

ESSAY

THE DEBATE OVER GENOCIDE IN DARFUR, SUDAN

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I. INTRODUCTION

On July 12, 2010, the International Criminal Court (ICC) indicted Omar al-Bashir, the president of Sudan, on charges of genocide in the Darfur region of his country.¹ An arrest warrant was issued forthwith. All signatories to the Rome Statute creating the ICC, at that point, were obligated to apprehend Mr. Bashir should he come within their borders and render him back to The Hague to answer for his crimes.² Indeed, since the U.N. Security Council referred the matter to the ICC, the arrest warrant can

[†] Professor of Law and Associate Dean, Creighton University School of Law; J.D., Indiana University; LL.M. Georgetown University; President of the U.S. National Section of L'Association Internationale de Droit Pénal. Congratulations to the editors of the *University of California-Davis Journal of International Law & Policy* for this outstanding volume. As with so many other atrocities in Africa, the genocide in Sudan presents us with yet another example of the international community's efforts arriving either too little or too late. This volume, with all the associated students and professors, helps keep the spotlight on Darfur, and hopefully the sadness of that situation, firmly in the collective conscience of mankind. My own meager contribution here is to craft a *rapporteur*-style essay on the difficulty that was encountered in affixing the genocide label to the atrocities committed against the people of Darfur.

¹ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 7 (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907142.pdf>.

² European Parliament Resolution P7_TA-PROV(2010)0315, Kenya: Failure to Arrest President Omar al-Bashir of Sudan, Sept. 9, 2010, at C, <http://www.europarl.europa.eu/document/activities/cont/201009/20100917ATT82761/20100917ATT82761EN.pdf>.

be considered an extension of a Security Council resolution – thereby binding all states, including Sudan, to arrest Mr. Bashir.³

However, the Sudanese president remains at large. The road to securing the issuance of this indictment against Mr. Bashir was fraught with legal and political difficulty. Ultimately, a stand-off ensued between two powerful forces as to whether or not the atrocities unfolding in this African nation rose to the level of genocide.

I. HISTORY OF THE CONFLICT

This tale begins when the large-scale suffering of the people in Darfur – a western territory in the East African country of Sudan – drew the world’s attention in 2003.

The Sudan (as the British called it) has always existed simultaneously in two worlds – one Arab, the other Black.⁴ Geographically, it is the catchment basin for the Blue and White Niles, which flow north from the Ethiopian highlands, joining at Khartoum to create the Nile River that pierces the great desert and provides the lifeblood of Egypt.⁵ Historically, this was a land of diverse and fractionalized tribes.

Ottoman Egypt finally conquered and unified the Arab and Islamic kingdoms of North Sudan in the early nineteenth century, but could not conquer the largely Black South until Lord Herbert Kitchener arrived in 1898 and extended joint Anglo-Egyptian dominance throughout the entire region.⁶ British Imperial incorporation followed thereafter. Sudan became independent by 1956, but conflict between Arab and Black forces contending for power immediately plunged the country into civil war. A long series of coups and dictatorships followed – the longest by Col. Gaafar Muhammad Nimeiri, who managed to hold power from 1969 to 1985.⁷

Gen. Omar al-Bashir led the 1989 coup that installed an Arab-dominated and Islamist government with himself at the helm. His extension of strict Islamic law into the non-Islamic South of Sudan touched off yet another civil war that lasted until 2004.⁸ Bashir equipped and used local militias to fight for the government. These Arab militias targeted Black settlements in the South: “[t]hey were not paid but were allowed to keep what they looted, including cattle, household possessions, and even women

³ Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities*, 7 J. INT’L CRIM. JUST. 333 (2009).

⁴ U.S. DEP’T OF STATE, *Background Note: Sudan* (Apr. 8, 2011), <http://www.state.gov/r/pa/ei/bgn/5424.htm>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

and children. Only vague orders were given, and the insurgent areas were instead declared an ethics-free zone, in which no reporting back was required, and no questions were asked.”⁹

As the civil war between the North and South was winding down, a new crisis erupted in 2003 in the West involving non-Arabized Black agrarian tribes, who were defending their land and villages against marauding Arab and Arabized Black rival tribes and militias, known as the *janjaweed*.¹⁰ President al-Bashir’s government in Khartoum supported the *janjaweed* in their attacks against Darfuri farmers with direct assistance from the Sudanese military, provoking a rebellion in the region.¹¹

Figure 1: Sudan (Darfur regions). Source - Save Darfur Coalition¹²



Again, using armed militias as proxy fighters, the government sought to eradicate resistance along ethnic lines. The ultimate aim of the Arab-dominated Islamic government in Khartoum was to eradicate the black

⁹ Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis as Genocide*, 20 HARV. HUM. RTS. J. 25, 28 (2007).

¹⁰ See U.S. DEP'T OF STATE, *supra* note 4.

¹¹ *Id.*

¹² *What Has Happened in Darfur?*, SAVE DAFUR, <http://www.savedarfur.org/pages/primer> (copyright permission CC BY-NC-SA).

African population from Darfur and “Arabize” the region.¹³ Suliman Giddo, a native of Darfur and founder of the Darfur Peace and Development Group said, “It’s not like regular war. The government, with the *janjaweed*, are killing people and replacing them.”¹⁴

Only a year and a half into the Darfur conflict, the U.S. State Department reported that the death toll in Darfur stood at over 50,000, and the humanitarian crisis had reached disastrous levels:

As of August 2004, based on available information, more than 405 villages in Darfur had been completely destroyed, with an additional 123 substantially damaged, since February 2003. Approximately 200,000 persons had sought refuge in eastern Chad as of August, according to the UN High Commissioner for Refugees (UNHCR); the UN Office for the Coordination of Humanitarian Affairs reports another 1.2 million internally displaced persons (IDPs) remain in western Sudan. The total population of Darfur is 6 million.

The lack of security in the region continues to threaten displaced persons. Insecurity and heavy rains continue to disrupt humanitarian assistance. The UN World Food Program provided food to nearly 940,000 people in Darfur in July. Nonetheless, since the beginning of the Darfur food program, a total of 82 out of 154 concentrations of IDPs have received food, leaving 72 locations unassisted.

Relief and health experts warn that malnutrition and mortality are likely to increase as forcibly displaced and isolated villagers suffer from hunger and infectious diseases that will spread quickly among densely populated and malnourished populations. The health situation for the 200,000 refugees in Chad is ominous.¹⁵

But why did the government turn its guns from the people of the South onto the people of the West? The easy answer is oil. Unable to defeat the forces of the oil-rich South, which was set on the path to independence by the peace agreements of the early 2000s (and which subsequently became independent in 2011), Khartoum’s economic future depended upon continuing oil production. By 2001, President al-Bashir’s government awarded the concession of oil-rich southern Darfur in the West to the

¹³ G. Jeffrey McDonald, *In Sudan Crisis, A Duty to Intervene?*, CHRISTIAN SCI. MONITOR, July 21, 2004, <http://www.csmonitor.com/2004/0721/p15s01-lire.html>.

¹⁴ *Id.*

¹⁵ U.S. DEP’T OF STATE, DOCUMENTING ATROCITIES IN DARFUR (2004), *available at* <http://2001-2009.state.gov/g/drl/rls/36028.htm>.

Chinese National Petroleum Corporation (CNPC). Although block 6, controlled by CNPC, is the only Darfuri region oil concession in serious production, President al-Bashir's government has designated other blocks in the Darfur region for oil concessions – for example, block 12A, to the North.¹⁶ Significant Chinese presence has been noted there as well, in conjunction with military action to drive local residents from their land:

[I]n August 2008 Darfuri rebel groups accused the government of mounting a military offensive in the north of block 12A. At the time, a Sudan Liberation Army commander (from the Abdel Wahid faction) alleged that Chinese oil workers had arrived in the area and a spokesperson for the Sudan Liberation Army (Unity faction) alleged that the government was trying to clear the rebels out of the area in order to make way for oil exploration.¹⁷

Indeed, the relationship between the Sudanese government and Chinese oil interests is a close one.¹⁸ Oil and guns tend to mix when security and economic interests overlap in cases such as this.¹⁹ China takes 55% of Sudan's oil exports²⁰ and supplies much of Sudan's weaponry – including almost 90% of its small arms.²¹ Meanwhile, Beijing uses its influence and its

¹⁶ Maram Mazen, *Sudan Plans to Start Pumping Oil in Darfur*, *Petroleum Minister Deng Says*, BLOOMBERG NEWS, Dec. 1, 2010, <http://www.bloomberg.com/news/2010-12-01/sudan-plans-to-start-pumping-oil-in-darfur-petroleum-minister-deng-says.html>.

¹⁷ *Global Witness Uncovers Evidence of Oil Exploration in Darfur*, EUR. COALITION ON OIL IN SUDAN, June 3, 2010, available at http://www.ecosonline.org/news/2010/evidence_of_oil_exploration_in_Darfur/.

¹⁸ See Peter S. Goodman, *China Invests Heavily in Sudan's Oil Industry: Beijing Supplies Arms Used on Villagers*, WASH. POST, Dec. 23, 2004, at A1. See generally Michael J. Kelly, *Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan*, 90 OR. L. REV. 413, 419-25 (2011) (analyzing the symbiotic economic, military and political relationship that has developed between Sudan and China, and how this has driven the genocide in Darfur).

¹⁹ Moira Herbst, *Oil for China, Guns for Darfur*, BUSINESSWEEK, Mar. 14, 2008, http://www.businessweek.com/globalbiz/content/mar2008/gb20080314_430126.htm.

²⁰ Energy Information Administration, U.S. Dep't of Energy, *Country Analysis Brief: Sudan* (Sept. 2009), citing Global Trade Atlas, available at <http://www.eia.doe.gov/cabs/Sudan/Full.html>.

²¹ Nicholas D. Kristof, *Prosecuting Genocide*, N.Y. TIMES, July 17, 2008, <http://www.nytimes.com/2008/07/17/opinion/17kristof.html> (“88 percent of Sudan's imported small arms come from China — and those Chinese sales of small arms increased 137-fold between 2001 and 2006. China has also sold military aircraft to Sudan, and the BBC reported this week that two Chinese-made A-5 Fantan fighter aircraft were spotted on a Darfur runway last month. The BBC also said that China is training Sudanese military pilots in Sudan. Likewise . . . Chinese engineers supervise arms production at the Giad industrial complex outside Khartoum. Chinese military companies have also helped set up arms factories outside Khartoum at Kalakla, Chojeri and Bageer.”).

veto as a permanent member of the United Nations Security Council to politically protect Sudan from censure whenever possible.²²

II. DEFINING GENOCIDE

So the pattern pursued during the North-South civil war – militias armed by the Sudanese government (many times with Chinese weapons) fighting a proxy war to attack villages and clear land for oil concessions (also mainly going to Chinese interests),²³ repeats itself in Darfur. And this goes to the crux of the argument over whether the atrocities carried out in Darfur are actually genocide. It comes down to a question of intent. Why is this question so serious? From an international relations standpoint, resolving the underlying conflict that caused the genocide may become impossible. The effects of applying the label “genocide” can truncate the options:

The danger of the word ‘genocide’ is that it can slide from its wider, legally specific meaning, to a branding of the perpetrators’ group as collectively evil. Having labeled a group or a government as ‘genocidal,’ it is difficult to make the case that a political compromise needs to be found with them. This leaves only various forms of pressure, such as sanctions, prosecution in a court of law, and, of course, military intervention. Sanctions rarely work. Prosecution is by definition too late for the specific crime in question. Military intervention is a clumsy tool that runs serious risks of failure and of inflammatory side effects.²⁴

Parties to the Genocide Convention undertake dual obligations – to punish and to prevent genocide. Yet disagreement over the meaning of the language of the convention itself makes it difficult at times for party states to carry out these obligations. The two main tracks of debate today concern, first, the content of the definition of genocide and, second, whether a legal duty of intervention arises if the definition is triggered. Academics are more concerned with the former, while politicians are more concerned with the latter. The definition from the 1948 convention is straightforward. Genocide is:

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

²² Goodman, *supra* note 18.

²³ *Id.*

²⁴ Waal, *supra* note 9, at 31.

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²⁵

States are obligated to prevent and punish genocide.²⁶ As to punishment, the treaty restricts states to self-policing, trying suspects “in the territory of which the act was committed,” or turning to the international community.²⁷ As to prevention, intervention rests in collective action via the United Nations or the state where the atrocities are occurring, not individual foreign states.²⁸ “[T]he 1948 Genocide Convention is silent about the *means* required to ‘prevent and punish’ the crime of genocide, and it would have been an anomalous anachronism for the member states of the UN to have made an exception to its rule of outlawing aggressive war by specifying that genocide created a duty of intervention.”²⁹

However, if a new norm of humanitarian intervention has become customary international law, then the Genocide Convention may have been altered to allow for this possibility, especially if genocide is considered to have passed into the *jus cogens* canon.³⁰ But even if intervention is possible, the question of a legal duty or legal right to intervene remains an open one that exists uncomfortably, but necessarily, alongside the reality that demonstrated inadequacies of the international system to respond to

²⁵ Convention on the Prevention and Punishment of Genocide art. 2, Dec. 9, 1948, 1021 U.N.T.S. 278.

²⁶ *Id.* art. 1.

²⁷ *Id.* art. 6.

²⁸ *Id.* art. 8; see also William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1718 (2006) (“[A]ny duty to prevent genocide that may involve the use of force must receive the imprimatur of the Security Council.”).

²⁹ Alex de Waal, *No Such Thing as Humanitarian Intervention*, HARV. INT’L REV., Mar. 21, 2007, available at <http://hir.harvard.edu/no-such-thing-as-humanitarian-intervention?page=0,0> (emphasis added).

³⁰ See David B. Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275, 1327 (2006).

genocide create a vacuum for non-U.N. sanctioned humanitarian intervention to fill.³¹

Generally, non-governmental organizations wish to see a legal duty to intervene once genocide is said to be occurring, while governments are more content with a legal right – one which they may choose not to exercise.³² In 1994, the U.S. tried everything to avoid use of the word “genocide” with respect to the tragedy befalling Rwanda and the wholesale slaughter of ethnic Tutsis for fear that “a finding of genocide might obligate the administration ‘to actually do something.’”³³

Regardless of the unresolved debate between a duty or a right to intervene, the United States did decide to recognize the atrocities carried out in Darfur as genocide by the government of Sudan. Emboldened by its State Department lawyers that a finding of genocide would carry no legal obligations,³⁴ and, in part, because of the shame of the Rwanda situation, the U.S. action effectively challenged the U.N. to follow suit.³⁵ Conversely, a high-level panel of the United Nations, led by Italian law professor Antonio Cassese, found that Sudanese government forces and militias were responsible for mass killings, torture, rapes, and forced displacement of civilians, but not genocide due to a lack of intent “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”³⁶ That finding – removing the label “genocide” – seriously undermined efforts to marshal international action to stop the atrocities in Darfur:

[T]he Report, together with the resulting news reports, made the struggle for Darfur intervention more difficult by undercutting efforts by Darfur action groups to mobilize public support. With headlines such as *Murder – But No Genocide*, the motivation to intervene was gone. Murder is bad, to be sure – but murder is

³¹ See generally *id.*

³² See generally INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (Dec. 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

³³ Rebecca Hamilton, *Inside Colin Powell’s Decision to Declare Genocide in Darfur*, THE ATLANTIC, Aug. 17, 2011, http://newamerica.net/publications/articles/2011/inside_colin_powells_decision_to_declare_genocide_in_darfur_56447.

³⁴ For further reading, see Memorandum from U.S. State Dep’t, Legal Analysis on the Genocide in Darfur (June 25, 2004) (*see infra* app. 60-63).

³⁵ Hamilton, *supra* note 33; *The Current Situation in Sudan and the Prospects for Peace: The Crisis in Darfur: Hearing before the S. Comm. on Foreign Relations*, 108th Cong. 8 (2004) [hereinafter *Hearing*] (statement of Colin Powell, U.S. Sec’y of State).

³⁶ John R. Cook, *Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT’L L. 501 (April 2005); see Int’l Comm’n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 160 (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

ordinary. One might lobby Congress to do something about genocide, but who ever heard of lobbying Congress to stop foreigners from murdering each other? Foreigners murder each other all the time. Genocide sounds like it might be our business, but 'mere' murder is theirs.³⁷

With the U.S. and the U.N. at odds over whether genocide was actually occurring, or even had occurred, in Darfur, the international community found itself in a stalemate over the question. How could two of the most credible and reputable players in global affairs come to such different conclusions? It was the question of intent.

The American Secretary of State Colin Powell, and later President Bush, came to the conclusion that "genocide has been committed in Darfur and that the government of Sudan and the Janjaweed bear responsibility"³⁸ The U.S. based its decision on a report conducted by the State Department, which found, "a 'consistent and widespread pattern of atrocities committed against non-Arab villagers.' The report, based on 1,136 interviews with refugees this summer, said 61 percent had witnessed the killing of a family member and 16 percent had been raped or had heard about a rape victim. About one-third had heard racial epithets while they were being attacked. . . ."³⁹

While an estimated 50,000 lives had been lost by the time of this decision in 2004, the number of dead had exploded to 300,000 by the spring of 2008.⁴⁰ Interviews conducted by the State Department leading up to the 2004 report among those who had fled to the refugee camps in neighboring Chad revealed the degree of horror witnessed by surviving members of the local population at the hands of the government-sponsored militias. Figure 2 stratifies acts of violence committed against Darfuris by typology and frequency.

At the same time that the United States was characterizing the tragedy unfolding in Darfur as genocide, the United Nations Security Council adopted resolution 1564, requesting the Secretary-General to establish a commission of inquiry to investigate the situation. In October 2004, the Commission was assembled with Italian law professor and former president of the International Criminal Tribunal for the Former Yugoslavia, Antonio Cassese, as its chair. The Cassese Commission interpreted its mandate as

³⁷ David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303, 306 (2006).

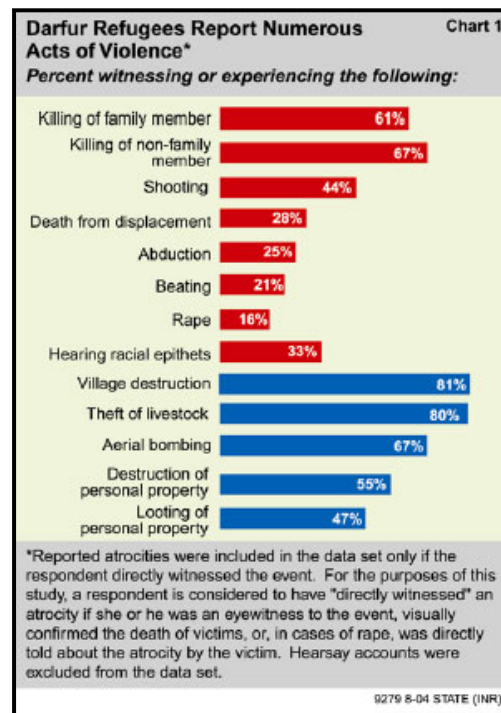
³⁸ Glenn Kessler & Colum Lynch, *U.S. Calls Killings in Sudan Genocide*, WASH. POST, Sept. 10, 2004, at A1; see also *Hearing*, *supra* note 35.

³⁹ Kessler & Lynch, *supra* note 38.

⁴⁰ Maggie Farley, *U.N. Puts Darfur Death Toll at 300,000*, L.A. TIMES, Apr. 23, 2008, <http://articles.latimes.com/2008/apr/23/world/fg-darfur23>.

one which included answering that this central question: “It . . . falls to the Commission to characterize . . . the violations of international human rights law and humanitarian law it may establish. This legal characterization is implicitly required by the further tasks of the Commission set out by the Security Council, namely (i) to establish whether those violations amount to genocide, and (ii) to identify the perpetrators.”⁴¹

Figure 2: Atrocity against Darfuris by Type and Frequency



The Cassese Commission quickly investigated the atrocities in Sudan, and assembled its report in the space of three months. The Commission took a very narrow reading of the specific intent requirement for proof of genocide. In so doing, it noted:

Of course, this special intent must not be confused with motive, namely the particular reason that may induce a person to engage

⁴¹ Int'l Comm'n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 160 (Jan. 25, 2005), available at http://www.icccpi.int/library/cases/Report_to_UN_on_Darfur.pdf.

in criminal conduct. For instance, in the case of genocide a person intending to murder a set of persons belonging to a protected group, with the specific intent of destroying the group (in whole or in part), may be motivated, for example, by the desire to appropriate the goods belonging to that group or set of persons, or by the urge to take revenge for prior attacks by members of that groups, or by the desire to please his superiors who despise that group. From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group.⁴²

The Commission had no problem arriving at the conclusion that the objective elements of genocide were present⁴³ in the violent physical atrocities carried out against Black Africans in the Darfur region of Sudan. And, after some academic and ethnological debate, the commission also concluded that the victim tribes were an ethnically distinct, and therefore protected, group.⁴⁴ However, what the Commission found missing was a manifestation of the specific intent to destroy that group.⁴⁵ “[T]he Commission concludes that the Government of Sudan has not pursued a policy of genocide.”⁴⁶

This surprising conclusion was immediately assailed and widely criticized by leading genocide scholars.⁴⁷ Questions were raised as to the rushed conclusions, adequacy of inquiries and even political influence on the commission by neighboring Egypt.⁴⁸ More criticism focused on the “in whole or in part” portion of the conclusion. Specifically, the whole population does not have to be destroyed, only a part of it – as was clearly the case with the Black African Darfuris.⁴⁹

Professors Gregory Stanton and Alex de Waal famously debated the question of specific intent to commit genocide in 2009. While de Waal generally agreed with the Cassese Commission, Stanton noted an important interplay between motive and intent that was lost on the Cassese Commission’s narrow reading of intent – namely, that genocidal intent is able to co-exist with conflicting motives:

⁴² *Id.* ¶ 493.

⁴³ *Id.* ¶ 507.

⁴⁴ *Id.* ¶¶ 508-12.

⁴⁵ *Id.* ¶¶ 513-18.

⁴⁶ *Id.* ¶ 518.

⁴⁷ Samuel Totten, *The U.N. International Commission of Inquiry on Darfur: New and Disturbing Findings*, 4 GENOCIDE STUD. & PREVENTION 354, 356-62 (2009).

⁴⁸ *Id.*

⁴⁹ *Id.* at 367-70.

Dr. de Waal argues that [Sudanese President] Bashir's purpose in Darfur is counterinsurgency, not genocide. The problem with that argument is that counterinsurgency may be one motive for mass killing, but that motive does not negate the intent of genocide. Motive and intent should not be confused. One of a regime's motives may be economic – to drive southern Sudanese off their oilfields, for example. But the regime's intent remains genocidal if it also has the purpose of deliberately destroying a national, ethnic, racial, or religious group, in whole or in part. Counterinsurgency and genocide are not mutually exclusive. In Darfur, they are congruent.⁵⁰

The Security Council referred the disagreement between the U.S. and the U.N. over whether the atrocities unfolding in Darfur amounted to genocide to the new International Criminal Court for investigation.⁵¹ The prosecutor for the ICC, Dr. Luis Moreno Ocampo, undertook an investigation of criminal activity in Darfur, and initially only succeeded in bringing war crimes and crimes against humanity charges.⁵² He stated, “[A]llegations have been made that . . . groups involved in the commission of crimes in Darfur did so with specific genocidal intent. This issue remains the subject of investigation and the Prosecutor has not, and will not, draw any conclusions as to the character of the crimes pending the completion of a full and impartial investigation.”⁵³

Meanwhile, the atrocities in Darfur continued to mount. In an appearance before the U.N. Security Council, Dr. Ocampo noted:

The ongoing situation remains alarming. There are four million people in need of humanitarian assistance in the region, two thirds of the population of Darfur; there are two million internally displaced people, who continue to be immensely vulnerable; there are continuing attacks against them and against international workers, as well as frequent impediments by the authorities to the delivery of assistance. . . . Attacks against UN, AU and humanitarian personnel are well documented. Reports

⁵⁰ Alex de Waal & Gregory H. Stanton, *Should President Omar al-Bashir of Sudan be Charged and Arrested by the International Criminal Court? An Exchange of Views*, 4 GENOCIDE STUD. & PREVENTION 329, 343-44 (2009).

⁵¹ S.C. Res. 1593, ¶ 1 U.N. Doc. S/RES/1593 (Mar. 31, 2005), available at <http://www.icc-cpi.int/library/cases/N0529273.darfureferral.eng.pdf>.

⁵² Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 at 1 (2005), July 6, 2007, available at http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC5-Darfur_English.pdf.

⁵³ Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 at 3, (2005), June 14, 2006, available at http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf.

allege indiscriminate and disproportionate air strikes by the Government of the Sudan that have caused destruction, loss of life and new displacement of civilians. Similarly, there are allegations of crimes committed by rebel forces.⁵⁴

By 2008, as casualties climbed and refugee numbers increased, Dr. Ocampo could no longer resist pressure to seek an indictment against President al-Bashir on charges of genocide. He requested the ICC issue an arrest warrant on that basis in July 2008.⁵⁵ This marked the first time that a sitting head of state had been indicted for genocide.⁵⁶ The reaction in Khartoum was violent: "Bashir's National Congress . . . warned of 'more violence and blood' in Darfur if an arrest warrant were issued."⁵⁷

The Pre-Trial Chamber did issue an arrest warrant in 2009 for President al-Bashir on charges of war crimes and crimes against humanity, but not genocide – finding, as the Cassese Commission had found, that genocide was not present, but the other two were.⁵⁸ Disappointed in this outcome, Prosecutor Ocampo then appealed the decision of the Pre-Trial Chamber.⁵⁹ Dr. Ocampo argued that the Pre-Trial Chamber had too narrowly construed the "reasonable grounds" standard for issuing an arrest warrant;⁶⁰ the Rome Statute simply directs the Court to issue an arrest warrant for someone if the Court thinks there are reasonable grounds for believing that the individual committed a crime within the jurisdiction of the Court.⁶¹ Basically, the Pre-trial Chamber took the view that the specific intent requirement for a conviction of genocide meant that a higher level of proof was required than reasonable grounds in order to issue an arrest warrant.

⁵⁴ Fifth Report, *supra* note 51, at 2.

⁵⁵ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 92 (Mar. 4, 2009).

⁵⁶ Saira Mohamed, *The ICC Appeals Chamber Decision on the Warrant of Arrest in Prosecutor v. Bashir*, 14 ASIL INSIGHTS (Feb. 17, 2010), <http://www.asil.org/insights100217.cfm>.

⁵⁷ Peter Walker & James Sturcke, *Darfur Genocide Charges for Sudanese President Omar al-Bashir*, THE GUARDIAN, July 14, 2008, available at <http://www.guardian.co.uk/world/2008/jul/14/sudan.warcrimes1>.

⁵⁸ Mike Corder, *Omar al-Bashir Charged by Hague for Orchestrating Darfur Genocide*, CHRISTIAN SCIENCE MONITOR (July 12, 2010), <http://www.csmonitor.com/From-the-news-wires/2010/0712/Omar-al-Bashir-charged-by-Hague-for-orchestrating-Darfur-genocide>.

⁵⁹ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," ¶ 3 (Mar. 10, 2009).

⁶⁰ Prosecutor v. Bashir, Case No. ICC-02/05-01/09 OA, Prosecution Document in Support of Appeal Against the "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir," ¶¶ 3, at 37-43 (July 6, 2009).

⁶¹ Rome Statute of the International Criminal Court art. 58(1)(a), July 17, 1998, 2187 U.N.T.S. 90.

In February 2010, the Appeals Chamber of the ICC ruled that the Pre-Trial Chamber had erred, noting that the Pre-Trial Chamber had adopted a “higher and more demanding” standard than required.⁶² In effect, such a standard would have forced the prosecutor to offer proof beyond a reasonable doubt that the perpetrator had committed genocide.⁶³ The Appeals Chamber then remanded the matter to the Pre-Trial Chamber. On July 12, 2010, the Pre-Trial Chamber did finally issue an arrest warrant for President Omar al-Bashir of Sudan.⁶⁴

III. CONCLUSION

The Pre-Trial Chamber’s 2010 arrest warrant marked the resolution of years of debate between academics and politicians, states and international bodies, and even amongst the chambers of the ICC on the question of whether genocide had occurred in Sudan. That this resolution came long after most of the atrocities had been committed is sad indeed. Nevertheless, the international and intergovernmental wrangling on this issue was likely necessary so that the conflicting arguments could be vetted and a winner finally declared. Many thousands of Darfuris died during this process. Unfortunately, even if a resolution of the genocide question had been forthcoming, those genocide victims may have remained victims nonetheless because no forceful military intervention was likely to occur.

While some would construe the reaction of the international community to the Darfur tragedy as dithering, this author included (at times of frustration over extreme casualties), it was important for the process to resolve itself. However, it would be tragic indeed if this process had to occur in each discreet instance of genocide.

The heartening aspects of this exercise in legal logic and analysis include the fact that the United States was willing to work through the Security Council to cooperate with the ICC, that the policy aspects of genocide indictments during the atrocity against heads of state were fully explored, and that the internal apparatus of the ICC appeared to be working and that the chambers respected one another’s limits – the Appeals Chamber remanded the case instead of issuing an arrest warrant on its own. Moving forward, the world must do a better job of stopping the “crime of crimes”—if it is to realize its stated goal of prevention over mere punishment. Perhaps

⁶² Prosecutor v. Bashir, Case No. ICC-02/05-01/09-OA, Judgment on the Appeal of the Prosecutor Against the “Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir,” ¶ 1 (Feb. 3, 2010).

⁶³ *Id.* ¶ 33.

⁶⁴ Prosecutor v. Bashir, Case No. ICC-02/05-01/09-OA, Second Decision on the Prosecution’s Application for a Warrant of Arrest, ¶ 7 (July 12, 2010).

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the experience of the international community in relation to Sudan helps us down that road a little.

APPENDIX
U.S. STATE DEPARTMENT LEGAL ANALYSIS OF GENOCIDE IN DARFUR



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- c) deliberately inflicting conditions of life calculated to bring about physical destruction of a group in whole or in part;
- d) imposing measures to prevent births; or
- e) forcibly transferring children to another group;

- o these acts are committed against members of a national, ethnic, racial or religious group; and

- o they are committed "with the intent to destroy, in whole or in part, [the group] as such".

- As is often the case in contemporaneously assessing whether genocide is occurring, the third required element (intent) is the most difficult to determine.
 - o When ratifying the Convention, the United States included the following understanding: "(1) That the term 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in article II means the **specific intent** to destroy, in whole or in **substantial** part, a national ethnical, racial or religious group as such by the acts specified in article II." (Emphasis added.)
 - o The difficult question with respect to the application of article II to the situation in Darfur is whether the Arab perpetrators or Sudanese Government supporters have the specific intent to destroy the non-Arab members of certain ethnic groups, as such, in whole or substantial part.
 - o In the case of Bosnia (Tab 1), the Secretary imputed genocidal intent based on the nature and scale of the atrocities associated with ongoing ethnic cleansing.

Who decides whether genocide has occurred?

- Our records reflect that the Secretary of State typically makes a determination whether genocide has occurred in a particular country.
- In recent years, after a careful evaluation of the facts in question, the Department has concluded that genocide occurred in Cambodia, Bosnia,

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Rwanda, and Burundi. In all cases but Cambodia, policy bureaus analyzed the acts of violence in the respective countries and, with L, recommended that the Secretary find that genocide was taking place.

What are the consequences of such a finding?

- Contracting Parties to the Genocide Convention have an obligation to prevent and punish acts of genocide in their territory. Article VI provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."
- As Sudan is not a Contracting Party to the Genocide Convention, its obligations apart from not directly engaging or participating in genocide are not clearly established under customary international law.
- Based on the available facts, a determination that genocide has occurred in Darfur would have no immediate legal -- as opposed to moral, political or policy -- consequences for the United States.
 - In prior years, the Department rejected arguments by some human rights advocates for an expansive reading of article I ("The Contracting Parties confirm that genocide . . . is a crime . . . which they undertake to prevent and punish") that would impose a legal obligation on all Contracting Parties to take particular measures to "prevent" genocide in areas outside of their territory.
- From a policy perspective, however, a finding of genocide can act as a spur to the international community to take more forceful and immediate actions to respond to ongoing atrocities.
 - Article VIII of the Genocide Convention provides that 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 genocide and related genocidal acts.

Attachments: Tab 1: October 1 and February 10, 1993 Action Memoranda on Genocide in Bosnia

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