DARFUR AND THE RHETORIC OF GENOCIDE

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I. INTRODUCTION

The ancient concept of humanitarian intervention¹ has become the subject of renewed debate and discussion at the inter-governmental level,² within the non-governmental sector,³ and in the academy.⁴ This concept can be defined as the intervention into the territorial state by another state or a collective of states, with or without authorization from the United Nations Security Council, for the promotion or protection of basic human rights where the territorial state is perpetuating abuses or is unable or unwilling to provide the necessary protection to its inhabitants.⁵ The concept of humanitarian intervention is implicated in such disparate events as the United Nations’s (U.N.) involvement in Somalia in 1992, the North Atlantic Treaty Organization’s (NATO) deployment in response to abuses in Kosovo in 1999, and the United States’s invasion of Iraq in 2003. In a major new initiative, the U.N. recognized:

[T]he emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved themselves powerless or unwilling to prevent.⁶

Although intrigued by the concept in theory, interested parties are grappling with the specifics of identifying substantive criteria justifying intervention, mechanisms for doing so within and without the U.N. institutional framework, operational considerations, and means to protect against abuses of the

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¹ Grotius argued in 1625 that “‘war for the subjects of another [is] just, for the purpose of defending them from injuries inflicted by their ruler’ . . . if [the] ‘tyrant . . . practices atrocities toward his subjects which no just man can approve.’” Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 Cardozo J. Intl. & Comp. L. 1, 2-3 (1995) (quoting Grotius, *Vindicae Contra Tynrannos* (1625)).

² See generally United Nations, Rpt. of Sec. General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Knowledge* (2004) (available at <http://www.un.org/secureworld/> (accessed Mar. 28, 2005)) [hereinafter High Level Panel]. The panel was an initiative of Secretary-General Kofi Annan to reconsider the role of the United Nations (U.N.) in light of new threats posed by terrorism, poverty, and war and violence within states, and changing conceptions of sovereignty, collective security, and the use of force. Id. In response to a plea by Secretary-General Kofi Annan following the North Atlantic Treaty Organization (NATO) operation in Kosovo to craft consensus principles governing humanitarian intervention, the International Commission on Intervention and State Sovereignty prepared a report on “The Responsibility to Protect” to promote a global debate on the relationship between intervention and state sovereignty. Intl. Comm. on Intervention & St. Sovereignty, *The Responsibility to Protect* ¶¶ 1.6-1.7 (Dec. 2001) (available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (accessed Mar. 28, 2005)). The report purposefully eschews the term “humanitarian intervention” in favor of the concept of the “responsibility to protect” in order to emphasize the protective function of any intervention. Id. at ¶¶ 1.39-1.41. This paper employs the former terminology, but notes the movement in the lexicon toward the latter. *See High Level Panel, supra*, at ¶201 (stating “[t]here is a growing recognition that the issue is not the ‘right to intervene’ of any State, but the responsibility to protect’ of every State when it comes to people suffering from avoidable catastrophe.” (emphasis in original)).


⁵ See Halberstam, *supra* n. 1, at 2.

⁶ *High Level Panel, supra* n. 2, at ¶203.
The crisis in Darfur, Sudan has provided an immediate test of the international community’s commitment to humanitarian intervention and its resolve to avoid the debacle of Rwanda, where the world stood largely silent while entire communities were exterminated with rudimentary farm tools. And yet, the international discourse concerning the humanitarian crisis in Darfur has conflated two distinct inquiries: the legal definition of genocide as it applies to the unique circumstances of Darfur and the propriety of humanitarian intervention, which remains mired in international politics. This conflation can be traced to a number of factors, including a misunderstanding of the obligations imposed by the Genocide Convention, the temptation to employ semantic hyperbole to provoke an international response, a persistent unwillingness to risk blood and treasure in defense of humanity, and the manipulation of a plausible delay tactic. Irrespective of the source of this conflation, the question of whether or not the violence in Darfur constitutes genocide is irrelevant outside the context of an international criminal tribunal with jurisdiction over events in Darfur. At the point in time at which state responsibility is at issue and economic, political, and military solutions to mass violence are being contemplated—be it on multilateral, regional, or even unilateral grounds—debating legal semantics about whether violence rises to the level of genocide simply has no place. Indeed, the methodology necessary to determine the commission of genocide is inapt—and the surrounding discourse discordant—when people are being systematically killed and expelled from their homes through violence on a mass scale. What matters is that the level of violence and the risk to humanity has reached a certain threshold. If international law creates a right—or even a duty—to intervene in countries where massive rights violations are occurring, such a right or a duty has long since been triggered in Darfur.

This paper seeks to disentangle the discourse on genocide and humanitarian intervention by arguing that any right or duty of states to engage in humanitarian intervention should be untethered from specific findings of genocide under international criminal law (ICL). It proceeds in three parts. First, by way of background, it situates the conflict in Darfur in the context of the Sudanese civil war that has raged on and off since Sudan achieved its independence in 1956. Second, it sets out the elements of the crime of genocide and identifies several problems of proof posed by this definition and the nature of mass violence in general that led to the finding by a U.N. International Commission of Inquiry (Commission) that the government of Sudan is not committing genocide in Darfur. This paper not reach its own conclusion about whether genocide is or is not occurring in Darfur, but it does evaluate the Commission’s reasoning within the ICL jurisprudence in an effort to demonstrate the complexity and subtlety of such an inquiry. Finally, it argues that there is a basic incongruity in undertaking a genocide analysis, which requires detailed considerations of identity and intent, while abuses are ongoing and some form of intervention or state sanction is being contemplated. The nuances inherent to the definition of genocide under ICL provide an inapt metric for determining state responsibility and designing an appropriate preventative response.

7. Indeed, the emergence of Darfur on the international agenda coincided with the 10th anniversary of the genocide in Rwanda.