id.* at 548.

113. Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 305-06 (1991). Professor Henkin also points out that the ousted President of Panama Guillermo Endara welcomed or consented to the American military action in Panama and, therefore, to the extent that the democratically-elected government of Panama was, in fact, the legitimate government of Panama under international law, such consent would have made the question of whether the U.S. military intervention violated Panama's sovereignty a moot point. *Id.* at 294.

114. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 298-301 (1963).

protection of countless non-nationals who were threatened by regimes engaged in murder, rape, torture, pillaging and enforced displacement, on a widespread and systematic basis. By the end of Pol Pot's reign, more than a million people had been murdered in Cambodia.<sup>115</sup> Idi Amin, too, had orchestrated the slaughter of more than 300,000 people.<sup>116</sup> The intentional, systematic murder of so many people was a stark reminder of the Holocaust in Europe and the Nanjing massacre in China during World War II.<sup>117</sup> The brutal dictators in Cambodia and Uganda attempted to hide behind the principles of national sovereignty and nonintervention enshrined in the UN Charter to avoid being held accountable for their actions. But they underestimated the political will of some states to risk violating the Charter to protect human rights.

#### IV. HUMANITARIAN INTERVENTION AND THE POST-COLD WAR ERA

The end of the Cold War marked an important turning point for human rights around the world. The number of free nations doubled and individuals who were once treated as pawns in an ideological chess game were now allowed to vote and determine their own destinies. Moreover, the UN gained legitimacy and increased its role in conflict management. As a consequence, collective military interventions on behalf of human rights were more common during the 1990s, and the UN Security Council was less inhibited in authorizing the use of force to prevent humanitarian crises. In several instances, the Security Council authorized the use of force to prevent brutal dictators or military regimes from committing violence against their own people. However, not all humanitarian interventions since the end of the Cold War have been approved by the Security Council. This chapter examines the increasing legitimacy of humanitarian intervention over the past fifteen years and the simultaneous erosion of the principles of national sovereignty and nonintervention in international law.

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115. Mydans, *supra* note 96, at 4.

116. Burmester, *supra* note 86, at 289-90.

117. In December 1937, the Japanese Imperial Army conquered Nanjing. The Japanese then massacred more than three hundred thousand people, mostly civilians and POWs. "Over twenty thousand cases of rape were reported. Many of the victims were gang raped and then killed." Several thousand more rape victims were sent to army brothels on the front lines (the so-called "comfort stations"). *WWW Memorial Hall of the Victims in the Nanjing Massacre*, at <http://www.arts.cuhk.edu.hk/NanjingMassacre/NM.html>.

### A. UN Authorized Humanitarian Intervention

Since the end of the Cold War, there have been four episodes where the Security Council has authorized the use of force to intervene in the internal affairs of a sovereign nation without that nation's consent. Of those four episodes, only two have been for purely humanitarian objectives, while the other two have been motivated also by a desire to restore international peace and security under Chapter VII of the UN Charter.

#### 1. UN Intervention in Iraq

In 1990, the Security Council passed Resolution 678 authorizing the collective use of force against Iraq in response to Iraq's invasion of Kuwait.<sup>118</sup> The Security Council determined that Iraq's invasion of Kuwait violated Article 2(4) of the UN Charter,<sup>119</sup> which prohibits the "threat or use of force against the territorial integrity or political independence" of any state.<sup>120</sup> The decision to use force against Iraq was taken on the basis of collective self-defense pursuant to Articles 39 and 40 of the Charter.<sup>121</sup> A coalition of nations led by the United States forced the Iraqi army out of Kuwait, but they refused to remove the Iraqi regime from power. The passage of Resolution 678 was the first time that the Security Council had authorized the use of force against a member state in twenty-five years.

Immediately following the Gulf War, coalition forces, led by the United States, sought the legal authority from the UN to protect the Kurdish minority in the northern part of the country who had suffered under the brutal regime of Saddam Hussein. Security Council Resolution 688 authorized the United States and its allies to use force within Iraq to protect the Kurds.<sup>122</sup> The Security Council claimed to act on the basis of international security concerns, describing the resulting flood of Kurdish refugees into Turkey and Iran as a threat to international peace and security in the region.<sup>123</sup> Referring to Article 39 of the Charter, the Security Council called for measures to prevent further breaches of the

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118. See U.N. SCOR, 45th Sess., 2963d mtg. at 27-28, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing member states to use all necessary means to of force against Iraq as a result of the invasion of Kuwait).

119. See *id.*

120. U.N. Charter art. 2, para. 4.

121. U.N. SCOR, 45th Sess., 2932d mtg. at 19, U.N. Doc. S/RES/660 (Aug. 2, 1990).

122. See U.N. SCOR, 46th Sess., 2982d mtg. at 31-32, U.N. Doc. S/RES/688 (Apr. 5, 1991).

123. *Id.*

peace by Iraq or acts of aggression against the Kurdish people.<sup>124</sup> Iraq claimed that Resolution 688 was a violation of its sovereignty.<sup>125</sup>

The Security Council's approval of the use of force to protect the Kurds was unprecedented in international law. For the first time since the creation of the Charter, the goal of preventing the slaughter of non-nationals within a sovereign state's borders trumped that state's claim to sovereignty and nonintervention. Although international security concerns in the border area between Iraq and Turkey were at the forefront of the Security Council's thinking, the self-defense doctrine was not invoked by the Council in making its decision to authorize the use of force after the Gulf war had ended. Thus, a new precedent had been established in international law: that forcible humanitarian intervention could be justified if the human rights violations occurring within a state amounted to a threat to international peace and security in the region. Though the new rule did not provide for humanitarian intervention in all circumstances, it did send a powerful signal to brutal dictators that they could no longer hide behind claims of sovereignty and nonintervention to avoid responsibility for abusing their own people. But what if there was no threat to international peace and security in the region? Would the Security Council be justified in authorizing the use of force to protect non-nationals in a purely internal conflict?

## 2. *UN Intervention in Somalia*

In 1991, violent conflict erupted between warring clans in Somalia following a severe drought and the collapse of the government.<sup>126</sup> Thousands of people died or fled the country during the crisis, and close to a million were forced to the brink of starvation before the UN intervened.<sup>127</sup> The Security Council, acting under Article 41 of the Charter, called for an arms embargo against Somalia to prevent the warlords from obtaining needed

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124. *Id.*

125. See Michael J. Reppas, *The Lawfulness of Humanitarian Intervention*, 9 ST. THOMAS L. REV. 463, 475-76 (1997) (citing Marc M. Boutin, *Somalia: The Legality of U.N. Forcible Humanitarian Intervention*, 17 SUFFOLK TRANSNAT'L L. REV. 138, 148-49 (1994)).

126. See Neil Henry, *Evacuees Tell of Somalia's Chaos, Carnage; Bodies Said to Litter Capital After Week of Fighting Between Rebels, Troops*, WASH. POST, Jan. 7, 1991, at A17.

127. See Keith B. Reichburg, *Diseases Sweep Somalis, Kill More than Famine*, WASH. POST, Oct. 2, 1992, at A1. The Security Council was slow to respond because it took the position that it needed the consent of the Somali warlords to provide humanitarian assistance. *Id.*

supplies to carry on their internal war.<sup>128</sup> The warring clans responded by raiding UN warehouses where food and medicine were stored and preventing aid from being distributed to the people. As the death toll continued to rise throughout the country, the Security Council deployed a small contingent of “blue helmets” to assist in the delivery of aid.<sup>129</sup>

With no end to the violence in sight, the UN Secretary-General notified the Security Council that the situation in Somalia had “deteriorated beyond the point at which it is susceptible to the peace-keeping treatment.”<sup>130</sup> The UN Chief requested that the Security Council use more “forceful measures” to facilitate the delivery of aid to the starving masses.<sup>131</sup> On December 3, 1992, the Security Council authorized a U.S.-led military intervention – the Unified Task Force (UNITAF) – under Article 42 of the Charter to assist with humanitarian relief efforts.<sup>132</sup> U.S. Marines guarded aid convoys and negotiated with clan leaders. They also were targeted for attack by forces loyal to one of the clan leaders, General Mohammed Farah Aideed. During one episode, eighteen U.S. Marines were killed in Mogadishu during a gunfight, and one U.S. soldier’s body was dragged through the streets in an act of defiance by armed gangs. The violence was captured on CNN and led to a public outcry against American involvement in Somalia back in the United States.<sup>133</sup> In May of 2003, U.S. troops withdrew from Somalia and the UN took over the peacekeeping mission.<sup>134</sup>

Despite the controversy surrounding the American casualties, the intervention in Somalia was an important milestone in international law. Unlike the intervention in Iraq a year earlier, the Security Council’s decision to intervene in Somalia was made for predominantly humanitarian reasons. The internal civil war in Somalia did not amount to a breach of the peace or threat to

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128. See U.N. SCOR, 47th Sess., 3039th mtg. at 55, U.N. Doc. S/RES733 (Jan. 23, 1992).

129. Approximately 500 lightly armed Pakistani troops were deployed in August 1992 to protect relief workers. The operation was called UNOSOM I. See U.N., *Somalia: UNOSOM I Background*, [http://www.un.org/Depts/dpko/dpko/co\\_mission/unosom1backgr2.html](http://www.un.org/Depts/dpko/dpko/co_mission/unosom1backgr2.html).

130. Letter, Security Council, Letter from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/24868 (Nov. 30, 1992).

131. See Don Oberdorfer & John Lancaster, *U.N. Chief Weighs Use of U.S. Troops in Somalia; Security Council to Consider Options for Protecting Relief Supply Lines*, WASH. POST, Nov. 27, 1992, at A1.

132. See U.N. SCOR, 47th Sess., 3145th mtg. at 1-4, U.N. Doc. S/RES/794 (Dec. 3, 1992); *Marines Land in Peace, Forces Hold Firm in Face of Pesky Press*, ST. LOUIS POST-DISPATCH, Dec. 9, 1992, at A1.

133. See generally MARK BOWDEN, *BLACK HAWK DOWN; A STORY OF MODERN WAR* (1999).

134. See Keith B. Richburg, *U.N. Takes Command of Troops in Somalia; U.S. General Departs, Replaced by Turk*, WASH. POST, May 5, 1993, at A23.

international peace and security under the Charter, though an argument can be made that the mass exodus of refugees into neighboring Kenya may have constituted such a threat. Moreover, it was a significant development for the UN to authorize a unilateral humanitarian operation to protect non-nationals, immediately followed by collective action to quell the civil unrest and ensure the flow of relief supplies to the Somali people. The joint U.S.-UN operation proved that the Charter could adapt to crises without compromising the principles of collective security and multilateralism. It further showed that humanitarian considerations can prevail over concerns about national sovereignty when governments collapse and fail to protect their own people.

### 3. *UN Intervention in Yugoslavia*

In 1991, tensions between Serbs, Croats and Muslims in the Balkans escalated when Croatia and Slovenia declared independence from Yugoslavia. The Balkan “powder-keg” had been fairly quiet during the Cold War, but the lifting of the Iron Curtain prompted calls for democracy and autonomy within the region. The ensuing war caused the deaths of thousands of innocent civilians and forced hundreds of thousands of people to flee their homes and villages. The atrocities committed by all sides during the Balkan conflict were so widespread that the UN was compelled to intervene.

The UN’s involvement in the internal affairs of the former Republic of Yugoslavia (FRY) increased rapidly over a short period of time. In 1991, the Security Council imposed a general weapons embargo against the former Yugoslavia.<sup>135</sup> In February of 1992, the Security Council established a United Nations Protection Force (UNPROFOR) to be deployed to Bosnia-Herzegovina for peacekeeping purposes.<sup>136</sup> In May that same year, the Security Council took the unprecedented step of recognizing Croatia, Slovenia, Bosnia-Herzegovina, and the Former Yugoslav Republic of Macedonia as independent states.<sup>137</sup> The Security Council also

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135. See U.N. SCOR, 46th Sess., 3009th mtg. at 43, U.N. Doc. S/RES/713 (Sep. 25, 1991).

136. See U.N. SCOR, 47th Sess., 3055th mtg. at 9, U.N. Doc. S/RES/743 (Feb. 21, 1992).

137. See U.N. SCOR, 47th Sess., 3076th mtg. at 115, U.N. Doc. S/RES/753 (May 18, 1992) (recommending that Croatia be recognized as an independent state); U.N. SCOR, 47th Sess., 3077th mtg. at 115, U.N. Doc. S/RES/754 (1992) (recommending that Slovenia be recognized as an independent state); U.N. SCOR, 47th Sess., 3079th mtg. at 1, U.N. Doc. S/RES/755 (May 20, 1992) (recommending that Bosnia and Herzegovina be recognized as independent states); U.N. SCOR, 47th Sess., 3196th mtg. at 1, U.N. Doc. S/RES/817 (Apr. 7,

expanded UNPROFOR's mandate to regulate the flow of refugees during the war.<sup>138</sup> Despite these efforts, the humanitarian crisis grew worse as Serbian forces intensified their campaign of ethnic cleansing in Bosnia.

In August of 1992, the Security Council authorized NATO under Articles 42 and 53(1) to take "all measures necessary" to facilitate the delivery of humanitarian assistance to Bosnia.<sup>139</sup> A "no-fly" zone was established over Bosnia to protect humanitarian supply convoys.<sup>140</sup> NATO was responsible for enforcing the ban on flights within the zone.<sup>141</sup> In addition, safe havens were established in several Bosnian cities to protect civilians from the violence.<sup>142</sup> NATO members contributed to the protection of human rights through their participation in the NATO-led Implementation Force (IFOR) and its successor Stabilization Force (SFOR). Intervention in Bosnia was NATO's first major military challenge since the end of the Cold War, and it eventually led to the signing of the Dayton Peace Accords in 1995.

NATO's intervention in the Balkan was a significant development in international law. This was the first time that a regional military organization was given the authority by the Security Council to use force against a UN member state. The UN helped pave the way for the intervention by recognizing Croatia, Slovenia, Bosnia-Herzegovina, and the former Yugoslav Republic of Macedonia as independent states. Without such recognition, the legal case for violating Yugoslavia's sovereignty would have been much weaker under the Charter. In the end, the decision to intervene was justified on humanitarian grounds, and the effect of this intervention was to save countless lives. This precedent would serve as the basis for NATO's intervention in Kosovo in the absence of Security Council approval six years later.

#### 4. *UN Intervention in Haiti*

In 1993, the UN and the U.S. were confronted with another humanitarian crisis stemming from the overthrow of the

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1993) (recommending that the Former Yugoslav Republic of Macedonia be recognized as an independent state).

138. U.N. SCOR, 47th Sess., 3104th mtg. at 1, U.N. Doc. S/RES/769 (Aug. 7, 1992).

139. U.N. SCOR, 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/770 (Aug. 13, 1992).

140. See U.N. SCOR, 47th Sess., 3122d mtg. at 2, U.N. Doc. S/RES/781 (Oct. 9, 1992).

141. See U.N. SCOR, 47th Sess., 3191st mtg. at 1-2, U.N. Doc. S/RES/816 (Mar. 31, 1993).

142. See U.N. SCOR, 48th Sess., 3199th mtg. at 2, U.N. Doc. S/RES/819 (Apr. 16, 1993) (establishing a safe area around Srebrenica); U.N. SCOR, 48th Sess., 3208th mtg. at 2, U.N. Doc. S/RES/824 (May 6, 1993) (establishing safe areas around Tuzla, Zepa, Gorazde, and Bihac).

democratically-elected government of Jean Bertrand Aristide in Haiti. Following the ouster of Aristide in 1991, the military-backed regime of Raul Cedras had launched a campaign of violence against Aristide supporters, forcing thousands to flee in make-shift rafts and boats across the Florida straits.<sup>143</sup> Fearing a flood of refugees on its shores, the U.S. requested authority from the Security Council to intervene militarily in Haiti. The U.S. argued that the flood of refugees constituted “a threat to international peace and security in the region” and, therefore, the Security Council should act under its Chapter VII enforcement powers to restore order.

Initially, the UN imposed economic sanctions against Haiti to persuade the military government to refrain from violating human rights.<sup>144</sup> On July 31, 1994, the Security Council authorized the U.S. to “use all necessary means to facilitate the departure from Haiti of the military leadership . . . and the restoration of the legitimate authorities of the Government of Haiti” under Article 42 of the UN Charter.<sup>145</sup> This was the first time that the Security Council ever used its Chapter VII enforcement authority to restore democracy to a country. Prior to sending troops to Haiti, President Clinton authorized former President Jimmy Carter to try and resolve the crisis peacefully.<sup>146</sup> Carter succeeded in reaching an agreement with Haiti’s military officials which called for the peaceful return of Aristide to power in exchange for amnesty for those involved in the coup.<sup>147</sup> Subsequently, the U.S. deployed 20,000 troops to Haiti to restore order and secure the return of Aristide to power.

The intervention in Haiti was motivated by the desire of the U.S. to restore international peace and security in its zone of influence. Though the effect of the intervention was to quell the violence and save thousands of lives, the chief aim of the mission was not humanitarian in nature. Similar to the intervention in Iraq, the Security Council interpreted Article 39 of the Charter broadly to conclude that the mass exodus of refugees from Haiti constituted a “threat to peace” and “breach of the peace” in the region. Nonetheless, the effect of the Security Council’s decision

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143. See Barbara Crossette, *135 Feared Lost as Haitian Boat Sinks Off Cuba*, N.Y. TIMES, Nov. 22, 1991, at A1.

144. See U.N. SCOR, 48th Sess., 3238th mtg. at 2-3, U.N. Doc. S/RES/841 (June 16, 1993). Economic sanctions were imposed to supplement the limited sanctions imposed against Haiti by the Organization of American States (OAS).

145. See U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (July 31, 1994).

146. See Douglas Jehl, *Showdown with Haiti: Overview; Holding Off, Clinton Sends Carter, Nunn and Powell to Haitian Junta*, N.Y. TIMES, Sept. 16, 1994, at A1.

147. See *Mission to Haiti: Text of Agreement Averting U.S. Invasion of Haiti*, N.Y. TIMES, Sept. 20, 1994, at A12.

was to save lives and restore order on the ground in Haiti. Refugees were permitted to return to their homes and food and medicine were provided to victims of the violence. It is arguable whether the resolution of the Haitian crisis can be classified as a success story for “humanitarian intervention” on behalf of non-nationals. The crisis was resolved through negotiations just prior to the deployment of U.S. troops to the area. Nevertheless, the fact that the Security Council authorized the U.S. to use force to restore order sent a powerful signal to the rest of the world that the UN would not tolerate regimes who abuse their own people. The UN’s role had changed dramatically from the Cold War era, and UN-authorized military intervention to protect human rights had become much more acceptable under international law.

*B. Humanitarian Intervention in the Absence of Security Council Approval*

This chapter has focused primarily on the development of UN-approved humanitarian intervention as a rare exception to the principles of national sovereignty and nonintervention enshrined in Article 2(7) of the UN Charter. However, the UN did not respond to every humanitarian crisis during the 1990s in the same fashion. In Rwanda and Kosovo, for example, the Security Council failed to act to prevent genocide and ethnic cleansing, prompting individual states such as France and the United States to intervene to prevent grave violations of human rights.

1. *The Rwandan Genocide*

The Rwandan tragedy of 1994 had its origins in the long-standing ethnic feud between the majority Hutu and minority Tutsi populations.<sup>148</sup> Following Rwanda’s independence from Belgium in 1962, intermittent fighting between Hutus and Tutsis has resulted in killings and large-scale migrations of civilians in and out of the country. In June of 1993, the Security Council authorized the establishment of the United Nations Observer Mission Uganda-Rwanda to oversee peace negotiations between the Hutu-dominated government of President Juvenal Habyarimana and the Tutsi rebel group, the Rwandan Patriotic

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148. The conflict between Hutus and Tutsis dates back to colonial times when German and Belgian rulers favored the Tutsis over the Hutus. *See generally* LT. GEN. ROMEO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2003).

Front (RPF).<sup>149</sup> In August, a peace agreement was reached in Arusha committing the parties to a cease-fire and a national power-sharing arrangement. Subsequently, the Security Council established “the United Nations Assistance Mission in Rwanda (UNAMIR) to assist the parties in the implementation of the Arusha Peace Accords.”<sup>150</sup>

The peace agreement, however, unraveled when President Habyarimana’s plane was shot down near the Kigali airport on April 6, 1994, killing everyone on board.<sup>151</sup> Immediately following President Habyarimana’s death, a wave of violence erupted across Rwanda between Hutus and Tutsis.<sup>152</sup> Over the next two months, approximately 750,000 Tutsis were killed or maimed by Hutus armed with machetes, and more than one million people fled the country.<sup>153</sup> In response to the genocide, the RPF launched a major offensive against Hutu forces which resulted in the overthrow of the Hutu regime.<sup>154</sup> Order was restored to parts of the country, and relief organizations were permitted access to assist victims of the tragic violence.

In the early weeks of the crisis, the UN refused to intervene. “Unable to cope with the violence, the Security Council” ordered most of its peacekeepers to withdraw from Rwanda.<sup>155</sup> France unilaterally intervened, but was accused of exploiting the chaos in its former colony for political gain.<sup>156</sup> More than two months after the genocide began, the Security Council finally agreed to provide humanitarian assistance. Acting under its Chapter VII enforcement powers, the Security Council authorized UN member states to intervene to protect refugees and civilians at risk in Rwanda.<sup>157</sup> As they had done in Somalia, UN peacekeepers provided security for relief workers and assisted with the reconstruction of roads, bridges and other infrastructure destroyed during the war. A safety zone also was established in southwestern Rwanda to provide food, shelter, and protection.<sup>158</sup> Following the establishment of the safety zone, France withdrew

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149. See U.N. SCOR, 48th Sess., 3244th mtg. at 1, U.N. Doc. S/RES/846 (June 22, 1993).

150. Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT’L L. 883, 904 (1995).

151. The president of Burundi also died in the plane crash.

152. See Tyagi, *supra* note 150, at 904.

153. The prime minister and several Belgian peacekeepers also were killed during the crisis.

154. See Tyagi, *supra* note 150, at 904.

155. *Id.* The Security Council voted to reduce UNAMIR’s strength from 2,539 to 270.

156. See *id.* at 904-06.

157. U.N. SCOR, 49th Sess., 3392d mtg. at 1, U.N. Doc. S/RES/929 (June 22, 1994).

158. See Tyagi, *supra* note 150, at 904. The purpose of the safe zone was to prevent RPF reprisals against Hutus.

from Rwanda, leaving UNAMIR in charge of restoring order to the battered nation.<sup>159</sup> Subsequently, the Security Council established an International Criminal Tribunal for Rwanda (ICTR) to prosecute those persons responsible for serious human rights violations.<sup>160</sup>

“[T]he Security Council determined that it was within its chartered powers to authorize the creation of the ad hoc tribunal as a means to maintain or restore international peace and security.”<sup>161</sup>

The Rwandan genocide was one of the worst humanitarian tragedies in history. One-seventh of the Tutsi population was slaughtered while the international community stood by and observed. The magnitude of the violence and the speed in which it was carried out was unprecedented, thus making it more difficult for the international community to react in time to protect civilians. The failure of the UN to respond in time to prevent the genocide was a low point for international law. A coalition of states had been prepared to act in defense of the Tutsi population, but they did not receive prompt Security Council authorization. According to Secretary-General Kofi Annan, “the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder.”<sup>162</sup> Ashamed of such inaction, Annan resolved to “never again” fail to protect “a civilian population from genocide or mass slaughter.”<sup>163</sup>

## 2. NATO's Intervention in Kosovo

The most recent example of the collective use of force applied in the name of humanitarian intervention was NATO's bombing of Yugoslavia in 1999. The decision by NATO to intervene in Yugoslavia was prompted by the outbreak of violence in March of 1998 between Serbian forces and the Kosovo Liberation Army (KLA). Serbian forces were engaged in a campaign of “ethnic

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159. *See id.* at 905.

160. U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (Nov. 8, 1994). Jurisdiction “for the ad hoc tribunals included grave breaches of the Geneva Conventions, violations of the laws and customs of war, crimes against humanity, and genocide.” John R. Worth, *Globalization and the Myth of Absolute Sovereignty: Reconsidering the “Un-Signing of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L.J. 245, 252 (2004).

161. Worth, *supra* note 160, at 252.

162. Press Release, Secretary-General Presents His Annual Report to General Assembly, U.N. Doc. SG/SM/7136, GA/9596 (Sept. 20, 1999).

163. *See* Press Release, Kofi Annan Emphasizes Commitment to Enabling UN Never Again to Fail in Protecting Civilian Population from Genocide or Mass Slaughter, U.N. Doc. SG/SM/7263, AFR/196 (Dec. 16, 1999) [hereinafter *Annan Emphasizes Commitment*]; *see also* Joseph Betz, *America's 2003 War of Aggression Against Iraq*, 9 NEXUS 145, 151 (2004).

cleansing” against Kosovo’s Albanian population resulting in murder, rape, and the forced expulsion of ethnic Albanian civilians from their homes.<sup>164</sup> By May of 1998, nearly five thousand ethnic Albanians in Kosovo had been reported killed, over one million had been driven from their homes, and more than five hundred villages had been destroyed.<sup>165</sup> The objective of the NATO bombing campaign was to prevent further atrocities and destroy the ability of Serbian police units and soldiers to wage war against Kosovo’s civilian population. NATO’s decision to intervene militarily was made in the absence of Security Council approval.

The NATO allies contended that the Security Council did authorize the use of NATO military power to enforce a cease-fire agreement and to protect civilians in Kosovo. The cease-fire was reached on October 13, 1998 when NATO threatened to bomb Serbian positions following the discovery of mass graves west of Kosovo’s capital, Pristina.<sup>166</sup> Two weeks after Yugoslavian President Slobodan Milosevic announced the cease-fire, the Security Council passed Resolution 1203, which called for the protection of unarmed monitors on the ground in Kosovo.<sup>167</sup> Resolution 1203 did not authorize NATO to use military force in Kosovo other than for the purposes of protecting unarmed monitors on the ground.<sup>168</sup> Nevertheless, when the cease-fire broke down in December, NATO officials took an expansive view of Resolution 1203 to authorize the use of air strikes against Serbian positions. According to A. Peter Burleigh, former acting head of the U.S. delegation to the United Nations, “[t]he NATO allies, in agreeing on Oct[ober] 13 to the use of force, made clear that they had the authority and the means to resolve this issue.”<sup>169</sup>

The NATO bombing campaign was the largest military intervention in Europe since the Second World War. It began on March 24, 1999 and lasted for more than two months. U.S. President Bill Clinton declared that “[i]f Milosevic is not willing to make peace, we are willing to limit his ability to make war on the

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164. See Jack Kelley, *Serbs Raping Women, Girls, Witnesses Say ‘The Violence is Increasing: This is Only the Beginning,’* USA TODAY, Apr. 14, 1999, at 3A.

165. See John Kifner, *Crisis in the Balkans: Horror by Design - The Ravaging of Kosovo*, N.Y. TIMES, May 29, 1999, at A1.

166. NATO members warned the Serbs that the alliance would conduct air strikes if Serbian forces in Kosovo did not comply with UN demands.

167. See U.N. SCOR, 53d Sess., 3937th mtg. at 1, U.N. Doc. S/RES/1203 (Oct. 24, 1998) (stating that threats of intervention have been made under an earlier Security Council Resolution, which the United States interpreted as permitting airstrikes if Serbian forces remain in Kosovo and continue attacks on ethnic Albanian villages).

168. See *id.*

169. John M. Goshko, *U.N. Council Backs Kosovo Pact, Clears Way for NATO Intervention*, WASH. POST, Oct. 25, 1998, at A28.

Kosovars.”<sup>170</sup> During the campaign, allied planes destroyed Serbian military installations, planes, bridges, and communications facilities, while allied ground troops built tent cities across the border in neighboring Macedonia to provide refuge for thousands of ethnic Albanian civilians.<sup>171</sup> After seventy-eight days of intense bombing, Serbian troops withdrew from Kosovo and 50,000 UN peacekeeping troops were deployed to stabilize the situation on the ground.<sup>172</sup>

Although NATO’s intervention in Kosovo was successful from a military standpoint, the legality of the intervention under the Charter remains in dispute to this day. Strict constructionists, or restrictionists,<sup>173</sup> contend that the use of force under the Charter can only be justified in two circumstances: (1) in self-defense, or (2) with the approval of the Security Council.<sup>174</sup> Neither of these circumstances existed during the Kosovo conflict. Human rights advocates argue that in the presence of genocide or serious violations of human rights, the right of states to counter such violence has turned into a legal and moral obligation.<sup>175</sup> From this more liberal perspective, the doctrine of humanitarian intervention has become a strict norm of international law based in state practice and *opinio juris*.<sup>176</sup> The Security Council’s refusal to authorize the use of force, therefore, constituted a moment of weakness for the UN and a failure of the body to live up to its moral and legal obligations. NATO’s decision to step in fulfilled these obligations.

The Kosovo crisis was a special case under international law. It was the first conflict to involve collective intervention by a regional military organization to prevent “ethnic cleansing.” During the conflict, Serbian forces intentionally created an atmosphere of fear and oppression through the use of force, threats of force, and acts of violence in order to drive out Kosovo’s majority

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170. Jane Perlez, *Conflict in the Balkans: The Overview; NATO Authorizes Bomb Strikes; Primakov, in Air, Skips U.S. Visit*, N.Y. TIMES, Mar. 24, 1999, at A1.

171. See General Wesley K. Clark, *Effectiveness and Determination*, at <http://usembassy-australia.state.gov/hyper/WF990528/epf508.htm>; see also William Drozdiak, *NATO Strengthens Presence in Albania and Macedonia*, WASH. POST, Apr. 10, 1999, at A15.

172. See R. Jeffrey Smith & Molly Moore, *Kosovo Pullout Set to Start Today; NATO-led Contingent to Enter Province*, WASH. POST, June 10, 1999, at A1; see also U.N. SCOR, 54th Sess., 4011th mtg. at 1-2, U.N. Doc. S/RES/1244 (June 10, 1999).

173. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 131-36 (1993).

174. See U.N. CHARTER art. 51.

175. See Dieter Kastrup, *From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT’L L.J. 404, 412 (1999).

176. See Cohan, *supra* note 76, at 349.

ethnic Albanian population. More than one million ethnic Albanians fled the country to escape harm. NATO allies determined that the doctrine of humanitarian intervention should take precedence over the principles of sovereignty and nonintervention even in the absence of Security Council approval. Accordingly, NATO's intervention in Kosovo established a dangerous precedent for future humanitarian interventions.<sup>177</sup>

#### V. THE DARFUR CRISIS AND THE CASE FOR HUMANITARIAN INTERVENTION

During the past year, the conflict in the western Darfur region of the Sudan has captured the attention of the international community. Sudanese Government forces and the Janjaweed have been carrying out attacks against black African tribes suspected of harboring rebels resulting in the deaths of more than 300,000 people and the forced removal of two million more from their homes and villages.<sup>178</sup> The United States has been in the forefront of calls for humanitarian intervention in Darfur, however the UN has yet to respond with decisive action.<sup>179</sup> In January of 2005, a UN-appointed international commission of inquiry submitted its report on the situation in Darfur to the Security Council, identifying numerous human rights violations over the past eighteen months and the perpetrators who committed such violations.<sup>180</sup> This chapter will examine the Commission's findings, the legal basis for humanitarian intervention in Darfur and the implications of the Security Council's failure to intervene in that conflict. It is arguable that the UN has failed to fulfill its obligations under the UN Charter and customary international law by refusing to intervene in the Sudan to prevent ethnic cleansing and grave violations of human rights.

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177. See Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty In the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 439 (2000).

178. See Warren Hoge, *10,000 Peacekeepers Sought BY U.S. for Southern Sudan*, N.Y. TIMES, Feb. 15, 2005, at A3 [hereinafter *10,000 Peacekeepers*].

179. See Warren Hoge, *France Asking U.N. to Refer Darfur to International Court*, N.Y. TIMES, Mar. 24, 2005, at A3 [hereinafter *France Asking UN*].

180. See *Commission Report*, *supra* note 6.

### A. *The Conflict in Darfur*

#### 1. *The Sudanese Civil War*

In order to understand the current crisis in Darfur, it is important to place the situation there within a broader historical and political context. Sudan is one of the largest countries in Africa with an estimated population of 35 million people.<sup>181</sup> The Sudanese people gained their independence from British-Egyptian rule in 1956 and, since then, have endured a series of regime changes.<sup>182</sup> The country is divided along religious lines and is ruled from the Islamic north where the capital, Khartoum, is located.<sup>183</sup> The south is mainly Christian with some animists and other non-Muslims.<sup>184</sup> Over the years, an Islamic-African-Arab culture has emerged in northern Sudan, where a multitude of tribes speaking a variety of languages have settled.<sup>185</sup>

Following the discovery of oil in the south during the early 1980s, the government of Colonel Gaafar Mohamed Al-Nimeiri implemented measures to tie the oil-rich areas of the south closer to the north. For example, Nimieri cancelled the 1973 Addis Ababa Agreement, which provided the south with autonomy, and instituted Sharia rule despite the fact that the south was predominantly non-Muslim.<sup>186</sup> These measures provoked a backlash in the south which ultimately led to civil war in 1983. Since then, the Sudanese civil war has been the longest running conflict in Africa. More than two million people have been killed and nearly 4.5 million persons have been forcibly displaced from their homes.

On January 9, 2005, a Comprehensive Peace Agreement (CPA) was reached between the Arab-dominated central government in Khartoum and the Christian and animist rebel group in the south calling for an end to the civil war.<sup>187</sup> Under the agreement, Islamic

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181. BUREAU OF DEMOCRACY, U.S. DEPT OF STATE, SUDAN, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003 1, 6 (2003), available at <http://www.state.gov/g/drl/rls/irf/2003/23755.htm>.

182. *See id.*

183. *See id.*

184. *See id.* at 2.

185. *See id.*

186. Under Shari'a, conversion by a Muslim to another religion is considered apostasy and is punishable by death if the accused refuses to recant. For more on Shari'a law, *see* BUREAU OF DEMOCRACY, U.S. DEPT OF STATE, SAUDI ARABIA, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003 1 (2003), available at <http://www.state.gov/g/drl/rls/irf/2003/24461.htm>; *see generally* DORE GOLD, HATRED'S KINGDOM 17 (2003); BERNARD LEWIS, THE ARABS IN HISTORY 176-77 (1993).

187. *See* Lacey, *supra* note 2. A two year peace process culminated on January 9, 2005 when First Vice-President Taha and Chairman John Garang of the Sudan People's

law is to apply only in the north and Sudan's oil revenues are to be shared between north and south.<sup>188</sup> Moreover, government and rebel forces are required to disarm and respect a north-south boundary line drawn up in 1956, which will be monitored and enforced by an international peacekeeping force under UN auspices.<sup>189</sup> The CPA marks the end of two decades of civil war and calls for a six year interim period, which will end with a referendum on the right to self-determination in southern Sudan. President Omar al Bashir hailed the peace deal as the beginning of a "new Sudan."<sup>190</sup>

## 2. *The Crisis in Darfur: A Humanitarian Tragedy Ignored*

Despite the achievement of a peace accord between the government in Khartoum and the rebels in the south, ethnic violence continues in the western Darfur region of the country. Darfur, which borders Libya, Chad, and the Central African Republic, is part of the Great Sahara region consisting of six million people living mostly in small villages and hamlets.<sup>191</sup> Darfur's inhabitants are divided into tribal groups who are predominantly Islamic and have depended on the land over the centuries for subsistence.<sup>192</sup> Drought, desertification, and ethnic violence have been persistent problems for the people in this part of Africa, forcing many tribes to uproot and migrate to and from the more fertile areas of Darfur.<sup>193</sup> Inter-tribal conflict has been exacerbated by the arms trade in the region as a consequence of the Sudanese civil war and Libyan-inspired efforts to pour arms into the region to fuel rebellions in neighboring Chad.<sup>194</sup>

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Liberation Movement/Army signed the CPA during an official ceremony, which incorporated all previously signed documents and cease-fire protocols.

188. *Id.* The agreement calls for a six year transition period involving shared government and use of natural resources, including oil, to ease the combatants toward peace. A referendum will be held at the expiration of the six year period among the Christian and animist minorities in the south to determine whether they wish to remain part of a unified Sudan.

189. *Id.*

190. Lydia Polgreen, *Sudan Peace Deal Allows Displaced to Go Home at Last*, N.Y. TIMES, Jan. 17, 2005, A3.

191. *Commission Report*, *supra* note 6, at 20. Most of the Darfur region is arid desert land though the area around the Jebel Marrah plateau is somewhat fertile. *Id.* at 21.

192. *Id.* at 20. Some of the tribes, including the Fur, the Barni, the Tama, the Jebel, the Aranga and the Masaalit, are agriculturalist and depend on crop production for survival. The Rhezeghat and Zaghawa are sedentary cattle herders. The Taaysha, the Habaneya, the Ben Helba, the Mahameed and others are mostly nomadic tribes and can be found herding cattle and camels in Darfur. *See generally* J.D. FAGE & W. TORDOFF, *A HISTORY OF AFRICA*, 4th ed. (2002).

193. *See Commission Report*, *supra* note 6, at 21.

194. *Id.* at 22.

The current conflict in Darfur was initiated by two rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), who blame the central government in Khartoum for many of the region's problems.<sup>195</sup> These groups claim that Darfuris have been consistently marginalized and not allowed to participate in high positions of government.<sup>196</sup> In March 2003, while the peace negotiations were taking place between the central government and the southern rebels, the Darfuri rebels attacked local police offices, government installations in Kutum and Tine, and the airport in El Fashir, where they looted government property and weapons.<sup>197</sup> Many soldiers were killed during the attacks and several military aircraft were destroyed.<sup>198</sup> In response to the uprising, the government in Khartoum withdrew its troops from the rural areas of Darfur and called upon local tribes to assist in the fighting against the rebels.<sup>199</sup> Several nomadic tribes, known as the Janjaweed, who were competing for land in the region responded favorably to the government's call.<sup>200</sup>

In the spring of 2003, the Sudanese Government launched an aggressive military offensive in Darfur to quell the insurgency. Since then, government forces and the Janjaweed have conducted indiscriminate attacks on villages, including killing of civilians, torture, enforced disappearances, rape, pillaging, and forced displacement.<sup>201</sup> The attacks have resulted in the deaths of nearly 300,000 people and forced more than two million more to flee their homes.<sup>202</sup> Widespread and systematic rape has resulted in the spread of disease and unwanted pregnancy.<sup>203</sup> The Sudanese Government has alleged that any attacks carried out by Government armed forces in Darfur were for counter-insurgency

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195. *Id.* at 22-23. The rebel groups primarily consist of members of three tribes: the Fur, the Massalit, and the Zaghawa. *Id.* at 23.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 23-24.

200. *Id.* at 24. The Sudanese government paid tribal leaders with grants and gifts on the basis of their recruitment efforts and how many persons they were able to recruit. The new recruits are referred to as the Janjaweed, a Darfurian term that means "armed bandit" or "outlaw on a horse or camel." *See id.*

201. *Id.* at 25. In the summer of 2004, the Sudanese government armed the Janjaweed and set it to work terrorizing black Africans in Darfur. *See Shuffling Paper While Africans Die*, *ECONOMIST*, Aug. 7, 2004, at 10 [hereinafter *Shuffling Paper*].

202. The vast majority of the victims have been from the Fur, Zaghawa, Massalit, Jebel and the Aranga tribes. *See Commission Report*, *supra* note 6, at 3.

203. In March 2004, 150 soldiers and Janjaweed abducted and raped 16 girls in Kutum. It has been reported that girls as young as ten years old have been raped during the conflict. *See Lydia Polgreen, Darfur's Babies of Rape Are on Trial from Birth*, *N.Y. TIMES*, at A1 [hereinafter *Darfur's Babies*].

purposes only and were conducted on the basis of military necessity.<sup>204</sup>

In 2004, the UN Security Council, acting under its Chapter VII enforcement authority, adopted Resolution 1564 requesting the Secretary-General of the United Nations to “rapidly establish an international commission of inquiry” to investigate human rights violations in Darfur.<sup>205</sup> The Commission visited the Darfur region in November 2004 and January 2005 and held extensive meetings with UN and government officials, members of the armed forces, and police, rebel leaders, internally displaced persons, and victims and witnesses of atrocities.<sup>206</sup> The Commission submitted its findings to the Secretary-General on January 31, 2005.<sup>207</sup>

The Commission’s findings were similar to the reported massacres in Rwanda and Kosovo. The Commission found that most attacks by the Sudanese Government and the Janjaweed were deliberately and indiscriminately directed against black Africans.<sup>208</sup> The attacks often began in the early morning, just before sunrise, when villagers were still asleep or at prayer.<sup>209</sup> “[T]he attacks involved the killing of civilians, including women and children, [looting], the burning of houses, schools and other civilian structures, as well as the destruction of wells, hospitals and shops.”<sup>210</sup> According to witnesses, the attackers made statements such as “we are here to eradicate blacks” and “the Fur are slaves, we will kill them.”<sup>211</sup> Several incidents involved aerial bombardment of civilians and civilian structures within villages followed by ground attacks aimed at terrorizing civilians on the run.<sup>212</sup> Moreover, rape and other forms of sexual violence by the

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204. *See Commission Report, supra* note 6, at 3.

205. U.N. SCOR, 60th Sess., 5040th mtg. at 3, U.N. Doc. S/RES/1564 (Sep. 8, 2004). The Commission assembled in Geneva and began its work on October 25, 2004. *Commission Report, supra* note 6, at 2.

206. *Commission Report, supra* note 6, at 2. The Commission visited the Sudan from November 7-21, 2004 and January 9-16, 2005, including travel to the capital and three Darfur states. *See id.* at 3.

207. *See* BUREAU OF INFORMATION PROGRAMS, U.S. DEPT OF STATE RELEASE, Judy Aita, *United Nations Finds War Crimes Committed In Darfur*, Feb. 1, 2005, at 1.

208. In a majority of cases, the victims of the attacks belonged to African tribes, in particular the Fur, Masaalit, and Zaghawa tribes. *See Commission Report, supra* note 6, at 65.

209. *Id.* at 64. In many cases, the attacks lasted for several hours and some villages were attacked repeatedly. *See id.*

210. *See id.*

211. *Id.* at 65.

212. *Id.* According to the report, the fact that aerial bombardment and ground attacks were in sync was an indication of the level of coordination between the Sudanese Government and the Janjaweed. *See id.*

Janjaweed and government troops occurred during the attacks.<sup>213</sup> According to the Commission's report, "[t]hese acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity."<sup>214</sup>

The Commission, however, did not find that the Sudanese Government had engaged in a policy of genocide.<sup>215</sup> The report states that the "policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds."<sup>216</sup> This finding is at odds with the U.S. Government's position on the Darfur conflict, which declared the attacks on black African villagers to be "genocide."<sup>217</sup> U.S. State Department spokesman "Richard Boucher told reporters in reaction to the report, '[w]e stand by the conclusion that we reached that genocide had been occurring in Darfur . . . Nothing has happened to change those conclusions.'" <sup>218</sup> The Commission did conclude that though the Sudanese Government has not pursued a policy of genocide in Darfur, crimes against humanity and war crimes have been committed that may be "no less serious or heinous than genocide."<sup>219</sup>

The international community has done little to prevent the violence in Darfur. In August of 2004, the Security Council passed a resolution giving the Sudanese Government thirty days to disarm the Janjaweed or face sanctions.<sup>220</sup> "The Sudanese army called the resolution a 'declaration of war' and vowed to fight any 'crusader' army that sets an impious foot on Sudanese soil."<sup>221</sup> In the end, the threat was ignored. Subsequently, the African Union

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213. *Id.* at 66. Some women have reported that their attackers used racial epithets and declared that they wanted to make more Arab babies, leading some to conclude that the use of rape is part of a campaign of ethnic cleansing. See *Darfur's Babies*, *supra* note 203.

214. *Commission Report*, *supra* note 6, at 3.

215. *Id.* at 160.

216. *Id.* at 4.

217. On July 22, 2004, the U.S. Senate and House of Representatives passed a resolution declaring that the Sudanese and Janjaweed attacks on black African Darfuris constituted "genocide." See Mikael Nabati, *The UN Responds to the Crisis in Darfur: Security Council Resolution 1556*, ASIL INSIGHTS, Aug. 2004, at 1. The United States was the first to characterize the violence in Darfur as genocide and the first to name potential perpetrators and call for punishment. See also Samantha Power, *Court of First Resort*, N.Y. TIMES, Feb. 10, 2005, at A25. Former Secretary of State Colin Powell also described the violence in Darfur as "genocide" during a recent visit to Darfur, but he and other American officials have downplayed the crisis in view of the recent peace agreement between the central government in Khartoum and the rebel Sudanese Liberation Movement/Army. See also Lacey, *supra* note 2.

218. See Hal Lindsey, *The Incredibly Irrelevant United Nations*, WORLDNETDAILY, Feb. 3, 2005, at 3, [http://worldnetdaily.com/news/article.asp?ARTICLE\\_ID=42684](http://worldnetdaily.com/news/article.asp?ARTICLE_ID=42684).

219. *Commission Report*, *supra* note 6, at 4.

220. *Shuffling Paper*, *supra* note 201.

221. *Id.*

demanded that the Sudanese Government stop the hostilities by December 18, 2004 “or face having the matter go to the United Nations Security Council” for consideration of enforcement measures.<sup>222</sup> The day after the Security Council’s deadline expired, Sudanese air strikes again were reported in southern Darfur.<sup>223</sup> Former U.S. Ambassador to the UN John Danforth exclaimed that “[t]he outside world’s efforts to end the killing in the Darfur region ‘are getting nowhere.’”<sup>224</sup>

On March 31, 2005, the Security Council took its first significant step to stop the violence by adopting a resolution assigning war crimes trials to the International Criminal Court (ICC) in the Hague.<sup>225</sup> The resolution was passed after much haggling with the Bush Administration who insisted that Americans be exempted from prosecution in the court.<sup>226</sup> Following the resolution’s adoption, a list of 51 suspects in the ethnic cleansing campaign in Darfur were handed over to the chief prosecutor of the ICC, opening the way for war crimes trials in the Hague.<sup>227</sup> Several of these suspects are senior Sudanese Government officials and army officers.<sup>228</sup> The Sudanese Government responded that it will refuse to hand over any of its citizens to face trial abroad.<sup>229</sup>

In addition to prosecuting war criminals, the UN, NATO and the EU agreed recently to increase funding to expand the African Union (AU) peacekeeping force in Darfur from 3,300 to 7,700 troops.<sup>230</sup> The AU is the only international body to have deployed troops in Darfur and it is considering increasing its force to 12,500 by the end of 2005 if the situation there does not improve.

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222. *Troops Attack in Darfur as a Deadline Passes*, N.Y. TIMES, Dec. 20, 2004, at A11.

223. *Id.* One Sudanese general had informed the African Union that the Sudanese government was complying with the deadline and that it would immediately and unconditionally cease hostilities in Darfur. Those fleeing the violence said that government forces and Arab militiamen had attacked their villages and were setting up bases there. *See id.*

224. *The Refugees Prepare to Return Home: Southern Sudan*, ECONOMIST, Dec. 11, 2004, at 45.

225. *See* U.N. SCOR, 60th Sess., 5158th mtg. at 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005); *see also* Warren Hoge, *International War-Crimes Prosecutor Gets List of 51 Sudan Suspects*, N.Y. TIMES, Apr. 6, 2005, at A6 [hereinafter *International War-Crimes*].

226. *See 10,000 Peacekeepers*, *supra* note 178. The United States “lobbied hard for referring the cases to a new tribunal to be run by the African Union and the United Nations and to be based at the war crimes court in Arusha, Tanzania.” *Id.*

227. *See International War-Crimes*, *supra* note 225.

228. *Id.* The Commission of Inquiry concluded that “a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes.” *Commission Report*, *supra* note 6, at 5.

229. *See 10,000 Peacekeepers*, *supra* note 178.

230. *See* Andrew England & Daniel Dombey, *Donors give boost to aid mission in Darfur*, FIN. TIMES, May 27, 2005, at 5.

Moreover, UN members recently pledged \$4.5 billion in aid to help rebuild Sudan.<sup>231</sup> The money is expected to pay for additional relief workers, food and supplies in the southern and western parts of the country and to help Sudan undergo the transition from war to peace. More than three million people displaced by the violence are expected to return to their homes over the next year and two million of them are in need of food aid.<sup>232</sup> Secretary-General Kofi Annan recently called upon all nations pledging aid to do so immediately in order to prevent starvation and the unraveling of the peace deal between the Sudanese Government and the rebels in the south.<sup>233</sup>

In July of 2005, peace talks were held in Nigeria between the Sudanese Government and two groups of Darfur rebels, which produced a declaration of principles for peace but no comprehensive settlement of the conflict.<sup>234</sup> Shortly after the declaration of principles was signed, the leader of the southern Sudanese rebel movement and newly named vice-president of Sudan, John Garang, was killed in a helicopter crash, prompting rioting and violence in Khartoum and its surrounding areas.<sup>235</sup> Several dozen people were killed during the rioting as Sudanese Government troops engaged in retaliatory attacks against rebels in the suburbs.<sup>236</sup> Thus, despite progress towards peace in recent months, the violence in Sudan continues, preventing Darfuris and others from returning to their homes and villages.

### *B. Humanitarian Intervention in Darfur: A Legal and Moral Imperative*

#### *1. The Humanitarian Argument in the Absence of 'Genocide'*

The failure to authorize collective military intervene in Darfur has been the subject of controversy within the UN. This controversy, in part, stems from the refusal of the UN to recognize the Sudanese Government's actions in Darfur as "genocide." The Commission concluded in its report to the Secretary-General that

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231. See Kofi A. Annan, *Billions of Promises to Keep*, N.Y. TIMES, Apr. 13, 2005, at A29 [hereinafter *Billions of Promises to Keep*].

232. *Id.*

233. See *id.*; see also Annan Calls on World Not to Repeat Errors of Bosnia, Rwanda, Cambodia, UN NEWS SERVICE, Apr. 14, 2005, at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/HMYT-6BFLJM?OpenDocument>.

234. See Mark Lacey, *One Time Enemies Join Forces to Lead Sudan on a Road to Peace Filled with Obstacles*, N.Y. TIMES, July 10, 2005, at A11.

235. See Andrew England, *Dozens Die as Clashes Continue in Khartoum*, FIN. TIMES, Aug. 4, 2005, at 3.

236. *Id.*

the “Government of Sudan has not pursued a policy of genocide” in Darfur because one element of the definition of genocide was missing, genocidal intent.<sup>237</sup> According to the Commission, the two *actus reus* elements of genocide were satisfied: (1) “killing, or causing serious bodily or mental harm,” and (2) “the existence of a protected group being targeted by the authors of [the] criminal conduct.”<sup>238</sup> However, the Commission noted that the requisite *mens rea* elements did not exist due to the fact that government troops sometimes spared the lives of members of targeted groups during attacks or simply drove them from their homes, rather than “annihilate” them.<sup>239</sup> According to the report:

[T]he intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population. . . the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government.<sup>240</sup>

The Commission concluded that such attacks were orchestrated “primarily for purposes of counter-insurgency warfare,” not genocide.<sup>241</sup>

It is indisputable that the crime of genocide carries a special status in international law. Historical examples of genocide include the intent to kill all Tutsis in Rwanda, Muslims in Bosnia-Herzegovina, or the Jews in Europe during World War II.<sup>242</sup> The UN was created, in part, for the express purpose of preventing the Holocaust from ever happening again. Since then, genocide has attained *jus cogens* status and it has become widely recognized that humanitarian intervention is justified to prevent it.

However, the UN has been cautious in defining large-scale massacres as genocide. During the Rwandan and Kosovo conflicts, the UN reached different conclusions as to whether genocide occurred even though both conflicts involved the intentional mass slaughter of civilians by government-led forces. In Rwanda, the massacre of Tutsis by Hutus, at first glance, did not satisfy the

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237. *Commission Report*, *supra* note 6, at 131-32.

238. *Id.*

239. *See id.* at 131.

240. *Id.*

241. *See id.* at 132.

242. *See* SCHABAS, *supra* note 74, at 235.

objective elements of genocide because the Tutsis and Hutus shared the same language, culture and religion, as well as the same physical traits. Notwithstanding these shared characteristics, the UN determined that the violence in Rwanda was genocidal in nature because the Tutsis perceived themselves as a “protected group” vulnerable to an intentional campaign of annihilation conducted by the Hutu majority.<sup>243</sup>

During the Kosovo conflict in the late 1990s, the massacre of ethnic Albanians by Serbian forces was not treated as genocide by the international community, but rather as “ethnic cleansing.” In a Memorandum drafted by the Government of Canada dated March 30, 1999, it was noted that the intent of the killings and forced expulsions in Kosovo was different from an “intent to destroy” or “annihilate” under the definition of genocide.<sup>244</sup> According to the Memorandum, “[e]thnic Albanians are being killed and injured in order to drive them from their homes, not in order to destroy them as a group, in whole or in part.”<sup>245</sup> Nevertheless, U.S. President Bill Clinton described NATO’s intervention in Kosovo as a “moral imperative” based on the need to protect human rights at the most basic level.<sup>246</sup>

It is debatable whether serious crimes other than genocide may justify humanitarian intervention under international law. The massacre of civilians in Iraq, Somalia, Haiti, and Yugoslavia did not amount to genocide, but the Security Council promptly responded to these crises by authorizing military intervention to prevent further atrocities. As a result of these UN actions, international law has come to recognize the legitimacy of UN-authorized military intervention for the purpose of preventing serious human rights violations. However, international law is less clear as to the legality of humanitarian intervention to prevent serious human rights abuses in the absence of Security Council approval. During the Rwandan genocide, the Security Council failed to authorize military intervention until it was too late and actually withdrew its troops from the danger zone when

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243. See *Prosecutor v. Akayesu*, Judgment, ICTR Trial Chamber, Case No. ICTR-96-4T (Sept. 2, 1998). In 1998, the International Criminal Tribunal for Rwanda sentenced former mayor Jean-Paul Akayesu to three life sentences for genocide and crimes against humanity and to 80 years for other violations including rape and encouraging widespread sexual violence.

244. See Memorandum of March 30, 1999, 37 CANADIAN YEARBOOK OF INTERNATIONAL LAW 1999, at 328.

245. *Id.*

246. President Bill Clinton, Address to the Nation on the Conflict in Kosovo (June 10, 1999), in WASH. POST, June 11, 1999, at A31.

the violence began.<sup>247</sup> In Kosovo, the Security failed to authorize military intervention to protect ethnic Albanians from ethnic cleansing. If it were not for NATO's willingness to intervene in Kosovo, the civilian death toll could have been much worse. According to one legal scholar, Kosovo may have been "the crucial stage in the emergence of a clear doctrine of humanitarian intervention."<sup>248</sup>

The Darfur crisis represents the latest failure of the Security Council to live up to its legal and moral obligations to protect basic human rights. It is estimated that nearly 300,000 Darfuris have lost their lives and more than two million have been forcibly removed from their homes.<sup>249</sup> The Commission found that Sudanese Government forces and the Janjaweed were responsible for war crimes and crimes against humanity "conducted on a widespread and systematic basis."<sup>250</sup> Though the Commission concluded that "the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds," such violence was targeted mainly at black Africans of certain tribes in Darfur and meant to drive them from their homes.<sup>251</sup> International offences such as these were identical to the indiscriminate murder and forced expulsion of Tutsi civilians in Rwanda and ethnic Albanians in Kosovo.

Due to the ongoing nature of the conflict, the case for humanitarian intervention in Darfur is just as pressing today as it was when the violence first erupted. At present, Sudanese Government forces and the Janjaweed continue to attack certain tribes. The death toll continues to rise and refugee camps are overflowing with civilians fleeing the violence. According to Secretary-General Kofi Annan, "it is vital that the international community move speedily . . . to protect civilians from recurring violence in Darfur."<sup>252</sup> Moreover, the fear of renewed attacks by the Janjaweed in rural, unsecured areas is preventing many

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247. The Security Council eventually recognized a de facto unilateral French intervention by authorizing the establishment of French safe havens to protect the internally displaced in Rwanda. See Elizabeth E. Ruddle, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 478 (1997).

248. Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 749 (2002).

249. See *France Asking UN*, *supra* note 179.

250. See *Commission Report*, *supra* note 6, at 3.

251. *Id.* at 4.

252. *Billions of Promises to Keep*, *supra* note 231.

Darfuris from returning to their farms.<sup>253</sup> Because farmers have been afraid to go into their fields for fear of the Janjaweed, “only half as much land has been cultivated in Darfur as [compared to] a normal year.”<sup>254</sup> Consequently, a disastrous crop failure and an increase in starvation is expected for 2005 and 2006.<sup>255</sup> The UN World Food Program estimates that it will have to feed approximately three million Darfuris to prevent a humanitarian catastrophe.<sup>256</sup> According to the *Economist*, “[t]he bad news is that the worst is still to come in Darfur.”<sup>257</sup>

## 2. *The Refugee Problem*

The mass exodus of refugees is an unfortunate consequence of most civil wars. Violence against civilians inevitably causes displacement and cross-border migrations of people seeking refuge from danger. Those neighboring countries who are forced to absorb a massive influx of people are confronted with a moral choice to accept or reject those fleeing the violence. For those governments willing to open the door to refugees, the price of their generosity can be high. The added economic and social burdens can strain a state’s resources and cause tension between the local population and the new arrivals. Such tension can threaten peace and stability in the region and result in violence.

Since the end of the Cold War, the UN has become more proactive in dealing with refugee crises caused by internal civil conflicts. The conflicts in Iraq, Haiti and Bosnia, for example, involved the forcible expulsion of large numbers of civilians from their homeland. The Security Council in each case determined that intervention was required to stem the flow of refugees to neighboring states. During the Iraq war, the fleeing of Kurds into neighboring Turkey and Iran was determined to be a threat to international peace and security and grounds for intervention.<sup>258</sup> In Haiti, too, the Security Council authorized the United States “to use all necessary means” to forcibly remove the military regime in power on the grounds that the exodus of refugees constituted “a

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253. The Janjaweed have been squatting on farm land owned by those fleeing the violence in the hope that a unique squatters law, which grants squatters title to property after one year, will eventually support their exclusive claim to the land.

254. See *The Worst is Yet to Come*, *ECONOMIST*, Nov. 27, 2004, at 47 [hereinafter *Worst is Yet to Come*].

255. See *id.*

256. The UN World Food Program, which fed approximately 1.4 million people in March 2005, warns that it will probably have to feed three million people by the end of the year. See Dinmore & Fasher, *supra* note 5.

257. See *Worst is Yet to Come*, *supra* note 254.

258. See U.N. SCOR, 46th Sess., 2982d mtg. at 1-2, U.N. Doc. S/RES/688 (Apr. 5, 1991).

threat to peace and security in the region.”<sup>259</sup> Furthermore, the outpouring of refugees from Croatia into Hungary and other central European states during the Balkan conflict was deemed to be a threat to regional peace and security,<sup>260</sup> requiring UNPROFOR to expand its mandate to include immigration and customs functions.<sup>261</sup> Each of these episodes established an important precedent for UN involvement in a state’s internal affairs to deal with refugee problems.

Similarly, humanitarian intervention in Darfur can be justified on the grounds that the refugee crisis constitutes a threat to international peace and security in the region. Over the past two years, Sudanese Government forces and the Janjaweed have driven more than 200,000 people from their homes into refugee camps in neighboring Chad to the east of Sudan.<sup>262</sup> The flood of refugees has imposed enormous burdens on impoverished communities and the Chadian Government who are unequipped to handle the sudden influx of people.<sup>263</sup> Food shortages in several villages pose potential health risks for the population and security problems for the government.<sup>264</sup> Moreover, hospitals have been overflowing, education has come to a standstill and roads are being damaged by the constant pounding of trucks carrying relief supplies.<sup>265</sup> According to the UN World Food Program Chadian Director Stefano Poretti, “[t]he people of eastern Chad displayed a remarkable humanitarian spirit in doing what they could to help the refugees when they first crossed from Darfur.”<sup>266</sup> “Time has

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259. U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (July 31, 1994); see also Kenneth Regensburg, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives With the Protectionist Agendas of Western Europe and the United States*, 29 CORNELL INT’L L.J. 225, 244 (1996).

260. See U.N. SCOR, 46th Sess., 3009th mtg. at 4, U.N. Doc. S/RES/713 (Sep. 25, 1991); U.N. SCOR, 47th Sess., 3104th mtg. at 1, U.N. Doc. S/RES/769 (Aug. 7, 1992).

261. See *id.*

262. The Office of the United Nations High Commissioner for Refugees (UNHCR) reported that 203,051 persons from the Darfur region were living in eleven camps and other locations as refugees in eastern Chad. See UNHCR data, <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/openssl.pdf?tbl=MEDIA&id=401159eca&page=publ>.

263. Initially, the refugees were welcomed in Chad by villagers from the same ethnic group. However, tensions have been increasing as locals compete with the new arrivals for food and water.

264. Chad has one of the world’s most hostile climates and the country has received scarce rainfall over the past year, which has had a devastating impact on its harvest. In addition to the poor rainfall, locusts have devoured pasture land and crops in the central cereal-producing areas, forcing nomadic herders and others to move to the east where the Darfur refugees are lodged in camps. See *Impoverished Chad Asks World to ‘Share the Burden’ of Darfur Refugees*, SUDAN TRIBUNE, Sept. 23, 2004, at 2, [http://www.sudantribune.com/article Impr.php3?id\\_article=5604](http://www.sudantribune.com/article Impr.php3?id_article=5604).

265. See *id.*

266. UN World Food Program, *Darfur Refugees in Chad Urgently Need Food Stocks Before Rainy Season*, Apr. 12, 2005, [http://www.wfp.org/newsroom/subsections/preview.asp?content\\_it](http://www.wfp.org/newsroom/subsections/preview.asp?content_it).

taken its toll, however, and it is now clear that [the local population is] just as critically in need of our help as those in the [refugee] camps.”<sup>267</sup>

In addition to Chad, refugees are pouring into Ghana as well.<sup>268</sup> Since January 2005, several hundred refugees from Darfur have traveled across several international borders to seek asylum in Ghana, the home of Secretary-General Kofi Annan.<sup>269</sup> Most have made their way from crowded refugee camps in Chad, where food and water are in short supply. Ghana already hosts nearly 48,000 refugees from the conflict in Liberia.<sup>270</sup> Ghana’s Refugee Board recently announced that its financial resources are being depleted and that help is needed from the international community to prevent a security crisis.<sup>271</sup>

In terms of international law, the conditions exist for the Security Council to authorize the use of force under Chapter VII to prevent a refugee crisis from becoming worse in the Darfur region. The refugee problems in Chad and Ghana are threatening to undermine stability and security in these states and international relief organizations are struggling to keep pace with the growing need for food, water and supplies. The Security Council already has determined in two prior resolutions that the situation in Darfur constitutes a threat to international peace and security in the region.<sup>272</sup> As discussed above, one of the primary justifications advanced by the Security Council in authorizing humanitarian intervention in Iraq, Haiti, and Bosnia was the “threat to international peace and security” in the region posed by the flood of refugees. This same threat is present today in the Darfur region and is expected to worsen in the future. During a recent visit to Chad, Secretary-General Annan told reporters “[w]e must find a political solution as soon as possible, or we could experience a regional tragedy.”<sup>273</sup>

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267. *Id.*

268. See Kwaku Sakyi-Addo, *Hundreds of Darfur Refugees Arrive in Ghana*, REUTERS, Apr. 14, 2005, at 1, <http://www.alertnet.org/thenews/newsdesk/L14320925.htm>.

269. *Id.* From the eastern border of Chad to Ghana’s capital, where the refugees have been arriving, is 1.640 miles cutting across Chad, Cameroon, Nigeria, Benin and Togo. See *id.*

270. Thousands of Liberians have returned home from Ghana since the Liberian civil war ended in 2003. See *id.*

271. See *id.*

272. See U.N. SCOR, 60th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/1556 (July 30, 2004); U.N. SCOR, 60th Sess., 5151th mtg. at 3, U.N. Doc. S/RES/1590 (Mar. 25, 2005).

273. *Annan Urges Political Solution for Sudan’s Darfur ‘As Soon As Possible,’* [http://www.darfurinformation.com/ic\\_annan\\_urges.shtml](http://www.darfurinformation.com/ic_annan_urges.shtml).

## VI. CONCLUSION

The situation in Darfur has been described as “one of the worst humanitarian crises in the world.”<sup>274</sup> Since the beginning of the conflict in 2003, human rights groups estimate that the Sudanese army and the Janjaweed have killed more than 300,000 people. Over two million Darfuris have been forced from their homes and have fled to refugee camps in southern Sudan and eastern Chad, among other neighboring states. Thousands of women and young girls have been raped, and entire villages have been destroyed to prevent certain targeted tribes from returning home. According to the UN World Food Program, nearly three million refugees are in urgent need of food, medicine and shelter as the rainy season approaches and the violence continues. Furthermore, the Darfur crisis has been exacerbated by the Sudanese Government’s refusal to allow unrestricted humanitarian access to Darfur.

The legal basis for intervening in Darfur to prevent grave violations of human rights is well-established under international law. The doctrine of humanitarian intervention permits the UN or its members to circumvent Article 2(7) of the UN Charter when either “genocide” or serious human rights violations are being committed. Prior UN Security Council resolutions authorizing the use of force to protect human rights in Iraq, Haiti, Somalia and Yugoslavia served as important precedents for the legality of humanitarian intervention under conditions similar to those in Darfur. Moreover, unilateral humanitarian intervention in the absence of Security Council approval has been justified on more than one occasion to prevent brutal regimes from slaughtering their own people and to restore international peace and security. Although such interventions occurred without the consent of the host governments, the moral imperative of preventing serious human rights violations was deemed to outweigh claims of sovereignty and nonintervention under the UN Charter.

It remains to be seen whether the UN, or one of its members, will take appropriate military action to prevent further violence against civilians in Darfur. The International Crisis Group, a conflict prevention organization, has already called for NATO to consider sending its own troops to Darfur, because of widespread fears that the AU will not be able to find enough soldiers to pacify

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274. *WFP Confirms Massive Humanitarian Crisis in Darfur, and Calls the Plight of Sudanese Refugees ‘Tragic.’* Statement by the UN World Food Program Executive Director James Morris, May 4, 2004, available at <http://www.wfp.org/index.asp?section=2>.

the region.<sup>275</sup> The international community's *modus operandi* at present tends to favor nonintervention, or limited humanitarian involvement, in order to allow the recently signed peace agreement between the Sudanese Government and the southern rebels to take effect. However, as it discovered during the Rwanda and Kosovo conflicts, the UN cannot afford to ignore its obligations to prevent abusive regimes from intimidating their own people. The UN's failure to timely act in those conflicts, and others, has damaged its credibility as the world's collective police organ and prompted some scholars and commentators to question its relevance in international affairs.<sup>276</sup>

Once again, the credibility of the UN is at stake in Darfur. The legal and moral case for humanitarian intervention is strong, but the political will to act is lacking. The continued failure of the UN, or its members, to intervene militarily in Darfur could cost more lives, undermine years of legal precedent in favor of humanitarian intervention and spell disaster for future generations having to live under brutal, dictatorial regimes. In the words of Secretary-General Annan, "[o]ur collective failure to provide a much larger force [in Darfur] is as pitiful and inexcusable as the consequences are grave for the tens of thousands of families who are left unprotected."<sup>277</sup> Ignoring the lessons of the past has already taken its toll on the civilian population in Darfur. Will the UN live up to its commitment to "never again" fail to protect a civilian population from genocide or mass slaughter?<sup>278</sup> Only time will tell.

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275. See Ralph Atkins, *NATO defends deal on Darfur airlift*, FIN. TIMES, June 10, 2005, at 3.

276. See, e.g., Henry Lamb, *The U.N.'s Crisis of Relevance*, WORLDNETDAILY.COM, Oct. 14, 2004, at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=40920](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=40920); W. Andy Knight, *The Crisis of Relevance at the UN*, EDMONTON JOURNAL, March 3, 2003; Michael Glennon, *The UN's Irrelevant Relevance*, FRANKFURTER ALLEGEMEINE ZEITUNG, July 2, 2003; Editorial, *The UN's Relevance*, NATION, Mar. 31, 2003, <http://www.thenation.com/oc.mhtml?i=20030331&s=editors>; Hazem Biqeen, *UN 'Relevance' a Sham*, FREE ARAB VOICE, <http://www.freearabvoice.org/articles/UNRelevanceASham.htm>; Muqtedar Khan, *The U.S. and the UN: Risking Relevance*, FOREIGN POLICY IN FOCUS, Feb. 13, 2003, at [http://www.fpif.org/pdf/gac/0302\\_relevance.pdf](http://www.fpif.org/pdf/gac/0302_relevance.pdf).

277. *Billions of Promises to Keep*, *supra* note 231.

278. *Annan Emphasizes Commitment*, *supra* note 163.