

ICC Charges in Darfur and the Genocide Convention
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Summary

On July 14, the Prosecutor of the International Criminal Court (ICC) presented evidence to the Pre-Trial Chamber that Sudanese President al-Bashir has committed genocide, war crimes, and crimes against humanity in Darfur and requested a warrant for his arrest. This marks the first time a sitting head of state has been accused of genocide in the ICC. Much of the ensuing public debate has focused on the supposed tensions and tradeoffs between peace and justice. But under recent international case law, the charges also have significant implications for other States, in particular those with close political, economic and diplomatic ties to Sudan.

Genocide is a crime under international law, and States are obligated to prevent, punish, and refrain from complicity in it. In a landmark 2007 case interpreting the Genocide Convention, the International Court of Justice (ICJ) held that the duty to prevent genocide attaches as soon as a State knows or should have known that genocide is occurring. The ICJ also held that States with knowledge that genocide is being perpetrated risk legal liability for complicity in the crime if they provide assistance that facilitates the genocide.

The genocide charges put forward by the ICC Prosecutor arise out of an official investigation ordered by the U.N. Security Council under Chapter VII of the U.N. Charter. As such, these charges make it increasingly difficult for any State to claim that it is unaware of the risk that genocide is occurring in Darfur. Countries that persist in providing military assistance, such as arms transfers, or substantial political and diplomatic protection to Sudan with the knowledge that genocide may be occurring risk legal liability for their failure to prevent or complicity in genocide.

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The obligation to prevent genocide under the 1948 Genocide Convention

In February 26, 2007, the ICJ addressed for the first time allegations of genocide by one State against another. In *Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosnia v. Serbia)*¹ (also known as “the Genocide Case”), the ICJ determined that both individuals and governments may be held responsible for violations of the Genocide Convention, an international treaty created in response to the Holocaust in 1948. Under the Genocide Convention, governments are obligated to refrain from, and not be complicit in, committing genocide. They are also required to take affirmative action to *prevent* genocide, on their own territory as well in other countries.

Under Article I of the Genocide Convention, “[t]he 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.” In the Genocide Case, the International Court of Justice was asked for the first time to clarify the obligation to prevent genocide. In that case, Bosnia argued that Serbia had not only participated directly in the genocide led by the forces of the Republika Srpska against the Bosnian Muslim population, but had also failed its separate duty to prevent the genocide in the first place.

The Court confirmed that the Genocide Convention created a “normative and compelling” obligation to prevent genocide, separate from the obligation to punish the crime.² States parties to the Convention must “employ all means reasonably available to them, so as to prevent the genocide so far as possible.”³ This is an “obligation of conduct,” requiring action regardless of whether the desired result is likely to be achieved. A State would violate the obligation to prevent genocide, therefore, if it had “manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.”⁴ The Court explained that any determination as to whether a State had taken all measures in its power to prevent genocide had to be made on a case-by-case basis.⁵ Nonetheless, the Court articulated several criteria to guide this assessment. These include “the capacity to influence effectively the actions of persons likely to commit, or already committing genocide;” “the geographical distance from the scene of the events;” and “the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.”⁶ States, the Court said, must take every conceivable action within the bounds of international law to prevent genocide.

This obligation to prevent genocide arises “at the instant that the State learns or should normally have learned of the existence of a serious risk that genocide will be committed.”⁷ A State does not have to be certain that genocide is happening; it is enough to trigger the obligation to prevent genocide that the State is aware of the risk that genocide is occurring. Furthermore, a State doesn’t *actually* have to know about the genocide or risk of genocide; it is enough that the State *should have known* for the obligation to take effect.

Serbia's violation of the obligation to prevent genocide

In applying these principles to the situation in the Balkans, the Court noted that due to Serbia's strong "political, military and financial links" with the Republika Srpska, Serbia was particularly well-situated to influence the Bosnian Serbs committing the genocide in Srebrenica.⁸ Further, the Court found that Serbia could not reasonably claim that it was unaware of the serious risk of genocide once the Srpska forces occupied Srebrenica.⁹ Because Serbia did not take "any initiative to prevent what happened, or any action ... to avert the atrocities which were committed,"¹⁰ the Court concluded that Serbia violated its obligation to prevent the Srebrenica genocide.¹¹

The obligation to prevent genocide in Darfur

As the ICJ held in the Genocide Case, States have a legal obligation to act to prevent genocide once they know or reasonably should have known of the serious risk that genocide is occurring. By publicly seeking genocide charges against President Bashir, the ICC Prosecutor has put governments on notice "of the existence of a serious risk" that genocide is occurring in Darfur. With the Prosecutor's announcement, Sudan's allies cannot credibly claim that they are unaware of the risk of genocide in Darfur. The charges put forward against President Bashir underscore the imperative to act, and the obligation to do so persists until the risk of genocide is averted or stopped.

The ICJ made clear in the Genocide Case that States have an individual obligation to act to prevent genocide, regardless of any actions taken by intergovernmental bodies to address the genocide. So, the fact that the Security Council has been "seized" of the conflict in Darfur and has issued binding resolutions is insufficient to fulfill the obligation of individual States to take action on their own to prevent the genocide in Darfur. The ICJ, emphasizing a State's duty to act regardless of action taken by other entities, stated, "[E]ven if and when these organs [of the United Nations] have been called upon, this does not mean that the States parties to the [Genocide] Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring...."¹²

The extent and scope of action required of each State depends on the nature and strength of its ties to the Sudanese government. While all States are required to act to help prevent the genocide in Darfur, States with the closest ties to Sudan are likely to have the most leverage over its behavior, and thus bear the greatest responsibility. As Human Rights First¹³ and others¹⁴ have documented, China is Sudan's main political, economic and military partner. The nature of this relationship means that China bears a special responsibility to act to prevent the genocide in Darfur. While China has undertaken some efforts to find a diplomatic solution to the conflict in Darfur (as have other Security Council members and other countries), given the strength and depth of its ties to Sudan, such political action is insufficient to fulfill its responsibility under the Genocide Convention. As the International Court of Justice specified,

States have to take “all measures” within their power to prevent genocide. The Court stated that political, economic, and military ties are crucial in analyzing the extent of a country’s influence. Thus, those ties must also be used to the full extent possible to prevent genocide. All other States with close political, economic or military ties to Sudan have a similarly heightened responsibility to act.

The obligation to cease arms transfers

In the Genocide Case, Serbia’s military support to Republika Skpska, including arms transfers, while Serbia knew or should have known of the risk of genocide, was an important factor in the Court’s holding that Serbia violated its duty to prevent genocide. A State that sells weapons to a government against whose head of state genocide charges have been lodged “manifestly fail[s] to take all measures to prevent genocide which [are] within its power.”¹⁵ Indeed, continued arms sales likely would fuel the capacity of such a State to commit genocide. Likewise, many forms of military support, including some military training, may also aid in the commission of genocide.

According to United Nations Comtrade data¹⁶ and to the United Nations Register on Conventional Arms,¹⁷ more than thirty countries have sold arms or military equipment to the Government of Sudan at some point since the beginning of the conflict in Darfur.¹⁸ But China and Russia have been the largest suppliers of arms and military technology to Sudan over the past three years. More than 90% of Sudan’s total small arms purchases since 2004 have come from China.¹⁹ Chinese military trucks have recently been discovered in Darfur.²⁰ During the same period, Russia sold attack helicopters to the Government of Sudan, and provided military training to helicopter pilots.²¹

Both China and Russia argue that their arms sales to the Government of Sudan fall outside the scope of the U.N. arms embargo on the provision of arms to Darfur.²² But the obligation to stop arms sales to Sudan flows directly from the Genocide Convention, regardless of the precise scope of the U.N. arms embargo. Countries continuing to sell arms to the Government of Sudan must suspend their arms transfers immediately in order to comply with the Genocide Convention.

The obligation to use political leverage

The Court concluded in the Genocide Case that the type and extent of actions a State is required to take in order to fulfill its obligation to prevent genocide depends upon the nature of its ties to the country allegedly committing the genocide. If a State has political links, it must use them to put pressure on the State engaging in a genocidal campaign. The closer those links are, the stronger the pressure must be. In the Darfur context, the Security Council has put some diplomatic pressure on Sudan. At the same time, Sudan has been protected from

Security Council criticism and action on numerous occasions, particularly by China²³ and Russia, two of the Council's permanent members, but also by other countries, including Libya and South Africa.²⁴ By providing the Government of Sudan with political cover in the face of the most serious abuses, such countries are failing to take all possible measures to prevent the genocide in Darfur.

Complicity in genocide under the Genocide Convention.

Under Article III of the Genocide Convention, States “are bound by the obligation ... not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide.”²⁵ The International Court of Justice interpreted this obligation to include a prohibition against conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and **complicity in genocide**.²⁶

According to the Court, a State is complicit in genocide if it provides “the means to enable or facilitate the commission of the crime.”²⁷ The Court analogized complicity in genocide to the rule under customary international law of State Responsibility on “aid and assistance,”²⁸ according to which any “State which aids or assists another State in the commission on an internationally wrongful act by the latter is internationally responsible for doing so.”²⁹

For a State to be complicit in genocide, the Court explained, it must **know** that the perpetrator of the crime (whether an individual or an organ of a State) is acting with genocidal intent—that is, with the specific intent to destroy a group in part or in whole for its very nature as a national, ethnic, racial or religious group.³⁰ Thus, to be complicit in genocide, a State must know that the perpetrator it is aiding and assisting is committing the crime of genocide.³¹ The Court identified but did not answer the separate question whether a State had to “share” the genocidal intent of the perpetrator in order to be found complicit in the genocide.³²

Applying this test to the situation in the Balkans, the Court found that there was “little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by [Serbia].”³³ However, the Court found that Bosnia had not definitely established that the Serbian authorities supported the Bosnian Serb army with clear knowledge of the genocide there.³⁴ Therefore, the Court concluded that Serbia could not be found responsible for complicity in genocide. It was not enough that Serbia should have known of the risk of genocide; the Court held that actual knowledge is required that the crime that is on the verge of or being committed is genocide in order to establish complicity.

Complicity in genocide in Darfur

Countries that continue to deliver arms to the Sudanese government and offer it other type of military, economic and political support, may not only be violating the obligation to prevent genocide in Darfur, but are also at serious risk of being found complicit in genocide themselves.

The Prosecutor's request for an arrest warrant against President Bashir heightens awareness about the credible risk of genocide in Darfur, and thus triggers the obligation to act to prevent it or ensure they are not complicit in committing it. In contrast to the situation in the Balkans addressed in the Genocide case, States can no longer claim they are unaware of the possibility of genocide in Darfur as a defense to continued support of the Government of Sudan. With this knowledge in mind, States must take all possible action to prevent and stop the genocide.

The provision of military support to the Government of Sudan in the form of arms sales or military training enhances the capacity of President Bashir's government to commit crimes, including genocide, in Darfur. Arms and military equipment sold by China and Russia in particular to Sudan have been found in Darfur and have been used by the Sudanese army and its Janjaweed militias in their attacks against civilians.³⁵ However, even if arms sold to Sudan are not directly sent or used in Darfur, their transfer to Khartoum likely allows the Sudanese military to deploy other weapons into Darfur without diminishing its defense capacities. Military training by foreign governments similarly bolsters the capacity of the Sudanese army to wage war, including in Darfur. Arms sales and military training facilitate the crimes committed in Darfur even if they are not directly provided to Darfur.

Would this level of aiding and assistance be sufficient to hold a State legally complicit in genocide under the Genocide Convention? We believe it could, particularly if sharing the genocidal intent of the main perpetrator of the crime is not legally required in order to establish complicity. If sharing the genocidal intent *is* required under international law for a State to be held complicit in genocide—still an open question even after the Genocide case—the answer is unclear. What is certain is that any State providing military support to the government of Sudan under the present circumstances is not taking all possible measures to stop the crimes, and is therefore in violation of international law.

¹ *Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. 2007. Available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

² Para. 427.

³ Para. 430.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Para. 431.

⁸ Para. 434.

⁹ Para. 436.

¹⁰ Para. 438.

¹¹ Ibid.

¹² Para. 427.

¹³ See Human Rights First, *Investing in Tragedy: China's Money, Arms and Politics in Sudan* (New York: Human Rights First, 2008), available at <http://www.humanrightsfirst.info/pdf/080311-cah-investing-in-tragedy-report.pdf>.

¹⁴ See for instance "Arms, oil, and Darfur: The evolution of relations between China and Sudan," *Sudan Issue Brief, Small Arms Survey*, July 2007 (available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-765NSX?OpenDocument>).

¹⁵ Genocide Case, para. 430.

¹⁶ The United Nations Commodity Trade Statistics (Comtrade) Database contains customs data reported to the U.N. by governments and is available at <http://comtrade.un.org/db/>.

¹⁷ Available at <http://disarmament.un.org/cab/register.html>

¹⁸ Commodities reviewed in the Comtrade database include all military and non-military small arms and light weapons (SALW), SALW ammunitions and SALW parts, as well as armored combat vehicles (tanks and other armored fighting vehicles and parts thereof). The value of sales for each country varies from a few hundred to several million dollars.

¹⁹ See Human Rights First, *Investing in Tragedy*, p. 11 ff.

²⁰ See Hilary Anderson, BBC, "China is 'fuelling war in Darfur,'" July 13, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7503428.stm>.

²¹ See Amnesty International, "New photos expose Sudan arms violations," August 24, 2007, available at <http://www.amnesty.org/en/news-and-updates/news/New-photos-expose-Sudan-arms-violations-20070824>; Russian military training to Sudan documented in confidential documents received by Human Rights First.

²² U.N. Security Council Resolutions 1556 (2004) and 1591 (2005), taken together, impose an arms embargo on all "belligerents" in Darfur, including the Government of Sudan. The embargo prevents countries from enabling the sale or supply of arms to Darfur, and requires the Government of Sudan to seek prior approval before transferring arms to the territory of Darfur. The Government of Sudan has systematically refused to comply with the embargo.

²³ For a detailed account of the political coverage given to Sudan by China at the Security Council and in other fora, see Human Rights First, *Investing in Tragedy*, p. 17 ff.

²⁴ Louis Charbonneau, Reuters, "Libya, South Africa try to block genocide indictment," July 28, 2008, available at <http://africa.reuters.com/wire/news/usnN28508399.html>

²⁵ Para. 179.

²⁶ Para. 416.

²⁷ Para. 419.

²⁸ Para. 419 and 420.

²⁹ Article 16 of the International Law Commission Articles on State Responsibility, as taken note of by the General Assembly on 12 December 2001. See Doc A/RES/56/83.

³⁰ Para. 421.

³¹ It is important to note the difference between the level of knowledge required to be held responsible under the duty to prevent genocide and under the prohibition against complicity in genocide. For a State to be complicit in genocide it must have “full knowledge” (para. 432) of the fact that genocide is about to be committed or is underway, whereas for the obligation to prevent genocide, it is sufficient that the State “should normally have been aware” (ibid.) of the danger that genocide would be committed.

³² Ibid.

³³ Para. 422.

³⁴ Ibid.

³⁵ United Nations Panel of Experts on Sudan, *Final Reports from the Panel of Experts*, (New York: United Nations, 2006), S/2006/65 (January 2006), S/2006/250 (April 2006), and S/2006/795 (October 2006), available at <http://www.un.org/sc/committees/1591/reports.shtml>. See also Human Rights First, *Investing in Tragedy*, “New photos expose Sudan arms violations,” and “China is ‘Fueling War in Darfur.’”