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“GENOCIDE”—THE POWER OF A LABEL

Michael J. Kelly*

*I know that I shall meet my fate
Somewhere among the clouds above;
Those that I fight I do not hate,
Those that I guard I do not love;
My country is Kiltartan Cross,
My countrymen Kiltartan's poor,
No likely end could bring them loss
Or leave them happier than before.
Nor law, nor duty bade me fight,
Nor public men, nor cheering crowds,
A lonely impulse of delight
Drove to this tumult in the clouds;
I balanced all, brought all to mind,
The years to come seemed waste of breath,
A waste of breath the years behind
In balance with this life, this death.*

—W.B. Yeats,
An Irish Airman Foresees His Death

The irony and ethical quandary of those who fight on behalf of others is an age-old riddle not likely to be solved anytime soon. Military intervention to stop genocide, which is unauthorized by the United Nations, is a voluntary, and perhaps illegal, action on the part of states seeking to protect a people not their own. The duty to intervene with genocide, if it exists at all, is murky. The atrocity to be prevented is defined, although that definition is being pulled in multiple directions. Like the airman in Yeats' poem, neither law nor duty may compel action, yet how can the world countenance genocide while it retains the ability to act?

Any state may be faced with the following situation: an unspeakable series of atrocities unfolds in the arid, rocky lands of a far off nation

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located on an exotic-sounding continent. Mass rapes, deportations, starvations, and ultimately death ensue. The events are terrible beyond description. The international community has not acted. The United Nations is in stasis under the threat of a veto from a permanent Security Council member. Civil war hangs in the air, ready to erupt. Is this genocide? Does it matter? Why?

Those three questions are the subject of this essay. They all derive from exploring the power of labeling a given or unfolding atrocity as “genocide.” Politicians, scholars, relief agencies, and distinguished judges at international tribunals regularly agonize over whether to apply the label. Most recently, collective hand-wringing focused on the crisis in Darfur, Sudan. The moral, political, and legal consequences that follow from withholding or applying the genocide label vary with the circumstance, and the effects of applying the label can truncate options for dealing with the situation. One commentator has noted,

The danger of the word ‘genocide’ is that it can slide from its wider, legally specific meaning, to a branding of the perpetrators’ group as collectively evil. Having labeled a group or a government as ‘genocidal,’ it is difficult to make the case that a political compromise needs to be found with them. This leaves only various forms of pressure, such as sanctions, prosecution in a court of law, and, of course, military intervention. Sanctions rarely work. Prosecution is by definition too late for the specific crime in question. Military intervention is a clumsy tool that runs serious risks of failure and of inflammatory side effects.¹

Parties to the Genocide Convention undertake dual obligations—to punish and to prevent genocide. These obligations, however, are couched in language that significantly qualifies their successful undertaking. The two main tracks of debate today concern, first, the content of the definition and, second, whether a legal duty of intervention arises if the definition is triggered. Academics are more concerned with the former, while politicians are more concerned with the latter.

The definition from the 1948 convention is straightforward. Genocide is:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

¹ Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis as Genocide*, 20 HARV. HUM. RTS. J. 25, 31 (2007).

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²

States are obligated to prevent and punish genocide.³ As for punishment, the treaty restricts states to self-policing, trying suspects “in the territory of which the act was committed,” or turning to the international community.⁴ As for prevention, intervention rests in collective action via either the United Nations or the state where the atrocities are occurring, not individual foreign states.⁵ It has been noted that “[t]he 1948 Genocide Convention is silent about the *means* required to ‘prevent and punish’ the crime of genocide, and it would have been an anomalous anachronism for the member states of the UN to have made an exception to its rule of outlawing aggressive war by specifying that genocide created a duty of intervention.”⁶

Nevertheless, if a new norm of humanitarian intervention has crystallized in customary international law, then the Genocide Convention may have been altered to allow for this possibility, especially if genocide is considered to have passed into the *jus cogens* canon.⁷ But even if intervention is possible, the question of whether there is a legal duty or right to intervene remains open. Moreover, this question exists uncomfortably, but necessarily, alongside the reality that demonstrated inadequacies of the international system to respond to genocide create a vacuum for non-U.N. sanctioned humanitarian intervention to fill.⁸

On the question of definitional content, concerns coalesce around expanding or contracting the definition of genocide. If it is expanded to include cultural annihilation or political repression, then the crime becomes more akin to a crime against humanity—the category of internationally criminalized conduct from which it originally sprang.⁹ Purists want to keep genocide limited to the most extreme atrocities and retain it as a distinct crime.

² Convention on the Prevention and Punishment of Genocide art. 2, Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277.

³ *Id.* at art. 1.

⁴ *See id.* at art. 6.

⁵ *Id.* at art. 8; *see also*, William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1718 (2006) (“[A]ny duty to prevent genocide that may involve the use of force must receive the imprimatur of the Security Council.”).

⁶ Alex de Waal, *No Such Thing as Humanitarian Intervention*, HARVARD INT’L REV., March 21, 2007, <http://hir.harvard.edu/articles/1482/> (emphasis added).

⁷ David B. Kopel, Paul Gallant, & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275, 1327 (2006).

⁸ *See generally id.* (discussing international anti-genocide programs, the Genocide Convention, and other sources of international human rights law).

⁹ Schabas, *supra* note 5, at 1719–20.

These issues are not restricted to current events. Turkey and the United States recently experienced a severe diplomatic breach over applying the label “genocide” to the 1915 mass deaths of Turkish Armenians at the hands of the Ottomans. On October 10, 2007, the U.S. House of Representatives Foreign Affairs Committee passed a resolution labeling the atrocity genocide, despite heavy lobbying from the president not to do so for strategic diplomatic reasons.¹⁰ Before being immediately recalled to Ankara, Turkey’s ambassador said that being labeled as precursors to Hitler “is a very injurious move to the psyche of the Turkish people.”¹¹

It was in the context of the First World War that the tragedy destined to befall the Turkish Armenian population began to unfold. The Ottoman Empire’s response to participation by a Christian Armenian division in a Russian-sponsored action against Turkey, as well as the declaration of a provisional Armenian government, was swift and brutal.¹² The Turkish government undertook an “undeclared campaign of genocide against [its] Armenian subjects”¹³ The resulting genocide of the Armenians was organized as a march “into the desert to die of starvation and thirst.”¹⁴ This brutal action led to the deaths of approximately 700,000 men, women, and children.¹⁵

¹⁰ *A Resolution Too Far*, ECONOMIST, Oct. 20, 2007, at 16.

¹¹ *Unearthing the Past, Endangering the Future*, ECONOMIST, Oct. 20, 2007, at 34 [hereinafter *Unearthing the Past*].

¹² See JOHN KEEGAN, *THE FIRST WORLD WAR* 223 (1999).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; see also PETER DU PREEZ, *GENOCIDE: THE PSYCHOLOGY OF MASS MURDER* 5 (Peter Collins ed., 1994). Some, however, put the death toll as high as 1.5 million. See H.R. REP. NO. 106-933, sec. 2, at 1 (2000) (noting the Armenian genocide killed 1.5 million men, women and children); Robert F. Melson, *The Armenian Genocide as Precursor and Prototype of Twentieth-Century Genocide*, in *IS THE HOLOCAUST UNIQUE?: PERSPECTIVES ON COMPARATIVE GENOCIDE* 119, 121 (Alan S. Rosenbaum ed., 2nd ed. 2001) (stating that approximately one million Armenians, out of a total population of two million, were killed between 1915 and 1918); SHAVARSH TORIGUIAN, *THE ARMENIAN QUESTION AND INTERNATIONAL LAW* 9 (2nd ed. 1988) (1973).

The Turkish government still denies that the Armenian Genocide ever took place despite its recognition by countless historians and governments. See Henry R. Huttenbach, *The Psychology and Politics of Genocide Denial: A Comparison of Four Case Studies*, in *STUDIES IN COMPARATIVE GENOCIDE* 217–19 (Levon Chorbajian & George Shirinian eds., 1999); William H. Honan, *Princeton is Accused of Fronting for the Turkish Government*, N.Y. TIMES, May 22, 1996, at B1 (calling Armenian deaths “the unintended result of wartime deprivation”); Stephen Kinzer, *Turks Fume Over Stance by French on Armenia*, N.Y. TIMES, June 21, 1998, at A4 (explaining Turkey’s denial of France’s public recognition of the Armenian genocide); *International Affirmation of the Armenian Genocide*, Armenian National Institute, available at <http://www.armenian-genocide.org/affirmation/resolutions/index.php> (listing nations which have publicly recognized the Armenian genocide).

In fact, the Young Turks regime, which had replaced the old Sultanate, used the outbreak of war in 1914 to effect this atrocity as an ultimate solution to the “Armenian question,” which had long nagged the Turkish government.¹⁶ Although the process was to be carried out in secret,¹⁷ dispatches from foreign officials clearly reflected the magnitude of what was happening.¹⁸ After the war, Henry Morgenthau, America’s Ambassador to Constantinople, recounted:

The final and worst measure used against the Armenians was the wholesale deportation of the entire population from their homes and their exile to the desert, with all the accompanying horrors on the way. No means were provided for their transportation or nourishment. The victims . . . had to walk on foot, exposed to attacks of bands of criminals especially organized for that purpose. Homes were literally uprooted; families were separated; men killed, women and girls violated daily on the way or taken to harems. Children were thrown into rivers or sold to strangers by their mothers to save them from starvation. *The facts contained in the reports received at the Embassy from absolutely trustworthy eye-witnesses surpass the most beastly and diabolical cruelties ever before perpetrated or imagined in the history of the world.*¹⁹

Telegrams from the Interior Ministry collected after the capitulation of Turkey confirmed the government’s intention to destroy the Armenian population. Two communications from Interior Minister Talaat Pasha focused monstrously on the destruction of Armenian children:

To the Government of Aleppo,

January 15, 1916—We hear that certain orphanages which have been opened receive also the children of the Armenians. Whether this is done

Moreover, Turkey, currently a candidate for membership in the European Union, continues to strenuously lobby against recognition of the Armenian massacre as “genocide” by the United States. See Douglas Frantz, *Some in Turkey See Minefield Along Road to European Union*, N.Y. TIMES, Dec. 1, 2000, at A13 (discussing Turkey’s progress with European Union admission); Eric Schmitt, *The House Races; Republican’s Unusual Gift: A Vote on the House Floor*, N.Y. TIMES, Oct. 7, 2000, at A11 (describing Turkey’s acknowledgment of Armenian deaths as the result of “civil unrest”); Eric Schmitt, *House Backs Off on Condemning Turks’ Killing of Armenians*, N.Y. TIMES, Oct. 20, 2000, at A11 (explaining how Turkey will take political action to prevent United States recognition of Armenian genocide).

¹⁶ See TORIGUIAN, *supra* note 15.

¹⁷ *Id.*

¹⁸ *Id.* at 18–22 (excerpting correspondence of the German Foreign Ministry between 1914 and 1918 on the Armenian question); see also Vahakn N. Dadrian, *Documentation of the Armenian Genocide in German and Austrian Sources*, in 3 THE WIDENING CIRCLE OF GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 77–125 (Israel W. Charny ed., 1994).

¹⁹ TORIGUIAN, *supra* note 15, at 13 (quoting HENRY MORGENTHAU, THE TRAGEDY OF ARMENIA 7 (1918), available at <http://digital.library.wisc.edu/1711.dl/History.Morgenthau02>) (emphasis in original).

through some ignorance of our real purpose, or through contempt of it, the Government will regard the feeding of such children or any attempt to prolong their lives as an act entirely opposed to its purpose, since it considers the survival of these children as detrimental. I recommend that such children shall not be received into the orphanages, and no attempts are to be made to establish special orphanages for them.

March 7, 1916—Collect the children of the indicated persons who, by order of the War Office, have been gathered together and cared for by the military authorities. Take them away on the pretext that they are to be looked after by the Deportations Committee, so as not to arouse suspicion. Destroy them and report.²⁰

The United States subsequently dispatched Major General James G. Harbord to Anatolia and the Caucasus on a fact-finding mission in the summer of 1919. His report to the Senate the following year confirmed the extent of the massacres:

Massacres and deportations were organized in the spring of 1915 under definite system, the soldiers going from town to town. The official reports of the Turkish government show 1,100,000 as having been deported. The young men were first summoned to the government building in each village and then marched out and killed. The women, the old men, and children were, after a few days, deported to what Talaat Pasha called "agricultural colonies," from the high, cool, breeze-swept plateau of Armenia to the malarial flats of the Euphrates and the burning sands of Syria and Arabia . . . Mutilation, violation, torture and death have left their haunting memories in a hundred beautiful Armenian valleys, and the traveler in that region is seldom free from the evidence of this most colossal crime of all the ages.²¹

Thanks to the lobbying efforts of a wealthy Armenian diaspora, several states (or legislatures therein), including Greece, Italy, Russia, Switzerland, Argentina, Australia, Canada, France, the Vatican and the European Parliament, have taken political stands to recognize the atrocities committed against Armenians as genocide, even though neither the term nor the crime existed when the atrocities occurred.²²

²⁰ *Id.* at 16–18.

²¹ *Id.* at 22–23 (quoting MAJOR GENERAL JAMES G. HARBORD, CONDITIONS IN THE NEAR EAST: REPORT OF THE AMERICAN MILITARY MISSION TO ARMENIA, S. DOC. NO. 266 at 7 (1920)).

²² See Armenian Nat'l Comm. of Am., Genocide Recognition (2006), available at <http://www.anca.org/genocide/recognition.php>. In the United States, forty of the fifty United States have also recognized the Armenian Genocide. See Armenian Nat'l Comm. Of Am., Genocide Recognition by U.S. States (2006), available at http://www.anca.org/genocide/states_map.php.

House Resolution 106, which passed the Foreign Affairs committee on a vote of twenty-seven to twenty-one and which has 226 co-sponsors, states that “[t]he Armenian Genocide was conceived and carried out by the Ottoman Empire. . . .” and “calls upon the President in the President’s annual message commemorating the Armenian Genocide issued on or about April 24, to accurately characterize the systematic and deliberate annihilation of 1,500,000 Armenians as genocide. . . .”²³

Seeking to mitigate the damage to U.S.-Turkish relations, Secretary of State Condoleezza Rice noted that “the American people don’t feel that the current Turkish government is the Ottoman Empire.”²⁴ That, however, is cold comfort to the Turks, who still deny that the atrocity was genocide, and who are still strenuously seeking to derail the measure before a vote by the full House of Representatives.

Turkey has succeeded in gaining renewed support from the White House. President Bush argued that “one thing Congress should not be doing is sorting out the historical record of the Ottoman Empire . . . Congress has more important work to do than antagonizing a democratic ally in the Muslim world, especially one that is providing vital support for our military everyday.”²⁵ This has stalled, but not killed, the resolution. The Speaker’s support has waned, as Turkey holds its strategic military alliance with Israel hostage in exchange—causing support for the Armenian resolution to collapse among key Jewish members of the House.²⁶

The issue of genocide labeling is also occurring in the twenty-first century, as it has most recently erupted in the Darfur region of Western Sudan. The origins of this crisis are not unique in Africa, which has suffered numerous struggles over land and resources, with power often divided along ethno-religious lines. The Arab-dominated government in Khartoum has long been fighting an insurgency against its regime. In the 1980s the decision was taken to employ local militias to fight on behalf of the government as a proxy.

These Arab militias targeted black settlements in the South; “[t]hey were not paid but were allowed to keep what they looted, including cattle, household possessions, and even women and children. Only vague orders were given, and the insurgent areas were instead declared an ethics-free zone, in which no reporting back was required, and no questions were

²³ Affirmation of the United States Record on the Armenian Genocide Resolution, H.R. Res 106, 110th Cong. §§2–3 (2007) (as passed by the Foreign Affairs Committee to the Full House on Oct. 10, 2007). See *House Comm. Approves Armenian Genocide Resol.*, CNN, Oct. 10, 2007, <http://www.cnn.com/2007/POLITICS/10/10/us.turkey.armenians/>.

²⁴ *Unearthing the Past*, *supra* note 11, at 34.

²⁵ Carl Hulse, *House Speaker Now Unsure if Armenian Genocide Motion Will Reach a Vote*, N.Y. TIMES, Oct. 18, 2007, at A16.

²⁶ *Id.*

asked.”²⁷ The relationship of the militias to the Sudanese government under President al Bashir is not unlike that between the Bosnian-Serb militias and the Yugoslav government under Slobodan Milosevic during the Bosnian civil war.

This conflict spread to Western Sudan, specifically the Darfur region, in 2003, as rebels began arming themselves and attacking government troops. Again, using armed militias as proxy fighters, the government sought to eradicate resistance along ethnic lines. The ultimate aim of the Arab-dominated Islamic government in Khartoum is to eliminate the black African population from Darfur and “Arabize” the region,²⁸ similar to Saddam Hussein’s Arabization efforts of the Kurdish areas in northern Iraq during the 1980’s. Suliman Giddo, a native of Darfur and founder of the Darfur Peace and Development Group said, “[i]t’s not like regular war. The government, with the Janjaweed, are killing people and replacing them.”²⁹

Only a year and a half into the Darfur conflict, the State Department reported that the humanitarian crisis had reached disastrous levels:

As of August 2004, based on available information, more than 405 villages in Darfur had been completely destroyed, with an additional 123 substantially damaged, since February 2003. Approximately 200,000 persons had sought refuge in eastern Chad as of August, according to the UN High Commissioner for Refugees (UNHCR); the UN Office for the Coordination of Humanitarian Affairs reports another 1.2 million internally displaced persons (IDPs) remain in western Sudan. The total population of Darfur is 6 million. The lack of security in the region continues to threaten displaced persons. Insecurity and heavy rains continue to disrupt humanitarian assistance. The UN World Food Program provided food to nearly 940,000 people in Darfur in July. Nonetheless, since the beginning of the Darfur food program, a total of 82 out of 154 concentrations of IDPs have received food, leaving 72 locations unassisted. Relief and health experts warn that malnutrition and mortality are likely to increase as forcibly displaced and isolated villagers suffer from hunger and infectious diseases that will spread quickly among densely populated and malnourished populations. The health situation for the 200,000 refugees in Chad is ominous.³⁰

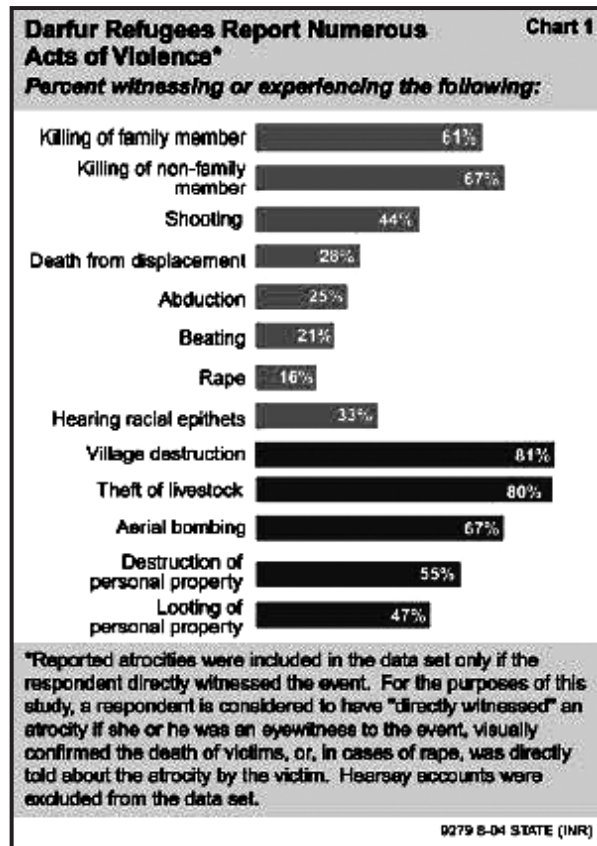
²⁷ de Waal, *supra* note 1, at 28.

²⁸ See G. Jeffrey McDonald, *In Sudan Crisis, A Duty to Intervene?*, CHRIST. SCI. MONITOR, July 21, 2004, at 16.

²⁹ *Id.*

³⁰ U.S. Dep’t of State Bureau of Democracy, Human Rights, and Labor and The Bureau of Intelligence Research, *Documenting Atrocities in Darfur*, Sept. 2004, <http://www.state.gov/drl/rls/36028.htm>.

The State Department conducted interviews of those who had relocated to refugee camps in neighboring Chad. These interviews revealed the degree of horror witnessed by the surviving members of the local population at the hands of the government-sponsored militias:



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The United States recognized the atrocities carried out in Darfur as genocide by the government of Sudan.³¹ Meanwhile, a high-level panel of the United Nations, led by Antonio Cassese, found that Sudanese government forces and militias were responsible for mass killings, torture, rapes, and forced displacement of civilians, but not genocide due to a lack of intent "to destroy, in whole or in part, a national, ethnical, racial or religious

³¹ *SOAT Receives Prestigious Prize as Torture and Killing Escalates in Darfur*, Aug. 31, 2006, <http://www.ircct.org/Default.aspx?ID=159&M=News&PID=577&NewsID=448>.

³² *The Current Situation in Sudan and the Prospects for Peace: Hearing Before the Comm. on Foreign Rel.*, 108th Cong. 8 (2004) (statement of Colin Powell, Sec'y of State of the United States).

group, as such.”³³ That finding—withholding the label “genocide”—seriously undermined efforts to marshal international action to stop the atrocities in Darfur.

[T]he Report, together with the resulting news reports, made the struggle for Darfur intervention more difficult by undercutting efforts by Darfur action groups to mobilize public support. With headlines such as *Murder—But No Genocide*, the motivation to intervene was gone. Murder is bad, to be sure—but murder is ordinary. One might lobby Congress to do something about genocide, but who ever heard of lobbying Congress to stop foreigners from murdering each other? Foreigners murder each other all the time. Genocide sounds like it might be our business, but ‘mere’ murder is theirs.³⁴

The Security Council referred the disagreement between the United States and the United Nations to the new International Criminal Court (ICC) for investigation.³⁵ Although the prosecutor for the ICC has undertaken an investigation of criminal activity in Darfur, he has only brought war crimes and crimes against humanity charges against two individuals,³⁶ and has stated, “allegations have been made that . . . groups involved in the commission of crimes in Darfur did so with specific genocidal intent. This issue remains the subject of investigation and the Prosecutor has not, and will not, draw any conclusions as to the character of the crimes pending the completion of a full and impartial investigation.”³⁷

Meanwhile, the atrocities in Darfur continue. In his latest report to the Security Council, the ICC’s prosecutor, Luis Moreno-Ocampo, noted

The ongoing situation remains alarming. There are 4 million people in need of humanitarian assistance in the region, two thirds of the population of Darfur; there are two million internally displaced people, who continue to be immensely vulnerable; there are continuing attacks against them and

³³ John R. Cook, *Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT’L L. 479, 501 (2005); see International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, para. 459, U.N. Doc. S/2005/60 (Jan. 25, 2005).

³⁴ David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT’L L. 303, 306 (2006).

³⁵ See generally S.C. Res. 1593, U.N. Doc. S/Res/508 (March 31, 2005) (referring the situation in Darfur to the Prosecutor of the International Criminal Court).

³⁶ Prosecutor of the Int’l Criminal Court, *Fifth Report of the Prosecutor of the Int’l Criminal Court to the UN Sec. Council Pursuant to UNSCR 1593 (2005)*, at 1 (June 7, 2007), available at http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC5-Darfur_English.pdf [hereinafter *Fifth Report of the ICC Prosecutor*].

³⁷ Prosecutor of the Int’l Criminal Court, *Third Report of the Prosecutor of the Int’l Criminal Court to the UN Sec. Council Pursuant to UNSCR 1593 (2005)*, at 3 (June 14, 2006), available at http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf.

against international workers, as well as frequent impediments by the authorities to the delivery of assistance. . . .

Attacks against UN, AU and humanitarian personnel are well documented. Reports allege indiscriminate and disproportionate air strikes by the Government of the Sudan that have caused destruction, loss of life and new displacement of civilians. Similarly, there are allegations of crimes committed by rebel forces.³⁸

With respect to the definition of genocide itself, the debate within academic circles is a teleological one—concentrating on the content of what can be considered genocide. Restrictivists seek to restrain the label’s usage to atrocities more akin to the Holocaust, while expansionists seek to broaden the label’s usage to include tangential atrocities.

The oldest element of the restrictivist school is Jewish ownership of the term “Holocaust,” and, by extension, of the ultimate model of genocide.³⁹ Although that position is still defended today by Israel and the Anti-Defamation League in the United States, the terms have found purchase as descriptors in other situations. What scholars now argue strenuously about is whether the definition of genocide covers (with or without specific intent) atrocities, such as extermination and ethnic cleansing, and whether political groups should be included as protected groups.

Prof. David Luban, of Georgetown University, believes “extermination” should be included in the definition to elevate that crime into genocidal conduct and avoid Darfur-like confusions.⁴⁰ Meanwhile, Prof. William Schabas of the National University of Ireland believes that ethnic cleansing, the practice of forcibly removing large populations from a territory, should not be included in the definition.⁴¹ Yet, the court in *Akayesu* interpreted non-lethal acts, such as restriction to subsistence diet, expulsion from homes, and reduction in essential medical services, as genocidal acts within the meaning of the “inflicting conditions of life” prong of the definition.⁴² Debates about whether ethnic cleansing constitutes genocide have raged since the Kosovo campaign, and have yet to be resolved.⁴³ Prof. Schabas’

³⁸ Fifth Report of the ICC Prosecutor, *supra* note 34, at 2.

³⁹ See Jewish Virtual Library, Holocaust Glossary: Terms, Places, and Personalities, http://www.jewishvirtuallibrary.org/jsource/Holocaust/wiesenthal_glossary.html.

⁴⁰ Luban, *supra* note 36, at 320.

⁴¹ “In Professor William Schabas’ words, ‘Ethnic cleansing is . . . a warning sign of genocide to come. Genocide is the last resort of the frustrated ethnic cleanser.’” Patricia Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 *GEO. J. LEGAL ETHICS* 445, 462–63 n. 49 (2003) (quoting WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 201 (2000)).

⁴² Prosecutor v. Akayesu, Case No. I.C.T.R. 96-4-T, Judgment, para. 506 (Sept. 2, 1998).

⁴³ Schabas, *supra* note 5, at 1708.

position, however, was recently buttressed by an opinion of the International Court of Justice in the case of *Bosnia v. Serbia*.⁴⁴

Although others have tried to reinsert protection for political groups since the adoption of the genocide definition in the 1948 Convention, U.S. Naval Academy scholar Barbara Harff is the most recent academic to conflate the term politicide, or political mass murder, with genocide. The Soviet Union insisted as a precondition to joining the treaty that political groups be excluded as protected groups.⁴⁵ The ICTR noted, however, that the character of the four protected groups in the treaty definition is dispositive of why they are protected:

On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups.⁴⁶

Therefore, political groups cannot be included.

Why is such political and academic vitriol being spilled on the question of labeling atrocities "genocide?" The intensity of the argument with respect to past atrocities reflects the desire of modern states not to be pasted with the stigma of having committed genocide. Modern Turks, for instance, are concerned with being compared to Hitler's Nazis, despite the fact that the genocide of Turkey's Armenians was carried out by the Ottomans.

With respect to unfolding atrocities, the intensity of the argument over applying the genocide label reflects the potentially high stakes of actually having to do something to stop it. Once genocide is found to be occurring, a moral and political duty arises in favor of action. The post-Holocaust mantra "never again" is chanted by pressure groups and nongovernmental organizations, pleading with states to deploy troops. But beyond the moral and political responsibility, is there a *legal* obligation to intervene?

⁴⁴ See Application of the Convention on the Prevention and Punishment of Genocide (Bosn. v. Serb.), 2007 I.C.J. 71 (Feb. 26) [hereinafter Judgment (Bosn. v. Serb.)]. "Neither the intent . . . to render an area 'ethnically homogenous,' nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy' . . . and deportation or displacement . . . is not necessarily equivalent to destruction . . ." *Id.* (emphasis in original).

⁴⁵ See Barbara Harff, *No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder Since 1955*, 97 AM. POL. SCI. REV. 57, 58 (2003).

⁴⁶ Prosecutor v. Akayesu, Case No. I.C.T.R. 96-4-T, Judgment, para. 511 (Sept. 2, 1998).

Two schools of thought are forming that arrive at divergent answers to this question. The non-interventionist school denies a legal duty based on a plain reading of the Genocide Convention. This school admits, however, the moral and political responsibility, and even advocates undertaking all other actions short of military intervention (economic sanctions, embargoes, etc.). The *option* of intervention is also on the table, under a newly developed theory of a sovereignty waiver if states commit genocide against their own people. Whether or not to exercise that option is in the discretion of each state.

Meanwhile, the interventionist school is a natural outgrowth of the post-war human rights movement. This school holds that a duty to intervene arises once genocide has been determined, and states with the capacity to act that do not do so are in breach of an international legal obligation. Widespread acceptance of humanitarian intervention by states, as well as the U.N. leadership in the 1990's, forms the basis for this school's underlying theory. Coupled with widespread acknowledgement that Rwanda's genocide was preventable (followed by the public contrition by states, including the United States), this school relies heavily on the moral and political weight of 800,000 dead Rwandans to buttress its legal argument.⁴⁷

Both schools have influential supporters. President Bush, although a robust interventionist when it comes to defending American interests, does not, in fact, recognize a duty to intervene to stop genocide—especially in Africa.⁴⁸ Richard Haass, president of the Council on Foreign Relations, also a robust interventionist against states that pursue weapons of mass destruction, harbor terrorists, or commit genocide on the theory that they have waived their sovereign right against intervention, recognizes no state-centered duty to intervene—only an option. The existence of a duty incumbent upon the international community collectively is possible.⁴⁹

Yet some commentators have noted that the threshold for intervention is such that even non-interventionists should take comfort that intervention would not be required very often. “[S]topping genocide doesn’t commit America to intervene everywhere. It actually sets the bar to intervention very high and justifies the use of force only when large numbers of civilians

⁴⁷ See Gregory H. Stanton, *Could the Rwandan Genocide Have Been Prevented?*, GENOCIDE WATCH, Jan. 27, 2002, available at <http://www.genocidewatch.org/aboutus/stantonrwandapreventionarticle.htm>.

⁴⁸ See Michael Ignatieff, *The Next President's Duty to Intervene*, N.Y. TIMES, Feb. 13, 2000, at WK17.

⁴⁹ Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 414–15 (2005).

are facing extermination, mass deportation or massacre and where force can actually turn the situation around.⁵⁰

Unsurprisingly, many interventionists go beyond using genocide as a trigger, arguing that any type of mass atrocity should provoke an intervention; a technical finding, or lack thereof, of genocide should not be the operative barrier. In the context of Darfur, the wrangling over whether genocide has occurred, they argue, is especially inappropriate:

Focusing the international assessment of this conflict on the genocide question has obscured and distorted the issues of real importance and provided a delay tactic for states reluctant to intervene to protect civilian populations from mass state-sponsored violence. . . . When civilians are the deliberate objects of attack, when entire villages and livelihoods are destroyed, when women and girls are mass raped, the possibility of humanitarian intervention is implicated, regardless of the identity of the victims or the specific intent of the perpetrators to destroy the victim group.⁵¹

As for the end to this duty, interventionists do not consider falling death rates to mitigate the duty to act. Declining deaths in Darfur in late 2007 prompted prominent academics to write:

As if Darfur hasn't suffered enough, some Western diplomats want to punish victims of the genocide for dying in smaller numbers. The United Nations recently confirmed a decline in the death rate, which a diplomatic official, quoted anonymously in the *Los Angeles Times*, and echoing the sentiments of others, argues is evidence that the genocide is over. But according to international law, genocide ends only when murders, torture and destruction of food, water and shelter ends. . . . Genocide is not a crime of severity; it is a crime of intent. As long as Sudan and its agents act with the intention to eliminate civilians in Darfur, every weapon in the arsenal of the international community should be used to stop them. That means admitting that trying to wipe a group of people off the face of the earth still shocks our basic concept of humanity, whatever the latest death statistics report.⁵²

The International Court of Justice (ICJ) has come down on the side of the interventionist school. In a qualified opinion, the ICJ recently held Serbia accountable for a breach of its international legal obligation to prevent genocide.⁵³ The genocide in question was the July 1995 massacre of Bosnian Muslim men by the Bosnian Serb militia at Srebrenica. The gov-

⁵⁰ Ignatieff, *supra* note 48.

⁵¹ Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101, 1141 (2005).

⁵² Jamal Jafari & Paul R. Williams, *A Coward's Way Out*, NAT'L L. J., Oct. 22, 2007, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1192525413042>.

⁵³ Judgment (Bosn. v. Serb.), *supra* note 43, at 154, 158.

ernment of Slobodan Milosevic, in neighboring Serbia, knew this massacre was likely to happen and yet did nothing to stop it, even though Belgrade retained significant influence over the Bosnian Serb forces. According to the ICJ, not only did Serbia have a duty under the Genocide Convention to prevent the massacre, but it also “does not need to be proven that the State concerned definitely had the power to prevent genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.”⁵⁴

The United Nations’ International Commission on Intervention and State Sovereignty iterated this duty in its 2001 report “The Responsibility to Protect.”⁵⁵ The duty to prevent genocide recognized in this report included military intervention by the U.N. Security Council to stop it from occurring. But the possibility of intervention by the General Assembly, military alliances (such as NATO), or other states were neither excluded nor required—leaving the door open for the continued use of humanitarian intervention.

Indeed, this may all go back to where we started—a fairly narrow definition for genocide, accompanied by a nebulous duty to prevent it, along with the option—though not the requirement—of military intervention. As José Alvarez, president of the American Society of International Law, reflects:

Given the schizophrenias of [the Responsibility to Protect], the maligned limits of humanitarian intervention merit a second look. . . . Humanitarian intervention . . . does little to threaten the traditional rights of sovereigns. On the contrary, the reference to “intervention” emphasizes its opposite: the ordinary rule of non-intervention. Humanitarian intervention does not suggest that by merely ratifying the UN Charter states sign away their sovereignty. Humanitarian intervention, however ambiguous its scope, was never conceived as anything but an add-on to the existing rules of international law, including the rules of self-defense. Unlike [the Responsibility to Protect], humanitarian intervention did not aspire to fundamentally reorient a state-centric system of rules away from state centrality. If the 20th century’s failures to intervene gave us [the Responsibility to Protect, the 21st century’s endless “war” on terror and the quagmire in Iraq are forcing us to appreciate anew the merits of old-fashioned humanitarian intervention.⁵⁶

⁵⁴ *Id.* at 158.

⁵⁵ See generally INTERNATIONAL COMMITTEE ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT: REPORT OF THE ICISS (2001), available at <http://www.responsibilitytoprotect.org/> (embracing the “responsibility to protect” against genocide, crimes against humanity, and ethnic cleansing).

⁵⁶ José E. Alvarez, *The Schizophrenias of R2P*, AM. SOC’Y OF INT’L L NEWSLETTER, Summer 2007, at 1, 11, available at <http://www.asil.org/newsletter/president/pres070927.html>.

Ultimately, application of the genocide label to a given atrocity is still a very political calculation, as offensive as that is. States want to retain the option of acting, but avoid the specific requirement of doing so. Expanding the legal definition, adding new protected groups, and characterizing the obligation to prevent as an affirmative state-centered, as opposed to a collective, duty of military intervention sends a shudder down the spines of politicians with deployable military units.

The hand-wringing will continue, and action may be had where genocide coincides with individual national policy preferences, but a consistent policy of intervention to stop genocide around the world, wherever it may erupt, especially under an expanded definition, is still a long way off. States are content for now to remain like Yeats' Irish airmen, acting on occasion, but under neither law nor duty, so long as they can keep either at bay.