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The legal duty to ‘prevent’: after the onset of ‘genocide’

EYAL MAYROZ

This article examines certain semantic ambiguities in interpretations of the legal duty to prevent genocide in the Genocide Convention, and their political implications. Its main focus is on allegedly already unfolding genocidal situations, such as in Darfur from 2003 to 2005. The study analyses representations of responses to genocide with particular attention to the combinations ‘preventing’, ‘suppressing’, ‘stopping’ and ‘halting’ genocide. Underlying the investigation are questions concerning the relationship between international law and political responses to genocide.

Introduction

The outbreak of fighting in the Darfur region of western Sudan during February 2003 is widely seen to have ushered in the deadliest phase yet in this long festering crisis. International media coverage and public debates about outside intervention, however, did not begin in earnest until the first half of 2004. By that time, ‘genocide’ allegations in relation to the crisis were becoming increasingly common.¹ These peaked in September 2004 when the United States Secretary of State Colin Powell issued an official genocide determination on Darfur, America’s first ever in relation to an ongoing crisis.² For many observers, then, the perceived opportunity to *prevent* genocide from erupting altogether in Darfur had been missed. Important questions still remained, however, about the legal duties of states in the face of what was believed by many to be genocide already ongoing and about the political actions mandated by these duties. Powell’s remark that his genocide determination on Darfur did not oblige the US to move beyond current policy³ dealt a harsh blow to widespread assumptions⁴ about the political consequences of invoking the UN Convention on the Prevention and Punishment of the Crime of Genocide (henceforth, ‘the Genocide Convention’ or ‘the Convention’). It also indicated the existence of knowledge gaps in relation to the mutual influences between international legal obligations and political responses to genocide.

Ideally, the responsibilities derived from a treaty-level obligation like the duty to prevent genocide should be clear to those who are expected to shoulder them: policymakers in states’ parties to the Convention. Recurring failures to act,

however, raise questions about the relationship between the legal controversies or ambiguities that surrounded the duty to prevent and political inaction. Were the failures products of political disingenuousness, or of actual weaknesses in the Genocide Convention? Were they to do with misinterpretations of legal obligations, or the sidelining of international law in the policymaking of key states?

One of the ambiguities referred to above concerned the preconditions for the activation of the Genocide Convention. For a long time it was widely believed that invoking the treaty required a legal determination of genocide. This understanding, coupled with the difficulties of making a timely determination, raised major hindrances to action for some political actors while offering others solid pretexts for inaction.

A 'disconnect' also seemed to exist at times between how 'legal minds' interpreted the duty to prevent and the way these interpretations were understood by, or at least communicated to, non-legal actors. For example, the common understanding of the verb 'to prevent' is to stop something from *ever* taking place. But is it possible to prevent the occurrence of something which has already started? In other words, does the legal duty to prevent extend to cover 'genocide' already in progress (as Darfur was alleged to be in 2004), or is it limited to impending situations only? The (affirmative) answer must have seemed so obvious to legal scholars that the point was hardly ever raised. Yet, as this study will show, when legal or political actors talk of responses to ongoing cases of genocide, they often augment 'prevent' with the words 'stop', 'halt', or in rare occasions even with 'suppress'. It is possible that such discourses were intended to compensate for the temporally narrow understanding of the word 'prevent' or, alternatively, to include tougher measures in the range of responses purportedly implied by the duty. These workarounds, however, could also lead to misunderstandings since, in contrast to 'prevent', there are no legally binding obligations on states in international law to 'stop', 'halt' or 'suppress' genocide. Confusions could particularly arise in relation to the term 'suppress'. Used originally by the drafters of the Genocide Convention in a judicial or penal context, the same word is now being employed by some commentators in the sense of a military intervention. This double meaning can only increase the uncertainties in already muddled political debates over responses to genocide or other mass atrocity crimes.

To help address the issues outlined above, this article explores semantic ambiguities, past and present, in the discussion of 'prevention' and of other common representations of responses to genocide in legal, political and academic texts. After briefly reviewing interpretations of the duty to prevent by the International Court of Justice (hereafter, the ICJ) and academic legal scholarship, the article presents an analysis focused on the duty's 'temporal scope',⁵ including the conditions that activate it and its applicability to genocide allegedly already underway. Investigation is then carried out of implied meanings and potential implications for policymaking of using the terms 'suppress', 'stop' and 'halt', either instead of, or in addition to the word 'prevent', to describe responses to ongoing genocide. Returning to the events of Darfur, the study discusses mainly shortcomings but also some potential strengths of the Genocide Convention in

facilitating international responses to the crisis, in the context of international law's limited capacity to influence political action.

The duty to prevent in the Genocide Convention

As implied in its official title ('The Convention on the Prevention and Punishment of the Crime of Genocide'), the 1948 Genocide Convention was envisaged by its drafters with the objective of 'prevention' very much in mind.⁶ Despite their intentions, however, the text itself focused mainly on punishment, with only two references to 'prevention', in Articles I and VIII. Article I read:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they *undertake to prevent* and to punish.⁷

The article established the only legal basis for states parties' duty to prevent genocide. Unfortunately, those who drafted the Convention did very little⁸ to clarify what specific measures states had to take to comply with the duty. The second and only other occurrence of the word was in Article VIII that stated: 'Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III'.⁹

Most scholars have supported the view that the directive in the Article VIII does not extend in significant ways beyond reaffirming states parties's, right to refer a situation (deemed by them as genocidal) to the 'competent' organs of the UN (i.e. mainly the UN Security Council and the ICJ).¹⁰ Here also, the drafters did not specify what actions would have to be taken, if at all, by these organs.¹¹ Third parties' obligations to prevent genocide thus remained ambiguous and in need of further interpretation.

Third parties' obligations to prevent genocide

Between 1948 and the early 1990s, the international community's response to the Genocide Convention was characterised by neglect.¹² During these decades of the Cold War, no serious efforts were made to use the Convention for rescuing the millions who perished in outbreaks of genocide, or hardly even to address the legal ambiguities in the Convention's text.¹³

The first major turning point took place in 1993. In March of that year, eleven months into the civil war in Bosnia, the government of Bosnia-Herzegovina took the Federal Republic of Yugoslavia (Serbia and Montenegro, hereafter FRY) to the ICJ¹⁴ on charges of violations of the Genocide Convention, in order to request provisional measures for protecting its citizens.¹⁵ In addition to charges of genocide, the FRY was also charged with a failure to prevent genocide under Article I of the Convention. In a separate opinion¹⁶ on the case (13 September 1993), ad hoc judge Elihu Lauterpacht, who was appointed by Bosnia, made a

number of observations concerning the obligation of third parties to prevent genocide.

In relation to the scope of the duty to prevent, the judge concluded that it is one that ‘rests upon all parties and is . . . owed by each party to every other’ (thereby clarifying its *erga omnes* character).¹⁷ However, he shied away from making a more explicit determination, citing State practice. ‘The limited reaction of the parties to the Genocide Convention in relation to these episodes may represent a practice suggesting permissibility of inactivity’, the judge argued.¹⁸ He concluded that the absence of a full treatment of this subject by both sides prevented him from expressing a final view on the matter, ‘sympathetic though [he was] in principle to the idea of individual and collective responsibility of States for the prevention of genocide, wherever it may occur’.¹⁹

The judge was also hesitant to in relation to Bosnia-Herzegovina’s claim that the imposition of a weapons embargo on all parties to the conflict by the Security Council (UNSC Resolution 713 of September 1991) conflicted with and undermined Bosnia’s duty to prevent genocide of its own people. While responding positively to the argumentation,²⁰ he refrained from taking a decisive position, invoking the procedural difficulty of the court to express its views on a matter involving third parties in a bilateral litigation. The judge then commented: ‘The position would, of course, have been somewhat different if, invoking the obligation resting upon all parties to the Genocide Convention to prevent genocide, the Applicant had started proceedings against one or more of other parties to the Convention challenging their failure to meet this commitment’.²¹ Soon after, Bosnia filed a statement of intent to commence proceedings against the United Kingdom, amongst other things, for failing in its affirmative obligation to prevent genocide through its actions in the UNSC.²² It ultimately decided, however—allegedly under duress²³—not to institute the proceedings.²⁴ Since then, no other attempts have been made to pursue this potentially significant question before the ICJ.

Thus, while initial steps were taken before the ICJ during 1993 to address the legal ambiguities concerning the duty to prevent, much of the detail remained open and waiting for future interpretation. Later developments in the case, mainly in 1996,²⁵ did little to resolve the uncertainties. These persisted and continued to affect the political debate concerning responses to genocide, including over Darfur more than a decade later.

The ICJ final ruling on Bosnia–Herzegovina vs. Serbia Montenegro

In February 2007, the ICJ published its final ruling on the Application of the Genocide Convention Case. Fourteen years elapsed since it began. Notwithstanding the momentous political events and changes that occurred during this period, the judgement was welcomed by many with much anticipation. In it, the court concluded that the ‘undertaking to prevent’ in the Genocide Convention (Article I) is ‘normative and compelling’,²⁶ unqualified²⁷ and bears direct obligation on states parties.²⁸ A referral to the Security Council does not relieve States parties of the

general obligation of prevention, noted the court.²⁹ It also determined that the obligation to prevent is one of conduct rather than of result, in the sense that compliance is to be measured by action and not by outcome.³⁰ Violation of the duty to prevent is therefore the result of omission, or the 'mere failure to adopt and implement suitable measures to prevent genocide from being committed'.³¹ States had to manifestly take all measures within their power that would contribute to preventing genocide.³² Their obligation is not to succeed but to exercise 'due diligence' by employing all means *reasonably* available to them to prevent genocide, *so far as possible*.³³ Importantly, these obligations vary according to the capacity of states 'to influence effectively the action of persons likely to commit, or already committing, genocide'.³⁴ The court mentioned three determinants of this capacity: the geographic distance between the state and the events; the strengths of the political links between the state and the main actors in the events; and the legal restrictions of action imposed on the state based on its particular legal position vis-à-vis the situations and affected people.³⁵ It concluded, however, that the Convention imposes such obligations on 'any State party which, in a given situation, *has it in its power to contribute to restraining in any degree the commission of genocide*'.³⁶ Notably, this latter determination prompted William Schabas to ask if the words of the court could not be applied to France, Belgium and the US in 1994 Rwanda, as well as to the case of Darfur in 2007.³⁷

The temporal dimensions of 'prevention'

Activation of the duty to prevent

The ICJ's judgement also addressed the politically thorny question of when a state obligation to prevent genocide actually begins. The activation of the obligation was long believed to require a legal determination of genocide. However, 'proving genocide' is not only difficult but involves also a long and time-consuming process. It requires either a ruling by the ICJ (as part of a civil litigation between states) or a criminal conviction of individual(s) in a national or international court/tribunal. David Scheffer thus wrote:

It has become folly of the most profound character to insist that a government, or the UN Security Council, must first take the time and effort to determine, under international criminal law, that the crime of genocide has been committed before taking military action or, if it can work quickly enough, diplomatic or economic measures to stop what might be, but may turn out not to be, genocide.³⁸

In its 2007 verdict the ICJ argued: '[To suggest] that the obligation to prevent genocide only comes into being when perpetration of genocide commences ... would be absurd *since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act*'.³⁹

It therefore determined that '[a] State's obligation to prevent, and the corresponding duty to act arise at the instant that the State learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be committed'.⁴⁰

From that moment on, a state that has means which are likely to have a deterrent effect on would-be perpetrators is under the duty to make use of them *'as the circumstances permit'*.⁴¹ Importantly (and perhaps unavoidably), the definition of what a 'serious risk' *is*, was left open to case by case interpretations of states (and possibly of courts) based on the circumstances.

A continuing obligation to prevent?

Once the duty to prevent in the Genocide Convention has been activated, how far, temporally, does it extend? The answer to this question would determine whether or not the duty applies also to genocide already in progress. Assessing the ICJ's 2007 ruling, Andrea Gattini commented:

... what really seems decisive in order to evaluate Serbia's responsibility [i.e. whether or not it had failed in its duty to prevent genocide] is the behaviour of the Serbian authorities *afterwards*, i.e. *once the genocide started*. This poses a conceptual problem about the temporal extension of the duty to prevent, which the Court did not address and which could be solved only if one assumes that the violation of the duty to prevent is a continuing one, so that the occurrence of the event and its continuation, far from bringing the duty to prevent to an end, will determine the aggravation of its violation.⁴²

There are two possible answers to this question. The first is that the duty to prevent only precedes the onset of genocide. Linguistically, this interpretation seems to go better with the narrow and more common understanding of 'prevent' as stopping something from ever occurring. The Oxford Dictionary definition of the word leaves very little room to apply 'prevent' to actions that have already begun.⁴³

Support for a narrow interpretation of the term 'prevention' could also be inferred, correctly or incorrectly, from genocide scholarship. Toufayan, for example, described the temporal nature of preventative measures to genocide as being taken in anticipation of, rather than in reaction to, events.⁴⁴ In line with this definition, he used the term 'impending genocide' rather than 'genocide' to refer to the object of prevention.⁴⁵ Similar notions could also be extracted from a general comment by Juan Mendez, former UN Secretary General's Special Advisor on the Prevention of Genocide, concerning the activation of the duty to prevent. Responding to a question during a press conference in Khartoum on 26 September 2005, Mendez remarked: 'If I wait until all the elements of genocide are in place according to international law, *then by definition I have not prevented it*'.⁴⁶

The second possibility is that the duty to prevent covers not only an impending but also an already ongoing genocide. According to this interpretation (recently articulated by Katherine Goldsmith) the prevention of genocide could mean 'either preventing genocidal actions from ever taking place or preventing *further* atrocities once genocide had arguably begun'.⁴⁷ In matters of the law one cannot assume or transfer meanings. The ICJ itself was careful to emphasise this point. 'The content of the duty to prevent [genocide] varies from one instrument to another,' wrote the court, 'according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented'.⁴⁸ Although

the ICJ did not explicitly address the question of temporal extension, several comments which it did make, support the notion of a scope that extends beyond 'pre-genocide prevention'.⁴⁹ The most important of those was in relation to a question about the conditions in which the obligation to prevent is breached. On this issue, the court quoted a general rule of the law of state responsibility (Article 14, paragraph 3) in the Articles of the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Acts. This rule states: 'The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and *extends over the entire period during which the event continues and remains not in conformity with that obligation*'.⁵⁰

While the focus of the court in quoting this passage was on the activation of the duty (i.e. on the words 'occurs when the event occurs') and not on the extension of the obligation to prevent, its inclusion in the ruling is still significant. The important question to ask, however, is whether the ILC text should be read to mean that the extended duration of the breach of the obligation to prevent indeed corresponds to the duration of the actual obligation to prevent.⁵¹ Another indirect support for 'prevention' as covering also the period of genocide may be gleaned from the court's assertion that the obligation of states [to prevent genocide] depends on their capacity to influence the actions of people likely to commit, '*or already committing*', genocide.⁵² Similarly, further down the paragraph, the court notes: 'a state's capacity to influence [the events] may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, *or the reality*, of genocide'.⁵³ The obligation to prevent is thus associated in the text with both a future and an ongoing genocide. Even if the duty to prevent does extend to cover ongoing cases, there are still relevant questions, semantic and others, in need of clarifying. For example, Goldsmith reconciled the narrow meaning of the word 'prevention' with the broader temporal scope by referring to the prevention of 'further atrocities'.⁵⁴ But does this interpretation also cover atrocities that have already begun? If so, then why (as discussed in the next section) is 'prevent' often augmented in political, academic, and even legal texts with the words 'stop', 'halt' or even 'suppress'? Departing from the legal disposition so far of the enquiry, the next section moves to briefly analyse pertinent relationships between 'prevention' and these other semantic representations of responses to genocide.

Beyond the ICJ: discourses about the implementation of prevention

To 'prevent or 'stop' ('halt') genocide'

An online tally of various signifiers describing action in relation to genocide points to the word 'stop' as likely the most widely used term next to 'prevent'.⁵⁵ A smaller scale qualitative analysis of political discourses and academic texts (legal and non legal) also returned some notable instances where 'stop', or 'halt' as its synonym, were used jointly with 'prevent' to signify genocide. Arguably, the purpose was often to compensate for the ambiguity in the temporal scope of the duty to prevent and/or augment its meaning in terms of implementation.

The joining of ‘stop’ with ‘prevent’ was already included in the title of Article XII of the first Secretariat draft (May 1947): ‘Action by the United Nations to *prevent or to Stop* genocide’.⁵⁶ The Secretariat’s commentary on the article argued that ‘if preventive action is to have the maximum chances of success’, the Genocide Convention should ‘bind the States to do everything in their power to support any action by the United Nations intended to *prevent or stop* these crimes’.⁵⁷ Similarly, in its recommendations to the UN almost forty years later, the Whitaker Report on the Question of Prevention and Punishment of the Crime of Genocide (1985) noted:

Perhaps, the Convention’s most conspicuous weakness is that it insufficiently formulates *preventive* measures. Such international short-term and long-term action would need to relate to different stages in the evolution of a genocidal process—anticipation of its happening; early warning of its commencement; and action to be taken at the outset of *or during a genocide itself to stop it*.⁵⁸

US President Clinton used the same formulation in his famous 1998 Kigali speech: ‘Let us work together as a community of civilized nations to strengthen our ability to *prevent and, if necessary, to stop genocide*’.⁵⁹ As did David Scheffer: ‘International organizations should be liberated to apply the term “genocide” more readily within a political context so as to publicly describe precursors of genocide and react rapidly either *to prevent or to stop* mass killings or other seeming acts of genocide’.⁶⁰ Gregory Stanton also asked: ‘How can the political will of the world’s leaders be mobilized to *prevent and stop genocide*?’⁶¹

Referrals to both ‘halt’ and ‘stop’ appear in the 2008 Albright–Cohen Genocide Prevention Task Force Report:

In the end, however, even if all institutions and organizations prove unable to take effective action, the United States should still be prepared to take steps to *prevent or halt* genocide . . . While the United States may face criticism for taking strong action in these cases, we must never rule out doing what is necessary to *stop* genocide or mass atrocities.⁶²

In an even clearer testimony to the meaning of ‘halt’, Samuel Totten wrote about ‘military intervention to *prevent or halt a potential or actual genocide*’.⁶³

The previous examples and the understanding of ‘stopping’ or ‘halting’ as bringing to a (temporary) stand, or an end, something which is already moving or taking place,⁶⁴ increase the probability that these words were used to clarify or compensate for the temporally narrow meaning of ‘prevention’ in relation to an ongoing genocide. They also raise substantive questions about the implementation of the duty to prevent, including the association between genocide’s two temporal stages (impending and ongoing) and the use of coercive force.

The duty to prevent and the use of force

Leading legal scholars have emphasised that no legal obligation exists under the Genocide Convention for states to ‘intervene’ in genocide. David Scheffer, for

example, responded to the suggestion that he was confusing prevention and intervention by writing:

[The suggesting person] may have missed what I published in 2002 (and cited in my [2006] article), namely, that *there is no legal obligation per se in the language of art. 1 of the 1948 Convention . . . that commits states parties to intervene, militarily or otherwise . . .* Prevention is one of two key requirements in art. 1 and it can entail countless methodologies.⁶⁵

In the first edition of his book *Genocide in international law*, William Schabas also argued that 'nowhere does the Genocide Convention recognize that individual States or the international community acting in concert *may or must intervene* in order to *prevent* the crime'.⁶⁶

The legal prohibition on the use of force across international borders was enshrined in the UN Charter.⁶⁷ It may be waived in two cases: (a) a presumption by a State of the right of self defence;⁶⁸ or (b) a political determination by the Security Council of a threat to, or breach of, international peace and security, and a Council (legally required) authorisation to act.⁶⁹ If the use of force in the latter category is coercive, it is generally described as 'intervention'; if consensual, as a 'peace operation'. Whereas the original intent of the Charter was to allow UNSC authorised interventions in response to cross border acts of aggression, the humanitarian intervention debate and Council's practice during the 1990s expanded the scope to extreme cases of human rights violations.⁷⁰ In 2005, the World Summit Outcome Document defined a new scope under the 'Responsibility to Protect doctrine (R2P) comprising of 'genocide' and three other international crimes: 'crimes against humanity'; 'war crimes' and the emerging crime of 'ethnic cleansing'.⁷¹ In theory, coercive responses were not necessarily temporally limited to already ongoing events of mass violence. This view was reflected in the various attempts by scholars to define 'humanitarian intervention'.⁷² In practice, however, coercive uses of military force were never broadly considered legitimate as 'preventative' (narrow sense) measures. Humanitarian interventions were thus launched only after the occurrence of mass killings.⁷³ Consequently, the understanding and discussions of 'intervention', or enforcement, were linked for the most part to ongoing cases of mass violence and much less so to impending cases ordinarily associated with prevention. As the following discussion suggests, some scholars and human rights activists may have turned to the term 'suppression' to fill this semantic gap in the interpretation of 'prevention'.

The meaning of 'suppression': judicial vs. military

Very little discussion was found in genocide studies literature about the meaning of 'suppression'. As one of only few actions that the final draft of the Genocide Convention called upon states to undertake, this is somewhat surprising.⁷⁴ Perhaps the question was not considered important since, unlike prevention and punishment, 'suppression' ended up as a recommendation, not a legal obligation. Confirming earlier interpretations to this effect, the ICJ concluded in 2007 that

Article VIII of the Convention may be seen to support ‘suppression’ at the political level rather than as a legal responsibility.⁷⁵ According to Scott Straus, both the meaning and actual implementation of ‘suppression’ are ambiguous in international law.⁷⁶ Commensurate with its dictionary definition,⁷⁷ the word could mean different things in various contexts. One common usage is in a negative sense, e.g., the suppression of a people, a culture, or of a language. Another use of ‘suppression’ is in the context of the setting up of a (global) prohibition regime vis-à-vis (an internationally) wrongful act.⁷⁸ This definition correlates well with Adam Jones’s depiction of the Genocide Convention as the ‘foundation’ of the prohibition regime against genocide.⁷⁹ Indeed, analysis of more than a hundred appearances of ‘suppress’ (or ‘suppression’) in the Genocide Convention’s *travaux préparatoires*⁸⁰ shows that when the word was used in a way that clearly conveyed its intended meaning, it was in this latter sense. The context was at times legislative but most often judicial.⁸¹

How does ‘suppression’ relate to military action in the sense of ‘intervention’? A search of the *travaux préparatoires* failed to make significant linkages between the two. In the only relevant comment found, the British delegate to the Sixth Committee described ‘genocide’ as a crime ‘for the suppression of which the United Kingdom and other countries had fought during the last war.’⁸² In more recent years, however, the word was used more often (mostly by non-legal scholars in the US) to signify humanitarian military interventions in ongoing cases of genocide. In *A problem from hell*, for example, Samantha Power stretched the legal interpretation of the Convention, arguing: ‘The [genocide] convention could be read to permit *military intervention*. The law even implied its necessity by enshrining a legal duty to “suppress.”’⁸³ Elsewhere, she also wrote about the consistent refusal of major powers ‘to take risks to suppress genocide’.⁸⁴ Holly Burkhalter also argued: ‘when the case for *military intervention to suppress* genocide becomes as clear as that of Rwanda, it [is] very late to be finding one’s conviction. The Rwanda genocide could have been *stopped*, but it would have been far easier to *prevent*.’⁸⁵

Similarly, Kenneth Campbell talked about multilateral *military intervention to suppress genocide*⁸⁶ and of ‘*using US troops to suppress genocide* in Bosnia, Rwanda, or Kosovo’;⁸⁷ Alan Kuperman mentioned ‘potential military options to *suppress* genocidal violence’;⁸⁸ and Adam Jones referred to his past support for state-led military interventions that *suppressed* genocide.⁸⁹ Adding the temporal scope to the fray, Jerry Fowler distinguished ‘suppression’ from a narrowly conceptualized ‘prevention’:

You don’t have to have a finding of genocide before you start preventing. By definition, prevent means before. But once you believe genocide is happening, I guess the term to use is *suppression*—suppress genocide, which is what we need to be doing in Sudan. And then *punishment* comes after you’ve failed in those first two events. (Emphases in original transcript)⁹⁰

A question to ask is how such authoritative uses of ‘suppression’ (and of ‘stop’/‘halt’) affected understandings of ‘prevention’ in the political sphere; for example, in relation to the recommendation in Art. 8 of the Genocide Convention that the UN

'take ... action ... for the prevention and *suppression* of acts of genocide'. More to the point, it is important to investigate how much influence such assertions have had on politicians' conceptualizations of 'legal' and/or 'legitimate' responses to genocide.

Discussion

Legal and political aspects of prevention debates

What obligations does the Genocide Convention impose on States Parties, and in relation to what temporal scope? The Convention's text itself has served very little to clarify these issues.⁹¹ Toufayan argued that 'nothing in the [later] debates about article I provide[d] the slightest clue as to the scope of the obligation to prevent'.⁹² Schabas also admitted that the parameters of the duty to prevent are 'very much a work in progress'.⁹³ Although the 2007 ICJ ruling provided guidance in relation to some of the legal responsibilities, others still remain ambiguous. In terms of extending the temporal scope, the legal answer should be clear. If the undertaking to prevent could not be interpreted to extend beyond the commencement of 'genocide', then, in a gruesome twist of the law, once the genocide has started states would not have been duty bound to take any action beyond punishment; at least not in term of their commitments under the Convention. Such an interpretation is of course unacceptable and the legal evidence, including the 'object and purpose' of the Genocide Convention,⁹⁴ suggest that 'prevention' should apply to both impending and ongoing genocidal situations. The problem then, at least at the outset, is a semantic one: how to reconcile between the temporally narrow definition of the word 'prevention' and the broader scope of the duty to prevent, which extends from 'pre-genocide prevention' to preventing continuation, further escalation, or manifestation of new genocidal massacres. An alternative identified in the discourse of both politicians and academic experts is to augment 'prevention' with other words, most commonly 'stop', 'halt' or even 'suppress' (i.e. to prevent future or impending genocide and to stop/halt/suppress genocidal situations already ongoing). These combinations not only help extend the temporal scope but also compensate for the presumed weakness of 'prevention' in terms of actions involved. One problem with this discourse, however, is that states have no legal obligation to 'stop' or 'halt' genocide, or even to 'suppress' it (judicially or militarily). Therefore, unless they bother to check, politicians and concerned citizens outside the legal loop could surmise (consciously or not) that the obligation of their state vis-à-vis ongoing genocide is based on a moral duty, not a legal one. In contrast to the situation with the Genocide Convention, the partition of the R2P concept to a responsibility to *prevent* and a responsibility to *react* (to mass atrocity crimes)⁹⁵ did not face such problems, since no legal distinction had been made between 'prevention' and 'reaction' in the codification of the doctrine. Arguably, though, even in R2P it is not always clear exactly when and where the shift from 'prevention' to 'reaction' takes place. When it comes to implementation, the words 'stop' and 'halt' are fairly

vague. To talk of ‘stopping’ or ‘halting’ genocide may sound steadfast; but without specifying concrete action it is as abstract and thus as meaningless as the use of ‘prevention’ as a catch-all phrase is. Arguably, this type of discourse is even more attractive for those who do not wish to commit to meaningful action.

The ambiguities discussed so far in relation to the duty to prevent only add to an already muddled debate over international responses to genocide or other mass atrocity situations. At the end of the day it is not so much the existence or absence of legal obligations as their subjective effects on political decision making at both national and international levels that matters most. The fuzzier the terms of this debate are, the greater the challenge to reconcile between the responsibilities flowing from the Genocide Convention, contentious as these may be, and the national-interest-driven political tussles over the shaping of international responses. As already suggested, these ambiguities also provide states and other political actors with greater freedom to evade criticisms for inaction as well as the risks of robust action. Thus, while authoritative legal determinations by the ICJ could clarify many issues, it is uncertain as to whether or not it is in the political interest of most states to help advancing such a solution.

Lack of clarity in interpretation of states’ legal duties

Why is the Genocide Convention so vague in relation to the duty to prevent? At least part of the answer is historical. The intergovernmental committees which drafted the Convention felt obliged to produce a document conservative enough for a global discourse in the UN. Such concerns, frequently voiced by delegates during the deliberations,⁹⁶ are a common constraint in the drafting of international treaties. Taking into account the international realities of 1947–1948 and the prevailing norms and conventions of the time, it is also easy to understand why international support required caution, and at times vagueness, in relation to implementation. An emerging bipolar divide was already affecting abilities and willingness of states to act in the ‘common good’.⁹⁷ Additionally, the sanctity of state sovereignty⁹⁸ was merely dented at Nuremberg and so short a time after the end of World War II, the focus was still on the dangers of interstate (rather than domestic) conflicts. The link between domestic violations of human rights and the maintenance of international peace and security was also much less clear than it is today. Prevention as well was as yet an underdeveloped concept. All of these factors had their constraining effects on the wording of the resulting Convention.

However, even after the signing of the Convention, there was hardly ever a legal discussion of the duty to prevent dedicated to the case of an *ongoing* genocide. This could be explained, perhaps, in that the only substantial review of the duty before the ICJ was in relation to the civil war in Bosnia-Herzegovina. Since the only legally recognised genocidal event during the war, the massacre in Srebrenica, lasted little longer than three days, prevention-related charges

were focused on Serbian leaders' failures to prevent the event *before* it had started and not on the short time during which it had taken place.

Preventing and halting genocide: Darfur and beyond

One of the questions introduced at the beginning of this article concerned the action (or actions) which the US was legally obliged to take in relation to the crisis in Darfur following Colin Powell's September 2004 determination of genocide. The evidence seems to suggest that authoritative interpretations of the obligation to prevent were nowhere near conclusive enough during 2004 to interpret ineffective actions in relation to Darfur by third States (or the UNSC) as clear violations of international law. Also, there was still no explicit ruling on the activation of the Convention; the ICJ's determination of a 'serious risk' threshold was only made three years later. However, even now, after the more recent clarifications from the ICJ, the task of holding a 'bystander' state to account for failing to 'prevent' genocide is not likely to be easy nor, arguably, very practical. The Bosnia Herzegovina referral to the ICJ was exceptional in that it had very strong incentives to go to the court. But sovereign states rarely find themselves as victims of an interstate genocide. In the exceptional event that a third state did take another state to the ICJ on charges of failure to meet the duty to prevent, what can we expect to see? For example, how efficient would the three examples provided by the ICJ as criteria to evaluate states' capacity (and consequently, extent of obligation to prevent) be for assessing future cases? What 'formula' should a state such as the US use to calculate its obligation to prevent, in terms of reconciling its geographical distance from a suspected genocidal event with its diplomatic/political ties with the perpetrators, and/or the availability (or absence) of resources at its disposal to influence their conduct? What about other criteria which could affect a state's capacity to prevent, but which the court did not specify? Under these circumstances, how influential could the (improbable) threat of being taken to court for failure to prevent be for tipping the scale from inaction to a possibly costly or risky action? These are but a few of many challenges and obstacles still on the path of turning the Genocide Convention into a significant instrument for genocide prevention.

Overcoming the Convention's shortcomings

Even though the duty to prevent applies to an already ongoing genocide, it is clearly more focused on, and relevant to, preventative action during the impending stage of genocide.⁹⁹ This is how it should be. The ICJ's assertion (supported by arguments from Scheffer) that the whole point of prevention is to prevent the occurrence of genocide¹⁰⁰ has helped, at least in theory, to disengage the need to justify invoking the Convention from a determination of genocide. However, the 'serious risk' threshold underscores the fact that earlier stages of prevention, widely believed to be the most effective in terms of preventative action, are not (and should not) be covered by the Convention. The Convention in this important

sense is therefore inevitably inefficient, and sources of legitimacy for earlier prevention must be sought elsewhere. Also, the point at which the threshold of 'serious risk' of genocide is crossed is not at all clear and therefore likely to provide new challenges. As an essentially political determination, it could be misused by different actors in different ways: to justify inaction where action is warranted or to serve as a (false) pretext for self-interested intervention.

The case of Darfur has shown that even an American referral of the situation to the UNSC in compliance with the Genocide Convention's recommendation was not enough to lead to effective international action. What legal or other remedies are there then for the Convention's shortcomings? Scott Straus has argued that the two possible solutions were either to strengthen the Genocide Convention or to develop other protocols which will trigger more forceful international response to massive violations of human rights.¹⁰¹ Whether or not R2P, the only potentially significant protocol in the making, would be able to overcome the obstacles it currently faces and meet these expectations is for the future to show.

David Scheffer offered to convert the narrow focus on 'genocide' to a broader focus on 'atrocities crimes' and establish a set of 'precursors of genocide'.¹⁰² He defined such precursors as 'those events occurring immediately prior to and during possible genocide that can point to an ultimate legal judgment of genocide but which should be recognized and used in a timely manner to galvanize international action to intervene, be it diplomatically, economically, or militarily'.¹⁰³ He distinguished precursors from 'indicators of genocide' which could manifest much earlier and which are much less conclusive in terms of the likelihood that they may lead to genocide.¹⁰⁴ In Scheffer's opinion, this would enable bypassing some of the difficulties associated with the determination of genocide. Schabas supported the idea of 'atrocities crimes', but also advocated a legal focus on 'crimes against humanity' instead of on 'genocide'. To him, 'the only [legal] significance of describing an atrocity as genocide rather than as 'crimes against humanity' is the relatively easy access to the International Court of Justice offered by article IX of the ... Convention',¹⁰⁵ a procedure which its value he nevertheless questions.¹⁰⁶

David Luban, however, tried to show that the pronouncement by the International Commission of Inquiry on Darfur that the events in the region amounted to 'war crimes' and 'crimes against humanity' *which may have been 'no less serious and heinous than genocide'*¹⁰⁷ had strong crippling effects on public pressure and political action at both national (American) and international levels.¹⁰⁸ His argument thus put in question the idea that 'crimes against humanity' could serve in a meaningful way to replace genocide in the political and public arenas, even if it did offer a legal solution to some of the notorious difficulties associated with the 'genocide debate'. When it comes to the genocide debate, it is again the political effects of the legal dispute rather than the legal implications themselves which complicate and impede action and provide justification for inaction. If Luban is right, the potential influence of a genocide determination by an internationally recognised body on world opinion and its significance for the political process as a whole may have been underestimated. Indeed, Schabas himself

has referred in the past to the assumed political clout of the 'genocide' label, describing it as 'still extremely important at the political level'.¹⁰⁹ More study is therefore required to improve our knowledge of the normative and political significances of 'genocide' for international action.

Conclusion

This article addressed a number of questions and controversies relating to the duty to prevent in the Genocide Convention. It identified a need for an informed understanding of its meaning, scope and implementation, in the context of the relationship between political decision-making and interpretations of legal obligations. The weakness of the Convention was acknowledged a short time after its birth by Sir Hersch Lauterpacht:¹¹⁰ 'Apparently, to a considerable extent, the [Genocide] convention amounts to a registration of protest against past misdeeds of individuals or collective savagery rather than to an effective instrument of their protection or repression'.¹¹¹ This tension between ideals and political realities that circumscribed the text of the Convention, has manifested ever since in the gap between often genuine aspirations to 'do something' to make genocide 'not happen in the first place', or 'go away', and political difficulties to put this objective into practice. This has led many, politicians and others, to talk of 'stopping' or 'halting' genocide, but often without offering (or committing to) concrete ways of how to do this. Was it the difficulty to determine 'genocide' (owing to the stringent criteria in its legal definition) which has played the key role over the last half a century in allowing states to get away with inaction in response to both threatened and allegedly ongoing genocide? Was it the ambiguity of the Convention in relation to the meaning and scope of the duty to prevent? Or was it the non-enforceable nature of international law due to which violations of 'treaty law' are rarely penalised? If indeed all, or most, of these factors have been consequential, then how realistic are the expectations which advocates of genocide prevention (and advocates of human rights protection in general) tend to pin on legal advancements in this area? For example, how likely is it that the ICJ would be called on by a state to issue in timely manner provisional measures ordering another state or states to desist from, or resume, certain actions which obstruct, or support (respectively), genocide prevention? Indeed, as Akhavan once pointed out, the absence of impartial actors who can initiate legal proceeding (Article IX) or call upon 'the competent organs' of the UN to take effective action (Article VIII) has been detrimental to the utility of the Convention.¹¹²

Legal scholars generally agree that decisions about prevention or intervention have more to do with policy and/or moral choices than with the law.¹¹³ It is not weaknesses in the Genocide Convention (prevention) or in the UN Charter (use of force) that constitute the greatest obstacles to timely resolute responses, but narrowly conceived interests of UNSC member states, and mainly the five permanent ones (P-5). International successes or failures hinge on the stand which states are willing to take, and/or the effectiveness of the means they are prepared to contribute, invest or risk. When the risks of military intervention are added to the cost-

benefit balance, the scales tend to tilt particularly sharply in favour of inaction.¹¹⁴ Thus, the placing of essentially normative decisions under the authority of one of the most politically skewed bodies, the UNSC, was and remains a recipe for ineffectiveness.

Given that most decisions about responses to genocide are political, the unavoidable question is if it really matters for the political process what legal definitions are attached to crimes. Indeed, when faced with the obstacles described above, the legal potential of the Convention to motivate or force states to act resolutely does seem very limited. However, political discussions that shape policies do not start or end behind closed doors at the UNSC. Draft policies are rather developed by member states and are subject in some countries to potential public debate or scrutiny, before or during their negotiation at the Council. It may be useful, therefore, to examine different ways in which international law could affect national or international politics, such as in the shaping of norms, legitimation or de-legitimation of policies, or by providing substance for public ‘naming and shaming’ of bystander states or states who actively protect perpetrators.

Admittedly, the power and incentives to block effective international action often lie in the hands of authoritarian states which are less susceptible to public pressures. However, even such states are not always or entirely insulated from domestic or external influences. One example manifested during the 2010 Beijing Olympics, when China succumbed to an international public campaign aimed to soften its negative position in relation to the hybrid UN peacekeeping mission to Darfur. The normative power of the ICJ should not be discounted altogether either. For example, it was argued by Schabas that Bosnia-Herzegovina’s aborted intent in 1993 to take the UK to court for its actions in the UNSC may have had some chances of success, especially in light of the ICJ’s 2007 judgement.¹¹⁵ While the threat of a civil litigation would never determine the policy of a powerful state, the public humiliation involved in such a verdict is likely to carry at least some weight, even for non democratic states. Thus, the recent interpretations of the duty to prevent by the ICJ and parallel developments in customary international law could be useful, if publicised extensively, in strengthening both public legitimacy and official calculations in favour of more timely and meaningful prevention efforts.

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Notes and references

- 1 The targeting of the Fur, Massalit and Zaghawa tribes, which manifested itself in the killing and displacement of civilians and the burning of villages, had been recorded—and the world alerted—since about the second half of 2003. See Eyal Mayroz, ‘Ever again? The United States, genocide suppression, and the crisis in Darfur’, *Journal of Genocide Research*, 2008, Vol. 10, No. 3, p. 362.
- 2 Colin Powell, ‘The crisis in Darfur: Testimony before the Senate Foreign Relations Committee’, *US State Department*, 9 September 2004.

- 3 Powell, 'Testimony before the Foreign Relations Committee'.
- 4 Scott Straus, 'Rwanda and Darfur: a comparative analysis', *Genocide Studies and Prevention*, Vol. 1, No. 1, 2006, p. 50. See also analysis in Eric Reeves, 'Secretary of State Colin Powell's genocide determination: what it does, and doesn't, mean for Darfur, September 10, 2004', [sudanreeves.org](http://www.sudanreeves.org/Sections-article214-p1.html), 2004, available at: <http://www.sudanreeves.org/Sections-article214-p1.html>.
- 5 The term 'temporal scope' (at times 'temporality') is used throughout the article in reference to the stage(s) of genocide covered by the word 'prevention'. This relates both to activation of the duty and the stages during which it is in effect.
- 6 See General Assembly's instructions to the drafting Committees in United Nations, *GA Resolution 96 (I)*, 11 November 1946.
- 7 United Nations, *The Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, Art. 1. Emphasis added.
- 8 Besides discussing prosecution.
- 9 UN, *Genocide Convention*, Art. 8.
- 10 See discussions in David Luban, 'Calling genocide by its rightful name: Lemkin's Word, Darfur, and the UN Report', *Chicago Journal of International Law*, Vol. 303, No. 7, 2006, p. 305n; Julie Flint and Alex De Waal, *Darfur: a short history of a long war* (New York: Zed Books, 2006), pp. 131; Straus, 'Rwanda and Darfur', p. 51; William A. Schabas, *Genocide in international law: the crime of crimes*, 2nd edn. (Cambridge; New York: Cambridge University Press, 2009), p. 85. For a different view, see Samantha Power, 'A problem from hell': *America and the age of genocide* (London: Flamingo, 2003), p. 58.
- 11 The drafting committees left these decisions to political negotiations. See, in relation to the UNSC discussion, Mark Toufayan, 'Deployment of troops to prevent impending genocide: a contemporary assessment of the UN Security Council's powers', *Canadian Yearbook of International Law*, Vol. 40, 2002, pp. 222, 226–227.
- 12 Review updated to 1985 in Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide (the 'Whitaker Report')* (United Nations, ECOSOC, UN Doc E/CN.4/Sub.2/1985/6, 2 July 1985), for example, paras. 55, 65.
- 13 See critique in Toufayan, 'The World Court's Distress', pp. 233–262. Exceptions include *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ 15 1951 (28 May).
- 14 Article IX of the Genocide Convention specifies the ICJ as the competent organ to discuss civil disputes between states. All other international courts and tribunals that deal with cases of genocide are tasked with criminal prosecutions of individuals.
- 15 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case* (Bosnia and Herzegovina vs. Yugoslavia (Serbia and Montenegro)), 1993 ICJ 3 (Request for the Indications of Provisional Measures Order of 8 April).
- 16 'Separate opinion' allows ICJ judges to add non-binding declarations to a court's decisions without having to dissent from them.
- 17 *Application of the Genocide Convention* (Order of 13 Sept.), para. 86 (separate opinion of judge Lauterpacht). An erga omnes obligation is owed by states toward the community of states as a whole, as all states have a legal interest in its performance. See on the duty to prevent genocide as *erga omnes*, Toufayan, 'The World Court's distress', pp. 249–250; Marko Milanovic, 'State responsibility for genocide', *The European Journal of International Law*, Vol. 17, No.3, 2006, p. 570.
- 18 *Application of the Genocide Convention* (Order of 13 Sept.), para. 115 (separate opinion of judge Lauterpacht). See critique in Toufayan, 'The World Court's distress', pp. 237–241.
- 19 *Application of the Genocide Convention* (Order of 13 Sept.), para. 115 (separate opinion of judge Lauterpacht). Critique in Toufayan, 'The World Court's distress', pp. 241–244.
- 20 *Application of the Genocide Convention* (Order of 13 Sept.), paras. 100–104 (separate opinion of judge Lauterpacht).
- 21 *Application of the Genocide Convention* (Order of 13 Sept.), para. 105 (separate opinion of judge Lauterpacht).
- 22 *Letter dated 24 November 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the Secretary-General (UN doc: A/48/659)*
- 23 See allegation by Bosnia-Herzegovina's legal advisor, Francis A. Boyle (in his CV) at: <http://www.law.illinois.edu/faculty/profile/FrancisBoyle>.
- 24 Schabas, *Genocide in International Law*, 2nd edn., p. 527.
- 25 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case* (Bosnia and Herzegovina vs. Yugoslavia (Serbia and Montenegro)), 1996 ICJ 3 (Preliminary Objections, Judgement, 11 July).
- 26 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)*, 26 February 2007, para. 427.
- 27 *Application of the Genocide Convention*, paras. 162.
- 28 *Application of the Genocide Convention*, paras. 165.

- 29 *Application of the Genocide Convention*, para. 427.
- 30 *Application of the Genocide Convention*, paras. 430; 461.
- 31 *Application of the Genocide Convention*, para. 432.
- 32 *Application of the Genocide Convention*, para. 430. The justification was that combined efforts by different states could jointly succeed in situations where efforts by one state could not.
- 33 *Application of the Genocide Convention*, para 430. Emphasis added.
- 34 *Application of the Genocide Convention*, para 430.
- 35 *Application of the Genocide Convention*, para. 430.
- 36 *Application of the Genocide Convention*, para. 461. Emphasis added. The obligations thus apply to all state parties including the host state (i.e. in whose territory the genocide is occurring).
- 37 See Schabas, *Genocide in International Law*, 2nd edn., pp. 523–524.
- 38 David Scheffer, ‘Genocide and atrocity crimes,’ *Genocide Studies and Prevention*, Vo. 1, No. 3, 2006, p. 231.
- 39 *Application of the Genocide Convention*, para. 431. Emphasis added. See similar argument in Scheffer, ‘Genocide and atrocity crimes’, p. 231.
- 40 *Application of the Genocide Convention*, para. 431. Emphasis added. See also para. 432.
- 41 *Application of the Genocide Convention*, para 432. Emphasis added.
- 42 Andrea Gattini, ‘Breach of the obligation to prevent and reparation thereof in the ICJ’s genocide judgment’, *The European Journal of International Law*, Vol. 18, No. 4, 2007, p. 704. Emphasis added.
- 43 *Oxford English Dictionary*, 3rd edn., August 2010; online version November 2010.
- 44 Toufayan, ‘Assessment of the UN Security Council’s powers’, p. 211.
- 45 The term ‘impending genocide’ in relation to prevention is used in Toufayan’s paper no fewer than nineteen times.
- 46 ‘Press conference, Mr Juan Mendez, the Special Advisor of the Secretary-General on the Prevention of Genocide, 26 September, 2005, *UNMIS HQ*, Khartoum’. Cited in Schabas, *Genocide in international law*, 2nd edn., pp. 574–575. Emphasis added.
- 47 Katherine Goldsmith, ‘The issue of intent in the genocide convention and its effect on the prevention and punishment of the crime of genocide: toward a knowledge-based approach’, *Genocide Studies and Prevention*, Vol. 5, No. 3, 2010, p. 240. Emphasis added.
- 48 *The Application of the Genocide Convention*, para. 429.
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- 52 *Application of the Genocide Convention*, para. 430. Emphasis added.
- 53 *Application of the Genocide Convention*, para. 430. Emphasis added.
- 54 Goldsmith, ‘Issue of Intent’, p. 240.
- 55 Results of a Google search conducted 3 February 2011. Emphasis added. The phrase ‘stop [or ‘stopping’] genocide’ returned 796,000 results, far more than all other search strings combined, including: ‘respond [or ‘responding’] to genocide’ (67,500); ‘intervene [or ‘intervention’] to stop genocide’ (56,800); ‘intervention of genocide’ (25,800); ‘halt [or ‘halting’] genocide’ (21,570); ‘intervention [or ‘intervene’] in genocide’ (7,160); ‘suppression of [or ‘suppress’] genocide’ (5,784).
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- 57 *UN Secretariat Draft*, pp. 45–46. Emphasis added.
- 58 *The Whitaker Report*, para. 78. Emphasis added.
- 59 Speech by Bill Clinton, ‘Remarks to the people of Rwanda’, 25 March 1998, available at: <http://millercenter.org/scripps/archive/speeches/detail/4602>. Emphasis added.
- 60 Scheffer, ‘Genocide and atrocity crimes’, p. 229. Emphasis added.
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- 65 Scheffer, 'Merits of unifying terms', p. 93. Emphasis added. See also address by David Scheffer, Ambassador-at-Large for War Crimes Issues, US Department of State, at the Conference on 'Genocide and crimes against humanity: early warning and prevention', US Holocaust Memorial Museum, Washington, DC, 10 December 1998, extract reproduced in William A. Schabas, *Genocide in international law*, 1st edn. (Cambridge; New York: Cambridge University Press, 2000), p. 496.
- 66 Schabas, *Genocide in international law*, 1st edn., p. 491. Emphasis added. Notably, this comment was removed from the second edition of the book (2009). Schabas, however, still maintained that although the duty to prevent is a legal responsibility, it may not be invoked by states as a pretext for circumventing the authority of the UN Charter. In Schabas, *Genocide in international law*, 2nd ed., p. 533.
- 67 UN Charter, Art. 2.4 and Art. 2.7 (deference to state sovereignty).
- 68 UN Charter, Art. 51.
- 69 UN Charter, Chapter VII, Art. 39, 42. Some argue also that, with prior Council authorisation, regional or sub-regional arrangements under Art. 53 could also authorise military action. See Ban Ki Moon, *Implementing the responsibility to protect: report of the Secretary-General* (UN Document A/63/677, 12 January 2009), para. 56.
- 70 See general discussion in Schabas, *Genocide in international law*, 2nd edn., p. 530.
- 71 See para. 138 of the *World Summit Outcome* at: <http://daccesssds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>.
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- 74 Genocide Convention, Art. VIII.
- 75 *Application of the Genocide Convention*, Para. 159.
- 76 Scott Straus, 'Darfur and the genocide debate', *Foreign Affairs*, Vol. 84, No. 1, 2005, p. 129.
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- 81 Ad Hoc Committee on Genocide, sixth meeting (UN document, e/ac.25/sr.6), 9 April 1948, p. 15; Sixth Committee, 80th meeting (UN document a/c.6/sr.80), 21 October 1948, p. 168; Sixth Committee, 65th meeting (UN document a/c.6/sr.65), 2 October 1948, p. 25; UN document a/c.6/sr.80, pp. 168, 169. See also in similar contexts: Sixth Committee, 63rd meeting (UN document a/c.6/sr.63), 30 September 1948, pp. 6, 7; Sixth Committee, 79th meeting (UN document a/c.6/sr.79), 20 October 1948, pp. 155, 158, 160; Ad hoc Committee on Genocide, 7th meeting (UN document e/ac.25/sr.7), 12 April, p. 786; UN document, e/ac.25/sr.6, p. 20.
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- 83 Power, *A problem from hell*, p. 58. Emphasis added.
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