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The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity

by Ramesh Thakur & Vesselin Popovski***

*Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.*

William Butler Yeats, *The Second Coming*

I. Introduction

The above lines are among the most popular and widely quoted lines of poetry in the English language. As well as the beauty of language, they have a haunting relevance for contemporary international politics. The multilateral system of global governance centred on the United Nations is in danger of falling apart. In that case, the problem of international anarchy will intensify. Yet in part the system is starting to unravel because of the spread of anarchy within the sovereign jurisdiction of member states of the international organization, some of whom have abused the attribute of state sovereignty underpinning the contemporary world order as a licence to kill with impunity. Some others lack the essential attributes of sovereignty that would enable them to protect the lives and safety of their citizens against a range of armed predatory groups. Revulsion at the murder of large numbers of civilians in a range of atrocity crimes—the drowning of the ceremony of innocence—has led to a softening of public and governmental support for the norms and institutions that shield the perpetrators

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of atrocity crimes from international criminal accountability. The failure to act can indeed be interpreted as the best lacking the courage of their conviction while the worst engage in mass murder with passionate intensity. "Mobilizing political will" is a more prosaic way of saying that the best need to rediscover and act on their convictions.

Discussion and analyses of the protection of civilians and the prosecution of perpetrators have hitherto proceeded along separate lines. It is our contention that the international protection and prosecution agendas are two sides of the same coin. The Second World War gave birth to the UN Charter and the Nuremberg Charter. The first was forward-looking, aiming to ensure peace and security, economic cooperation and respect for human rights. The second was backward looking, aiming to punish those who started the war and committed horrific crimes against humanity. The defence lawyers in Nuremberg argued that the international law is concerned with the actions of sovereign states, not of individuals, and therefore the defendants should not be liable for international crimes. The judges rejected this defence and in a landmark advance from the ancient state-centric tradition, they made individuals directly accountable in international law. But if individuals are bound by and can be prosecuted under international law, then it must logically follow that individuals must equally be protected by international law. The idea of international individual accountability twinned with an increasingly robust international human rights norm. The recognition of individuals as subjects of international duties logically led to the recognition of individuals as beneficiaries of international rights. The individualization of the responsibility of the perpetrators has been paralleled with the individualization of the protection of the victims.

This dual process of individualization of rights and duties in international law was rapidly codified in the 1948 Genocide Convention, the four 1949 Geneva Conventions, and the 1977 Additional Protocols which helped to develop international humanitarian law. In 1948 the Universal Declaration of Human Rights was adopted, followed by two UN Covenants on political and civil; and on economic, social and cultural rights. These two branches of law—international humanitarian law and human rights law—have a central feature in common: both deal with the protection of victims. Yet they are also different: international humanitarian law applies in time of armed conflict, human rights law in time of peace. International humanitarian law is a contract between states and regulates how to fight wars; human rights law is a contract between states and citizens and regulates how to live in peace. International humanitarian law protects the civilians of the enemy; human rights law protects the state's own civilians. In international humanitarian law states (prosecutors) sue individuals; in human rights law individuals sue states.

In sum, the problem is the atrocities committed against innocent civilians. The inter-related twin tasks are to protect the victims and punish the perpetrators. Both require substantial derogations of sovereignty, the first with respect to the norm of non-intervention and the second with respect to sovereign impunity up to the level of heads of government and state. At the same time, both require sensitive judgment calls: the use of external military force to protect civilians inside sovereign jurisdiction must first satisfy legitimacy criteria rooted largely in just war theory, while the prosecution of alleged atrocity criminals must be balanced against the consequences for the prospects and process of peace, the need for post-conflict reconciliation and the fragility of international as well as domestic institutions.

This paper begins with an outline of the background factors that have helped to put the twin issue on the policy agenda of international affairs. We will then describe the main elements of the responsibility to protect and institutions of international criminal justice respectively. In the third section, we will examine the dilemmas and choices that have to be made with regard to whether, when and how to implement the double agenda. Finally, we will point out how the principles underpinning the operational agendas of protection and punishment are remarkably similar.

II. Background: A Changed World from 1945 to 2005

The end of the Second World War and the establishment of the United Nations in 1945 and the formal adoption of the responsibility to protect norm at the summit of world leaders held at the United Nations in 2005 mark convenient chronological book-ends for us. During this period, the key changes relevant to our analysis include the changing nature of armed conflict that has put civilians on the frontline of conflict-related casualties; the rise of a powerful human rights movement and the parallel growth of international humanitarian law, leading to the emergence of a humanitarian community dedicated to championing the cause of civilian protection; the emergence of a robust civil society that is transnational rather than sovereignty-bound; the rise of human security as an alternative paradigm to national security; and globalization, which (1) has shrunk distances; brought images of human suffering into our living rooms and on our breakfast tables in graphic detail and real time while simultaneously expanding our capacity to respond meaningfully, thereby increasing the calls to do so; and (2) made total state control of border crossings by people, goods, finance, information, disease, drugs and so on physically impossible, thereby severely curtailing the exercise of sovereignty in practice.

Changing Nature and Locale of Armed Conflict

The number of armed conflicts rose steadily until the end of the Cold War, peaked in the early 1990s, and has declined since then. The nature of armed conflict itself has changed,¹ with most being internal rather than inter-state. Until the Second World War, war was fought between strong and mechanized armies as an institution of the states system, with distinctive rules, etiquette, norms and stable patterns of practices. Today's wars are mostly fought in poor countries with small arms and light weapons; and between weak government forces and ill-trained rebels. Although often brutal, these wars kill fewer people. In most of today's armed conflicts, for example Darfur, displacement, disease and malnutrition resulting from warfare kill far more people than missiles, bombs and bullets. The locale of warfare has also shifted. Today we have more wars, and more UN peace operations, in Africa than the rest of the world combined. Often, wars of national liberation leading to the creation of new countries were followed by wars of national debilitation as the new states faced internal threats to their authority, legitimacy and territorial integrity from secessionist movements.

The net result is that non-combatants are now on the frontline of modern battles and civilians comprise up to 90 percent of conflict related casualties. The UN is an organization dedicated to the territorial integrity, political independence, and national sovereignty of its member states and the maintenance of international peace and security on that basis. But the overwhelming majority of today's armed conflicts are intra- and not inter-state. With the changed nature of war, the United Nations confronts a major difficulty: how to reconcile its foundational principle of member states' sovereignty with the primary mandate to maintain international peace and security and the equally compelling mission to promote the interests and welfare of "We the peoples of the United Nations." Secretary-General Kofi Annan discussed the dilemma in the conceptual language of two sovereignties, vesting respectively in the state and in the people.²

Thus the need to help and protect civilians at risk of death and displacement caused by armed conflict is now paramount. Diplomats, international and nongovernmental organizations (NGOs) alike will be judged on how well they discharge or dishonour their international responsibility to protect. The agenda of the Security Council, the World Bank, inter- and non-governmental humanitarian actors, international criminal justice institutions, and international civil society converge on this point.

1 One of the best studies to map the changes in armed conflict since 1945 is Andrew Mack, et al., eds., *Human Security Report 2005* (Oxford: Oxford University Press, 2005).

2 Kofi A. Annan, "Two Concepts of Sovereignty," *The Economist*, 18 September 1999, pp. 49–50.

So too does that of UN peace operations. This was not the case with classical peacekeeping.³ Traditional peacekeeping aimed to contain and stabilise volatile regions and interstate conflicts until such time as negotiations produced lasting peace agreements. The newer “complex humanitarian emergencies” produced multiple crises all at once: collapsed state structures; humanitarian tragedies caused by starvation, disease or genocide; large-scale fighting and slaughter between rival ethnic or bandit groups; horrific human rights atrocities; and the intermingling of criminal elements and child soldiers with irregular forces. A high-level international panel, chaired by former Algerian foreign minister Lakhdar Brahimi and charged with realigning peace operations with current challenges and realities, concluded that “when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence with the ability and determination to defeat them.” For in the final analysis, “no amount of good intentions can substitute for the fundamental ability to project credible force if complex peacekeeping, in particular, is to succeed.”⁴ Mandates, and the resources to match them, have to be guided by pragmatic, realistic analysis and thinking. The UN Secretariat “must not apply best-case planning assumptions to situations where the local actors have historically exhibited worst-case behaviour.”⁵

Nor should the need for impartial peacekeeping translate automatically into moral equivalence among the conflict parties on the ground: in some cases local parties consist not of moral equals but aggressors and victims. Political neutrality has too often degenerated into military timidity, the abdication of the duty to protect civilians and an operational failure to confront openly those who challenge peacekeeping missions in the field. Impartiality should not translate into complicity with evil. The Charter sets out the principles that the UN must defend and the values that it must uphold.⁶ The reluctance to distinguish victim from aggressor implies a degree of moral equivalency between the two and damages the institution of UN peacekeeping.

3 For an exploration of the changes from classical peacekeeping to peace operations by the United Nations, see Ramesh Thakur and Albrecht Schnabel, eds., *United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement* (Tokyo: United Nations University Press, 2001), and Alex J. Bellamy, Paul Williams and Stuart Griffin, *Understanding Peacekeeping* (Oxford: Polity Press, 2004).

4 *Report of the Panel on United Nations Peace Operations (A/55/305-S/2000/809)*, 21 August 2000, p. viii. For a comment on the Brahimi Report, see David M. Malone and Ramesh Thakur, “UN Peacekeeping: Lessons Learned?” *Global Governance* 7:1 (January–March 2001), pp. 11–17.

5 *Ibid.*, para. 51.

6 The language and the argument of the Brahimi Report here borrowed from a speech of Kofi Annan himself to the Council on Foreign Relations in New York in 1999; see Ian Johnstone, “The Role of the UN Secretary-General: The Power of Persuasion Based on Law,” *Global Governance* 9:4 (October–December 2003), p. 444.

Human Rights

The multiplication of internal conflicts was accompanied by a worsening of the abuses of the human rights of millions of people. International concern with human rights prior to the Second World War dwelt on the laws of warfare, slavery, and protection of minorities. In 1948, conscious of the atrocities committed by the Nazis while the world looked silently away, the United Nations adopted the Universal Declaration of Human Rights. Covenants in 1966 added force and specificity, affirming both civil-political and social-economic-cultural rights without privileging either set. The UN has also adopted scores of other legal instruments on human rights. In his landmark report in March 2005 setting the terms of the global debate on UN reforms, Kofi Annan for the first time elevated human rights to co-equal status and importance alongside security and development. He argued that security cannot be achieved in the midst of persistent and severe poverty, development is not possible in conditions of insecurity, neither security nor development is achievable and sustainable without ensuring the human rights of citizens, and the attainment of all three requires multilateral cooperation.⁷

Human rights advocacy rests on “the moral imagination to feel the pain of others” as if it were one’s own, treats others as “rights-bearing equals,” not “dependents in tutelage,” and can be viewed as “a juridical articulation of duty by those in zones of safety toward those in zones of danger.”⁸ The origins of the Universal Declaration in the experiences of European civilization are important, not for the reason that most critics cite, but for the opposite reason. It is less an expression of European triumphalism and imperial self-confidence than a guilt-ridden Christendom’s renunciation of its ugly recent record; less an assertion of the superiority of European human nature than revulsion at the recent history of European savagery; not an effort to universalize Western values but to ban the dark side of Western vices like racial and religious bigotry.⁹ Far from cross-cultural divisions, the loss of a son killed by government thugs unites mothers of all religions and nationalities in shared pain, grief and anger. The challenge is how best to interpret and apply universal values with due sensitivity to local contexts and sensibilities.

The tensions crippling the efficacy, credibility and legitimacy of the formal human rights machinery reflect domestic and international politics at their

7 Kofi A. Annan, *In larger freedom: towards development, security and human rights for all*. Report of the Secretary-General (New York: United Nations, document A/59/2005, 21 March 2005).

8 Michael Ignatieff, *Human Rights as Politics and Idolatry*, edited and introduced by Amy Gutmann (Princeton: Princeton University Press, 2001), p. 163.

9 Jack Donnelly, “Human Rights and Asian Values: A Defense of Western Universalism,” in Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), p. 68.

most raw. Human rights can be violated most cruelly, pervasively and systematically by governments. Efforts to monitor and enforce human rights therefore take the form chiefly of claims by citizens against their own governments. But the multilateral system is fundamentally inter-governmental, and so the different governments have a common interest in limiting the scope and enforceability of international investigative agencies. At the same time, we see human rights manipulated in international relations to demonize adversary regimes in efforts, not always unsuccessful, to wrap commercial and geopolitical calculations in the flag of universal values.

The law of the Charter governs *when* force may be used; international humanitarian law governs *how* force may be used. The roots of the latter are to be found in the tradition of “just war,” which focussed not simply upon the circumstances leading to the initiation of hostilities (*jus ad bellum*) but also the conduct of hostilities themselves (*jus in bello*).¹⁰ While the International Court of Justice deals with justice among states, the increasing attention and sensitivity to human rights abuses and humanitarian atrocities raise questions of individual criminal accountability in a world of sovereign states. The international community has responded to barbarism by drafting and adopting international legal instruments that ban it.¹¹

On the occasion of Raphael Lemkin’s birth centenary, Kofi Annan recalled that to describe an old crime, Lemkin had coined the new word “genocide” in 1943, two years before the world became familiar with Auschwitz, Belsen and Dachau, and almost single-handedly drafted an international multilateral treaty declaring genocide an international crime, and then turned to the United Nations¹² in its earliest days and implored Member States to adopt it.¹³ The Genocide Convention, adopted by the General Assembly on 9 December 1948, was a milestone in defining genocide as a crime against humanity and thus a matter of universal criminal jurisdiction.

Humanitarian Protection

The human rights movement grew as an effort to curb arbitrary excesses by states against the liberties and rights of their citizens. International humanitarian law emerged as an effort to place limits on the behaviour of belliger-

10 See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1992); and Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld & Nicolson, 1983).

11 See Robert Gellately and Ben Kiernan, eds., *The Spectre of Genocide: Mass Murder in Historical Perspective* (Cambridge: Cambridge University Press, 2003), and Martin Shaw, *War and Genocide: Organized Killing in Modern Society* (Cambridge: Polity Press, 2003).

12 Lemkin was discovered weeping in a UN corridor at the news and described the convention as an epitaph for his mother who had been among many members of his family killed in the Holocaust; Michael Ignatieff, “The Legacy of Raphael Lemkin,” lecture delivered at the US Holocaust Memorial Museum Washington, 13 December 2001, available at www.ushmm.org/conscience/events/ignatieff/ignatieff.php.

13 United Nations, *Press Release SG/SM/7842*, 13 June 2001.

ent forces during armed conflict. The convergence of the interests of human rights and humanitarian communities with respect to protecting victims of atrocity crimes (crimes against humanity, large-scale killings, ethnic cleansing, and genocide) is a logical extension of their original impulses. At the same time, it produces the paradox of humanitarianism—"an endless struggle to contain war in the name of civilization"¹⁴—encouraging, even demanding, the use of force.

The Red Cross prototype of "neutral humanitarianism" was abandoned by some humanitarians in the aftermath of Rwanda and Srebrenica. The complex humanitarian emergencies of the 1990s had already begun to blur the border between military peace operations and humanitarian intervention (meaning the impartial delivery and distribution of emergency aid). In some cases in Africa and the Balkans military convoys were used to establish "humanitarian corridors" through which relief supplies could be delivered to civilians trapped in zones of violent conflict. MSF concluded after Rwanda in 1994 that genocide cannot be stopped with medicines; other critics of neutral humanitarianism referred derisively to the "well fed dead" of Srebrenica a year later. The result was "political humanitarianism" or "humanitarian intervention," now meaning the use of military force to come to the rescue of civilians being killed in large numbers in acute conflict zones.

Yet the defenders of the traditional neutrality of humanitarians in the field also had their counter-slogans, talking for example of the "operation shoot to feed" absurdity of Somalia in the early 1990s. Especially after Afghanistan and Iraq, they adapted the Irish dramatist Brendan Behan's comment about police to conclude that there is no humanitarian disaster so dismal that a military intervention could not make it worse. It was not until "the challenge of humanitarian intervention" was reformulated as "the responsibility to protect" (discussed below) that the two sides came together again.

Human Security

"Human security" has its roots partly in the human rights tradition that regards the state as the chief threat to its own citizens, and partly in the development agenda that looks to the state as the chief agent of change for the better. The rise of the human security paradigm puts the individual at the centre of the debate, analysis and policy.¹⁵ He or she is paramount, and the state is a collective instrument to protect human life and promote hu-

14 David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004), p. 323.

15 One of the best single studies of human security is S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the United Nations: A Critical History* (Indiana University Press for the UN Intellectual History Project, 2006).

man welfare. The fundamental components of human security—the security of people against threats to personal safety and life—can be put at risk by external aggression, but also by factors within a country, including “security” forces, acid rain, forest fires, rising sea levels, floods, earthquakes and tsunamis.

The reformulation of national security into human security is simple, yet has profound consequences for how we see the world, how we organise our political affairs, how we make choices in public and foreign policy, and how we relate to fellow-human beings from many different countries and cultures. It has a twofold relevance to our present argument. First, it directs our attention to the reality that the discourse of national security is often (ab)used to justify state atrocities against its own citizens, whereas human security is resistant to being conflated into regime security. And second, it is the conceptual root of the sense of international solidarity that impels us to protect victims of atrocities and punish their tormentors.

Civil Society

Although it takes governments to convert emerging norms (for example international criminal accountability) into binding law through multilateral conventions and treaties, for example the Rome Statute establishing the International Criminal Court (ICC), many civil society organizations seek to shape the evolution and adoption of norms and lobby for their adoption in formal agreements. There has been an exponential growth in the number of civil society actors. The net result of expanding global citizen action has been to extend the theory and deepen the practice of grassroots democracy without borders. Civil society activism across borders, issue-specific coalitions among complementary groups from around the world and engagement with like-minded governments and intergovernmental organizations have been distinguishing features of the work of NGOs and important explanations for their success. They bridge the “disconnect between the political geography of the state on the one side and the new geography of economic and social relations on the other.”¹⁶

Society has become too complex for citizens’ demands to be satisfied solely by governments at national, regional and global levels. Instead civil society organizations play increasingly active roles in shaping norms, laws and policies. This provides additional levers to people and governments to improve the effectiveness and enhance the legitimacy of public policy at all levels of governance, while at the same time posing challenges of representation, accountability and legitimacy both to governments and back to the civil society actors.

16 Thorsten Benner, Wolfgang H. Reinecke, and Jan Martin Witte, *Shaping Globalization: The role of global public policy networks* (2002), p. 4; downloadable from: www.globalpublicpolicy.net.

The growing influence and power of civil society actors means that they have effectively entered the realm of policy making. They are participants in global governance as advocates, activists and policy makers. Their critiques and policy prescriptions have demonstrable consequences in the governmental and intergovernmental allocation of resources and the exercise of political, military and economic power. With influence over policy should come responsibility for the consequences of such policy.

Globalization

Transnational civil society activism is but one symptom of a globalizing world. Globalization has generated dramatic increases in political, social, commercial-economic, environmental, and technological influences across borders, while the proportion subject to control and regulation by governments has diminished. National frontiers are becoming less relevant in determining the flow of ideas, information, goods, services, capital, labour and technology. The speed of modern communications makes borders increasingly permeable, while the volume of cross-border flows threatens to overwhelm the capacity of states to manage them. Globalization releases many productive forces that can help to uplift millions from poverty, deprivation and degradation. But it can also unleash destructive forces—"uncivil society"—such as flows of arms, terrorism, disease, prostitution, drug and people smuggling, etc. that are neither controllable nor solvable by individual governments.

There has also been a certain globalization of the process of policy-making that remains incomplete. The major problems and challenges are increasingly global in their scope and impact, and require concerted global solutions. But the policy authority for tackling all problems remains vested in states, who also retain the monopoly over the coercive capacity to mobilize the necessary resources. This particular disconnect explains the often fitful, hesitant and inadequate efforts in addressing many of today's major challenges.

III. The Erosion of Sovereignty

Modern international society is built around sovereign statehood as its bedrock organizing principle. The combined effect of the broad trends identified above is to pose significant conceptual and policy challenges to the notion of state sovereignty. The gradual erosion of the once sacrosanct principle of national sovereignty is rooted today in the reality of global interdependence: no nation is an island sufficient unto itself any longer.

Sovereignty is the foundational principle on which contemporary world order rests, dating from the 1648 Peace of Westphalia and affirmed by the ICJ and expressed in UN Charter Article 2(1). Externally, sovereignty

means the legal identity of the state in international law, an equality of status with all other states, and the claim to be the sole official agent acting in international relations on behalf of a society. The juridical equality of states can exist alongside extreme disparities of size, wealth, power and status.

Sovereignty originated historically in the European search for a secular basis of state authority in the 16th-17th centuries. It embodies the notion that in every system of government there must be some absolute power of final decision. The state's primary concern is with order. In order to discharge this function of government, the sovereign must be above the law.

Subsequently, sovereignty was redefined in terms of a social contract between citizens and rulers. Violations of the contract by rulers voided the duty of citizens to obey the commands of the sovereign. By the end of the 19th century a distinction was being drawn between legal sovereignty as vested in parliament and political sovereignty as vested in the electorate. In the twentieth century, the trend was taken further with the notion of popular sovereignty that was conceived initially as consent and subsequently as active choice of the citizens.

National sovereignty locates the state as the ultimate seat of power and authority, unconstrained by internal or external checks; constitutional sovereignty holds that the power and authority of the state are not absolute but contingent and constrained. Domestically, power sharing between the executive, legislature and judiciary, at federal and provincial levels, is regulated by constitutional arrangements and practices. Internationally, states are constrained by globally legitimated institutions and practices.

The United Nations is the chief agent of the system of states for exercising international authority in their name. UN membership has typically been the final symbol of sovereign statehood for freshly independent countries and their seal of acceptance into the international community of states. Article 2(7) of the UN Charter prohibits the organization from intervening in "matters that are essentially within the domestic jurisdiction" of any member state.

Yet by signing the Charter a country accepts collective obligations and international scrutiny. The restrictions of Article 2(7) can be set aside when the Security Council decides to act under the collective enforcement Chapter VII. The scope of what constitutes threats and breaches has steadily widened to include such matters as HIV/AIDS, terrorism, and atrocities. In any case, Art. 2(7) concerns matters "essentially" within domestic jurisdiction. This implies that the issue is subject to judgment, which may differ from one competent authority to another and may evolve over time in response to altered perceptions of the threats to international peace and security. Moreover, as shown in Somalia, the collapse of state authority means that there is no functioning government to fulfil an essential condi-

tion of sovereignty, on the one hand, and the violence, instability, and disorder can spill over from that failed state to others, on the other. The Security Council thus dealt with Somalia under the coercive clauses of Chapter VII rather than the consensual Chapter VI. Applying this argument more broadly, some analysts have questioned just how many of today's states would meet the strict requirements of sovereign statehood, describing many as "quasi-states."¹⁷ And finally, the norm of nonintervention has softened as that of human rights has hardened.

IV. The Responsibility to Protect

The twin protection-prosecution agenda lies at the crossroads of the above trends that between them have heightened real-time awareness of depredations and atrocities, increased pressures to respond effectively, expanded the toolkit to do so, and fenced in the exercise of both internal and external sovereignty with innumerable threads of global norms and treaties. The United Nations is the forum of choice for debating and deciding on collective action requiring the use of military force. It also has been the principal forum for the progressive advancement of the human rights agenda in its totality, including group-based social, economic, and cultural rights as well as individual civil and political rights.

Traditional warfare is the use of force by rival armies of enemy states fighting over a clash of interests: us against them. Collective security rests on the use of force by the international community of states to defeat or punish an aggressor: all against one. Traditional peacekeeping involved the insertion of neutral and unarmed or lightly armed third party soldiers as a physical buffer between enemy combatants who had agreed to a ceasefire: us between two enemies. It was not meant to check a warlike intent; rather, it helped to give effect to a new-found pacific intent. Peace-enforcement accepted the use of force by better armed but still neutral international soldiers against spoilers and transgressors of a peace agreement. "Humanitarian intervention"—the use of military force on the territory of a state without its consent with the goal of protecting innocent victims of large-scale atrocities—differs from all these in that it refers to the use of military force by outsiders for the protection of victims of atrocities: us between perpetrators and victims. The controversy over humanitarian intervention arises from a conflict between different contemporary norms, producing normative incoherence, inconsistency, and contestation.¹⁸

17 Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press, 1990). See also Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 2001).

18 This is developed in Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to The Responsibility to Protect* (Cambridge: Cambridge University Press, 2006), Chapter 12.

Sovereignty as Responsibility

Sovereignty, far from being absolute, has thus generally been considered to be contingent. The more significant change of recent times is that it has been reconceived as being instrumental. Its validation rests not in a mystical reification of the state, but in its utility as a tool for the state serving the interests of the citizens. Internal forms and precepts of governance must conform to international norms and standards of state conduct. That is, sovereignty must be exercised with due responsibility. This crucial normative shift was articulated by Francis M. Deng, the Special Representative of the Secretary-General for Internally Displaced Persons.¹⁹ States are responsible for providing life-protecting and life-sustaining services to the people. When unable to do so, as responsible members of the international community they must seek and accept international help. If they fail to seek—or obstruct—international assistance and put large numbers of people at risk of grave harm, the world has an international responsibility to respond.

The Charter is itself an example of an international obligation voluntarily accepted by member states. On the one hand, in granting membership to the United Nations, a signatory state is welcomed as a responsible member of the international community. On the other hand, by signing the Charter the state accepts the responsibilities of membership. There is a *de facto* redefinition from sovereignty as right of exclusivity to sovereignty as responsibility in both internal functions and external duties. In today's world, political frontiers have become less salient both for international organizations, whose rights and duties can extend beyond borders, and for member states, whose responsibilities within borders can be subject to international scrutiny.

Another challenge came with the adoption of new standards of conduct for states in the protection and advancement of international human rights. Over time, the chief threats to international security have come from violent eruptions of crises within states, including civil wars, while the goals of promoting human rights and democratic governance, protecting civilian victims of humanitarian atrocities, and punishing governmental perpetrators of mass crimes have become more important.

The Charter contains an inherent tension between the intervention-proscribing principle of state sovereignty and the intervention-prescribing principle of human rights, which explains the controversy over humanitarian intervention. Individuals became subjects of international law as bear-

¹⁹ Francis M. Deng, et al., *Sovereignty as Responsibility: Conflict Management in Africa* (Washington DC: Brookings, 1996), and Francis M. Deng, "Frontiers of Sovereignty," *Leiden Journal of International Law* 8, no. 2 (1995): 249–286. See also, Thomas G. Weiss and David A. Korn, *Internal Displacement: Conceptualization and its Consequences* (London: Routledge, 2006).

ers of duties and holders of rights under a growing corpus of human rights and international humanitarian law treaties and conventions - especially the Charter, the Universal Declaration of Human Rights and the two covenants, the four Geneva Conventions plus the two prohibiting torture and genocide. The cluster of norms inhibiting, if not prohibiting, humanitarian intervention includes, alongside the norm of non-intervention, state sovereignty, domestic jurisdiction, pacific settlement of disputes, non-use of force and, in the case of UN-authorized use of force, impartiality.

In the first four decades, state sovereignty was privileged over human rights, with the significant exception of white-minority rule in Rhodesia and *apartheid* in South Africa. The balance tilted in the 1990s. In a number of cases, the Security Council endorsed the use of force with the primary goal of humanitarian protection and assistance: the establishment of no-fly zones in Northern Iraq to protect the Kurdish minority, the proclamation (no matter how ineffectually) of UN safe areas in Bosnia, the delivery of humanitarian relief in Somalia, the restoration of the democratically elected government of Haiti, and the deployment of the multinational Kosovo Force (KFOR) in Kosovo after the 1999 war.²⁰

There was a second change. From 1945 to the end of the Cold War in 1989-90, the preservation of peace was privileged over the protection of human rights. The Charter talks of both but provides concrete instruments for the maintenance of the former. The proliferation of complex humanitarian emergencies and the inappropriateness of the classical tenets of UN peace-keeping for dealing with them highlighted the inherent tension between the neutrality of traditional peacekeeping and the partial consequences of peace enforcement. The dilemma was confronted squarely in the Brahimi Report which concluded that political neutrality has often degenerated into military timidity and the abdication of the duty to protect civilians.

The Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS) wrestled with the whole gamut of difficult and complex issues involved in the debate. Its report, entitled *The Responsibility to Protect*, sought to change the conceptual language, pin the responsibility on state authorities at the national and the Security Council at the international level and ensure that interventions, when they do take place, are done properly.²¹

ICISS adapted sovereignty as responsibility and proceeded to replace the familiar "humanitarian intervention" with "the responsibility to protect." Based on state practice, Security Council precedent, established and

20 See Brian D. Lepard, *Rethinking Humanitarian Intervention* (University Park: Pennsylvania State University Press, 2002), pp. 7-23.

21 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).

emerging norms, and evolving customary international law, ICISS held that the proscription against intervention is not absolute.

While the state whose people are directly affected has the default responsibility to protect, a residual responsibility also resides with the broader international community of states. This is activated when a particular state either is unwilling or unable to fulfil its responsibility to protect; or is itself the perpetrator of crimes or atrocities; or where populations living outside a particular state are directly threatened by actions taking place there. The fallback responsibility requires that in some circumstances action must be taken by external parties to support populations that are in jeopardy or under serious threat. The goal of protective intervention is not to wage war on a state in order to destroy it and eliminate its statehood, but to protect victims of atrocities inside the state, embed the protection in reconstituted institutions after the intervention, and then withdraw all foreign troops.

The Secretary-General's High Level Panel on UN reforms reaffirmed the importance of changing the terminology from the deeply divisive "humanitarian intervention" to "the responsibility to protect" if the international community is going to forge a new consensus. It explicitly endorsed the ICISS argument that "the issue is not the "right to intervene" of any state, but the "responsibility to protect" of *every* State."

In the event, the "responsibility to protect" was one of the few substantive items to survive the negotiations at the 2005 World Summit. The final outcome document contained clear, unambiguous acceptance of individual state responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Member states further declared that they "are prepared to take collective action, in timely and decisive manner, through the Security Council . . . and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations." The concept was given its own subsection title.²²

V. International Criminal Justice

Another form of international intervention, particularly in response to atrocity crimes, is international criminal prosecution. The world has made revolutionary advances in the criminalization of domestic and international violence by armed groups and their individual leaders.²³ The ICC offers hope for a permanent reduction in the phenomenon of impunity. The

22 2005 *World Summit Outcome*, adopted by UN General Assembly as Resolution A/RES/60/1, (24 October 2005), paras. 138–140.

23 See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon, 1997); Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998); and Ramesh Thakur

landscape of international criminal justice has changed dramatically over an astonishingly short period of history. In 1990, a tyrant could have been reasonably confident of the guarantee of sovereign impunity for his atrocities. Today, there is no guarantee of prosecution and accountability, but the certainty of impunity is gone. The fates of Augusto Pinochet (Chile), Hissen Habre (Chad), Slobodan Milosevic (Serbia), and Charles Taylor (Liberia) are but some of several dramatic twists and turns in the last decade in the search for universal justice.

International Criminal Court

The 128-article Rome Statute of the ICC was adopted at the conclusion of the UN Diplomatic Conference held from 15 June to 17 July 1998. It marked the culmination of a decade-long process initiated by the General Assembly in 1989 when it requested the International Law Commission to study the subject of the establishment of an ICC. The final vote was 120 in favour and 7 against (among them China and the US, two permanent members of the Security Council) with 21 abstentions (including India, representing one-sixth of humanity). Participants included representatives from 160 countries plus 33 observers from intergovernmental and 236 observers from NGOs. The ICC Statute received its 60th ratification in April 2002 and came into effect in July 2002. On 22 April 2003 Luis Moreno Ocampo of Argentina, who helped to put his country's former military rulers on trial, was elected as its first prosecutor. By 1 January 2007, 139 countries had signed and 104 had ratified the Rome Statute.

The way to apprehend and punish the perpetrators of conscience-shocking crimes on a mass scale is through an international legal framework that establishes the notion of "universal jurisdiction,"²⁴ where jurisdiction in respect of such crimes depends not on the place where they are committed, but on the nature of the crime itself. If they are truly "crimes against humanity," they can be prosecuted before the courts of any country. The Geneva Conventions of 1949 established the category of war crimes called "grave breaches" which could be prosecuted in the courts of all countries that have ratified the conventions.

The UN Charter was never meant to be a tyrant's charter of impunity or his constitutional instrument of choice for self-protection. The world has moved on from the restrictive culture of sovereign impunity of previous centuries to an enlightened culture of international accountability more

and Peter Malcontent, eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo: United Nations University Press, 2004); Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (Oxford: Oxford University Press, 2004).

- 24 See "The Princeton Principles on Universal Jurisdiction", adopted by distinguished jurists around the world in 2001, published by the Program in Law and Public Affairs, Princeton University available at http://www.law.uc.edu/morgan/newsdir/unive_jur.pdf

suited to the modern sensibility. Nuremberg and Tokyo were instances of victors' justice.²⁵ Yet by historical standards, both tribunals were remarkable for giving defeated leaders the opportunity to defend their actions in a court of law instead of being dispatched for summary execution. The ad hoc tribunals of the 1990s are important milestones in efforts to fill institutional gaps in the original central mission of the UN, viz. to control group violence. They have been neither unqualified successes nor total failures. While they have helped to bring hope and justice to some victims, combat the impunity of some perpetrators and greatly enrich the jurisprudence of international criminal and humanitarian law, they have been expensive, time-consuming and contributed little to sustainable national capacities for justice administration.

The international criminal tribunals have been ad hoc and ex post facto, set up to try limited numbers of individuals for specific activities, in specific situations and specific regions. They therefore suffer from particularism. An international criminal court with universal jurisdiction has been the missing link in the system of international criminal justice.²⁶ The International Court of Justice handles cases between states, but not between individuals. Without an international criminal court that holds individuals responsible for their actions where governments fail, or are not able to do so, acts of genocide and egregious violations of human rights often go unpunished. Since 1945, there have been many instances of crimes against humanity and war crimes for which no individuals have been held accountable.

The ICC's permanence, institutionalized identity and universal jurisdiction will enable an escape from the tyranny of the episodic and attenuate perceptions of politically motivated investigations and selective justice. Only universal liability can arrest and reverse the "drift to universalism"²⁷ from the Nuremberg and Tokyo to the Yugoslavia and Rwanda tribunals, along with such other way-stations as the detention of Pinochet in Britain. Permanence also helps to cumulate and build on precedents. The ICC will be

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- 25 This still casts a shadow over East Asian regional relations. The annual visit by Prime Minister Junichiro Koizumi to Tokyo's Yasukuni Shrine to honor Japan's 2.4 million soldiers killed in war aroused fierce opposition from China and the Koreans because 14 Class A convicted war criminals are also interred there. Defenders of his visit retorted that the convictions were based on victors' justice. See "Separation of war criminals 'will never happen': Yasukuni," *Japan Times*, 5 June 2005. Parliamentary secretary Masahiro Morioka asked "What tribunal was the Tokyo tribunal? Both sides do wrong in a war. It is erroneous to label only countries that win as right and nations that lose as wrong"; "Morioka again slams war tribunal," *Japan Times*, 23 June 2005.
- 26 See Yves Beigbeder and Theo Van Boven, *Judging War Criminals: The Politics of International Justice* (New York: St. Martin's Press, 1999); Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Clarendon Press, 2001); David Scheffer, "The United States and the International Criminal Court," *American Journal of International Law* 93:1 (January 1999), pp. 12–22; and Sarah B. Sewall and Carl Keyser, eds., *The United States and the International Criminal Court: National Security and International Law* (Lanham, MD: Rowman & Littlefield, 2000).
- 27 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), p. 283.

an efficient and cost-effective alternative to ad hoc tribunals with respect to money, time and energy, and may also provide sensible alternatives to dubious sanctions and unilateral military retaliation.

The establishment of the ICC as a permanent and universal international criminal court marks one of the most significant advances in international law. Yet the reluctance to join the ICC by three permanent members of the Security Council—China, Russia and the USA, and also by other populous countries such as India, Indonesia, Pakistan and others were testimony to a significant division of opinion in the international community. In the battle over the ICC, reasonable US demands were listened to and accommodated. But gradually the conviction grew that objections were being raised and arguments were being framed to fit a predetermined policy of opposing the very idea of a credible and independent ICC with universal jurisdiction. Cherif Bassiouni, chair of the Rome Statute's drafting committee, wrote later that most delegations concluded that "it would be better to stop giving in to the United States; they believed the United States would never be satisfied with the concessions it got and ultimately would never sign the Treaty for completely unrelated domestic political reasons."²⁸

Nevertheless, there are two respects in which the US fears about the ICC may be well founded: the rule-of-law standards and the integration of criminal justice within an overarching framework of democratic governance.

For a trial to be authentic, the possibility of acquittal must be as much an inbuilt requirement as the possibility of conviction. The US criminal justice system goes about the farthest in the world in protecting the rights of the arrested and accused. International criminal law, it has been argued, shifted the focus from the defence to the prosecution.²⁹ The ICTY "does not always respect the rights of the criminal defendant in ways consistent with international human rights norms or national constitutions."³⁰ The UN has to ensure that any process of trial and prosecution is credible, meets international standards on the independence and impartiality of prosecutors and judges, and respects the rights of victims as well as defendants.³¹

Second, the ICC is not embedded in a broader system of democratic policy making, there is no political check on it, and therefore its authority to overturn policy established by national democracies is questionable. In a

28 Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of the I.C.C.," *Cornell International Law Journal* 32:3 (1999), p. 457.

29 William Schabas, "Balancing the rights of the accused with the imperatives of the accountability", in Thakur and Malcontent, eds., *From Sovereign Impunity to International Accountability*, pp. 154–68.

30 Jose Alvarez, "The UN Security Council: Are there checks to provide balance?", *Law Quadrangle Notes* (University of Michigan Law School) (Fall 1994), p. 43.

31 Kofi Annan, *Report of the Secretary-General on the Work of the Organization* ((New York: United Nations, 2004), para. 223.

national system, the office of the prosecutor functions within a well-established structure of state governance, while the ICC “is not established as part of a centralized system of international governance that can govern the entire international community.”³² The ICC may experience legitimacy problems “insofar as it provides for jurisdiction over non-party nationals, displaces the state as the conduit of democratic representation and provides no alternative mechanism for democratic governance.”³³

Christine Chinkin quotes from one of the international criminal cases, referring to the Bosnian Muslim women victims of war-related sexual violence, that consent could not be freely given when the women had nowhere to go and no place to hide.³⁴ We will perhaps have made our transition from barbarism to culture when the burden of that haunting phrase is transferred from the victim to the perpetrators and would-be perpetrators.

VI. Balancing Competing Claims

Neither the protection nor the prosecution agenda is absolute, to be privileged in every instance over all competing claims. Military intervention, even for humanitarian purposes, is a nicer way of referring to the use of deadly force on a massive scale. Even when there is agreement that military intervention may sometimes be necessary and unavoidable in order to protect innocent people from life-threatening danger by interposing an outside force between actual and apprehended victims and perpetrators, key questions remain about agency, lawfulness, and legitimacy. ICISS argued that the UN is the principal institution for building, consolidating, and using the authority of the international community. Because of this, it is especially important that every effort be made to encourage the Security Council to exercise—and not abdicate—its responsibilities.

Even when the just cause threshold is crossed of conscience-shocking loss of life or ethnic cleansing, intervention must be guided by the precautionary principles of right intention, last resort, proportional means, and reasonable prospects. The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned. Military intervention can only be justified when every non-military option for the

32 Hisashi Owada, “The Creation of the International Criminal Court: A Critical Analysis,” in R. K. Dixit and C. Jayaraj, eds., *Dynamics of International Law in the New Millennium* (New Delhi: Manak, for the Indian Society of International Law, 2004), p. 101. Prof. Owada was a member of the Japanese delegation to the Rome conference and has since been elected as a Judge of the ICJ.

33 Madeline H. Morris, “Democracy, global governance and the International Criminal Court,” in Thakur and Malcontent, eds., *From Sovereign Impunity to International Accountability*, p. 191.

34 Christine Chinkin, “Gender-related crimes: A feminist perspective,” in Thakur and Malcontent, eds., *From Sovereign Impunity to International Accountability*, p. 128.

prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded. The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective. And there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

The ethic of conviction would impose obligations to prosecute people for their past criminal misdeeds to the full extent of the law. The ethic of responsibility imposes the countervailing requirement to judge the wisdom of alternative courses of action with respect to their consequences for social harmony in the future. International criminal justice takes away from domestic authorities the options of alternative modes of healing and restitution with a view to reconciliation that puts the traumas of the past firmly in the past.³⁵ The legal clarity of judicial verdicts sits uncomfortably with the nuanced morality of confronting *and overcoming*, through a mix of justice and high politics, a jointly troubled past. Truth commissions provide a half-way house between victors' or foreigners' justice and collective amnesia. Truth commissions take a victim-centred approach, help to establish a historical record and contribute to memorialising defining epochs in a nation's history.

Another problem lies in the contradictory logics of peace and justice. Peace is forward-looking, problem-solving and integrative, requiring reconciliation between past enemies within an all-inclusive community. Justice is backward-looking, finger-pointing and retributive, requiring acknowledgment and atonement, if not trial and punishment, of the perpetrators of past crimes.

In both tasks—protection of victims and prosecution of perpetrators—the application of international mechanisms comes second, only after the domestic mechanisms are either exhausted or powerless. While the ad hoc international criminal tribunals have primacy over the operation of domestic court systems,³⁶ the ICC has been constructed to give primacy to domestic systems and become operative only in the event of domestic unwillingness or incapacity. Art. 17 of the Rome Statute stipulates that the jurisdiction of the ICC is to be activated only when states are “unwilling or unable genuinely to investigate or prosecute.” Similarly, the “responsibility to protect”

35 The growing literature on the subject includes Bass, *Stay the Hand of Vengeance*; Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2001); Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998).

36 For a study of the issue, see Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003).

concept expects and requests states first to protect their populations, and triggers international intervention only after governments are either weak and unable, or unwilling (complicit in crimes) to do so. This prevalence of domestic over international jurisdiction presents the UN and other assistance agencies with a very important mission—how to build capacities and empower states to deal with both tasks—protection of victims and prosecution of perpetrators.

One final red flag that also relates to both the agendas: governments of the US, Britain, Australia, France etc. find it beyond their imagination to conceive of circumstances in which their countries might be the targets of military intervention by “the international community.” Consequently, they are unable to empathise with the concerns of developing countries, who do fear being the targets of international intervention by tomorrow’s moral majority. There is a simple enough solution to this, and even UN-authorized interventions will generate North-South friction until such time as the solution is adopted. This is the vexed issue of Security Council reform with respect to composition, procedures and accountability. On composition, it needs a better representation of contemporary power realities, continents and developing countries in both permanent and elected categories. On procedures, it needs to be far more open, transparent and democratic. On accountability, it must be made answerable to the General Assembly and also brought within the jurisdictional oversight of the World Court. Absent these reforms, all military interventions will be considered to be in the interests of the rich and powerful minority targeted at the poor and weak majority.

Similarly, international criminal justice will remain permanently suspect as victors’ justice until such time as some of leaders and commanding generals of the major Western allies are also put on trial, convicted and sentenced.³⁷

VII. Conclusion

The differences in the international protection and punishment agendas apply, *mutatis mutandis*, to the domestic law enforcement organs. Every state needs police and army to protect the population, and laws and courts to punish the criminals. The police and army are part of the executive branch of the government, empowered accordingly and authorized to act expediently. The prosecution and judges are part of a separate judicial

37 See, for example, P. X. Kelley and Robert F. Turner, “War Crimes and the White House,” *Washington Post*, 26 July 2007, p. A21. Their concern was about tortures authorized by the White House and committed by US personnel. General (ret’d) Kelley was appointed commandant of the Marine Corps (1983–87) by President Ronald Reagan; Turner served as legal counsel in the Reagan White House.

system, fully independent in their deliberations and decisions from the government.

That said, the specific mechanisms for protection of people and prosecution of perpetrators should not be over-estimated. The ICTY has no police force to search mountains and arrest suspects. When the ad hoc tribunals were established by the Security Council, the language in the resolutions—that they will be instrumental in “the maintenance of international peace and security”—raised unnecessarily ambitious expectations. The tribunals can play only a limited and very specific part in the long and difficult process of peacebuilding. Being adversarial by nature, they are not best in reconciling people. Trauma and tensions in the societies can and should be addressed by other less confrontational forums, such as truth commissions, reconciliation and rebuilding initiatives, public apologies etc. One has to remember that the victims (survivors and relatives) of crimes—although they certainly deserve all possible sympathy—are not the only rights-holders. The logic of retribution through criminal justice needs to be tempered with the logic of restoration and reconciliation of the societies.

Secondly, the protection of innocent civilians and the prosecution of perpetrators of atrocities should never be divided into ethnic or religious lines. Victims of all sides need equal protection and perpetrators from all sides—for example Serbs, Croats, Bosnian Muslims or Albanians—need to face the same penalties. One problem with the legitimacy of the ICTY was the initial heavy imbalance between the high number of prosecuted Serbs and the low number of prosecuted persons from the other ethnic groups, not to mention the total lack of prosecution of any of the possible war crimes committed by NATO during the bombing in 1999.

Given the changing nature and victims of armed conflict, the need for clarity, consistency, and reliability in the use of armed force for civilian protection lies at the heart of the UN’s credibility in the maintenance of peace and security. The changed nature of armed conflict demands the enforcement of two tasks: the apprehension and punishment of the evildoers; and the protection of the innocent. The two tasks aim at the same final objective—the reduction and elimination of violent conflicts. But they require different techniques and instruments. The prosecution of perpetrators necessitates a permanent court. The protection of civilian people needs a permanent army. The first has already been established—the ICC. The second—UN Emergency Peace Service (UNEPS) is under discussion,³⁸ with some regional capacities already developed within the African Union (AU) and the European Union (EU).

38 See Robert Johansen, ed., *A United Nations Emergency Peace Service to Prevent Genocide and Crimes Against Humanity*, Global Action to Prevent War, Nuclear Age Peace Foundation, World Federalist Movement (2006) available at http://www.globalactionpw.org/uneps/UNEPS_PUBLICATION.pdf.

THE RESPONSIBILITY TO PROTECT AND PROSECUTE: THE PARALLEL EROSION OF SOVEREIGNTY AND IMPUNITY

Such permanent bodies—the ICC and the UNEPS—are essential foundations to materialize the joint responsibility to protect and prosecute, nevertheless, the differences between the two tasks should not be confused. The protection of the innocent needs to be expedient, whereas the prosecution of perpetrators needs to be slow and deliberate, taking into consideration due process and fairness. “Quick justice” a la Saddam Hussein’s trial and execution is an oxymoron. Conversely, a slow and tardy response to atrocities (as in Darfur) is no response. The protection of innocents demands strong political engagement. Heads of states and governments need to get to their phones as soon as possible, discuss options, make decisions and give clear and firm orders to their generals. On the opposite side, they should not give orders to the prosecutors or judges—criminal accountability has to be apolitical, independent, based on strict legality, and not influenced by external agents.