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Why GSP?

Genocide Studies and Prevention: An International Journal (GSP) is the official journal of the International Association of Genocide Scholars (IAGS) and is published by the University of Toronto Press through a partnership of the IAGS and the International Institute for Genocide and Human Rights Studies (A Division of the Zoryan Institute) (IIGHRS). The two organizations share a deep commitment to the study and prevention of the genocide of *all* peoples.

GSP's mission is to understand the phenomenon of genocide, create an awareness of it as an ongoing scourge, and promote the necessity of preventing it, for both pragmatic and moral reasons. The journal seeks to educate, inform, and encourage new generations of scholars to conduct research on genocide and provide a forum for those who wish to work toward preventing it. This interdisciplinary, peer-reviewed journal will stress that genocide is a universal human experience; to that end, it will publish scholarly articles and reviews on all aspects of genocide and will welcome, in particular, comparative analyses and articles on the prevention of genocide.

We feel a sense of urgency in a world where, in the aftermath of the Holocaust, the slogan “never again” was coined, yet since 1945 we have seen the mass slaughter of Bengalis, Cambodians, Rwandans, Bosnians, Kosovars, and Darfuris, to name only a few. During the same period, the destruction of indigenous peoples has been less visible, but ongoing.

We believe strongly that research, analysis, education, and awareness are necessary to help civil societies, governments, and policy makers understand the consequences of the failure to prevent genocide and other gross violations of human rights in a world in which, today, some 100 million people live outside their countries of birth due to forced displacement.

We recognize that the promise of genocide prevention explicit in our title is very ambitious. How do we prevent genocide from happening? No single step will change the world, but we believe that through careful research and reasoned argument, governments and policy makers can be persuaded to expand their concept of national interest to include the prevention of genocide. We further believe that for governments and policy makers to have the political will to enforce the international laws and conventions on genocide through intervention and prevention, they must be held accountable by their informed constituencies. It is through education and awareness that people are made to understand their responsibility to hold their governments accountable in this regard.

While awareness is a first step to the prevention of genocide, cognitive awareness is not enough. In our ever-shrinking world, where there is ever-increasing competition for land and the basic resources for life, the conditions for violent conflict are ever greater. We feel that the key failure of human society has been the failure to adopt life itself as the central value of all human decision making.

Our journal will strive to generate innovative research on all aspects of the causes, dynamics, outcomes, and colossal consequences and implications of the policies we adopt regarding the choices between preserving and harming human life.

Genocide is a man-made catastrophe, and, as such, it can be prevented by mankind. This journal sets its sights on new ideas for the prevention of genocidal death-making. *Genocide Studies and Prevention* will be particularly open to contributions that go beyond safe, approved, and established paradigms of scholarship and science. It will be open to the unusual, the daring, and the courageous. At the same time, such thinking needs to be anchored responsibly to the norms and safeguards of established academic and scientific disciplines. We hope this journal will provide an effective forum for creative thinking on all aspects of genocide studies, serve to raise awareness of genocide, and promote the prevention of genocide with ideas that are both visionary and practical.

Israel W. Charny

President, International Association of Genocide Scholars
Chair, Joint Journal Committee of IAGS and IIGHRS

Roger W. Smith

Chair, Academic Advisory Board, International Institute for Genocide and Human Rights Studies
Past President, International Association of Genocide Scholars

Editors' Introduction

Upon publication of this, the first issue of *Genocide Studies and Prevention*, we, the four co-editors, are pleased to welcome you, the reader, to these pages. Our aim is to produce a high-quality peer-reviewed journal that addresses cutting-edge issues in the field of genocide studies and related areas such as preventive diplomacy, conflict management, intervention, sanctions, and post-genocidal issues.

Prior to delineating the procedures we shall adhere to in evaluating manuscripts, we wish to express our collective appreciation for the support and encouragement we have received from diverse sources. Israel Charny and the board of the International Association of Genocide Scholars have provided a constant source of encouragement. They, along with the International Institute for Genocide and Human Rights Studies (IIGHRS), a division of the Zoryan Institute chaired by Roger W. Smith, were instrumental in jointly conceptualizing the journal and co-developing the mission statement. This partnership provided the legal and financial structures required for such an undertaking. The partnership was further enhanced by the inclusion of the University of Toronto Press, an outstanding academic publisher that has an existing partnership with the Zoryan Institute. We would like to mention specifically the role played by Greg Sarkissian, President of the IIGHRS, and George Shirinian, its Executive Director, in coordinating these efforts with Israel Charny and Roger Smith. Without the aid and encouragement of all these individuals, this journal would have remained an idea without a physical presence.

Genocide Studies and Prevention is a peer-reviewed international journal. As such, it adheres to the most vigorous academic standards, similar to those of longer-standing scholarly journals such as the *American Political Science Review* and *The American Historical Review*. Every manuscript submitted to the journal is sent to three qualified referees in a double-blind review process. The editors read and assess the referees' comments and evaluations and decide upon publication, revisions and resubmission, or rejection. It is no secret that the most highly regarded academic journals reject more manuscripts than they accept. While we do not have a quota, we do plan to subject every article we receive to the most rigorous standards of the academy. Our goal is to produce a top-ranking journal in which articles present both significant findings and innovative ideas. To achieve this goal, we vigorously encourage readers such as you to submit their most significant work for consideration by *GSP*, and we hope that, in the process of so doing, you will be joining us in this exciting enterprise. In a very real sense, the success or failure of this endeavor depends on your helping us as writers, reviewers, and readers. We hope you find this first issue, as well as the ones that will follow, stimulating and informative.

Thank you for all your support.

Alex Alvarez
Herb Hirsch
Eric Markusen
Samuel Totten

Introduction to the Special Issue on Darfur

Samuel Totten and Eric Markusen

In launching the first issue of *Genocide Studies and Prevention*, we, the four editors (Alex Alvarez, Herb Hirsch, Eric Markusen, and Samuel Totten), feel compelled to address one of the most pressing issues facing genocide scholars today—the current crisis in Darfur, Sudan. It is a crisis that erupted in early 2003 and continues today. It is one in which government of Sudan troops (GoS) and the Janjaweed (Arab militia) are responsible for the mass murder of an estimated 180,000 black Africans (primarily from the Fur, Zaghawa, and Massaleit tribal groups) and possibly more than 250,000 others as a result of genocide by attrition (depriving the more than two million internally displaced persons of adequate food, water, shelter, and medical care).

Once again—as happened in Rwanda in 1994 and in Srebrenica in 1995, to mention but two instances—the international community’s response to the unfolding crisis was late in coming and far too tepid and anemic when it did come. As far back as December 2003, Jan Egeland, UN undersecretary general for humanitarian affairs, declared Darfur to be the worst humanitarian crisis in the world, and yet the international community proffered words over action in “addressing” the crisis. While various non-governmental organizations decried the situation in Darfur, the UN Security Council dithered by issuing one timid resolution after another in which it made idle threats to sanction Sudan if the killing, mass displacement, mass rape, and destruction continued. The mass murder—some, including the US government, deemed it genocide, while others, including the UN, deemed it crimes against humanity—continued unabated, but the United Nations did not see fit to alter its response in any real way.

Instead of taking firm steps to halt the mass killing, rape, and wholesale destruction of the black Africans’ villages and their way of life (it is estimated that more than 2,000 black African villages have been utterly destroyed and burned to the ground), the UN Security Council welcomed the African Union’s offer to deploy troops as monitors in the Darfur area. The UN Security Council knew full well that the AU mission would be not only undermanned and under-resourced but working with an inadequate mandate, but it did not seem to care about such critical limitations and liabilities. It is also true that the AU mission ostensibly provided the UN Security Council with an easy “out.” That is, as long as the African Union was on the ground in Darfur—and continued to demand that it be allowed to handle the crisis on its own—the UN Security Council was more than willing to capitulate to these demands, for the simple but profound reason that this provided the council with a rationale for not acting. Such an approach also met the specific wishes of at least three of the permanent members of the Security Council: China (which has huge petroleum interests in Sudan), Russia (which has a large and extremely lucrative arms deal with Sudan), and the United States (which now considers Sudan a partner in its so-called war on terrorism). Once again, *realpolitik* won out over real humanitarian concern.

This special issue on Darfur provides a glimpse into various aspects of the crisis. René Lemarchand, an expert on the Great Lakes region of Africa, contributes an

overview of the crisis that places it within the larger context of Sudan's history. Scott Straus, a political scientist at the University of Wisconsin–Madison, presents a comparative study of the genocides perpetrated in Rwanda (in 1994) and in Darfur. Samuel Totten, a scholar of genocide studies at the University of Arkansas, Fayetteville, provides a critique of the US State Department's Atrocities Documentation Project—whose data resulted in the determination by the US government that genocide had been (and possibly continued to be) perpetrated in Darfur—along with a critique of the motives and ramifications of the “finding” of genocide. Kelly D. Askin, a lawyer, scholar, and expert on mass rape, delineates and discusses the crimes that have been perpetrated against girls and women in Darfur since early 2003. Jerry Fowler, a lawyer and the staff director of the Committee on Conscience at the United States Holocaust Memorial Museum, presents an argument as to why and how, under international law, the situation in Darfur constitutes genocide. Finally, Canadian military officer Major Brent Beardsley, who served as personal assistant to the force commander of the United Nations Mission in Rwanda during the 1994 Rwandan genocide, reflects on the failure of the international community to stop the genocide in Rwanda and the significance of the latter vis-a-vis the ongoing tragedy in Darfur.

The aim of this special issue on Darfur is to provide readers with a sense of what is taking place on the ground in Darfur, the international community's reaction to the crisis, and the ramifications of the latter for the people of Darfur, and for efforts to develop effective means for preventing and/or stanching genocide. In many ways, it is also a lamentation for lives lost and an expression of frustration and anger over what could have been but wasn't, since the international community seems stuck in its affinity for *realpolitik*.

Unsimplifying Darfur

René Lemarchand

*Professor Emeritus, Department of Political Science,
University of Florida*

Much of the debate about genocide in Darfur appears woefully misinformed about the complex realities of the crisis, in particular its growing imbrication with the conflict in neighboring Chad. The parallel with Rwanda is limited, even though, in both cases, the international community has failed utterly to stop the atrocities committed against innocent civilians. No prevention strategy is likely to succeed unless cross-border raids from Chad into Darfur and vice versa are stopped, and this will not happen as long as the Sudanese and Chadian authorities are playing one faction off against another in what looks increasingly like a proxy war. Genocide should not be seen as the sole touchstone for intervention. War crimes, ethnic cleansing, and atrocity crimes, to name only some of the horrors illustrated by the Darfur tragedy, provide ample justification, moral and political, for the international community to take concerted action to protect civilian lives. The most urgent task facing the international community is not to strive for a consensus about genocide but to frame an effective prevention strategy. For this to happen, immediate attention must be paid to the crisis in Chad, which could unleash renewed cross-border violence, destabilize the Deby regime in Ndjamena, and ultimately play into the hands of Khartoum.

There is no sign of an early end to Darfur's agonies. If anything, the growing interconnection between insurgents in the Western Sudan and their allies in Chad has made a viable solution all the more remote.¹ Since February 2003, when Arab–African tensions erupted into a full-scale confrontation, anywhere from 200,000 to 400,000 have perished in the course of the violence unleashed by Khartoum-backed militias (Janjaweds) upon civilians, to which must be added 1.8 million displaced in Darfur and 200,000 inside Chad. Dozens of villages in that country, north and south of the strategic border town of Adré, have been the targets of murderous cross-border raids mounted by Arab militias. The litany of crimes committed by the “evil horsemen”—the literal meaning of “Janjaweed”—ranges from the killing and maiming of civilians to rape and abduction, and from the burning down of houses and shelters to the destruction of farmland and the theft of cattle. In the climate of insecurity spreading across the hundreds of kilometers of borderlands, the capacity of humanitarian non-governmental organizations (NGOs) to reach the growing population of refugees and internally displaced persons (IDPs) whose lives are at risk is becoming ever more limited.

The political risks and the costs in human lives are not limited to Darfur. In southern Sudan, the Comprehensive Peace Agreement (CPA) of 9 January 2005, intended to bring to an end the long simmering North–South civil war, is gravely imperiled. And the prospects of widening factional violence in Chad loom increasingly large on the horizon. As Nicholas Kristof has correctly observed, “Chad may collapse into civil war, chaos and banditry, like Darfur itself but on a much larger scale.”² With an ever-greater number of Chadian and Darfurian Africans seeking Khartoum's

assistance in their fight against the Chadian regime, the ethno-political equation is every day becoming more complicated.

The thoroughly inadequate response of the international community in the face of such unmitigated human disaster raises further questions. As is becoming more evident every day, the performance of the African Union (AU) in Darfur—officially designated as the African Union Mission in Sudan (AMIS)—falls short of expectations. Only under considerable international pressure and promise of financial assistance, following the collapse of the 8 April 2004 ceasefire agreement between the Sudanese government and the insurgents, did the AU agree to send in a monitoring force of some 4,000 men, consisting in large part of Nigerians (1,200) and a few hundred Rwandan troops. To this must be added 700 military observers, whose observations have done little to lower the temperature. Despite generous funding from the United States and the European Union—estimated at half a billion US dollars—the AU mission has been notoriously ineffective in preventing the raiders from committing atrocities against civilians.

Samantha Power's sobering assessment is worth bearing in mind:

The AU mission is clearly overwhelmed. Its teams, spread out across an area the size of France, manage at most three patrols per day in various sectors of the region, and African countries are hardly eager to send in more soldiers. . . . Soon this stopgap mission will fail not only those in need of protection but all the other interested parties as well. The Western powers have already spent more than a billion dollars feeding refugees in camps that feel increasingly permanent, and it is nearly inevitable that, as in the West Bank and Pakistan, some Muslims in these camps will be radicalized and take up arms locally, or, perhaps, further afield.³

The image of radicalized refugees “taking up arms locally, or, perhaps, further afield” brings to mind another crisis situation of appalling proportions: more than a million Hutu refugees sought asylum in eastern Congo in the wake of the Rwandan genocide, including hundreds, possibly thousands, of *génocidaires* who later launched deadly raids into Rwanda. But the fate of Hutu refugees in eastern Congo is by no means the only—or, indeed, the most relevant—parallel with the situation in Darfur.

The Ghosts of Rwanda

If anyone deserves credit for drawing public attention to our inability to learn any lesson from the Rwandan carnage, it is Eric Reeves, whose eloquent wake-up calls in the media and on the Internet have yet to be heeded by policy makers. Comparing AMIS to the UN Assistance Mission for Rwanda (UNAMIR), headed by Lt. Gen. Roméo Dallaire, he notes that “we are witnessing an equivalently dishonest and cowardly failure” and that “the AU is no more capable of halting the ongoing destruction of primarily African tribal populations than Dallaire was able to halt the *interahamwe* or deter Hutu extremists of the Rwandan government and military.” “The ghosts of Rwanda,” Reeves concludes, “are stirring ominously in Darfur. Differences in geography, history, and genocidal means do less and less to obscure the ghastly similarities between international failure in 1994 and the world's current willingness to allow ethnically-targeted human destruction to proceed essentially unchecked.” And because of this appalling inertia, leading to a death toll “exceeding 400,000,” he speculates that “with human mortality poised to increase significantly in coming weeks and months, there is no clear evidence that Rwanda's unspeakable slaughter will not eventually be numerically surpassed.”⁴

Not even the most casual observer of Darfur's agony can remain insensitive to the scale of the human suffering unfolding in this forbidding dystopia. But it takes more than a superficial acquaintance with the history, geography, and politics of the region to appreciate how radically different from that of Rwanda is the context of the killings in Darfur. Unlike Rwanda (26,000 km²), Darfur covers a huge expanse of territory. In a space of some 450,000 km², approximately ten times the size of Rwanda, the population is estimated to be between 3.5 and 4 million,⁵ that is, half that of Rwanda, much of it distributed among scores of small village communities. This basic fact speaks volumes about the enormous logistical difficulties facing the now 7,000-strong AU monitoring force in its Sisyphean efforts to stop the hemorrhage.

Whether the carnage should be seen as genocide or as a case of ethnic cleansing run amok is where the Rwanda analogy begs the question, and opinions differ. While the official stance of the Bush administration is unequivocal in its use of the "G-word," the European Union and the United Nations have been notoriously reluctant to describe the killings in such terms. For all his searing criticisms of the Bush policies in Darfur, Eric Reeves is clearly on the same wavelength in detecting "genocidal intent." In his testimony before the Africa Subcommittee of the US House of Representatives on 11 March 2004, Reeves explained that while "the current phrase of choice among diplomats and UN officials is 'ethnic cleansing,' given the nature and scale of human destruction and the clear racism animating attacks systematically directed against civilians from the African tribal groups, the appropriate term is genocide."⁶ Nicholas Kristof—who, in his *New York Times* op-eds, has done more to sensitize the American public to the horrors of Darfur than most other commentators—would concur. "Darfur," he writes, "is just the latest chapter in a sorry history of repeated inaction in the face of genocide, from that of Armenians, through the Holocaust, to the slaughter of Cambodians, Bosnians and Rwandans."⁷

It is noteworthy, however, that both Amnesty International and Human Rights Watch (HRW) have carefully avoided the use of the word, opting instead for "ethnic cleansing" as a more appropriate term.⁸ Similarly, the 2004 Report of the International Commission of Inquiry on Darfur grudgingly admits that human rights violations were committed "by people who might have acted with genocidal intentions," but concludes that "there was not sufficient evidence to indicate that Khartoum had a state policy intended to exterminate a particular racial or ethnic groups."⁹

Given that there are differences of opinion among scholars as to what constitutes genocide, such divergences of opinion are not too surprising. For some, the question of establishing the evidence of genocide is irrelevant; more important is to use the "G-word" as a tool to mobilize public opinion. For others, however, the crucial issue is whether we are dealing with genocide as defined in the 1948 UN Convention on Genocide ("deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part") or something else—e.g., ethnic cleansing, or the use of force to crush a rebellion. For Gérard Prunier, much depends on how we define genocide: "if we use the 1948 UN definition it is obvious that Darfur is a genocide," but not if by genocide we mean a "total obliteration" of the victim group.¹⁰ In an article whose questions what others have taken for granted—"Is It Genocide?"¹¹—Nelson Kasfir argues that even though there is no doubt about the identity of the perpetrators, or about their determination to destroy "in whole or in part" the African population, the element of intent remains unclear. He suggests that the aim of Khartoum could just as well be seen as an attempt to crush a rebellion, not to commit genocide. This is consistent with the distinction drawn by Jacques Sémelin

between genocide, which involves “the total eradication of a collectivity, as defined by those whose self-assigned task is to annihilate it,” and ethnic cleansing or massacres aimed at enforcing submission.¹² For Sémelin—and many others—the killings in Darfur would fit into the latter category, involving a partial destruction in order to bring about global submission.¹³

Compounding the difficulty of establishing genocidal intent is the problem of discriminating between Arabs and Africans, where both share many of the same cultural traits, including religion and language, and where both victims and killers are found among members of the same community.

Africans vs. Arabs?

As Darfur’s name indicates, the Fur people has given its name to an area that comprises not just the Fur but a complex mix of African and Arab populations. “The population of Darfur,” Gustav Nachtigal wrote in the 1870s, “may be divided on the one hand into Negroes and Arabs, or on the other into its original inhabitants and the conquered peoples or foreigners.”¹⁴ This Arab/African polarity did not rule out a common set of regional identities, or, for that matter multiple identities. A central theme of Darfur’s precolonial history refers to the process of early state formation around the ancient seventeenth-century sultanate whose core area was the mountainous region of Jebel Marra. Territorial expansion went hand in hand with ethnic absorption, with the Fur people serving as the pivot around which a specific ethno-regional identity eventually developed.¹⁵ Anyone familiar with Nachtigal’s painstaking description of the “Organization of the Fur State”¹⁶ cannot fail to be impressed by the extraordinary complexity and highly bureaucratized character of this archaic yet inherently fragile state system, soon to collapse under the combined onslaught of the Turco-Egyptian conquest, the Mahdist revolt,¹⁷ and, ultimately, the imposition of colonial controls. The resulting political vacuum has yet to be filled.

However dated—and not always exempt of ethnic biases¹⁸—Nachtigal’s narrative makes clear to the reader the danger of reducing Darfurians to a simple racial dichotomy. Cutting across the “Negro vs. Arab” fault line, he notes, are countless other divisions, as between those who pay tribute and those who do not, those “who have equal rights” and those who do not, those who are of foreign origins (from Bornu and Baguirmi) and the autochthons, those tribes that were conquered and those that successfully resisted conquest, and so forth.¹⁹ Some groups are nomads, others semi-nomads or sedentary, among both Africans and Arabs. And there are those Africans “who appear by mixing with Arab tribes to have been transformed centuries ago, and now live in Darfur among the Rezeqat, where they can no longer be distinguished from the Arabs either physically or socially.”²⁰ By way of example, Nachtigal cites a Zaghawa sub-group, the “Zoghawa [sic] Amm Kimmelte,” which comes as a surprise when one considers the strong and unanimous identification of today’s Zaghawa with the African community.

The Arabs, likewise, are divided into numerous sub-groups, some of which are found in both Chad and Sudan. In his listing of “major non-Arab groups” and “major Arab groups,” Alex de Waal, a leading authority on Darfur, comes up with a total of seven Arab and fifteen non-Arab communities, each in turn divided into subcategories. Although Arabs form the bulk of the Janjaweed—the instrument used by Khartoum to kill, maim, or displace Africans civilians—de Waal notes that “the largest and most influential of Darfur’s Arabs are not involved, including the Baggara, Rizeigat,

the Habbaniya, the Ma'aliya, and most of the Ta'aisha."²¹ As in Rwanda, the tendency in Darfur is to identify the "bad guys" with an entire ethnic community.

The distinction between Arabs and Africans is, to a large extent, a social construct (not unlike the distinction between Hutu and Tutsi). De Waal calls the Arab vs. African dichotomy "historically bogus, but disturbingly powerful."²² The labels, after all, are by no means exclusive. There has been in the past considerable intermarriage between the two groups, and identity switches are by no means uncommon, a phenomenon again reminiscent of relations between Hutu and Tutsi. Both communities are Muslim, and Arabic is widely spoken among them. Although sporadic conflicts between Arabs and Africans were not unheard of in colonial and precolonial times, the scale of today's carnage has no precedent in history. What is unprecedented, too, is the extent to which ideology and propaganda, originating from within and outside Sudan, have contributed to the growing polarization of ethnic identities.

The Roots of Carnage

As in the case of Rwanda, no single-factor analysis will do to explain the cause of Darfur's tragedy. We are confronted with an array of forces and circumstances that goes far beyond the boundaries of Sudan. Most observers would agree that the triggering factor was the surprise attack on El Fasher, in April 2003, by the Sudan Liberation Army (SLA), the principal and earliest insurgent faction, resulting in the destruction of seven military aircraft and the death of about 100 people. But El Fasher was only the symptom of more fundamental factors.

Of these, perhaps the most consequential has to do with the steady advance of desertification through much of northern Darfur, resulting in devastating famine. According to Prunier, what is known locally as the *maja'a al-gutala* ("the famine that kills") caused the death of an estimated 95,000 people from August 1984 to November 1985.²³ With the massive population movements from north to south—and with Arab cattle herders moving in ever-increasing numbers into those areas of the south less affected by the drought—a series of local clashes over land erupted, first between Fur and Arabs in the Jebel Marra area (1987–1989), then between Massalit and Arabs (1996–1998).²⁴ Each time the parties to a conflict reached out to the Arab-dominated provincial government for a fair settlement, the government consistently sided with the Arabs.

The spread of a stridently pro-Islamic ideology did little to diminish the government's blatant favoritism toward Arabs. The roots of what de Waal calls "an Arab supremacist ideology" are to be found, in part, in ideas indigenous to the Sudan—generally associated with Hasan al-Turabi's National Islamic Front and later his Popular Congress. Just as important, however, has been the export of "Arabism" from Chad and Libya.

The Chadian side of the story, in a nutshell, involves a warlord named Acyl Ahmed, who, as head of the Armée du Volcan in the late 1970s and early 1980s, was able to mobilize a large number of Chadian Arabs against Hissène Habré's Forces Armées du Nord ("Northern Army"). Of all the Trojan horses produced by Colonel Muammar Gaddafi's stable, Acyl was by far the most faithful. Although he died in 1982, his pro-Arab ideology is still alive. For this, much of the credit goes to Gaddafi. After suffering a major defeat in northern Chad at the hands of Habré in 1987, the Libyan leader turned his attention to Darfur. To carve out for himself another sphere of influence and hold aloft the banner of the "Arab Gathering" (*Al tajammu al-arabi*)—a "militantly racist and pan-Arabist organization," Prunier informs us²⁵—some 2,000

Islamic Legion troops were sent to Darfur in 1987. The ideological seeds of the present conflict, in short, were planted long before the attack on El Fasher.²⁶

Exactly how the southern rebellion has affected its counterpart in Darfur is not entirely clear. Through the years, going back to the Federal Democratic Alliance of former Darfur governor Ibrahim Deraige, the Southern Peoples Liberation Army (SPLA) has given moral and financial support to the African resistance in Darfur, but in so doing it has unwittingly stimulated factional disputes about the distribution of arms and money. If the SPLA struggle in the south served as an example to emulate, this does not mean that it has always been to the advantage of the Darfurian rebels. Again, considerable ambiguity surrounds the fallout of the Comprehensive Peace Agreement (CPA) signed by Khartoum and the SPLA in the south in January 2005. The effect, arguably, has been to encourage the insurgents to make every effort to wrest a similar agreement from Khartoum, while at the same time contributing to a hardening of the position of the central government on meeting their demands: after virtually giving up the monopoly of the ruling party, in line with the CPA, it is now dead set against any further erosion of its executive power.

A Fractured Insurgency

The fragmentation of the insurgency into rival factions, though rarely mentioned—let alone explicated—in the media, is not the least of the obstacles to peace. Only recently has Kristof—one the most insistent and articulate critics of Western policies in Darfur—grudgingly recognized that “some responsibility attaches to the rebels in Darfur,” as “they have been fighting each other instead of negotiating a peace with the government that would end the bloodbath.”²⁷ Yet there has been bitter infighting among rebels almost from the beginning. No sooner was the SLA created, in early 2003, than a violent struggle for the leadership of the movement began to surface.

Today, the bulk of the insurgents are drawn from the Zaghawa, Fur, and Massalit “tribes,” with the Zaghawa straddling the boundary between Chad and Darfur. Each is divided into sub-groups, with the Zaghawa, for example, split between Tuer, Bideyat, and Kobe, and each sub-group in turn divided into clans. The persistence of intra-Zaghawa factionalism, as we shall see, is crucial to an understanding of the complex interconnections between the Darfur-based insurgents and their kinsmen in Chad.

If the Zaghawa have been the driving force behind the insurgency, this is because many “had acquired professional military training in the Chadian or Sudanese armies, a fact that has caused them to predominate in the upper ranks of the insurgency to this day.”²⁸ This also helps explain why they came to be viewed with considerable suspicion by Fur and Massalit elements—but leaves unanswered the question of how they ended up fighting each other. Part of the answer lies in the multiplicity of sub-ethnic and clan fissures among the Zaghawa. The really critical factor, however, has to do with the impact of Chadian politics on the rebellion. Just as Darfur has had a significant backlash effect in Chad, the reverse is equally true.²⁹

The insurgents are divided into two principal rival armed factions, the SLA and the Justice and Equality Movement (JEM), the latter, the weaker of the two, drawing much of its support from Zaghawa Kobe and the former from Tuer and Bideyat as well as Fur and Massalit. The SLA, founded in February 2003, is decidedly secular in orientation, while the JEM remains highly receptive to Hasan al-Turabi’s brand of Islamic ideology.³⁰ The SLA, moreover, claims a more diversified ethnic membership, which is also why it is more vulnerable to internal dissention.

The early history of the SLA provides a dramatic illustration of the potential for disintegration inherent in its ethnic composition. At first, every effort was made to include representatives of each major ethnic group in its leadership. Thus, while the chairmanship of the movement was given to a Fur (Abdel Wahid Mohammed el-Nur), the deputy chairmanship went to a Massalit (Mansour Arbab) and the military command to a Zaghawa (Abdallah Abakar, replaced after his death by Minni Arko Minnawi). After receiving substantial support from Zaghawa elements in the Chadian military, Minnawi's Zaghawa scored a number of military successes against the Khartoum government, only to raise the anxieties of Fur elements. A bitter struggle for leadership ensued between Fur and Zaghawa. In the words of a recent International Crisis Group report,

the rapid expansion and intensification of the conflict overwhelmed the leaders and their nascent structures. Over time, the animosity between Minni and Abdel Wahid grew as they jostled for primacy. Whereas Minni assumes that Zaghawa military strength should be reflected in the leadership, Abdel Wahid and other non-Zaghawa insist on the original tribal allocations of positions, including a Fur as chairman.³¹

Although the origins of divisions within the insurgency are inseparable from Darfur's fragmented social identities, these divisions have been greatly intensified by the growing involvement of Chadian factions in the politics of the rebellion, and vice versa.

The Chadian Connection

Long before the emergence of Darfur as a flashpoint of conflict, the Sudan had been a key player in the struggle for power between Idriss Deby, Chad's incumbent president, a Zaghawa of Bideyat origins, and his immediate rival, Hissène Habré. If Deby ultimately came out on top, routing Habré and his Toubou warriors in the course of a daring raid on Ndjamena in December 1990, it was because of the massive support he received from Darfur-based Zaghawa elements, many of Kobe origin, with the blessings of Sudanese President Omar Hassan al-Beshir. His indebtedness to al-Beshir helps explain Deby's initial reluctance to get involved on the side of the insurgents. By late 2005, however, he had no other choice but to turn against his former ally. On 7 December 2005, a Sudan-backed Chadian rebel faction based in Darfur attacked Guereda, some 120 km north of Adré, killing ten Chadians and wounding five. A few days later, on 18 December, an even more brutal raid was launched on Adré. The attacks were promptly denounced by Deby as a Khartoum-instigated maneuver to destabilize his regime.

It is easy to see, in such circumstances, why Deby should be viewed with the greatest distaste by his former benefactor. Perhaps less obvious is that after consistently playing one faction off against another, and with his army on the verge of disintegration, Deby now has very little room to maneuver. For fear of antagonizing Khartoum, he first turned down demands for assistance from the SLA while secretly encouraging the rise of a breakaway faction within the Kobe-dominated JEM, the National Movement for Reform and Development (NMRD). Another split emerged in April 2005 following a trial of strength between JEM'S field commander, Mohammed Salih Harba, and its top leader, Khalil Ibrahim, leading to the creation of a Provisional Revolutionary Collective Leadership Council, causing some observers to see in this latest dissidence the evil hand of Idriss Deby.

The result of all this has been a drastic shrinkage of Deby's bases of support within the army, as shown by the recent defections suffered by his 30,000-strong Chadian National Army (CNA). Top-heavy, poorly trained, rife with internecine quarrels over

pay and promotions, the upper ranks of the military include no fewer than sixty generals and 256 colonels.³² Exactly how many have joined the insurgents is unknown. Reports indicate that on 9 December 2005, at least 349 soldiers and eighty-two officers joined the rebellion; another 400 troops followed on 16 February 2006, led by generals Seby Aguid and Issaka Diar, along with some thirty high-ranking officers. Many of the defectors are of Kobe origin and are deeply resentful of Deby's indifference to the fate of their kinsmen across the border in Darfur. But there is also growing evidence that they have been joined by a fair number of Bideyat, whose grievances stem from Deby's less than cooperative attitude in meeting the demands of the SLA. A major blow to the regime came with the defection of Tom Erdimi, a prominent Zaghawa, who once served as coordinator of the Chadian petroleum project. His "Socle pour le Changement, l'Unité et la Démocratie" ("Base for Change, Unity, and Democracy"; SCUD) has since emerged as a key anti-Deby politico-military group.³³

Further complicating the political equation, a large number of Chadian Arabs have joined hands with the Janjaweed, while a growing number of Chadian and Darfurian Africans are being supported by Khartoum in their efforts to destabilize the Deby regime. One well-informed Chadian observer told this writer, in March 2004, that the majority of the Arabs involved in human rights abuses were Chadian Arabs, many of Juhaina origins. Their expectation, presumably, is that Khartoum will return the favor and help them overthrow Deby, in a replay of the scenario that brought Deby to power in 1990. While the recruitment of Chadian Arabs has been going on since 2004, if not earlier, only now is fear of retaliation by non-Arab Chadians an important motive for crossing into Darfur. In the words of a recent Human Rights Watch (HRW) report, "Chadian Arabs from the area south of Adré have recently been crossing into Sudan in numbers significant enough to raise concern among humanitarian workers that the migration is being driven by fear of retaliatory attacks at the hands of non-Arabs."³⁴

Arabs are not the only group seeking Deby's overthrow. The rebel attack that nearly brought down the Ndjamen regime on 14 April 2006³⁵ must be credited to the "Front Uni pour le Changement Démocratique" ("United Front for Democratic Change"; FUC), led by Mahamat Nour, a Chadian African of Tama origins whose political base is the "Rassemblement pour la Démocratie et la Liberté" ("Gathering for Democracy and Freedom"; RDL), a predominantly Tama organization and one of several groups affiliated to the FUC. Significantly, Nour is said to enjoy the full backing of Khartoum in his fight against Deby. Suffice it to say that it was none other than Nour who, back in 2003, took the initiative in organizing groups of Janjaweed, with Khartoum's blessings.

How to prevent the army from unraveling is the key issue facing Deby. It lies at the heart of the stalemate between the Chadian government and the World Bank.³⁶ The bank's decision to freeze Chad's offshore oil-revenue account is understandable, given that the government is in material breach of its loan contract. Deby's immediate concern, however, is to find the financial resources needed to avoid a further disintegration of his armed forces. Although the domestic backlash of the Darfur insurgency poses a clear and present danger to his Zaghawa-dominated state, whether he can throw to the winds his obligation to set aside a substantial portion of the oil revenue for poverty alleviation and still meet the demands of the army is anybody's guess.

With the emergence of Chadian opposition factions seeking sanctuary in Darfur, new actors have entered the fray, determined to overthrow the Deby regime. Since the attack on Adré by the RDL, a Chadian faction based in Darfur, six other opposition

movements have joined the RDL to form the FUC. So far the SCUD has been unwilling to rally to the FUC. Khartoum apparently made every effort to persuade Nour to hand the leadership of the coalition to Tom Erdimi, an invitation Nour promptly declined.³⁷ The factional split between Tama and Zaghawa is only one of the many fractures undermining the Chadian opposition. Whether and how far to enter into a tactical alliance with Khartoum is another source of division. The stakes, in short, are perceived differently depending on the groups concerned, their ethno-regional profile, and their leadership patterns.

The Limits of the Genocide Template

Given the complexity of the forces on the ground, questions are bound to arise as to the pertinence of the genocide model as a point of entry for explicating the Darfur crisis. Unfortunately, there seems to be growing confusion among scholars and observers between honest disagreements and what passes for an unacceptable denial of genocide. It is one thing to posit genocide as a given, from which are derived certain logical conclusions about the state of the play on the ground, and quite another to proceed by induction to test the validity of that assumption.

From all the evidence available, there are serious reasons to question the identities of the targeted groups, the extent to which the perpetrators are manipulated by Khartoum, and their intent to exterminate. Today the struggle is not only between Arabs and Africans but among Africans. Furthermore, while there is considerable evidence to show the involvement of the Khartoum authorities in recruiting and arming Arab militias, Jérôme Tubiana, a leading French authority on Darfur, paints a more complex situation in which “the extent to which the Sudan government controls the *janjawids* remains unclear.”³⁸ He cites a Fur intellectual to the effect that “the government has in part lost control (of the *janjawids*)” and goes on to note that

control over the Arab militias operates within three circles: the first consists of local leaders, including traditional chiefs, politicians and intellectuals..., the second involves Darfur-based Arab personalities, army men and politicians, close to the seats of power in Khartoum, who act as intermediaries between Khartoum and local leaders..., [and] the third refers to the hard-liners in Khartoum, i.e. Jellaba Arabs from north Sudan, specifically Shagiya Arabs. This Shagiya circle would seem to have gained sufficient weight to challenge president al Beshir himself, also a Jellaba, but who belongs to the Jaalin group.³⁹

Control over the Chadian Arabs would seem to lie primarily with the first of these groups. As for the key element in the definition of genocide, the intent to exterminate, the record shows that such has not always been the case. In the words of the most recent HRW report on Darfur,

as markets in Darfur have been disrupted by violence and population dislocation, normal commerce is being replaced by a war economy in which livestock raiding and looting feature prominently. Hence, *janjawids* cross-border raids appear to be motivated heavily by considerations of profit, as cattle, horses, food and even household items such as straw mats and cups have been looted... Statements attributed to *janjawids* by eyewitnesses suggest that the appropriation of land may be another motivation for the violence.⁴⁰

What emerges from all this is a pattern of violence aimed at the forced removal of specific ethnic communities, a phenomenon much closer to ethnic cleansing than to genocide. This does not mean that the abominations committed against Africans by Arabs, or by other African rebel groups, are less objectionable than those described as

genocidal killings, or that ethnic cleansing or “massive violations of human rights,” to use Kofi Annan’s expression, deserve less moral attention. Scale makes little difference when human lives are at stake. What it does mean is that analysts owe it to themselves to be self-conscious in their use of language when it comes to making sense of mass violence.

There are practical implications as well. One is compelled to wonder whether accusations of genocide, given the ambiguity of the evidence, are the best way to induce a change of attitude on the part of the Khartoum authorities. Which is not to say that a different language would produce miracles. At first grudgingly amenable to a UN intervention, the al-Beshir government is now adamantly opposed to a transfer of responsibility for peacekeeping to the UN, and there is no indication that the African Union is prepared to challenge that decision, even though it has agreed “in principle to a transition from AMIS to a UN operation.”⁴¹ While the dialogue between Khartoum and the international community appears to have reached an impasse, the AU is unwilling to take a firm stand on the atrocities committed by the Sudan government. If anything, the AU’s decision to block an EU-sponsored resolution in the UN General Assembly’s social and humanitarian committee to end the culture of impunity and disarm the militias responsible for the massacres—while reminding donors that “an average of US\$22,857,719 is required in cash each month” for AMIS to continue its operations⁴²—smacks of humbug. So, too, the explanation proffered by Nigeria, representing the AU, to the effect that “any condemnatory action would endanger the peace talks.”⁴³ When one considers the AU’s apparent determination to stymie all attempts at blowing the whistle on Khartoum, the ongoing debate about genocide sounds distressingly hollow.

There are ample reasons to agree with Scott Straus that the debate about genocide misses the central point about Darfur:

Darfur has shown that the energy spent fighting over whether to call the events there “genocide” was misplaced, overshadowing difficult but more important questions about how to craft an effective response to mass violence against civilians in Sudan. The task ahead is to do precisely that: to find a way to stop the killing, lest tens of thousands more die.⁴⁴

Those lines were written in late 2004. Since then thousands have died.

Notes

1. See Lydia Polgreen, “20,000 in Chad Are Uprooted by Attacks,” *New York Times*, 28 February 2006.
2. Nicholas D. Kristof, “The Slaughter Spreads,” *New York Times*, 16 April 2006, section 4.
3. Samantha Power, “Missions,” *New Yorker*, 28 November 2005, 61.
4. Eric Reeves, “The Ghosts of Rwanda: The Failure of the African Union in Darfur,” 13 November 2005, <http://www.sudanreeves.org/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=535&page=1> (accessed 21 April 2006).
5. Douglas H. Johnson, *The Root Causes of Sudan’s Civil Wars* (Oxford: James Currey, 2003), 139.
6. Quoted in Gérard Prunier, *Darfur: The Ambiguous Genocide* (Ithaca, NY: Cornell University Press, 2005), 156.
7. Nicholas D. Kristof, “Never Again, Again?” *New York Times*, 20 November 2005, 13.
8. See Amnesty International, *The State of the World’s Human Rights*, Report 2005 (London: Amnesty International Publications, 2005), 235–38; Human Rights Watch, *Darfur Bleeds: Recent Cross-Border Violence in Chad* (HRW Report No. 2, February 2006). In response to

- HRW's choice of words, Eric Reeves had this to say: "What HRW calls 'ethnic cleansing' reflects an unfortunate unwillingness by this distinguished human rights organization to consider the implications of its own findings, which make clear that there is abundant evidence of 'genocidal intent' in the very command structure of Khartoum's military, intelligence and political hierarchy." Eric Reeves, "Darfur Held Hostage: Khartoum Adamantly Rejects UN Peacekeeping Force," 1 March 2006, <http://www.sudanreeves.org/index.php?name=Sections&req=viewarticle&artid=551> (accessed 27 April 2006).
9. Quoted in Prunier, *Darfur*, 143, 157.
 10. *Ibid.*, 156.
 11. Nelson Kasfir, "Sudan's Darfur: Is it Genocide?" *Current History* 104 (2005): 195–202.
 12. Jacques Sémelin, *Purifier et détruire : usages politiques des massacres et génocides* (Paris: Le Seuil, 2005), 406.
 13. To quote, "le processus de destruction est donc partiel, mais son effet se veut global. Car les responsables de l'action comptent sur l'effet de terreur pour imposer ainsi leur domination politique sur les survivants [the process of destruction is partial, but its effect is meant to be global. For those responsible for the act (of destruction) rely on the effect of terror to impose their political domination on survivors]." *Ibid.*, 389.
 14. Gustav Nachtigal, *Sahara and Sudan*, vol. 4, *Wadai and Darfur*. Trans. and ed. Allan G.B. Fisher and Humphrey J. Fisher (Berkeley and Los Angeles: University of California Press, 1971), 346.
 15. For an outstanding discussion of regional identity formation in Darfur, see Alex de Waal, "Who Are the Darfurians? Arab and African Identities, Violence and External Engagement," *African Affairs* 104: (2005): 181–205. By far the best introduction to the issue of Janjaweed identity, and to the historical backdrop of the current crisis, is Julie Flint and Alex De Waal, *Darfur: A Short History of a Long War* (New York: Zed Books, 2005).
 16. See chapter 5 of his monumental work on *Wadai and Darfur*, 324–45.
 17. Led by a self-appointed Mahdi (divine leader) committed to restoring the purity of Islam and expelling the Turkish rulers, the Mahdist rebellion of 1881 led to the defeat of the Turks and the capture of Khartoum in 1885. The Mahdist state ruled over two-thirds of today's Sudan and lasted until the British conquest in 1898.
 18. Consider his description of the Fur: "The Fur or Forawa have a fairly dark skin, grey-black or black, are of middle height and with undistinguished features. Their character is arrogant, hot-tempered and revengeful, and they are much given to quarrelling and outbreaks of violence. They can scarcely lay claim to any reputation of real bravery. They have little talent for industry, almost as little indeed as their western neighbors, the people of Wadai, and like all mountain dwellers, hold tenaciously to their ancient manners and customs, so that Islam itself, of which in the larger villages they are fanatical adherents, has not been able in the more distant regions to suppress Paganism completely." Nachtigal, *Wadai and Sudan*, 349.
 19. *Ibid.*, 346 ff.
 20. *Ibid.*, 349.
 21. De Waal, "Who Are the Darfurians?", 199.
 22. *Ibid.*, 197.
 23. Prunier, *Darfur*, 56.
 24. The parallel with the situation in southern Chad is striking: as in Darfur, Arab and Gorane cattle herders are moving in ever-growing numbers into Saraland, causing countless confrontations, some extremely bloody; the situation is made all the more explosive by the fact that the Sara are overwhelmingly Christian.
 25. Prunier, *Darfur*, 45.
 26. From a pro-Arab praise singer, Gaddafi has recently morphed into an apostle of peace: thus, in July 2005, Libya took the initiative in organizing reconciliation talks in Tripoli—the so-called Darfur Forum, which includes prominent Darfurians drawn from the interior and exile rebels, Khartoum-based politicians, and tribal chiefs opposed to the policies of the

- central government. Although Gaddafi's initiative did lead to a cease-fire agreement in July 2005, countless violations have occurred since then.
27. Kristof, "Never Again," 13.
 28. International Crisis Group, *Unifying Darfur's Rebels: A Prerequisite for Peace* (Africa Briefing No. 32, Nairobi/Brussels, 6 October 2005), 2.
 29. For a more sustained discussion, see René Lemarchand, "Où va le Tchad?" *Afrique Contemporaine* 3 (2005): 117–28.
 30. Hasan al-Turabi's party, the National Islamic Front (NIF), ideologically close to the Muslim Brotherhood, is widely regarded as a force for the promotion of *shariah*-based radical Islamic fundamentalism in the Sudan and throughout North Africa. See Hasan al-Turabi, "The Islamic State," in *Voices of Resurgent Islam*, ed. John Esposito, 241–51 (New York: Oxford University Press, 1983).
 31. ICG, *Unifying Darfur's Rebels*, 3.
 32. See Lemarchand, "Où va le Tchad?" 121.
 33. For further information, see Bello Bakary and Makaila Nguebla, "Scoop: le secret de Tom Erdimi et les tractations à l'Est," *Focus-Akhbar*, <http://www.ialtchad.com/focustomsecret.htm> (accessed 24 April 2006).
 34. HRW, *Darfur Bleeds*, 10.
 35. See Marc Lacey, "After Battle in Capital, Chad Threatens to Expel Sudanese," *New York Times*, 15 April 2006.
 36. See Lydia Polgreen and Celia W. Dugger, "Chad Oil Funds, Earmarked for Poor, Go Astray," *International Herald Tribune*, 20 February 2006.
 37. For further information on the Chadian side of the equation, consult www.ialtchad.com, especially Bakary and Nguebla, "Scoop : le secret de Tom Erdimi."
 38. Jérôme Tubiana, "Le Darfour : un conflit identitaire?" *Afrique Contemporaine* 214 (2005): 165–206, 175.
 39. *Ibid.*, 176.
 40. HRW, *Darfur Bleeds*, 7.
 41. African Union, Peace and Security Council, *Report of the Chairperson on the Situation in Darfur* (10 March 2006), 1.
 42. *Ibid.*, 12.
 43. Warren Hoge, "Sudan: UN Darfur Resolution Blocked," *New York Times*, 24 November 2005.
 44. Scott Straus, "Darfur and the Genocide Debate," *Foreign Affairs* 84 (2005): 123–33, 124.

Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur

Kelly Dawn Askin

This article discusses how rape and other forms of sexual violence have been prominent features of the ongoing attacks (from 2003 to the present) committed by government of Sudan (GoS) troops and the Janjaweed (Arab militia) in Darfur, Sudan. It first provides a historical overview of wartime rape in law and society, then discusses some of the many reports (including the UN's Commission of Inquiry on Darfur) that have documented the perpetration of rape and other forms of sexual violence in Darfur by GoS troops and Janjaweed. Following a discussion of specific cases of rape and other sexual crimes committed in Darfur, the author discusses how such crimes can be and have been prosecuted as war crimes, crimes against humanity, and genocide. Among the other issues discussed in the essay are the concepts of individual and superior responsibility, as they relate to prosecuting those responsible for sexual violence, and the critical need to hold leaders accountable for sex crimes.

Sex crimes have a devastating impact far beyond the individuals physically violated by the assaults—these assaults destroy lives, families, communities, and associated groups. Not only must those who survive the violence suffer an attack committed against the most intimate, sacred parts of their bodies but they are also, especially if the crime committed against them is reported to authorities or becomes known, forced to endure the additional psychological, familial, social, cultural, legal, and religious implications of these attacks, both on themselves and on others. No other form of violence has such a broad-reaching adverse impact on both victims and associated groups. Vile acts such as amputating limbs, beheading, and torture instill horror, but these crimes do not routinely cast stigmas or affect marriageability.

To intensify fear and humiliation, rapes in many violent conflicts are committed publicly and by more than one assailant. Women's reproductive capacity—including their potential to bear children for the victim or the victimizer group—is one of numerous reasons women and girls are singled out for sexual assault. Discriminatory laws, customs, and practices regulating female sexual activity and sexual purity impose additional harms, instead of conferring protection. More detrimental consequences of sexual violence, such as HIV/AIDS, other contagious sexually transmitted diseases or infections, and damage to the reproductive system, are also common. Furthermore, the shame and stigma wrongly imputed to victims of sex crimes and to their families; the historical practice of criminal justice systems (police, prosecutors, judges, legislators) that marginalize or ignore rape crimes or, worse,

revictimize the victims; the sheer terror that threats of such crimes evoke; the severe medical and reproductive repercussions; and the simple fact that, for countless cowardly combatants, unlawfully attacking an unarmed woman or girl and raping her is more “attractive” than legitimately attacking an armed soldier/militia member—these are some of the reasons that sexual violence has become such an effective and potent instrument of war and vehicle of terror and destruction.

Rape and other forms of sexual violence have been prominent features of attacks committed by government of Sudan (GoS) forces and their Janjaweed (JJW) proxy against non-Arabs in all three states of Darfur. In fact, it is difficult to find a comprehensive report on the most serious crimes committed in Darfur that does not include sex crimes. Murder, rape, pillage, forced displacement, and razing of villages are part and parcel of ground attacks. If a village attack involves either GoS forces or their Janjaweed puppets and collaborators on the ground, rape virtually always forms part of the attack. Even in instances when the primary purpose of a particular attack is not to kill or displace civilians but instead, for example, to steal their cattle, rape still routinely occurs. And when the primary purpose of an attack is to inflict maximum harm on the civilians and drive survivors into the desert and out of the territory, sex crimes are particularly rampant and vicious.¹

A multitude of reports on crimes committed in Darfur has been published over the past two years, and, as in other armed conflicts around the world, these reports confirm that sexual violence is committed both strategically and opportunistically in Darfur.² Opportunistic rapes are committed because the atmosphere of war and the violence, lawlessness, chaos, and hatred it produces create the opportunity. Random rapes cause as much fear and trauma as orchestrated crimes, sometimes more, because of their unpredictability. Once it becomes clear that superiors do not disapprove of sexual violence, the opportunistic rapes typically become more public, more frequent, and more vicious, growing indistinguishable from and becoming part of the organized rapes committed, at least in part, to inflict widespread terror and harm on the targeted group.

Even if it cannot be proved that rape was officially encouraged or initially intended, when the crimes become well known and superiors fail to disapprove of them, or acquiesce and tolerate the abuse, this signals tacit approval. And, in fact, the whole world was repeatedly informed of the rapes in Darfur. Undoubtedly, political and military leaders in Sudan knew of them, and their silence demonstrated official tolerance and even encouragement. By the time the government expressed its purported outrage over the rapes, they had been raging unabated for some two years; hundreds of thousands had been killed, millions were displaced, and Darfur was in shambles as a result of the scorched-earth policy of the GoS. The conditions of life intentionally inflicted upon black Darfuris are so dire that women and girls have been forced to knowingly risk rape by venturing outside internally displaced persons (IDP) camps for the food and firewood they need to survive inside the camps.

The Historical Treatment of Wartime Rape in Law and Society

Since the beginning of recorded wartime history, rape has been a common characteristic of armed conflict. From Viking invasions to the Crusades to World Wars I and II, and the hundreds of intra- and international armed conflicts in between, there is a litany of reports of rape and other sexual atrocities committed during the course of the conflict. The literature is so replete with depictions of rape during war that it is exceptional to read in detail about one (war) without reading about the other (rape).

Yet, until relatively recently, most reports depicted sexual assault as an inevitable consequence, a regrettable byproduct, or simply a common feature of war, not as a serious crime, much less a means of attack that could in fact significantly and dramatically affect the war.

Beginning in the late Middle Ages, the customs of war gradually began to treat rape as a war crime and not as the legitimate right of a victor—part of the so-called spoils of war—as had been largely accepted until about the fifteenth century. For centuries, rape was considered primarily a crime committed against a man's property. By the end of the nineteenth century, wartime rape was widely criminalized but seldom punished. Even by the mid-twentieth century, rape was regarded principally as a crime against honor or dignity, not a crime of violence.³ And there is little indication that it was then considered as bad as—or worse than—death.

In contemporary law, sexual violence is a crime under both customary and codified laws. More recently, wartime rape was explicitly forbidden by the Fourth Geneva Convention (1949) and the Additional Protocols to the Geneva Conventions (1977).⁴ Furthermore, the laws of war strictly mandate that combatants direct attacks solely against military objectives, including other combatants; they can never lawfully direct attacks against civilians or civilian objects.⁵ When militaries respect the laws of war, promote notions of honor, and even, perhaps, punish those of their own soldiers who commit sex crimes, rape still occurs (as it does in law-abiding societies during peacetime.) Even when rape is strictly forbidden by superiors who enforce the laws and take measures to prevent or punish the crime, though it takes place less frequently, and certainly less conspicuously, it remains a persistent occurrence (as do other war crimes). However, when the targeting of civilians and the abuse of women is not expressly forbidden by military and political leaders, and its perpetration is either explicitly or implicitly encouraged, simply ignored, or, in some circumstances, even ordered, the regularity and brutality of the crime increase exponentially. This is the situation in most contemporary armed conflicts, including that in Darfur. Thus, while the sexual violence committed in Darfur is horrific, sexual depravity is not unusual during conflict situations, and sexual atrocities are not unique to Darfur. The universal recognition that rape is epidemic in armed conflict, and has been from time immemorial, puts all on notice, including leaders, about the frequent commission of sexual violence.

Sexual Violence in Darfur

Many reports have documented atrocities in Darfur, and more than a dozen reports documenting these crimes have focused *exclusively* on rape and other forms of sexual violence, indicating its perceived gravity, its pervasiveness, and its need for redress.⁶ International and local human rights organizations, UN bodies and agencies, and government agencies, monitors, and reporters have been among those expressing alarm over the persistent episodes of sexual violence committed during attacks on villages, while victims are in flight, and inside and outside IDP and refugee camps. Nonetheless, because of significant underreporting of the crime (due largely to discriminatory treatment of victims by law and society), the number of rapes undoubtedly greatly exceeds even the high numbers already known. Male rapes and other forms of sexual violence (especially mutilation) are increasingly reported and also occur with far greater frequency than statistics indicate.

Sex crimes are almost always accompanied by other forms of violence or abuse, such as beatings, forced nudity, enslavement, inhumane conditions, or destruction

of homes, families, communities, and livelihoods. Many victims are killed after being raped, but some are left alive, sometimes because many perpetrators consider rape worse than death.⁷ Pregnancy and damage to reproductive health are also regular features of rapes; self-induced abortions to terminate the pregnancies are not uncommon.

In 2004, the United Nations appointed five independent commissioners to investigate and report on the most serious crimes perpetrated in Darfur. The Commission of Inquiry (COI) into crimes committed in Darfur released its report in January 2005, concluding that atrocity crimes had been committed in all three states of Darfur by both Sudanese government forces and Janjaweed militia. In summarizing its conclusion on the crimes committed on a widespread and systematic basis throughout Darfur, the report states as follows:

Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity.⁸

The COI Report outlines the most common patterns of rape crimes, which had been previously documented and were then confirmed by the commissioners' own investigations:

First, deliberate aggressions against women and girls, including gang rapes, occurred during the attacks on the villages. Second, women and girls were abducted, held in confinement for several days and repeatedly raped during that time. Third, rape and other forms of sexual violence continued during flight and further displacement, including when women left towns and IDP sites to collect wood or water. In certain areas, rapes also occurred inside towns. Some women and girls became pregnant as a result of rape.⁹

As other reports similarly conclude, rape, gang rape, sexual slavery, and pregnancy as a result of rape were recurring themes in attacks throughout hundreds of villages in North, West, and South Darfur.

The most extensive documentation of crimes committed in Darfur, including sex crimes, was collected by the Coalition for International Justice and US State Department's Atrocities Documentation Project in July and August 2004, during which more than 1,100 interviews were conducted in refugee camps in Chad and in several other unofficial makeshift camps just inside the Chad–Sudan border.¹⁰ Testimony of sexual violence obtained by the Atrocities Documentation Teams (ADT) includes the following (names of villages are typically spelled phonetically; numbers in parentheses are ADT interview numbers):¹¹

- “In Western Darfur (near Beida) in June 2003, a Masaleit man saw the Janjaweed cut out the stomachs of pregnant women. If the fetus was male, the JJW [Janjaweed] hit the fetus against a tree; if female, the fetus was left in the dirt. The witness stated his sister was [also] raped.” (41)
- “In Western Darfur (near Foro Borunga) in June 2003, a Fur man said his wife was raped by seven GoS soldiers, and thirteen other women were also raped during the attack. He saw horsemen take a baby from a woman's back, tear off

its clothes and slice its stomach; another woman's baby daughter was smashed against a tree and killed. He witnessed approximately twenty male and seven female babies being killed." (6)

- "A Fur woman fled an attack on her village in Darfur (near Bendesi) in August 2003. She witnessed a twelve-year-old girl being gang raped by five men; the girl died soon after the attack. The witness also heard of many children being abducted as slaves or cow-herders." (4)
- "During an attack in West Darfur (near Gokor) in November 2003, a Masaleit woman was among forty women captured and gang raped by seven soldiers during an aerial and ground attack. Some males were also sexually assaulted." (336)
- "A Masaleit woman in West Darfur (near Senena) in December 2003 said twenty girls were captured by GoS and gang-raped (vaginally and anally) for three days. Three girls had nails put in their vaginas (one of whom died), two other girls had their vaginas sewn up, and five became pregnant from the rapes. All were unmarried." (491)
- "In West Darfur (near Genena) in December 2003, a Masaleit woman stated that she and six other women were taken to a GoS base (Dongeta) where they were held for three days and repeatedly gang raped (vaginally and anally, sometimes with sticks) while tied naked and spread eagle. The witness saw the bodies of three naked elderly women with foreign objects thrust in their vaginas. She also said another woman told her she had been tied to a tree and forced to watch her daughter being raped." (497)
- "A Masaleit woman in West Darfur (near El Geneina) in February 2004 saw GoS soldiers catch sixteen women with babies. They broke the baby boys' necks in front of the mothers and beat mothers with their own babies like whips until the babies died." (482)
- "In Northern Darfur (near Karnoi) in January 2004, a pregnant Zaghawan woman and four girls (aged 12, 13, 15, 16) were abducted and raped by five to six soldiers each night, until their release five days later." (161)
- "A Zaghawa woman in North Darfur (near Karnoi) had her village attacked in March 2004 and she and eight other women were abducted and raped. After a month, an officer with two stars on his shoulder made the soldiers let the women go." (170)

The ADT interviewers also recorded testimony of epithets or slurs directed at the victims during the course of the sexual assaults. Rape often lasts for long periods, and the perpetrators tend to communicate some of the reasons behind the attacks. Some of the rape testimony collected by the ADT that includes racial or gendered comments is reproduced here:

- "During an aerial and ground attack on a village in North Darfur (near Karnoi) in June 2003, a female Zaghawa survivor reported that she was told 'we want to kill the men and take the women to be our wives.'" (542)
- "During an attack in Western Darfur (near Masteri) in November 2003, a Masaleit woman was raped by ten soldiers who said that the government 'sent them to kill and rape and clean their land.'" (287)
- "During a ground attack in Western Darfur (near Seleya) in November 2003, a Eregnan man reported hearing 'we will kill all men and rape women. We want

to change the color. Every woman will deliver red. Arabs (will be) the husbands of those women.” (533)

- “During a village attack in Western Darfur (near Kruink) in November 2003, a male Masaleit witness reported seeing twelve women raped and mutilated (breasts and vaginas cut) by GoS and JJW, and being told ‘you have no country here, you must leave and go to Chad.’” (325)
- “A Masaleit woman in West Darfur (near El Geneina) in December 2003 saw Arabs take eight male babies by their feet and slam them into the ground until they died; the JJW told women being raped: ‘We rape you to make a free baby, not a slave like you!’” (489)
- “A Fur male reported that in December 2003, a few months before his village in West Darfur (near El Geneina) was attacked, Janjaweed raped his daughter and two other girls (ages 14, 15, 16) and said ‘We will take your women and make them ours. We will change the race.’” (575)
- “During an attack on her village in Western Darfur (near Misterei) in January 2004, a Masaleit woman reported that she was one of sixteen women caught and raped during an aerial/ground attack. She was raped by four soldiers. Three other rapes she witnessed included having breasts slashed; two girls died from the gang rapes. The attackers told her ‘if you like this stay in Sudan, if you don’t, go to Chad.’” (259)
- “A Zaghawa woman in North Darfur (near Kotum) in March 2004 stated that sixteen girls from her village were abducted and gang raped. A perpetrator said ‘From now and for twenty years we will kill all the blacks and all of the Zaghawa tribe.’” (803)
- “A Masaleit woman in South Darfur (near Garsila) had her village attacked in June 2004 by GoS and JJW. Despite being four months pregnant, she fled, but was caught running by five men. They beat her with a whip, causing her to lose her baby. The attackers said: ‘Black prostitute, whore—you are dirty blacks.’” (1056)

The incidents described above represent only a fraction of the reports of various forms of sexual violence inflicted on the black indigenous population in Darfur, but they demonstrate the consistency of the reasons behind the attacks, the regularity with which rape crimes occur, and the calculated use of rape as an instrument to terrorize and destroy the targeted group. The gendered nature of many attacks—targeting fetuses or babies because of their sex and targeting some women because of their reproductive capacity or pregnancy—should not be minimized. Time and again interviewees told of black Darfuris being raped, raped in gangs or with foreign objects, or having breasts, vaginas, or penises mutilated; pregnant women having their wombs sliced open or women having their pregnancies forcibly aborted by beatings or other abusive treatment; babies, particularly male babies, being murdered; women made pregnant by the rapes; men and women forced into nudity; and women and girls being abducted and sexually enslaved. Males are often targeted in armed conflicts because they are viewed as the fighters or potential fighters; females are targeted because they are viewed as the repositories of culture and the (re)producers of generations, or simply as the gender intended to serve and service men. The form and nature of the violence often reflects these attitudes.

In the most progressive societies, impediments to reporting, investigating, and prosecuting rape still abound. In conservative and religious societies like Sudan,

the obstacles multiply. In particular, as mentioned above, the misplaced shame and stigma of rape crimes and revictimization by criminal justice systems cause this crime to be underreported. When extremist laws or practices, such as the Islamic laws operating in Darfur, require women or girls to prove a rape by the testimony of four male witnesses and to be subjected to an insensitively or crudely conducted government medical exam, there is little incentive, and many disincentives, to reporting the crime. This is particularly true because the survivor may be charged with *zena* (adultery or having sex outside of a marital relationship) if she cannot prove the rape, especially if she is pregnant. Such a charge may result in public whippings and imprisonment, perhaps even a death sentence. At a minimum, it can result in the survivor's being cast out of the community and precluded from marrying. In addition, the dysfunctional and discriminatory court system in Darfur—not to mention the fact that the courts are controlled by the government, which is considered responsible for the atrocities—further reduces reporting of sex crimes.¹²

Rape as Genocide and a Crime against Humanity

Since the mid-1990s, many articles and books have focused on how rape and other forms of sexual violence can be and have been prosecuted as war crimes, crimes against humanity, and genocide.¹³ Crimes include rape, enslavement, sexual slavery, torture, persecution, mutilation, enforced sterilization, forced pregnancy, forced abortion, forced nudity, sexual humiliation, forced marriage, cruel treatment, and inhumane acts, some of which are explicitly listed in the International Criminal Court (ICC) Statute, while others are implicitly covered under the statute's "or any other form of sexual violence of comparable gravity" language.¹⁴ Judgments in the Yugoslav Tribunal (the International Criminal Tribunal for the former Yugoslavia, ICTY) and the Rwanda Tribunal (the International Criminal Tribunal for Rwanda, ICTR) have also convicted individuals of rape as crimes against humanity and instruments of genocide.¹⁵ Because, as noted above, there is already a plethora of information available on how gender-related crimes can be successfully prosecuted, these issues will be given only cursory treatment here.

The ICC can prosecute gender-related crimes under articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) of the ICC Statute. The gender crimes specifically enumerated in the statute are rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, and other forms of sexual violence of comparable gravity. Additionally, gender persecution and trafficking of women and children are also explicitly referred to in the statute.¹⁶

Under the UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) and the ICC Statute, "genocide" means any of the acts listed in article II, sub-paragraphs (a)–(e), committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such. The five prohibited acts are as follows:

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

“Killing members of a group,” prohibited in (a), is undoubtedly the most widely recognized means of committing genocide, although all five sub-articles are equally prohibited. The other sub-articles do not necessarily involve death, or even outright violence, as a means of destroying a group. Rape as an instrument of genocide most often invokes sub-articles (b), intending to destroy a protected group by “causing serious bodily or mental harm to members of that group,” and (d), “imposing measures intended to prevent births within a group.”¹⁷ As noted above, rape, along with torture and enslavement, including sexual torture and sexual slavery, regularly takes longer to commit than other crimes, and the extended time and close proximity of the perpetrator and the victim often prompt statements by the perpetrator(s) that can be useful in discerning genocidal intent. The Akayesu Judgment of the Rwanda Tribunal is the seminal decision recognizing rape as an instrument of genocide.

The ICTY and ICTR have also convicted persons for rape as a crime against humanity when the crimes formed part of a widespread or systematic attack directed against a civilian population. It is the attack that must be either widespread or systematic, not the rapes, although rape itself is frequently both widespread and systematic. The phrase “systematic rape” does not mean that each rape is meticulously organized and planned; it refers, among other things, to a plan or policy to sexually abuse women, which is often carried out by implicitly or explicitly encouraging or granting free rein to commit the crime.

There is every indication that the official policy of the GoS and Janjaweed forces is to wage, jointly or separately, concentrated and strategic attacks against black Darfuris by a variety of means, including killing, raping, pillaging, burning, and displacement. Various forms of sexual violence have consistently formed part of these attacks. As emphasized by the COI report, “The findings of the Commission confirm that rape and sexual abuse were perpetrated during attacks by *Janjaweed* and soldiers. This included the joint attacks by Government soldiers and *Janjaweed* attacks.”¹⁸ BBC News reported the following regarding the attack of one village: “More than 100 women have been raped in a single attack carried out by Arab militias in Darfur in Western Sudan. . . . Another 150 women . . . have been abducted.”¹⁹ Rape crimes have been documented in dozens of villages throughout Darfur and committed in similar patterns, indicating that rape itself is both widespread and systematic.

The information available on crimes in Darfur suggests that the ICC can prosecute rape as a crime against humanity and an instrument of genocide and that other forms of sexual violence, particularly forced pregnancy, sexual mutilation, and sexual slavery, are also common prosecutable forms of attack and destruction in Darfur.

Individual and Superior Responsibility

The ICC can prosecute both physical perpetrators and others responsible for sexual violence, including civil and military leaders and others who ordered, instigated, aided, abetted, or otherwise facilitated the crimes (individual responsibility), or who knew or had reason to know about crimes committed by subordinates under their control but failed to prevent, halt, or punish the crimes (superior responsibility). In most situations, the persons most responsible for orchestrating war and the atrocities committed therein are not the physical perpetrators or even those physically present at the crime sites, unless they are military/militia leaders. More specifically, in the ICC Statute, individual criminal responsibility grants the court jurisdiction over persons

who commit a crime, individually or jointly; who order, solicit, or induce a crime; or who aid, abet, assist, or otherwise facilitate a crime. Participating in a common criminal purpose may also incur individual criminal responsibility.²⁰ Command and superior responsibility is invoked (1) for military leaders and other superiors who knew or should have known of crimes, or consciously disregarded information about them; and (2) where the crimes were committed by subordinates under their effective responsibility/authority/command and control, and they failed to take all necessary and reasonable measures within their power to prevent or repress the crimes or to report the crimes to the relevant competent authorities for investigation and prosecution.²¹

In the jurisprudence of the World War II trials, as well as the ICTY and the ICTR, and as incorporated in the ICC Statute,²² crimes may be punished under the joint criminal enterprise (JCE) theory of responsibility (also known as the common purpose doctrine). Essentially, a JCE is considered a form of commission, a form of individual criminal responsibility. A JCE is composed of a plurality of persons participating in some way (through assistance or other contribution) in a common plan/design/purpose that amounts to or involves a crime within the jurisdiction of the court. The common plan can be agreed upon in advance, can materialize extemporaneously, and can be inferred from the facts.²³

The ICTY has identified three distinct, but often overlapping, forms of JCE: JCE I is the basic form, in which all co-defendants share the same criminal intent or goal; they knowingly participate in some way and intend the result. JCE II is the systemic form. It is a subset of JCE I and has primarily been applied to concentration camps or situations where there is an orchestrated campaign of persecution or oppression. In JCE II, there is an organized system of ill treatment, and defendants have awareness of the nature of the system and an intent to further that system. There is some form of participation in the system, but their participation does not have to be significant. JCE III is the extended form, whereby responsibility for crimes committed beyond the common plan can be incurred. This happens when a perpetrator—not necessarily the defendant—commits a crime outside the common purpose, but the act is a natural or foreseeable consequence of the criminal endeavor. Here, a defendant willingly takes a risk that additional predictable crimes will be committed. The various forms may, and often do, overlap or occur parallel to each other.²⁴

In a culture of mass atrocity, it may sometimes be difficult to determine which crimes were part of the agreed-upon enterprise and which were outside the scope of the intended crimes but nonetheless foreseeable. But in most situations of mass violence and oppression, rape and other common forms of sexual violence will not be mere foreseeable consequences; rather, they should be considered integral parts of the destruction, of the physical and mental violence intentionally inflicted on the targeted group. The fear and terror inflicted by sexual violence rivals, and sometimes exceeds, that of murder; it is a crime calculated to inflict maximum harm on the targeted group. Treating sex crimes as simply foreseeable (JCE III) but killing, beating, torturing, and burning as intended (JCE I) or part of a system of ill treatment (JCE II) would distort the historical record and ignore the gravity and potency of the crimes. Thus, rape crimes should be prosecuted under JCE I and II, with JCE III rape prosecutions restricted to situations in which the joint criminal plan was very specific (e.g., summary execution of all boys over thirteen years of age in a village) and the rapes that occur are truly not planned but are nonetheless foreseeable.²⁵

In Darfur, the evidence suggests that GoS political and military leaders participated in a joint criminal enterprise with their Janjaweed collaborators, whom the GoS armed, supplied, and directed for at least the first two years. Initially, many attacks were joint GoS and Janjaweed attacks, until virtually all black African villages had been attacked; after that, the GoS appears to have largely left it to the Janjaweed and regular bandits to complete the destruction on the ground. From February 2003 to March 2005, in particular, a common mode of attack in Darfur was for a GoS plane or helicopter to bypass Arab villages and carry out an attack (or surveillance) on black villages, in concert with or followed by ground attacks by government forces or government-supported Janjaweed militia. During the course of these attacks, civilian huts were destroyed; men, women, and children killed; women and girls raped; animals and other property stolen; child cattle herders and others abducted; and survivors forced into the inhospitable desert.

Aerial and ground attacks also commonly targeted life sources, such as water and food supplies, shelter, arable land, crops, livestock, and medical supplies.²⁶ In the context of Darfur, with temperatures soaring to 130°F in the harsh desert environment during the day but dropping dramatically some nights, such destruction was especially effective and quite naturally resulted in death and illness. Starvation, dehydration, exposure, infection, and disease were intended results of the intentional destruction of life sources and forced displacement.

The ad hoc tribunals have refined but not significantly developed the concept of command/superior responsibility beyond that promulgated by the post-World War II trials; most indictees in the Yugoslav (ICTY) and Rwanda (ICTR) Tribunals have been found guilty of individual responsibility. Indeed, the courts have found not only that many leaders regularly failed in their duty to prevent or punish crimes committed by subordinates but, more egregiously, incurred individual responsibility for facilitating the commission of the crimes. As might be expected, leaders who orchestrate, authorize, condone, encourage, or otherwise assist criminal activity do not then tend to endeavor to stop the crimes they have orchestrated or to punish those who committed the crimes they themselves have authorized. Therefore, the ICTY and ICTR have tended to either convict on individual responsibility and dismiss the superior responsibility charges or find that the superior responsibility crimes were subsumed within the crimes incurring individual responsibility. Thus, the notion seems to be that if one orders a crime, one should not also be held responsible for failing to punish the subordinate who carried out one's orders.

Ignoring crimes committed by subordinates initially might fall under superior responsibility, failure to act. But when the silence continues, a potent message is sent to subordinates that superiors do not disapprove of their crimes, and this signals tacit approval, invoking individual responsibility. Additionally, JCE, being a form of commission, is a form of individual responsibility, not superior responsibility. Still, when there is insufficient evidence available to prove that a leader participated in a JCE or facilitated the commission of a crime, holding him (or her) responsible for his duty to prevent or punish crimes committed by the de facto or de jure subordinates under his command and control remains a viable option.

The ICC Prosecutor, Luis Moreno-Ocampo, has consistently stated that his office intends to focus on leaders bearing the greatest responsibility for the most serious crimes. For Sudan, then, the ICC will likely indict less than a dozen civil and military leaders (including those of the Janjaweed/militia) for war crimes, crimes against humanity, and possibly genocide in Darfur. There is little dispute that war crimes and

crimes against humanity, including sex crimes, have been committed. Many genocide experts have concluded that genocide has also been committed in Darfur.²⁷ The COI Report unconvincingly reached a different conclusion, leading the government of Sudan to imply that the commission had exonerated it of all serious criminal activity. The US government has called the crimes in Darfur a genocide and, despite its hostility to the ICC, did not veto a Security Council resolution referring the situation in Darfur to the ICC.²⁸

Holding Leaders Accountable for Sex Crimes

As noted above, the ICC has indicated that it intends to focus principally on investigating those holding the highest level of responsibility for justiciable crimes. Leaders have a duty to protect the civilian population and provide justice to those who have been victims of crimes. In Darfur, government leaders have not only failed in this duty but are also implicated in committing or otherwise facilitating the atrocities. In *Kvočka*, the ICTY Trial Chamber emphasized that special measures need to be taken to ensure that women placed in vulnerable positions during armed conflict are protected from sexual violence. It further noted that once they have reports or knowledge of such crimes, persons in positions of authority are placed on notice; to prevent being held accountable, they must take extra measures to prevent sex crimes.²⁹ Even if one took the dubious view that consistent reports of rape crimes in conflicts throughout the world over the past thousand years, not to mention the explosion of rape reports filed during wars over the last decade, did not put leaders on notice that sexual assaults are a common means of destroying a community or harming a targeted group, the recurring monthly reports of rape crimes in Darfur certainly did put the political and military leaders in Sudan on notice that rape was a frequent occurrence there. Reports by the United Nations, of which Sudan is a member, also highlight the prevalence of rape and raise it as a grave concern.

A wide range of UN experts has repeatedly noted that rape crimes flourish in Darfur with the full knowledge of the government. For example, Louise Arbour, the UN's high commissioner for human rights and the former chief prosecutor of the ICTY and ICTR, as well as a former member of the Supreme Court of Canada, has stressed that "there is a credible base of evidence that there is a severe, severe, serious amount of sexual violence that is not being properly addressed."³⁰ On 21 June 2005, Jan Egeland, the UN undersecretary for humanitarian affairs, reported that "in Darfur, rape is systematically used as a weapon of warfare."³¹ In March 2004, Mukesh Kapila, the UN coordinator for Sudan, discussing the mass rape committed in Darfur, emphasized that "it is more than just a conflict. It is an organized attempt to do away with a group of people."³² Sima Samar, UN special rapporteur for human rights in Sudan, has stated that "gender-based violence continues unfortunately with impunity" and that the government's excuses were unacceptable.³³ And Juan Mendez, UN special advisor to the secretary-general on the prevention of genocide, emphasized that even by September 2005, "the rape of women remained too prevalent."³⁴

It is relatively straightforward to hold persons criminally responsible for sex crimes when they commit them physically, directly order the crimes (and there is documentation or other evidence), or are physically present at crime sites and either encourage or otherwise aid and abet the crimes. As noted above, it is also largely accepted that the most culpable government and military leaders do not have to be physically present at crime sites to be held accountable for the policies they have dictated in directing a widespread or systematic attack against a targeted civilian

group. Nonetheless, when attacks on village after village involve murder, torture, rape, pillage, and forced displacement, in prosecutions, all but the sex crimes will typically be attributed to the leaders as part of their official policy.

While in theory it should not be particularly complicated to hold political/civilian or military leaders criminally responsible, either as individuals or as superiors, for sexual violence when the crimes are widespread or systematic, not to mention notorious, in practice there has been enormous reluctance to hold leaders and non-physical perpetrators accountable for sex crimes, as opposed to other crimes. In general, the attitude seems to be that leaders need not be physically present at crime sites to be held responsible for the carnage that ensues during the course of carrying out a plan or policy to harm the targeted group, whereas sex crimes are regularly treated by investigators, prosecutors, and judges as different, private, or special crimes, outside the scope of any intended attack. The notion—held by many investigators, prosecutors, trial attorneys, and judges—appears to be that leaders should not be held accountable for *sex* crimes unless there is incontrovertible proof that they ordered the crimes or that they knew about them and *personally* intended their commission. This attitude is not only legally and factually inaccurate, it is morally untenable, provides a flawed, sexist historical record of the events, and denies justice to half the population. Failing to hold leaders accountable for sex crimes when they occur regularly and consistently over weeks and months, let alone years, suggests that the crimes are not considered serious or are deemed personal/private issues. It also ignores consistent and credible reports that wartime rapes are used strategically as weapons of war or instruments of terror.

That said, the ICTY has recognized that leaders can be held accountable for sex crimes when they neither were present nor ordered the crimes. For example, in the *Plavsic* case before the ICTY, Biljana Plavsic, a former leader of the Bosnian Serb entity, pled guilty to one count of persecution as a crime against humanity in exchange for dropping the other seven charges, including the genocide counts. To accept a guilty plea, the chamber had to be satisfied that the guilty plea was informed, voluntary, and unequivocal and that there was a sufficient factual basis that the crimes were committed and that the person pleading guilty participated in them. Plavsic's guilty plea on the charge of persecution as a crime against humanity, accepted by the tribunal, included acknowledging responsibility for rape crimes.³⁵ The persecution count accused Plavsic of participating in a joint criminal enterprise to plan, instigate, order, and aid or abet the persecution of non-Serbs in Bosnia-Herzegovina. The means of persecution included killing, raping, torturing, forcibly displacing, and committing other inhumane acts against civilians and destroying civilian property. Accepting the guilty plea and convicting Plavsic of persecution as a crime against humanity, the chamber noted that she was neither as influential nor as powerful as many other leaders, and played a lesser role in facilitating the crimes. Nonetheless, she incurred responsibility for rape and other crimes by acquiescing in them. As Plavsic herself stated, "although I was repeatedly informed of allegations of cruel and inhuman conduct against non-Serbs, I refused to accept them or even to investigate."³⁶ She thus bore individual responsibility for the crimes, being a leader who knowingly participated in a joint criminal endeavor to persecute non-Serbs. She may not have specifically intended the rapes, but nonetheless she had knowledge of them and made no effort to indicate disapproval, to complain, or to initiate preventive measures, thus incurring individual responsibility for the crimes.³⁷

To be sure, the orchestrators of mass atrocity in Darfur know what is happening on the ground and receive full and detailed reports of events. The political, military, and militia leaders have no doubt that when they order an attack, the ensuing violence will take many diverse forms, including rape. In the extraordinary event that they were so naïve that they did not know initially, they certainly knew after reports were issued, and still the leaders have continued urging or ignoring unlawful attacks on civilians with full knowledge that rape—and other crimes—would form part of the attacks.

The government of Sudan has not made a secret of its intent to refuse to cooperate with the ICC, including denying visas to ICC investigators and prosecutors seeking to enter the country. Thus there will be some difficulty in investigating crimes within Darfur itself, at least until Sudan is forced or induced to cooperate with the court. Nevertheless, refugees who are victims of and witnesses to crimes in Darfur are in dozens of countries around the world—more than 200,000 in Chad alone—and many would undoubtedly be willing to give evidence to the ICC. States parties to the ICC—100 countries, as of November 2005—are required by the ICC Statute to cooperate with the court, and many of these countries have valuable intelligence information on evidence of crimes and the most culpable parties. The UN Security Council, the African Union, the European Union, UN bodies and agencies, and non-governmental organizations can also play a positive role in assisting the court. The obstacles confronting the ICC are many, but with perseverance, integrity, and creativity, the challenges can be overcome and the people of Darfur can receive some measure of justice for the atrocities committed against them.

Notes

1. See, e.g., Human Rights Watch, “Sexual Violence and Its Consequences among Displaced Persons in Darfur and Chad” (HRW briefing paper, 12 April 2005); Médecins sans Frontières, “The Crushing Burden of Rape: Sexual Violence in Darfur” (MSF briefing paper, 8 March 2005); *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 January 2005), http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed 19 April 2006) [COI Report]; Tara Gingerich and Jennifer Leaning, *The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan* (Boston: Physicians for Human Rights, 2004); Human Rights Watch, “Empty Promises? Continuing Abuses in Darfur, Sudan” (HRW briefing paper, 11 August 2004); Amnesty International, “Darfur: Rape as a Weapon of War: Sexual Violence and Its Consequences” (AI document AFR 54/076/2004, 19 July 2004).
2. See Nicholas D. Kristof, “Sudan’s Department of Gang Rape,” *New York Times*, 22 November 2005; Jonah Fisher, “A Culture of Impunity in Darfur,” *BBC News*, 26 September 2005; *Report of the UN Special Advisor on the Prevention of Genocide, Visit to Darfur, Sudan 19–26 September, 2005* (4 October 2005), http://www.protectedarfur.org/Pages/Download_Docs/Special_Advisor_Report1005.pdf (accessed 19 April 2006).
3. The historical treatment of the laws and customs of war concerning rape, from customary law to codified law, is discussed in detail in Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Ardsey, NY: Transnational Publishers, 1997), 18–48.
4. *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Fourth Geneva Convention]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977*, 1125 U.N.T.S. 3, 16 I.L.M. 1331 (entered into force 7 December 1978) [Additional Protocol I]; *Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of*

- Non-International Armed Conflicts, June 8, 1977*, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force 7 December 1978) [Additional Protocol II].
5. Protocol I, arts. 35, 48–60. While the laws of war accept that civilians may be killed or injured during activities directed against military objectives, as “collateral damage,” nonetheless civilians cannot be the object of or the target of an attack. Further, many precautions are required to be taken to minimize the risk of civilians being injured during an attack against military objects.
 6. See, e.g., Amnesty International, “Sudan: Surviving Rape in Darfur” (AI document AFR 54/097/2004, 9 August 2004); Amnesty International, “Rape as a Weapon of War”; Amnesty International, “Sudan: Mass Rape, Abduction and Murder” (AI document AFR 54/125/2004, 10 December 2004); Amnesty International, “Sudan: Systematic Rape of Women and Girls” (AI document AFR 54/038/2004, 15 April 2004); Médecins sans Frontières, “The Crushing Burden of Rape”; Human Rights Watch, “Darfur: Women Raped Even after Seeking Refuge,” *Human Rights News*, 12 April 2005, <http://hrw.org/english/docs/2005/04/11/sudan10467.htm> (accessed 19 April 2006); UNICEF, “Darfur Region in Crisis: Girls and Women Terrorized by Widespread Rape in Darfur” (news release, 20 October 2004); Refugees International, “Rape, Islam and Darfur’s Women Refugees and War Displaced” (24 August 2004); Mark Fritz, “In Darfur Wood-Gathering Women Walk through a Minefield of Rape” (International Rescue Committee, 19 August 2004); Tracy Hampton, “Agencies Speak Out on Rape in Darfur,” *Journal of the American Medical Association* 294 (2005): 542–44; Nicholas D. Kristof, “A Policy of Rape,” *New York Times*, 5 June 2005; Lydia Polgreen, “Darfur’s Babies of Rape are on Trial from Birth,” *New York Times*, 11 February 2005; Robyn Dixon, “In Sudan, Rape’s Lasting Hurt,” *LA Times*, 15 September 2004; Emily Wax, “‘We Want to Make a Light Baby’: Arab Militiamen in Sudan Said to Use Rape as Weapon of Ethnic Cleansing,” *Washington Post*, 30 June 2004; Sam Dealey, “Rape Is a Weapon in Darfur, but Sudan’s Government Doesn’t Want to Hear about It,” *Sudan Times*, 28 August 2005, TIME/US edition; BBC News, “Mass Rape Atrocity in West Sudan,” 19 March 2004; BBC News, “UN Attacks Darfur ‘Fear and Rape,’” 25 September 2004; Somini Sengupta, “Rampage of Rape in Sudan Continues Undeterred,” *New York Times*, 27 October 2004; Sudan Organisation Against Torture, “Darfur: Abduction and Rape in Nyala” (press release, 20 September 2005); Alexis Masciarelli and Ilona Eveleens, “Sudanese Tell of Mass Rape,” *BBC News*, 10 June 2004.
 7. For example, Refugees International reports, “‘As you have raped me, please don’t leave me alive . . . kill me with your gun’ begged Almina to her rapist. ‘May shame kill you’ was the reply of the Janjaweed militiaman who raped her.” Refugees International, “Rape, Islam, and Darfur’s Women Refugees.”
 8. COI Report, 3.
 9. *Ibid.*, paras. 334–36.
 10. See US Department of State, *Documenting Atrocities in Darfur* (21 September 2004), <http://www.state.gov/g/drl/rls/36028.htm> (accessed 19 April 2006).
 11. Unpublished statements collected by the CIJ/USAID Atrocities Documentation Project (on file with author).
 12. See, especially, *Access to Justice for Victims of Sexual Violence: Report of the United Nations High Commissioner for Human Rights* (29 July 2005), 13–26, <http://www.ohchr.org/english/press/docs/20050729Darfurreport.pdf> (accessed 19 April 2006).
 13. Like many other academics, legal experts, and journalists, I have previously written on various ways to prosecute gender crimes; I do not want to repeat them again here. See, e.g., Askin, *War Crimes Against Women*; Kelly D. Askin, “Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status,” *American Journal of International Law* 93 (1999): 97–123; Kelly D. Askin, “Crimes within the Jurisdiction of the International Criminal Court,” *Criminal Law Forum* 10 (1999): 33–59; Kelly D. Askin, “Women and International Humanitarian Law,” in *Women and International Human Rights Law*, vol. 1, ed. Kelly D. Askin and Dorean M. Koenig, 41–87 (Ardsley, NY: Transnational Publishers, 1999); Kelly D. Askin, “The International War Crimes Trial of

- Anto Furundzija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes,” *Leiden Journal of International Law* 12 (1999): 935–55; Dorean M. Koenig and Kelly D. Askin, “International Criminal Law and the International Criminal Court Statute: Crimes against Women,” *Women and International Human Rights Law*, vol. 2, ed. Kelly D. Askin and Dorean M. Koenig, 3–29 (Ardsley, NY: Transnational Publishers, 2000); Kelly Dawn Askin, “Women’s Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC,” in *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, ed. Dinah Shelton, 47–63 (Ardsley, NY: Transnational Publishers, 2000); Kelly D. Askin, “Comfort Women: Shifting Shame and Stigma from Victims to Victimizers,” *International Criminal Law Review* 1 (2001): 5–32; Martina Vandenberg and Kelly D. Askin, “Chechnya: Another Battleground for the Perpetration of Gender Based Crimes,” *Human Rights Review* 2 (2001): 140–56; Kelly D. Askin, “The Quest for Post-Conflict Gender Justice,” *Columbia Journal of Transnational Law* 41 (2003): 509–21; Kelly D. Askin, “The Kunarac Case of Sexual Slavery: Rape and Enslavement as Crimes Against Humanity,” in *Annotated Leading Cases of International Criminal Tribunals*, vol. 5, ed. Andre Klip and Goran Sluiter, 806–17 (Antwerp: Intersentia, 2003); Kelly D. Askin, “Prosecuting Wartime Rape and Other Gender Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles,” *Berkeley Journal of International Law* 21 (2003): 288–367; Kelly Dawn Askin, “The International Criminal Tribunal for Rwanda and Its Treatment of Crimes against Women,” in *International Humanitarian Law: Challenges*, vol. 2, ed. John Carey, William V. Dunlap, and R. John Pritchard, 33–88 (Ardsley, NY: Transnational Publishers, 2004); Kelly D. Askin, “Gender Crimes: *Jus Cogens* Violations and Universal Jurisdiction,” in *African Perspectives on International Criminal Justice*, ed. Evelyn A. Ankumah and Edward K. Kwakwa, 57–66 (Maastricht: Africa Legal Aid, 2005); Kelly Dawn Askin, “Gender Crimes Jurisprudence in the ICTR,” *Journal of International Criminal Justice* 3 (2005): 1007–18; Kelly D. Askin, “The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors,” in *Listening to The Silences: Women and War*, ed. Helen Durham and Tracey Gurd, 125–54 (Leiden: Martinus Nijhoff, 2005).
14. *Rome Statute of the International Criminal Court*, 1998 Sess., U.N. Doc. A/CONF.183/9 (1998) (entered into force 1 July 2002) [ICC or Rome Statute], art. 7.
 15. See, e.g., *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T (2 September 1998) [Akayesu Trial Judgment]; *Prosecutor v. Kunarac et al.*, Judgment, IT-96-23-T & IT-96-23/1 (22 February 2001) [Kunarac Trial Judgment]; Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerp: Intersentia, 2005).
 16. ICC Statute, art. 6, art. 7(1)(g), and art. 8(b)(xxii) and 8(e)(vi). Under the crimes against humanity provisions of the statute, “enslavement” is specifically noted to include “the exercise of such power in the course of trafficking in persons, in particular women and children” (art. 7(2)(c)) and “persecution” explicitly includes gender-based persecution (art. 7(1)(h)).
 17. See, e.g., Askin, *War Crimes against Women*.
 18. COI Report, para. 338.
 19. BBC News, “Mass Rape Atrocity.”
 20. ICC Statute, art. 25.
 21. *Ibid.*, art. 28 (the requirements for military commanders and other superiors are slightly different.)
 22. *Ibid.*, art. 25(3)(d).
 23. *Prosecutor v. Tadic*, Judgment, 1T-94-1-A (15 July 1999) [Tadic Appeals Judgment], para. 227.
 24. See, e.g. *ibid.*, paras. 195–229; *Prosecutor v. Kvočka*, Judgment, IT-98-30-T (2 November 2001), paras. 79–86 [Kvočka Trial Judgment]; *Prosecutor v. Kvočka*, Judgment, IT-98-30-A (28 February 2005), paras. 77–119 [Kvočka Appeals Judgment]; *Prosecutor v. Ntakirutimana*, Judgment, ICTR-96-10A & ICTR-96-17A (13 December 2004), paras.

- 461–68; *Prosecutor v. Milutinovic et al.*, Decision on Dragoljub Odjanic’s Motion Challenging Jurisdiction–Joint Criminal Enterprise, IT-99-37-AR72 (21 May 2003); *Prosecutor v. Stakic*, Judgment, IT-97-24-T (31 July 2003), paras. 438–42; *Prosecutor v. Krnojelac*, Judgment, IT-97-25-A (17 September 2003), paras. 64–124; *Prosecutor v. Vasiljevic*, Judgment, IT-98-32-A (25 February 2004), paras. 94–111; *Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, IT-99-36-A (19 March 2004). See also *Rwamakuba v. Prosecutor*, ICTR-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide (22 October 2004).
25. See, e.g., *Prosecutor v. Krstic*, Judgment, IT-98-33-T (2 August 2001), paras. 621–45, in which the summary execution of all men and boys of fighting age in Srebrenica was held to be a joint criminal enterprise (JCE I), but the rape crimes committed during the course of the JCE were deemed foreseeable (JCE III) under the circumstances of mass violence and persecution.
 26. See, e.g., Physicians for Human Rights, “Destroyed Livelihoods: A Case Study of Furawiya Village, Darfur” (Preliminary Briefing, 2005), http://www.phrusa.org/research/sudan/pdf/darfur_briefing.pdf (accessed 19 April 2006).
 27. See, for example, some of the reports on Darfur crimes included on the Web sites of Prevent Genocide International, <http://www.preventgenocide.org/> (accessed 19 April 2006); Darfur: A Genocide We Can Stop, <http://www.darfurgenocide.org/> (accessed 19 April 2006); and Save Darfur, <http://www.savedarfur.org> (accessed 19 April 2006), as well as Gregory H. Stanton, “Genocide Emergency: Darfur, Sudan” (Genocide Watch, 2 April 2004), <http://www.genocidewatch.org/Never%20Again.htm> (accessed 19 April 2006).
 28. U.N. Doc. S.C. Res. 1593, S/RES/1593, 31 March 2005.
 29. Kvočka Trial Judgment, para. 318.
 30. BBC News, “UN attacks Darfur ‘Fear and Rape.’” The Commission of Inquiry made a similar statement: “On their part, the authorities failed to address the allegations of rape adequately or effectively.” COI Report, para. 336.
 31. See Claudia Parsons, “Sudan: UN Says Rape Is Systematic Weapon of War in Darfur” (Women Living Under Muslim Laws, 21 September 2005), <http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-249107> (accessed 19 April 2006).
 32. BBC News, “Mass Rape Atrocity.”
 33. Quoted in “Sudan Failed to Try Darfur War Crimes–UN Rights Official,” *Sudan Times*, 23 October 2005.
 34. Fisher, “Culture of Impunity.”
 35. See *Prosecutor v. Plavsic*, Plavsic Sentencing Judgment, IT-00-39 & IT-00-40/1 (27 February 2003), paras. 27, 29, 34, 120, 126.
 36. *Ibid.*, para. 51.
 37. *Ibid.*, especially paras. 55, 121.

A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination

Jerry Fowler

*Committee on Conscience, United States Holocaust Memorial Museum*¹

US Secretary of State Colin Powell determined that genocide as defined in the UN Genocide Convention had occurred in Darfur, but he disclaimed any new obligations as a result of that determination. Under the permissive provisions of Article 8 of the convention, he called upon the UN Security Council to investigate whether genocide or other crimes were being committed, with a view to accountability. The subsequent investigation by a UN Commission of Inquiry concluded, on rather dubious grounds, that the Sudanese government was not responsible for genocide but recommended referral of the situation to the International Criminal Court for purposes of accountability; ironically, the opposite conclusions of Powell and the UN Commission produced the same result: a call for steps toward accountability. A further irony is that the UN Convention, although articulating an international condemnation of the crime of genocide, compels nothing more. The attempts at the September 2005 World Summit to obtain recognition of an international responsibility to protect underscored the fundamental reality that nations will not act decisively to confront genocide and other massive human rights abuses out of a sense of legal obligation, but only as a matter of political and practical necessity.

Legal scholar Diane Orentlicher once observed that the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) “has come to embody the conscience of humanity.”² She then acidly remarked that the convention’s “moral force is surely ironic,” in light of the persistent failure of governments to enforce its terms.³ Darfur adds another sad chapter of irony in the convention’s history, given the dramatic incongruity between the sense of urgency that one might expect a plausible case of ongoing genocide to engender and the relatively lackadaisical international political response that has in fact unfolded. As it turns out, this irony is embedded in the provisions of the UNCG itself. After calling for international cooperation “to liberate mankind from such an odious scourge,” the convention proceeds to define the crime of genocide in terms that, from the perspective of “preventing” or “suppressing” genocide, are problematic. It then offers only the vaguest sense of what should be done when genocide is imminent or actually under way.

‘‘To Liberate Mankind from Such an Odious Scourge’’

Though there are examples of mass violence directed against identifiable groups dating back to antiquity, “genocide” as a term and a concept has a quite recent origin. Raphael Lemkin, a Jewish lawyer who fled Poland after the German invasion in 1939,

Jerry Fowler, “A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination.” *Genocide Studies and Prevention* 1, 1 (July 2006): 29–40. © 2006 from *Genocide in Darfur: Investigation into Atrocities in the Sudan* edited by Samuel Totten and Eric Markusen. Reproduced by permission of Routledge/Taylor & Francis Group, LLC.

coined the word and introduced it in 1944.⁴ He derived it from the Greek for tribe or nation (*geno-*) and the Latin for killing (*-cide*). By “genocide,” Lemkin meant “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”⁵

In no small part due to the efforts of Lemkin himself, his new word soon gained currency.⁶ It was mentioned in the 1945 Nuremberg indictment as a description of war crimes committed by the defendants being tried before the International Military Tribunal.⁷ In December 1946, the General Assembly of the newly created United Nations adopted a resolution that described genocide as “a denial of the right of existence of entire human groups” that “shocks the conscience of mankind” and “affirm[ed]” that genocide is “crime under international law.”⁸

That resolution also set in motion the process that resulted in the adoption of the UNCG on 9 December 1948.⁹ The convention itself is rather a spare document—nineteen articles, of which the last nine are more technical than substantive, dealing with matters such as where states that become parties to the convention shall deposit their instruments of ratification or accession (with the secretary-general of the United Nations); how many states must become parties before the convention comes into force (twenty, a number reached in late 1950); and where the original copy of the convention would be held (in the UN archives).

The convention’s preamble invokes “international law” and “the spirit and aims of the United Nations,” as well as the condemnation of genocide “by the civilized world.” It echoes the General Assembly’s view that international cooperation is necessary to free humanity from the “odious scourge” of genocide. To that end, Article I specifies that “genocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and to punish.”

The heart of the substantive portion of the convention is Article II, which defines genocide as a matter of international law. The definition has two essential components: a specified physical act (what lawyers would call the *actus reus*) and a particular state of mind (technically, a *mens rea*). The specified acts cannot constitute genocide unless they are committed with the requisite state of mind.

The specified acts are the following:

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

The required state of mind—which distinguishes genocide from any other crime—is the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Thus, merely intending to commit the specified acts is not enough. The perpetrators must also have a “specific” or “special” intent to destroy a protected group in whole or in part.¹⁰ Establishing the subjective intent harbored in the minds of perpetrators can present vexing issues of proof, especially when events are unfolding in some inaccessible location. As discussed more fully below, the circumstances surrounding the commission of specific acts can provide evidence of the intent with which those acts are committed.

Several articles flesh out the central idea that genocide is an international crime, and therefore punishable. Article III explains that not only genocide itself but also “conspiracy to commit genocide,” “direct and public incitement to commit genocide,” “attempt to commit genocide,” and “complicity in genocide” can be punished. According to Article IV, perpetrators are subject to punishment without regard to their status as “constitutionally responsible rulers” or holders of some other public office. In Article V, the parties “undertake” to pass whatever domestic legislation might be necessary to give effect to the terms of the convention, specifically emphasizing punishment for genocide and the other crimes listed in Article III. For good measure, Article VI adds an unspecified “international penal tribunal”¹¹ as a possible venue for trying those accused of genocide, in addition to courts in the territory where the criminal acts were committed.¹² Article VII addresses the extradition of accused perpetrators from one country in order to stand trial in another.

As terse as are the provisions related to punishment of genocide, the convention’s other avowed goal—that of genocide prevention—gets even shorter shrift. Article VIII merely states that a party to the convention “*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” (emphasis added). Tossing the ball into the UN’s court, in other words, is permitted but not required.

No other article refers to prevention, except for Article I’s rather ambiguous statement that parties to the convention “undertake to prevent” genocide. Exactly what obligation this language imposes is not clear. Particularly opaque is whether the undertaking to prevent genocide is directed at a state’s own territory or territory under its control or whether it imposes some duty on parties to act wherever in the world genocide might be threatened or occur. Some scholars have asserted the latter.¹³ Yet the language of the convention does not give any indication that such an extensive obligation was contemplated. Indeed, it would be quite bizarre to think that the drafters intended in 1948 to make intervention in the internal affairs of other states obligatory for individual states or groups of states (through the broad interpretation of Article I), while recourse to the United Nations is merely optional (under the plain terms of Article VIII). Such a scheme diverges wildly from the structure for maintaining international peace and security established just three years earlier with the adoption of the UN Charter and the creation of the United Nations itself. And in the almost six decades since the adoption of the UNGC, there is scant evidence of state practice evincing a sense of obligation to prevent or suppress genocide in other countries pursuant to Article I. When Bosnia argued before the International Court of Justice that all parties to the UNGC had a duty under Article I to prevent genocide against it and its citizens, the ad hoc judge appointed by Bosnia itself could only observe, rather morosely, that “the limited reaction of the parties to the Genocide Convention in relation [to past episodes of apparent genocide] may represent a practice suggesting the permissibility of inactivity.”¹⁴ Likewise, the May 1994 internal State Department memorandum to US Secretary of State Warren Christopher recommending that the United States begin to use the word “genocide” in relation to Rwanda noted that such a move “would not have any particular legal consequences.”¹⁵

Is, Is Not

The UNGC provided the framework within which US Secretary of State Colin Powell and the United States government considered, in mid-2004, the question of whether

genocide was occurring in Darfur. Applying Article II's legal definition to the facts gathered by the Atrocities Documentation Team (ADT) and from other sources, they concluded that genocide had been committed and that the government of Sudan and its militia allies—the so-called Janjaweed—were responsible.¹⁶

In announcing his determination, Secretary Powell pointed to murder, rape, and other physical violence committed against members of non-Arab ethnic groups. This violence corresponded with the acts specified in Article II (a) and (b) of the UNCG—killing members of a group and causing serious bodily or mental harm to them. He also pointed to the destruction of foodstuffs and other means of survival of the targeted groups, coupled with obstruction by the Sudanese government of the humanitarian assistance that the victims needed in order to survive. This conduct, which itself inflicted a large number of deaths on the targeted population in addition to those caused by direct violence, corresponded with article II(c)—deliberately inflicting conditions of life calculated to bring about a group's physical destruction, in whole or in part.

As for the "intent to destroy" required by Article II, Powell concluded that intent could be inferred from the Sudanese government's deliberate conduct. Inferring intent from conduct in the absence of direct evidence is widely accepted. The International Criminal Tribunal for Rwanda (ICTR), for example, has listed a number of circumstances that are relevant to determining "intent to destroy," many of which are present in the case of Darfur: "the general context of the perpetration of other culpable acts systematically directed against that same group"; "the scale of atrocities committed"; the "general nature" of the atrocities; deliberately and systematically targeting members of some groups but not others; attacks on (or perceived by the perpetrators to be attacks on) "the foundation of the group"; "the use of derogatory language toward members of the targeted group"; "the systematic manner of killing"; and "the relative proportionate scale of the actual or attempted destruction of a group."¹⁷

In this regard, Powell's testimony to the Senate Foreign Relations Committee emphasized the scale and scope of the murder and rape of civilians as well as the fact that the actions of the Sudanese military and its militia allies were "a coordinated effort, not just random violence."¹⁸ Additionally, in the report released along with the testimony, the ADT's investigation documented substantial use of racial epithets and derogatory language directed against members of non-Arab ethnic groups in conjunction with violence.¹⁹ Powell also noted Khartoum's failure to cease and desist from the attacks on non-Arab groups and its continued obstruction of humanitarian aid even after having been repeatedly put on notice by other governments and by the United Nations.

Invoking Article VIII of the UNCG, Powell called upon the United Nations to undertake its own investigation. Thus, the only specific outcome of the genocide determination was the September 18 passage by the UN Security Council of Resolution 1564, which requested that the UN secretary-general appoint an International Commission of Inquiry to look into whether acts of genocide had in fact occurred and to identify perpetrators of violations of international humanitarian and human rights law. While awaiting the commission's report, the Security Council decided "to remain seized of the matter."

At the end of January 2005, the commission issued its report, which documented the Sudanese government's role in organizing, arming, and training the Janjaweed militia. Page after page of the voluminous report laid responsibility for serious

violations of international humanitarian and human rights law at the government's doorstep. The commission concluded that the government and its allies bore primary responsibility for massive violence against civilians that had a pronounced ethnic dimension. Addressing the particular terms of the UNCG, the commission noted that its investigation

collected substantial and reliable material which tends to show the occurrence of systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle).²⁰

The commission believed that this evidence could establish the physical acts enumerated in Article II(a)–(c).²¹

But then the Commission explicitly “conclude[d] that the Government of Sudan has not pursued a policy of genocide” based on the absence of the required “intent to destroy.”²² Although the commission's report acknowledges that the scale of the atrocities, the systematic nature of the atrocities, and racially motivated statements by perpetrators indicated genocidal intent, it asserts that “other more indicative elements” pointed to a lack of intent. The commission identifies three elements supposed to be “more indicative.”²³

First, in some unspecified number of villages, the attackers “refrained from exterminating the whole population.”²⁴ As evidence, the commission refers to one group of villages in which the government commissioner and the leader of the Arab militias executed about 227 of some 1,200 people who were captured after the attack. Apparently, fifteen of the executed were on a written list brought by the perpetrators, seven were village leaders (*omdas*), and 205 were accused of being rebels. The commission's reference to the fact that the perpetrators did not “exterminat[e] the *whole* population” is puzzling. The plain language of the convention includes an intent to destroy a group “in part.” The commission itself explains in a previous paragraph that international case law establishes that “the intent to destroy a group ‘in part’ requires the intention to destroy a ‘considerable number of individuals’ or ‘a substantial part,’ but not necessarily a ‘very important part of the group.’”²⁵ The commission fails to offer any reason why 227 out of 1,200 is neither a “considerable number of individuals” (in relation to that sample) nor “a substantial part” of that sample, especially when the community leadership was particularly targeted. Moreover, it seems to take at face value the perpetrators' reported assertion that the 205 murdered villagers were rebels, leading the commission to distinguish between “the intent . . . to destroy an ethnic group as such” and “the intention to murder all those men they considered to be rebels.” Yet, on just the previous page, the commission quotes a number of utterances in which the perpetrators used ethnic identity, racial epithets, and terms such as *Torabora* (slang for “rebels”) interchangeably.²⁶ The whole point of the government's campaign against the civilian population of non-Arab ethnic groups was equating ethnicity with rebellion, rendering it nonsensical to distinguish an intent to destroy those ethnic groups from an intent to murder rebels. The targets were, by the Sudanese government's apparent definition, one and the same.²⁷

The second element cited by the commission as indicating a lack of genocidal intent is that the Sudanese government collects survivors of destroyed villages in camps for internally displaced persons (IDPs), where it “generally allows humanitarian

organizations to help the population . . . by providing food, clean water, medicines and logistical assistance.”²⁸ This element begs the question of whether the direct violence (i.e., murdering and raping) was of sufficient scale to evince the intent to destroy the targeted groups “in part,” even though there are survivors who were not murdered outright. And the commission offers no rationale explaining why this element should be more indicative of intent than the scale and systematic nature of direct violence. It also skirts the issues of government obstacles to humanitarian aid, which were reduced but not eliminated by concerted international pressure in mid-2004; continuing elevated mortality rates in these camps; and continuing attacks (meaning murder and rape) against those who venture out of the camps in search of essentials of life such as firewood, water, or food.

The third element identified by the commission is that some unspecified number of villages with a mixed ethnic composition had not been attacked at the time the commission was undertaking its investigation. It is difficult to know what to make of this assertion as the commission makes no effort to contextualize it. For example, it does not quantify the number of untouched villages in relation to the number of villages destroyed, or by relating the number of inhabitants of such villages to the number of civilians who were subject to murder, rape, or displacement. Just as importantly, previously unharmed villages were being attacked and destroyed *during* the time that the commission was researching and writing its report.²⁹

The commission’s final paragraph of analysis regarding intent is perhaps the most difficult to fathom. It recounts a single anecdote from “a reliable source” in which one man was not killed when “attackers”—there is no identification of these attackers—took 200 camels from him. By contrast, the man’s younger brother resisted the theft of his one camel and was shot dead. “Clearly,” the commission concludes, “in this instance the special intent to kill a member of a group to *destroy the group as such* was lacking, the murder being only motivated by the desire to appropriate cattle belonging to the inhabitants of the village.”³⁰ Perhaps the requisite intent was indeed missing in that one instance. But the relationship of that one instance to the overall situation—in which “pillaging and destruction . . . appears to have been directed to bring about the destruction of the livelihoods and means of survival of” the targeted populations³¹—is a mystery.

Weighing the Evidence

Although Powell and the UN’s Commission of Inquiry operated from a largely similar factual base, they reached diametrically opposite conclusions on the question of genocide. One explanation for this may be an issue that neither addressed explicitly: the weight of evidence necessary to reach a conclusion. In these circumstances, how much evidence of genocidal intent—in terms of quality and credibility—is necessary relative to evidence of a lack of intent?

The commission hints that it applied an extremely high standard in assessing the evidence. “Courts and other bodies charged with establishing whether genocide has occurred,” the report notes, “must however be very careful in the determination of subjective intent.”³² It then approvingly quotes the International Criminal Tribunal for the former Yugoslavia for the proposition that “[c]onvictions for genocide can be entered only where intent has been unequivocally established.”³³ In essence, the commission adopted for itself the standard that intent must be shown “beyond reasonable doubt”—the weight of evidence necessary to convict an individual in a criminal trial.³⁴ This is the most exacting burden imaginable—an understandable

burden for a prosecutor to bear when a court is deciding the life or liberty of an individual.

Viewed in the context of this burden, the commission's analysis on the issue of genocidal intent is less mysterious. The three "elements" it cites, though not particularly compelling, do cast some doubt on the existence of a genocidal intent on the part of the Sudanese government. One might well conclude that the evidence of genocidal intent that is adduced in the commission's report, though quite strong, does not establish such intent "beyond reasonable doubt."

But this standard is clearly wrong under these circumstances. The commission was not a court of law, nor was it adjudicating the fate of individual defendants. The liberty of an accused defendant did not turn on its decision. Quite to the contrary, the commission was called upon only to make a threshold finding on the basis of which the UN Security Council would decide whether to take additional action, including referring the situation to the International Criminal Court (ICC) for a full-fledged criminal investigation.

A review of the ICC Statute makes clear the commission's error in applying the "beyond reasonable doubt" standard. The statute contemplates several stages through which a case proceeds, each requiring that a separate weight of evidence be met. When a situation is referred to the ICC, the prosecutor is required to initiate an investigation unless "there is *no reasonable basis* to proceed."³⁵ Having conducted an investigation, the prosecutor may seek an arrest warrant if he or she can establish "*reasonable grounds to believe* that the person has committed a crime within the jurisdiction of the Court."³⁶ The court is next called upon to confirm the charges, which it will do if the prosecutor offers "sufficient evidence to establish *substantial grounds to believe* that the person committed the crime charged."³⁷ Finally, at trial, an individual can only be convicted if the court is "convinced of the guilt of the accused *beyond reasonable doubt*."³⁸

Between "no reasonable basis to proceed" and "beyond reasonable doubt" lies a continuum along which the required weight of evidence steadily, and appropriately, mounts as the process moves forward. To eliminate that continuum and require a prosecutor to establish guilt beyond a reasonable doubt *as a condition* of launching an investigation would be nonsensical. Yet that is the standard of proof apparently applied by the commission, in spite of the fact that its investigation was prefatory to any judicial action. The commission's application of this standard is all the more erroneous in light of the constraints placed upon it by the amount of time available,³⁹ as well as the continued perpetration of the very crimes it was supposed to investigate. It was not in any conceivable position to reach a conclusion "beyond reasonable doubt" on an issue as complex and problematic as genocidal intent.

As previously mentioned, Powell did not articulate what weight of evidence he looked for in making his determination. But the tenor of his analysis, which emphasized the necessarily limited nature of the ADT investigation and other information available, suggests that he was, in essence, asserting a *reasonable basis* for concluding that the Sudanese government and its Janjaweed allies had committed genocide. The additional facts established by the commission confirm the existence of that reasonable basis.

Politics, Not Law

If a determination of genocide is to be a predicate for further action—whether the launching of a judicial investigation or the launching of humanitarian intervention or

anything else—the weight of evidence necessary to support that finding cannot be “beyond reasonable doubt.” That level of evidence will simply not be available until those in danger are long dead. Commissions or diplomats or politicians can take endless refuge behind every fig leaf of doubt. Outside of a formal judicial process, it only makes sense to speak of a reasonable basis to believe that genocide is occurring or threatened.

But the ultimate irony of the UNCG is that, when it comes to “preventing” or “suppressing” genocide, a determination of genocide does not trigger any form of action whatsoever. If this was not already clear from the convention’s plain language, it was made starkly so by Secretary Powell’s assertion on 9 September 2004, that “no new action is dictated by this determination.”⁴⁰ Powell’s affirmative determination and the commission’s negative one had the same effect. The UNCG, for all its supposed moral force, in actuality contributes little to prevention or suppression.

Powell’s request to the United Nations, pursuant to the permissive provisions of Article VIII, to launch an investigation was made “with a view to ensuring accountability”—that is, punishment. Yet punishment is not the same as prevention or suppression. It inevitably occurs, if at all, after the time for preventing or suppressing has passed. One may argue that a sufficiently real threat of punishment may have a deterrent effect powerful enough to stop ongoing acts of genocide or to prevent imminent acts. But that argument is purely theoretical. And the continued deterioration of the situation in Darfur months after the Security Council referred the situation to the ICC suggests that the theory may be faulty.

Powell’s request under Article VIII of the UNCG, Security Council Resolution 1564, the UN Commission of Inquiry’s investigation, the commission’s analysis of genocidal intent—all were couched in the language of law drawn from the UNCG and other legal instruments. But in a very real sense, the whole process was a burlesque of law. Essentially, everything documented by the commission was not only knowable but actually known months and months before the commission was even formed. Even as the commission was conducting its investigation, the government of Sudan was continuing to perpetrate the very crimes that the commission was analyzing. During the whole time that the basic facts have been known, and even since the commission released its report, no effective action has been taken by the so-called international community actually to stop the killing and the rapes. It is as though one man is clubbing another on a street corner while bystanders respond with a prolonged reflection on whether the incident is premeditated murder or simple assault or even self-defense. Meanwhile, the crime continues.

Powell, near the end of his testimony in September 2004, told the Senate committee that “[w]e have been doing everything we can to get the Sudanese government to act responsibly.” He certainly deserves credit for going out of his way to identify himself with a difficult issue, and there are many officials in the State Department and elsewhere in the US government who have been working diligently on Darfur. But the definition of “everything we can” is ultimately a political question, not a legal one. And effective prevention and suppression of “genocide”—or other forms of mass atrocities against civilian populations—will not occur through a sense of obligation under international law but as the result of political pressure on governments by their citizens. As Samantha Power has argued, politicians will act to stop mass killing when the political cost of inaction outweighs the risk of acting.⁴¹

In preparation for the 2005 World Summit, held to mark the sixtieth anniversary of the United Nations, a draft General Assembly resolution was circulated that would

have recognized an “*obligation*” of UN members to use various peaceful means “to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” The draft would also have recognized a “shared *responsibility*” to take collective coercive action under the UN Charter if peaceful means fail and national authorities are “unwilling or unable to protect their populations.” In the end, the first passage was watered down to acknowledge a “responsibility” to use “appropriate diplomatic, humanitarian and other peaceful means.” The second passage jettisoned the notion of a responsibility to act and replaced it with the statement that

we are prepared to take collective action . . . on a case-by-case basis . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴²

Being “prepared” to do something case-by-case is in fact consistent with actually *not* doing anything from case to case.

It may well be that the final language approved by the UN General Assembly represents a normative advance. It is certainly more explicit than anything in the UNCG. It also broadens the circumstances in which action may be taken beyond the narrow category of genocide by adding war crimes, ethnic cleansing, and crimes against humanity, which may forestall endless arguments about the complex and problematic notion of genocidal intent. But the final language underscores the fact that the prevention and suppression of genocide and other mass atrocities will never be accomplished by the international community, or by members of that community, through a sense of legal obligation. It will happen, if at all, as a result of political or practical necessity. Only by recognizing and acting on this reality can we hope to end the heartbreaking irony of a universally condemned crime that is allowed to occur in broad daylight.

Notes

1. The views expressed are those of the author and not necessarily those of the Committee on Conscience or the United States Holocaust Memorial Museum.
2. Diane Orentlicher, “Genocide,” in *Crimes of War*, ed. Roy Gutman and David Rieff, 153–57 (New York: W.W. Norton, 1999), 153.
3. *Ibid.*
4. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation; Analysis of Government; Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79.
5. *Ibid.*
6. Samantha Power, “A Problem from Hell”: *America and the Age of Genocide* (New York: Basic Books, 2002), 30–85.
7. Indictment: United States of America et al. v. Hermann Goering et al., *The Avalon Project: Nuremberg Trial Proceedings*, vol. 1 (International Military Tribunal, 1945), <http://www.yale.edu/lawweb/avalon/imt/proc/count.htm> (accessed 21 April 2006), para. VIII(A). The four counts in the indictment charged the defendants with crimes against the peace, war crimes, crimes against humanity, and conspiracy to commit the other crimes.
8. *The Crime of Genocide*, UN General Assembly Resolution 96(I), UN Doc. A/64/Add. 1 (11 December 1946), 188–89, <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf> (accessed 21 April 2006).
9. *Convention on Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, http://www.unhcr.ch/html/menu3/b/p_genoci.htm (accessed 21 April 2006).
10. W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), 217–21.

11. This idea came to fruition in July 2002 with the creation of the International Criminal Court. By January 2006, 100 countries had become members of the court. Neither the United States nor Sudan is a member of the court.
12. It is now widely, though not unanimously, accepted as a matter of customary international law that genocide is subject to “universal jurisdiction,” meaning that the crime can be adjudicated in any national court without regard to territorial or other connections. Schabas, *Genocide in International Law*, 353–68.
13. See, e.g., Stephen J. Toope, “Does International Law Impose a Duty upon the UN to Prevent Genocide?” *McGill Law Journal* 46 (2000): 187–94, 192–93.
14. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Further Requests for the Indication of Provisional Measures, International Court of Justice (1993), separate opinion of Judge Elihu Lauterpacht, para. 115.
15. US Department of State, “Has Genocide Occurred in Rwanda?” (action memorandum, May 1994), <http://www.gwu.edu/~7Ensarchiv/NSAEBB/NSAEBB53/rw052194.pdf> (accessed 21 April 2006).
16. Colin Powell, “The Crisis in Darfur” (written remarks before the Senate Foreign Relations Committee, 9 September 2004), <http://www.state.gov/secretary/former/powell/remarks/36032.htm> (accessed 21 April 2006).
17. *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T (2 September 1998), paras. 523–24; *Prosecutor v. Musema*, Judgment and Sentence, ICTR-96-13-A (January 27, 2000), para. 166.
18. Colin Powell, “The Crisis in Darfur” (testimony before the Senate Foreign Relations Committee, 9 September 2004), <http://www.state.gov/secretary/former/powell/remarks/36042.htm> (accessed 21 April 2006).
19. US Department of State, *Documenting Atrocities in Darfur* (Washington, DC: Bureau of Democracy, Human Rights and Labor and Bureau of Intelligence and Research), <http://www.state.gov/g/drl/rls/36028.htm> (accessed 21 April 2006), 4.
20. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 January 2005), http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed 19 April 2006) [COI Report], para. 507.
21. *Ibid.*, para. 518. The commission also addressed the issue of whether the targeted “tribal” groups are of the type (“national, ethnical, racial or religious”) protected by the UNCG and concluded that they are. *Ibid.*, paras. 508–12). This is a more complicated question than might first appear (see, e.g., Schabas, *Genocide in International Law*, 109–14), but it does not ultimately seem to be an issue with regard to Darfur.
22. *Ibid.* At the same time, the commission conceded that individuals, including government officials, may in fact have acted with genocidal intent (para. 520), begging the difficult question of how many government officials must harbor such intent before it is attributed to the state itself.
23. *Ibid.*, para 513.
24. *Ibid.*
25. *Ibid.*, para 492.
26. *Ibid.*, note 189: “Epithets that eyewitnesses or victims reported to the Commission included the following: ‘This is your end. The Government armed me.’ ‘You are Massalit [a non-Arab ethnic group], why do you come here, why do you take our grass? You will not take anything today.’ ‘You will not stay in this country.’ ‘Destroy the *Torabora*.’ ‘You are Zhagawa tribes [a non-Arab ethnic group], you are slaves.’”
27. The commission itself, as well as the State Department’s ADT, found little or no evidence of rebel activity in villages that were attacked by the Sudanese government and its militia allies.
28. COI Report, para. 515.
29. Brian Steidle, “In Darfur, My Camera Was Not Nearly Enough,” *The Washington Post*, 2 March 2005, <http://www.usmmm.org/conscience/alert/darfur/steidle> (accessed

- 21 April 2006). One of the pictures brought back from Darfur by Steidle, a former US Marine who served on the African Union monitoring team, is of the body of a boy who looks about two years old, killed when his village was attacked. The date stamp on the photo is 2005/01/15, ten days before the commission submitted its report to the secretary-general.
30. COI Report, para. 517.
 31. *Ibid.*, para. 638.
 32. *Ibid.*, para. 503.
 33. *Ibid.*
 34. *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998), http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (accessed 21 April 2006), art. 66.3.
 35. *Ibid.*, art. 53.1 (emphasis added).
 36. *Ibid.*, art. 58 (emphasis added).
 37. *Ibid.*, art. 61 (emphasis added).
 38. *Ibid.*, art. 66.3 (emphasis added).
 39. The secretary-general requested that the commission report back to him within three months of its creation. COI Report, para. 1.
 40. Powell, "Crisis in Darfur" (written remarks), 5.
 41. Power, "A Problem from Hell", 510–11.
 42. *2005 World Summit Outcome*, UN General Assembly Resolution 60/1, UN Doc. A/Res/60/1 (2005), <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf> (accessed 21 April 2006), para. 139.

GENOCIDE STUDIES AND PREVENTION

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Rwanda and Darfur: A Comparative Analysis

Scott Straus

Department of Political Science, University of Wisconsin, Madison

The article presents a comparative analysis of genocide in Rwanda and Darfur. The first half of the article examines the patterns and origins of violence in both cases and uses the comparison to generate some theoretical inferences about the causes of genocide. The analysis finds that both cases demonstrate a similar character of violence but that in Rwanda the violence was more intense, more exterminatory, and more participatory than in Darfur. Both episodes took place in the midst of civil war, in periods of political transition, in countries with histories of ethnic nationalism, and in areas where the conflicting ethnic populations lived in relative proximity. However, in Rwanda the state is more compact, centralized, and effective, which may explain the variation in intensity. The second half of the article focuses on the international response to genocide in both cases. After Rwanda, observers emphasized the importance of using the label “genocide” and creating domestic constituencies. Darfur showed that both strategies are insufficient. In response to Darfur, US officials declared “genocide” to be occurring, and there emerged a politically diverse civil-society coalition to lobby the administration. Yet the net outcome for both cases, in terms of the absence of an effective policy to halt genocide, was the same. The article argues that focusing too intently on a “genocide” determination may be counterproductive, that international politics matter yet mobilization on Darfur outside of North America was weak, and that protocols for the use of force to prevent genocide should be clarified.

Introduction

Since the Darfur crisis began in 2003, the Rwandan genocide of 1994 has been a frequent comparative point of reference. Some commentators have called the violence in western Sudan “another Rwanda,” others a “slow-motion” Rwanda. Most often, the comparison has had two primary connotations. The first concerned the violence itself. Genocide was happening again in Darfur, and hence Darfur was like Rwanda. The second connotation concerned the international response to the violence. As in Rwanda, the international community was not acting to stop genocide, and hence Darfur was like Rwanda.

Both comparative claims are accurate, as far as they go. However, the claims also deserve closer scrutiny. To what degree are the patterns of violence in Rwanda and Darfur similar? To what degree are they different? From an international perspective, in what ways is the response to Darfur similar to and different from what happened in Rwanda? Answers to these questions have inherent epistemological value, but they also have theoretical and practical import. From a theoretical perspective, what do the commonalities and differences between the two cases suggest about why genocide happens? From a practical perspective, what do the international reactions to both cases indicate about the effectiveness (or lack thereof) of particular prevention strategies?

This article approaches Darfur and Rwanda with these comparative questions and objectives in mind. The central purpose is to analyze similarities and differences between the two cases in order to generate theoretical and practical inferences. The article does not make normative claims about differences between the cases. I argue below that violence in Rwanda was more intense and more exterminatory than it has been in Darfur. The point is not that Rwanda's violence was worse than Darfur's, nor is it that Rwanda's victims suffered more than Darfur's victims. From a survivor's perspective, violence is violence; the loss of a family member is the loss of a family member. But from a comparative analytical perspective, empirical differences (and similarities) are important to note because they can generate insights about the causal dynamics of mass violence. This article focuses only on two cases, and hence the theoretical inferences have limited generalizability. Nonetheless, because the analogy between Rwanda and Darfur is often made and because comparative analysis can yield valuable insights, I pursue it here.

Broadly, the article is divided into two sections, each with several subsections. In the first main section, I discuss the dynamics of genocide in both cases, addressing the primary patterns of violence in Darfur and in Rwanda as well as common causal factors in both cases. I then make some theoretical observations based on the analysis, noting both similarities and differences. In the second main section, I discuss the international response to genocide in both cases. Here I focus on three main areas: the debate over whether to use the label "genocide" in both cases; the formation (or lack thereof) of a domestic constituency in the United States calling for prevention; and, finally, international obstacles to prevention.

Dynamics of Genocide in Darfur and Rwanda

Patterns of Violence

One nexus of comparison between the two cases concerns intensity of violence, in particular the rate of killing (that is, the number of deaths over time). As of this writing in April 2006, large-scale attacks on civilian populations in Darfur have been continuing for three years, with some variation over time. Judging from existing data, it appears that attacks surged in late 2003 and early 2004, declining in early 2005. The violence also appears concentrated in some parts of Darfur but not in others.¹ The number of deaths in this period is the subject of some controversy. Some estimate between 63,000 and 140,000 violence-related civilian deaths, while others put the number at 400,000 (Darfur's population before the violence began was about 6.5 million). The low estimate comes from a 2005 US State Department report. The high estimate comes from a 2005 report issued by the Coalition for International Justice (CIJ); the report was based on research conducted in conjunction with other scholars.² The primary reasons for the divergent estimates in these reports relate to assumptions about the constancy of violence over time, about the distribution of violence across regions in Darfur, and about whether existing survey data are representative.

By contrast, the Rwandan genocide took place during the 100-day period from 6 April to 17 July 1994. There was variation in when violence started in different regions, but ultimately genocidal violence occurred in almost every part of the country under government control. Most murders took place during the first five weeks of the genocide. Detailed data from one region (Kibuye Prefecture) indicate that two weeks into the genocide nearly 80% of all murders had already taken place.³ Estimates of the number killed in Rwanda range from 500,000 to one million. The difference in the estimates depends principally on how many Tutsis are said to have lived in Rwanda

before the genocide. Thus, even a low estimate of the number killed yields a very high ratio of the number of Tutsis killed as a percentage of the pre-existing Tutsi population. For example, in one of the best studies of the genocide, Alison Des Forges gives a low estimate of 500,000 Tutsis killed, but that sum equals 75% of all resident Tutsis in Rwanda before the genocide.⁴

Similar ratio estimates for Darfur do not yet exist. In other words, it is not clear exactly how many black African Darfuris have been killed as a percentage of the pre-existing black African population. That said, the ratio is likely to be smaller. As of this writing, there are considerably more black Africans in Darfur who have been displaced than black Africans who have been killed through direct or indirect means. This is true even if, to date, the violence in Darfur has lasted ten times longer than it did in Rwanda. In short, the violence in Rwanda was more intense than that in Darfur—it was faster and more murderous.

The modes of violence follow the same logic. In Darfur, forced displacement, destruction of villages, destruction of the means of survival, killing of men, and mass rape are the principal modes of violence.⁵ Of these, forced destruction and destruction of villages are the primary modes of violence and the primary source of mortality in Darfur. Lacking access to food, clean water, shelter, and medical care, many displaced Darfuris have died because of disease and malnutrition. According to the CIJ report, direct killing accounts for about 35% of all deaths.⁶ Again using the CIJ estimate, the number displaced in Darfur is about seventeen times the number directly killed. (As of this writing, an estimated 2.4 million people have been forced from their homes and are living as refugees in Chad or internally displaced persons [IDPs] within Sudan.) In short, forced displacement—and the related consequences of disease and malnutrition—is the primary source of death, and this, as we shall see, stands in contrast to Rwanda.

The violence in Darfur has primarily been against black Africans. Ethnicity in Darfur is complex, and I discuss it below. But perpetrators often characterize the targets of their violence as “blacks,” “Nubas,” or “Zurgas.” Darfur is home to three large black African tribes—the Fur, the Massaleit, and the Zaghawa—and perpetrators appear to attack anyone who belongs to these groups. Various investigations are consistent on this point: the violence is deliberately waged against Darfur’s black African populations.⁷

The perpetrators in Darfur are mainly government soldiers and militias. The Sudanese Air Force has also participated in attacks by bombing villages before soldiers and militias launch ground attacks. There is considerable evidence that the militia, army, and air force act in a coordinated fashion. Soldiers and militias sleep in the same camps; the government also has supplied the militias, who most frequently go by the name “janjaweed” or “janjiwid.”⁸ After studying the matter in some depth, U.S. officials at the State Department concluded that there was close coordination between Sudanese armed forces and the militias.⁹ Militia leaders also readily admit that they are acting on government orders.¹⁰

How does all this compare with the situation in Rwanda? In general, the character of violence was similar—in both cases, the violence was directed by the state, targeted at a particular ethnic population, and intended to destroy that ethnic population in substantial part. If the standard for determining “genocide” is the legal one established by the International Criminal Tribunal for the former Yugoslavia (ICTY), both are cases of genocide. That said, direct killing was the primary mode of violence in Rwanda. Where Tutsis were found, they were most often killed; there was relatively

little forced displacement. The violence in Rwanda also happened countrywide (rather than in one region), and it occurred over a much shorter period of time. In Rwanda, perpetrators additionally attacked and killed leading Hutu opposition politicians and Hutus who openly refused to participate in the genocide. Such intra-ethnic violence appears to be less present in Darfur.

Rwanda, like Darfur, experienced significant levels of sexual violence. Some authors estimate that 250,000 to 500,000 rapes were perpetrated during the Rwandan genocide. However, that number is a somewhat imprecise estimate: it is based on the number of pregnancies from rape reported after the genocide.¹¹ Sexual violence is so commonly reported in Darfur that it may be more prevalent in that case than in Rwanda.¹² More research on the question is needed. As in Darfur, destruction and looting of property were features of the violence in Rwanda. Many homes of Tutsis and dissident Hutus were destroyed, both before and after Tutsis were killed; Tutsi homes were also occupied during and after the genocide. But in Rwanda, unlike Darfur, few villages (or other administrative units) were completely destroyed. Prior to the genocide in Rwanda, Hutus and Tutsis in Rwanda lived side by side throughout the country; there were almost no administrative units where only Tutsis lived. As a consequence, the destruction of homes was selective, while in Darfur entire villages were routinely destroyed.

Concerning the perpetrators, as in Darfur, Rwanda's *génocidaires* included soldiers, police, and militia. In many instances, Rwandan soldiers and militia were instrumental in the largest massacres at church sites, schools, and other locations where large numbers of Tutsis had gathered. However, one difference between the two cases concerns civilian mobilization. In Rwanda, state and military officials deliberately sought—and sometimes required—the participation of large numbers of Hutu civilian men who, until that point, had had no prior history of violence. The result was that even though soldiers and militias often were involved in killings of the greatest magnitude, ordinary civilian men were probably more numerous in the perpetration of the genocide than were soldiers and militarily trained militias. Ordinary civilian participation in Darfur seems less present.

The violence in Darfur and that in Rwanda are both examples of state-directed, large-scale violence against civilian populations defined in ethnic terms. Both cases resulted in massive loss of life (in Darfur, the loss of life continues); both have significant levels of sexual violence; and both involve soldiers and militias. The main differences concern intensity. The violence in Rwanda was faster, more exterminatory, and more participatory—that is, it involved the participation of far larger numbers of civilians—than in Darfur. In short, these cases are of the same genre. They are both cases of genocide—if the standard for genocide is the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (UNCG). However, the two cases are not identical.

Origins of Violence in Darfur

The roots of violence in Darfur and Rwanda are complex, but the two cases have a number of commonalities that, themselves, have theoretical implications. Darfur's violence has intersecting local, national, and regional lineages, some stretching back several decades.

The first principal long-term lineage of the violence in Darfur relates to local resource conflicts and local ethnic conflict. Identity is not straightforward in Darfur (nor in Rwanda; more on the latter below). The region is home to more than three

dozen ethnic and sub-ethnic groupings, but within those groupings there are two main intersecting cleavages. The first is between sedentary farmers and semi-nomadic herders; the other is between black Africans and Arabs. The two cleavages usually overlap—that is, Arab families often engage in semi-nomadic pastoralism, while black African families often engage in sedentary agriculture. That said, many Arab families grow crops, and many black Africans raise livestock. Both groups also participate in non-farming and non-husbandry professions. Moreover, “black African” and “Arab” are somewhat misnomers, in that the two populations, partly because of intermarriage, have similar physical appearances, and everyone is technically African. The groups are also uniformly Muslim. Nonetheless, the Arab and black African social categories exist and are meaningful to Darfuris.

In recent years, several factors have increased tension between Arabs and black Africans in the region. Starting in the 1980s, in particular, drought, famine, and desertification increased competition for dwindling resources, especially water and grazing areas. Herders encroached on agriculturalists’ lands, leading to mutual arming. Some nomadic herders began purchasing weapons to protect their livestock and to increase the roaming range of their animals, while some farmers bought arms to protect their land.¹³

National policies and politics increased the local tensions. Northern Arabs have dominated the Sudanese state since independence. That domination is the source of a long-running civil war between north and south in Sudan (more below). As conflict in Darfur escalated, government leaders in the capital, Khartoum, backed local Arabs. Northern leaders supplied weapons to local Arabs and promoted Arabs in local government positions, thereby increasing Arab power and leverage in the region and marginalizing black Africans.¹⁴

There was also a regional dynamic, involving a conflict between Chad and Libya. In order to unseat a government in Chad, Libyan leader Muammar al-Qaddafi funded Chadian rebels based in Darfur. The presence of Chadian rebels in Darfur in the 1970s and 1980s had two principal effects. The first was that it led to the availability of cheap weapons, which facilitated the arming of both local Arabs and local Africans. The second was that the Chadians and Libyans, in particular, introduced and promoted Arab supremacist ideology in Darfur. Libya is also the source of a Darfuri Arab supremacist organization called the “Arab Gathering” or “Arab Union.”¹⁵

The sequencing of these local, national, and regional influences is not yet clear. But this brief discussion highlights two important points. First, conflict between Arabs and black Africans in Darfur was real and salient prior to the eruption of mass violence in 2003; the conflict intensified in the 1980s and continued through the 1990s. Second, the ethnic divisions have a history—the conflict is not one of “ancient hatreds” but, rather, one whereby particular conditions and influences increased the salience of ethnicity and intensified tension between groups. As some Darfuris claim, “Conflict defines origins”—that is, identity-based cleavages are as much the consequences as the causes of violence.¹⁶

There is another, more proximate lineage to the violence in Darfur—namely, the gradual ending of the civil war between the northern, Arab-dominated government, on the one hand, and Christian and animist black southerners, on the other. Various iterations of the North–South war have afflicted Sudan for all but ten years since the country’s independence from Britain in 1956. Since 1983, alone, the war in the south has cost an estimated two million lives. Beginning in 2001, however, the government and the main southern rebel movement, the Sudan People’s Liberation Movement

(SPLM), entered into comprehensive peace negotiations. After numerous rounds of talks, the two sides reached agreement; in January 2005, government and rebel delegations officially ended the war, to much international acclaim. However, Darfur was not represented in the negotiations. Black Africans in Darfur, who had felt marginalized because of government-supported discrimination and who had conflicted with local Arabs in the past, worried about their future in post-war Sudan. Those various concerns led two black African groups to launch an armed rebellion against the Sudanese state in 2003.¹⁷

Civil war is the other principal proximate origin of genocide in Darfur. After officially launching the rebellion, rebels in Darfur won a series of battles against government forces.¹⁸ The government responded by arming and supporting Arab militias; together, they targeted the rebels *and* the rebels' presumed supporters: "black Africans" became the enemy. The result is what we have seen: coordinated military–militia attacks on the black African population of Darfur. The goal—according to a document cited by Julie Flint and Alex de Waal—became to "change the demography of Darfur and empty it of African tribes."¹⁹

Origins of Violence in Rwanda

The roots of violence in Rwanda have much in common with those in Darfur. In Rwanda, ethnicity was a salient cleavage that pre-existed the mass violence, although, as in Darfur, ethnic difference in and of itself also did not cause violence during most periods. In Rwanda, there are two principal ethnic groupings, Hutu and Tutsi (though other identities, including regional, class, *and* clan, also matter). Hutus and Tutsis do not fit a standard model of deeply divided ethnic groups. The two groups speak the same language, practice the same religions, live in the same regions, and share numerous other attributes. Hutus and Tutsis in Rwanda also intermarried frequently, at least before the genocide.

That said, Rwanda has a pronounced history of political ideologies based on ethnicity and race. That history is long (and beyond the terms of this article), but the colonial and independence periods are critical to understand. The colonial experience racialized and hardened previously more fluid and more complex identities.²⁰ The exact precolonial nature of the Hutu and Tutsi categories is unclear, but they related to status, economic activity, and relationship to the monarchy. Europeans, however, saw Hutus and Tutsis as races, and the colonialists favored the Tutsis, whom they viewed as a superior race. In the colonial system, Tutsis were systematically favored, and an elaborate racial discourse developed to support Tutsi power. That changed at independence, when Hutu counter-elites argued that Hutus should rule because they were the majority (constituting about 85% of the population). The Belgians ultimately backed that position, giving birth to the "Hutu Revolution," whereby Tutsis were violently ousted from power, the monarchy was abolished, and Hutus came to dominate the newly independent Rwanda. An ideology of Hutu rule remained a part of Rwandan political culture, particularly among elites, even if, on a day-to-day basis, ordinary Hutus and Tutsis interacted without hostility at most times from independence through the 1990s.

Like Darfur's, Rwanda's genocide also had proximate roots. In particular, the mass violence in Rwanda occurred during a civil war. Rwanda experienced two primary phases of war. Between 1990 and 1993, Tutsi-dominated rebels fought Hutu-led government forces. In August 1993, the two sides signed a peace agreement, but on 6 April 1994, the Rwandan president was assassinated, which triggered a new round of

the civil war. The genocide occurred during the second phase of the civil war, and the logic of war was central to the rationale for killing Tutsi civilians. Tutsis—all Tutsis—were labeled rebel accomplices and killed as wartime “enemies.”

Like Darfur’s, Rwanda’s violence occurred during a period of political upheaval. In Sudan, the sources of political change and instability were the peace negotiations with the southern rebels and factionalism within the ruling party.²¹ In Rwanda, the sources of change and instability were the civil war, the peace negotiations, and the transition from a single-party to a multi-party state. In Rwanda, the civil war displaced tens of thousands; the 1993 peace agreement called for a major restructuring of the army; and multi-partyism undermined and threatened the power of ruling elites (as did the civil war).

In short, the two episodes have some causal factors in common. In particular, the violence took place in the midst of a war between governments and rebel groups that, respectively, had strong ethnic identifications. In both episodes, the violence happened during a period of political turmoil and change. And in both countries there pre-existed political ideologies based on ethnicity and a history of ethnic identification. The point is not that there was “ancient ethnic hatred” in both places but that ethnic classifications and ethnic political ideologies were meaningful and resonant prior to the violence.

But, as previously mentioned, violence in Rwanda was more intense and more exterminatory than that in Darfur. One reason for this may relate to the character of state power. In contrast to Sudan, Rwanda is a compact, densely populated country with centralized and locally intensive state institutions. The Rwandan state also has a long history of forced labor, a history that dates back to the precolonial period (and extends into the colonial and postcolonial periods). The geography is one of rolling, farmed or grazed hills—making the rural population vulnerable to local surveillance. By contrast, Sudan is a vast, sparsely populated state with a more decentralized governing structure. Darfur has, moreover, experienced political and administrative neglect since well before independence.²² The result is that Sudan’s state capacity for local control and civilian mobilization is less than Rwanda’s. The patterns of violence follow: in Darfur, the violence is slower, less intense, and less participatory than in Rwanda. The character of state institutions and power in both places may, in part, explain this variation.

Theoretical Implications

What, if any, are the theoretical implications of this brief comparative analysis? The analysis is not a definitive test of different theories of genocide. Nonetheless, the comparison does yield some theoretical inferences, and it does provide some evidence to support (and detract from) different existing explanations of mass ethnic violence.

Viewed together, Darfur and Rwanda provide evidence to support the hypothesis that genocide happens in periods of political upheaval and transition.²³ By contrast, the evidence detracts from theories such as those of Rudolph Rummel, who claims that absolute power is a precondition for genocide.²⁴ In both Rwanda and Sudan, national elites chose radical, genocidal measures as their power eroded or threatened to erode. In both cases, the sources of the erosion were sharp divisions within ruling coalitions, looming elections combined with limited public support for ruling parties, peace negotiations that would have led to significant change, and civil war. It was in this context of fractured and fracturing power—not one of absolute, uncontested dictatorship—that national elites, who still dominated key institutions such as the military, chose extreme strategies to maintain their control and dominance.

Darfur and Rwanda also provide evidence to support the hypothesis that war and genocide are causally related. In both cases, genocide happened during periods of intense civil war. Perpetrators in both cases linked the logic of war to the logic of mass violence; that is, they justified their tactics as counter-insurgency and self-defense. Moreover, in both cases the strategy of mass violence occurred as government forces were on the defensive. In Rwanda, Hutu hardliners committed genocide as they were losing ground to rebels; in Darfur, hardliners advocated mass violence after the rebels won a series of victories. That war was a central causal factor in the Rwandan genocide is a central conclusion of my own research.²⁵ Scholars of genocide increasingly point to the importance of war.²⁶ Darfur provides further evidence to confirm the claim. Intense, defensive episodes of civil war combined with political upheaval and fractured power appear to drive extreme violent measures on the part of ruling elites.

Scholars of genocide have consistently highlighted a relationship between ideological notions of perfection, utopia, and purity, on the one hand, and mass violence, on the other.²⁷ The idea that genocide is rooted in top-down ideological attempts to create utopias has clear application to the Nazi case, as well as to Cambodia under the Khmer Rouge. However, Darfur and Rwanda do not lend clear support to the hypothesis. In both cases, ideologies of ethnic nationalism and exclusive ethnic rule pre-existed the violence (see below), but in neither case do there appear to be the kinds of messianic, metaphysical, and fantastical notions associated with creating perfection. In Darfur and Rwanda, war, fractured power, political upheaval, and the associated material fears drove the radicalization of national elites more than utopian, revolutionary visions of society did.

Both Rwanda and Darfur indicate the importance of ethnic nationalism, but in surprising ways. In Rwanda, an ideology of majoritarian Hutu nationalism underpinned each post-independence government before the genocide. In Sudan, Arab nationalism has been a consistent feature of Khartoum governments since independence.²⁸ At the same time, however, in both cases the mass violence happened as—or after—ruling elites had entered into peace negotiations with formerly excluded groups. In Rwanda, just prior to the genocide, the Habyarimana government had signed a peace agreement (the Arusha Accords) with Tutsi rebels; in Sudan, as Darfur broke, the al-Bashir government was in the process of finalizing a peace deal with southern rebels. Many argue that Rwanda's peace deal led to extremism; the compromise with Tutsi rebels angered nationalists, who then turned to irregular measures to keep power.²⁹ It is unclear whether something similar happened in Sudan. But genocide did not happen during a period of official insistence on exclusive ethnic nationalism; rather, in both cases, the mass violence happened after or during peace negotiations with previously excluded "others." None of this detracts from the claim that ethnic nationalism is an ideological foundation for genocide.³⁰ Empirically, however, the evidence from both cases suggests that the timing of mass violence relates to when the ethnic exclusivity of a ruling coalition is ending or threatens to end.

Rwanda and Darfur also provide some evidence about the importance of ethnicity to genocide, but, again, in surprising ways. Some theories suggest that deep divisions, hatred, and widespread prejudice are essential conditions of large-scale violence and genocide.³¹ Ethnicity was salient before the mass violence in both Darfur and Rwanda. However, what is unusual about these two cases is that the communities in question lived in relative proximity, and thus both Darfur and Rwanda suggest that ethnic proximity may matter more than ethnic distance in producing mass violence. In Rwanda, Hutus and Tutsis are interconnected populations. Not only do Hutus and

Tutsis speak the same language, practice the same religion, and so forth, they also, before the genocide, lived next door to one another throughout the country and intermarried. In Sudan, much of the country is deeply split between northern Arab Muslims and southern black Christians and animists. But Darfur does not fit that mold. As noted above, Darfuris are uniformly Muslim; Arabs and Africans live in relative proximity (at least compared to Arabs and black Africans in other parts of the country); and there was some intermarriage between the groups.

Why ethnic proximity might lead to mass violence is less clear. It may be that proximity increases security fears in wartime. It may be that opportunity for violence is greater: if ethnic groups live in distant parts of the country, then mass killing becomes more difficult. It may be that proximity increases information, which, in turn, facilitates killing. These (and other) hypotheses deserve more research. The argument does not apply to all cases of genocide; it would appear not to work, for example, for the Armenian genocide (though it does appear to work for what took place in Bosnia in the 1990s). The point is only that the evidence from Darfur and Rwanda indicates that mass violence happens among relatively proximate ethnic communities, and this may offer some clue as to why violence happens on this scale.

The various claims in this section are neither comprehensive nor conclusive. Objections may be raised to each of the arguments. Every war does not lead to genocide, every period of political instability does not lead to extremism, and there are many instances of ethnic proximity in which peace holds over time. Each point needs theoretical refinement. Nonetheless, the comparison does reveal some counterintuitive patterns, and it does generate theoretical inferences, which, in turn, point the way for further comparative research.

International Responses

Darfur and Rwanda are instructive for what they demonstrate not only about causal dynamics but also about prevention strategies (or lack thereof). Darfur and Rwanda are “negative” cases in that a concrete policy to stop the killing did not take shape in either episode. Analyzing the cases together offers some insight into why or why not. After Rwanda, analysts and activists gleaned certain lessons about how to generate an effective international response to genocide. Those lessons, in turn, shaped the social and activist response to Darfur. Yet the strategies that emerged around Darfur have not yet been successful in leading to a policy to halt the violence. Thus Darfur highlights dimensions that Rwanda did not, and comparing the cases offers insight that would not be evident if only one of the cases were considered in isolation.

The Genocide Debate

Darfur and Rwanda both show(ed) that terminology debates are central, and probably inevitable, when crises of such magnitude break out. In particular, whether to label each case one of “genocide” was (and continues to be, in the case of Darfur) a major point of discussion, though the outcomes differed. In the Rwandan case, powerful international actors chose *not* to use the word “genocide.” US State Department spokespeople were told that they could only refer to “acts of genocide.” That directive led to the now infamous exchange in which spokeswoman Christine Shelly was pressed on whether genocide was happening in Rwanda but would only acknowledge “acts of genocide.” How many “acts of genocide” does it take to make genocide? she was asked. Shelly would not answer.³²

The issue within the Clinton administration was that intervention was not a viable policy option. Less than a year after American soldiers were killed and dragged through the streets in Mogadishu, top American officials had no appetite for deploying troops in a risky situation in Central Africa. Nor did UN officials want to expose peacekeepers to increased risk after Somalia.³³ The label “genocide” mattered because American officials worried that under the UNCG, which the US Senate had ratified, the United States would be obligated to act if the government formally recognized that genocide was occurring. Since forceful action was off the table, American officials did not want the term “genocide” used—despite overwhelming evidence that genocide was indeed occurring in Rwanda. Many observers concluded that the take-away lesson from Rwanda was that, even in the face of resistance to intervention, calling the violence “genocide” would trigger a forceful response.

Fast-forward to Darfur. In 2003, as the crisis unfolded, Darfur received little international attention. But 2004 was the tenth anniversary of the Rwandan genocide and the year that the violence in Darfur deepened. Both issues led to increased attention to Darfur. Given the experience of Rwanda a decade before, one focal point for activists was to pressure US officials to label the violence “genocide.” During the summer of 2004, in particular, President George W. Bush came under pressure from an unusual coalition of actors to call Darfur “genocide.” Congress passed a unanimous and historic declaration labeling the violence in Darfur “genocide.” In response, Secretary of State Colin Powell hired an NGO, the Coalition for International Justice, to conduct a survey that would allow him to make a determination. That, NGO, in turn helped establish the Darfur Atrocities Documentation Team (ADT), which traveled to Chad and conducted an innovative survey of more than 1,100 Darfuri refugees.³⁴

The results were convincing. The survey showed clearly that the violence was directed at black African Darfuris, that the government supported the violence, that the violence was widespread and organized, and that the aim was to destroy the population in substantial part. What was happening in Darfur was genocide. Powell subsequently appeared before a US Senate committee and declared that the term “genocide” applied to the violence in Darfur. The declaration was the first time a US administration official of such high ranking had conclusively declared genocide to be happening while the genocide was under way. Several weeks later, President Bush made the same claim in an address to the United Nations.³⁵

However, the genocide declarations did not result in the kind of policy that many had hoped for. On this, Powell was clear: a formal genocide declaration would not lead to concrete policy changes on the part of the US government. Instead Powell brought the measure to the UN Security Council, which eventually created a commission to determine if, indeed, genocide was occurring. The resulting report by the UN Commission of Inquiry on Darfur documented the patterns of violence described by the Darfur ADT, as well as by other human-rights organizations and eyewitnesses. However, the commission concluded that “genocide” was not the right label because there was not conclusive evidence that Sudan’s leaders intended to destroy the black African population in substantial part. The commission’s report states that crimes against humanity had occurred—and that such crimes are as bad as genocide.³⁶ The UN Security Council referred the matter to the International Criminal Court, which has subsequently begun investigating the crimes committed in Darfur. But more than a year later, a concrete policy has yet to be put in place to stop the violence, despite the historic determinations of genocide.

What does all this show? First, the UNCG is not as powerful as some imagined. The convention holds that signatories are obligated to “prevent” genocide, but it lacks specific measures and mechanisms detailing how such prevention would work. In short, triggering the convention is not sufficient to provoke concrete international preventative action. There is thus a premium either on strengthening the convention, with a view toward making it more concrete, or on developing other protocols to trigger a forceful international response to massive violations of human rights (see below for more on the latter course).

Second, Darfur shows the risks of pushing too hard on a genocide determination. “Genocide” is a contested concept, one upon which reasonable people can disagree. Some people hold a broad view of genocide as large-scale mass violence directed against members of a particular social category, such as an ethnic or political group. Others hold a narrower view of genocide as extermination.³⁷ The violence in Darfur is not a clear-cut case of intentional annihilation of an ethnic group, and hence some observers are uncomfortable using the label “genocide.” Gérard Prunier, for example, calls Darfur an “ambiguous genocide” and a “quasi-genocide.”³⁸ The UN Commission of Inquiry concluded that the term was not warranted. Other careful and thoughtful analysts reach the same conclusion.³⁹ The point is that real differences do exist in defining “genocide,” and Darfur shows that those differences will surface in the midst of crises and during situations that are not clear-cut cases of extermination. By extension, insisting too narrowly on using the label of “genocide” can, and in this case did, impede a policy discussion about how to halt the killing.

Domestic Constituencies

Darfur and Rwanda also provide an instructive contrast on domestic constituencies. In Rwanda, there was fairly little activism as the genocide unfolded. Human-rights organizations lobbied the Clinton administration and United Nations representatives, and many newspapers put Rwanda on their front pages, especially toward the end of the crisis. But there was no great public outcry to stop genocide in Rwanda.⁴⁰ To be sure, the violence there was quick, and thus there was limited time to generate significant domestic pressure on the issue. Nonetheless, the lesson from Rwanda was that if activists expected political leaders to take risky and costly preventative actions, then they needed to lobby their representatives and to create domestic momentum. After reviewing various twentieth-century cases of genocide, Samantha Power concludes that “the battle to stop genocide has . . . been repeatedly lost in the realm of domestic politics.”⁴¹ For the battle to be won, argues Power, constituents, civil society, elite opinion makers, and bureaucrats within the government need to pressure representatives to create the necessary political will.

Darfur was different. In 2003, it is true, the violence received little international attention. But the situation changed in 2004 and 2005; in particular, in 2004, a UN official compared Darfur to Rwanda;⁴² the tenth anniversary of the events in Rwanda took place (and generated much interest and concern for Darfur); and the film *Hotel Rwanda* was released, giving considerable visibility to Rwanda and to genocide. Starting in 2004, a powerful and politically diverse informal coalition formed to pressure the Bush administration. That coalition included evangelical Christians, African Americans, human-rights organizations, Jewish-American groups, and government officials who were angered at what had happened in Rwanda a decade earlier. High-profile journalists, especially *New York Times* columnist Nicholas Kristof, wrote powerfully and doggedly about Darfur. There was also very vibrant

student activism on Darfur on dozens of college and university campuses in the United States and Canada.

Rarely has there been such sustained, widespread, and politically eclectic domestic, civil-society activism on a foreign-policy issue, especially one that concerns Africa. African politics and issues only infrequently make editorial pages and only rarely become the subject of activist campaigns. Even then, particular issues remain salient only for short periods. Not so with Darfur: the pressure has been fairly consistent and persistent, even if the tsunami in December 2005 distracted attention from Darfur, at least for a while. US officials were responsive: domestic pressure resulted in the historic declarations of genocide, as we have seen. But the domestic pressure was not sufficient to generate a concrete policy to stop the genocide. Power may be right that the battle to halt genocide in the past has been lost in domestic politics, but it is also hard to imagine a more politically appealing and pervasive constituency forming on a human-rights issue in an African country. In short, Darfur shows that domestic pressure may be necessary, but it is not sufficient.

Obstacles to Intervention

In truth, there are many reasons why no intervention policy materialized. American troop commitments in Iraq and Afghanistan, as well as the course of the former war, made it politically difficult for US officials to deploy soldiers to an African country where they would have a strong moral purpose but lack a clear exit strategy. That being the case, a critical question is why other international actors did not take a leadership role on Darfur. Indeed, the battle to stop genocide in Darfur was lost less in domestic American politics than in the international arena. This, too, is a lesson from Darfur: international politics matter for developing a coherent and effective response to genocide.

Domestic constituents pressured American officials on Darfur, and American officials, in turn, brought the issue to the UN Security Council; it was there that the momentum to change policy on Darfur fizzled. American officials may be criticized for not doing more on Darfur, but it is clear that the American initiative ran into a phalanx of opposition at the Security Council. In particular, China and Russia initially blocked any serious resolution to punish Sudan through sanctions. In April 2006, however, China and Russia abstained on a US proposal to impose limited sanctions on both government forces and rebels. Still, there remains hostility to the idea of authorizing a military force to intervene in Darfur with a forceful mandate. China obtains a significant share of its oil from Sudan and has substantial investments there; Russia sells weapons to Sudan. Moreover, both countries are generally hostile to the idea that human-rights issues trump sovereignty. As two of the five permanent members of the Security Council, Russia and China acted as effective veto players when it came to harnessing the United Nations to take preventive action in Darfur.

Even beyond Russia and China, however, the issue of Darfur never gained much traction. In particular, Darfur did not capture the kind of public or political attention or concern in Europe that it did in the United States. Why Darfur never gained a head of steam in Europe is a story that remains to be written. Did Iraq cast a shadow over Darfur? That is, after Iraq, did the European public and political establishment distrust American leadership, especially concerning military action in an oil-producing, Arab-identified state? Or is the reason that the European Union is not an effective foreign-policy-making institution for dealing with crises outside Europe? The issue requires further investigation. Predictably, American officials encountered suspicion and opposition in the Arab world as they pressed for action on Darfur. The

responses of African leaders were more mixed. In the end, the African Union deployed troops on a ceasefire-monitoring mission, but the troops' mandate was limited to protecting monitors and did not extend to protecting Darfuri civilians. The AU troops also lacked the resources, troop strength, and training to halt the violence.⁴³

The issues underlying international paralysis in the face of genocide will not be easy to resolve. Despite widespread ratification of the UNCG, and despite repeated claims that halting massive abuses of human rights is a top priority of the United Nations, there remain deep divisions between states over the use of military force to stop genocide. The issue of sovereignty is particularly contentious when the intervening powers come from the West or the North and the subjects of intervention from the South, or less powerful states in general. There is clearly international suspicion that humanitarian intervention will be a mask for material and strategic interests. Powerful states may sidestep international disagreement when cases erupt near their borders. In 1999 in Kosovo, for example, American and Western European leaders employed NATO forces when Russia, China, and other countries blocked the Security Council from authorizing force. But for cases where less is at stake economically and strategically—those in Africa, for example—ignoring international opposition and sidestepping the United Nations become more difficult.

One way forward is to clarify international protocols for confronting genocide and for using military force to stop it. This would require renewed debate on the vexing questions surrounding humanitarian intervention.⁴⁴ The “Responsibility to Protect” framework is a key initiative, one that received nominal backing at the 2005 UN summit in New York. But many concrete issues remain. Central to any policy will be determining a threshold for intervention, establishing clear mechanisms to identify the threshold, and clarifying international protocols for deploying the use of force once a threshold is met and other options are exhausted. Consensus on these issues remains distant, and it would be naïve to think that finding consensus will be easy. But Darfur shows that without resolution on some of these matters, there is little reason to expect a concrete and effective international response to genocide when it occurs.

The importance of international civic coalitions is another lesson from Darfur. American audiences took to heart the lessons from Rwanda, as we have seen. They were told that their representatives' phones needed to ring. Activists, in turn, developed a diverse coalition and successfully lobbied American legislators and the administration as the Darfur genocide unfolded. The effort was successful. But the international stage was where a policy to halt the violence in Darfur lost momentum. Clarifying international protocols to stop genocide will help, as I have argued, but so, too, will building an international coalition to prevent genocide.

...

In early May, as this issue was going to press, there were signs of progress. Responding to a new and intense round of lobbying, US officials initiated a major diplomatic effort to obtain a peace agreement between the Sudanese government and the Darfuri rebels. British, Canadian, and some African governments strongly supported the initiative. After days of intense negotiations, Sudanese government officials and the largest Darfuri rebel faction signed an agreement. Two rebel factions refused. The peace deal could lead to a lull in the violence and to a UN peacekeeping force in Darfur, though it is too early to know whether either will happen. But the diplomacy demonstrated the kind of coordinated and international effort required to make genocide prevention a reality.

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GENOCIDE STUDIES AND PREVENTION

AN INTERNATIONAL JOURNAL

The US Investigation into the Darfur Crisis and the US Government's Determination of Genocide

Samuel Totten
University of Arkansas, Fayetteville

This article examines the genesis and implementation of the Atrocities Documentation Project initiated by the US State Department as well as the US government's determination that genocide had been perpetrated in Darfur, Sudan, between late 2003 and August 2004. In doing so, the author considers and analyzes the rationale for the investigation and the reasoning for the genocide determination, as given by various US officials. He also delineates and discusses the perceptions of various scholars vis-à-vis the same issues, noting that many of the latter suspect there were ulterior motives behind the genesis and implementation of the investigation as well as the genocide determination. Finally, the author discusses the positive aspects of the investigation and the potential negative ramifications of the genocide determination.

Introduction

In July and August 2004, the US Department of State sponsored a field investigation, the Darfur Atrocities Documentation Project (ADP), whose express purpose was to ascertain whether genocide had been and/or continued to be perpetrated in Darfur. By that point, the Darfur crisis had been declared “the worst humanitarian disaster in the world” by Jan Egeland, the UN under secretary for humanitarian affairs;¹ the United States Holocaust Memorial Museum's Committee on Conscience had issued a genocide warning vis-à-vis the killings and death in Darfur; and both the US House of Representatives and US Senate had declared the situation to be a case of genocide.

Following an analysis of the data collected by the Darfur Atrocities Documentation Team (ADT), Secretary of State Colin Powell declared, on 9 September 2004, in a statement to the US Senate Foreign Relations Committee, that genocide had been perpetrated in Darfur.

In the year and a half since the investigation and subsequent declaration by Powell, heated debate has erupted over the true motives and value of the ADP as well as over the validity of the genocide determination. Some have asserted that while crimes against humanity have been perpetrated in Darfur, genocide has not. What follows is a discussion of the stated purpose, methodology, and findings of the ADP, as well as the debate over the motives behind the project and the determination of genocide by the US government.

Purpose, Location, Methodology

As noted above, during the late summer of 2004, the US Department of State undertook an investigation to assess whether government of Sudan (GoS) troops and/

Samuel Totten, “The US Investigation into the Darfur Crisis and the US Government's Determination of Genocide.” *Genocide Studies and Prevention* 1, 1 (July 2006): 57–78. © 2006 from *Genocide in Darfur: Investigation into Atrocities in the Sudan* edited by Samuel Totten and Eric Markusen. Reproduced by permission of Routledge/Taylor & Francis Group, LLC.

or the Janjaweed (Arab militia) had committed genocide against the black African population in Darfur. As Stephen Kostas notes,

By all accounts, Andrew Natsios' frequent warnings of a growing humanitarian crisis in Darfur first alerted the US Department of State to the gravity of the situation there. Natsios, head of the United States Agency for International Development (USAID), made nine trips to Sudan between late 2003 and spring 2004 and repeatedly warned key officials at the State Department that conditions were grave and deteriorating.²

Continuing, Kostas reports,

During early 2004, [Lorne] Craner, Assistant Secretary for the State Department's Bureau of Democracy, held regular intelligence briefs with the Bureau of Intelligence and Research (INR) and the Central Intelligence Agency (CIA). [Pierre-Richard] Prosper [then US ambassador-at-large for war crimes, who had previously served as the prosecutor for the International Criminal Tribunal for Rwanda (ICTR) case against Jean-Paul Akayesu and obtained the first conviction for genocide in an international court] recalls that "as we moved into the spring of 2004, it became a little clearer, at least from the information that was emerging from our people as well as NGOs [non-governmental organizations], that there was a deliberate targeting and killing of the African population."³

Significantly, the ADP was the first official investigation by one sovereign nation (the United States) into the internal strife of another sovereign nation (Sudan) for the express purpose of ascertaining whether genocide had been perpetrated or not.⁴ Under the auspices of the US Department of State's Bureau of Democracy, Human Rights and Labor (DRL), the Coalition for International Justice (CIJ), an NGO, was hired to recruit the investigators and to coordinate the investigation on the ground. Ultimately, twenty-four investigators from around the world formed the ADT. The areas of expertise and backgrounds of these investigators were eclectic; the investigators included, for example, an expert in the field of sex crimes and international law; a prosecutor for the US Justice Department (who had also served as a prosecutor for the ICTR); a New York City district attorney (who had worked as an investigator with the International Criminal Tribunal for the former Yugoslavia [ICTY]); two experts on genocide; and a detective from London who had served as an investigator with the ICTY.

Upon their arrival in Abeche, a desert town in the far reaches of eastern Chad, the investigators were briefed by both CIJ and USAID personnel on the then current situation in Darfur and the status of the refugee camps in Chad. Additionally, they were given several hours of training. The US State Department's Bureau of Intelligence and Research (INR) provided a detailed discussion of the research methodology and questionnaire devised for the investigation, emphasizing throughout the significance of conducting a systematic study with a random selection of respondents. The training also included a tutorial by a female police officer from the United States (who had also worked as an investigator with the ICTY) on interviewing victims of sexual assault. As each investigator would have his or her own interpreter who spoke Arabic, English, and one or more tribal languages, a session on working with interpreters was provided, conducted by a professor of linguistics, an expert on translation and working with translators, from the University of Stockholm.

Following the training session, teams of investigators were dispersed to informal settlements and UNHCR refugee camps lining the Chad side of the Chad/Sudan border which housed black African refugees forced from their villages in Darfur by GoS troops and/or the Janjaweed. As noted in the State Department's report on the ADP,

“a plurality of the respondents were ethnic Zaghawa (46 percent), with smaller numbers belonging to the Fur (8 percent) and Massalit (30 percent) ethnic groups.”⁵

Once in the field and ready to conduct interviews, each investigator and translator selected a section of the camp and counted off every tenth tent. If more than one adult (eighteen years of age or older) was present, a method of randomly selecting the interviewee was used and the person selected was asked if he or she was willing to be interviewed. (Few people declined to be interviewed, and when they did it was generally due to being extremely, if not gravely, ill or when engaged in work that had to be completed. In such a situation, the interviewer and interpreter moved on to the next occupied tent and the process of selection was repeated.) Once a person agreed to be interviewed, the rest of the people in the immediate area were politely asked to leave until the interview had been completed. This precaution was taken to enable respondents to answer the interview questions as honestly and openly as possible, without pressure or interference from family members or others.

All investigators used the eight-page Darfur Refugees Questionnaire, developed in Washington, DC, via a collaborative effort involving members of various non-governmental organizations (including the CIJ), the American Bar Association, and staff from the State Department.⁶

Initially, the investigator asked his or her interpreter to introduce himself (the translator), then the investigator. Then, through the interpreter, the investigator delineated the purpose and focus of the interview. The interviewee was informed that the investigator was there to speak with him or her about his or her experience in the Darfur region of Sudan and that his or her name, identity, and responses would remain confidential. The investigator also informed the interviewee that participation in the project did not, in any way, guarantee compensation for that which had been stolen from him or her, nor did it guarantee that he or she would be asked to press charges against an alleged perpetrator or to testify at any future trial(s). Finally, each interviewee was informed that he or she should only agree to be interviewed if he or she truly wanted to be, as participation was totally voluntary and there would be no repercussions for choosing not to participate.

The interviewer began by seeking such information as the name, age, ethnic group, and years of schooling of the respondent. Subsequently, interviewees were asked to locate, on a series of maps provided for the investigators by the State Department, the town, village, or settlement from which they had been forced. Next, the interviewees were asked about when and why they had left their homes; if they had been harmed (and, if so, how); if other members of their family or their village had been harmed or killed (and, if so, who and how); if any property had been stolen from them or destroyed (and, if so, exactly how many cows, camels, goats, donkeys, chickens, bags of grain and seed, etc.); if their abode and/or village/settlement had been destroyed, partially or completely; if specific groups of people had been singled out for denunciation and/or brutality (and, if so, who and in what way(s)); if any members of their immediate family, extended family, and/or fellow villagers perished on the way to the refugee camp or settlement in which they were now residing in Chad (and, if so, who and how); why they thought they had been attacked and forced from their homes; and if, on the journey to Chad, they had witnessed or heard about other attacks on people and villages.

The interviews lasted between forty-five minutes and two hours; the average was about one hour. During the course of each interview, the investigator asked follow-up questions in order to have the respondents clarify and elaborate on points and to move

from the general to the specific (e.g., if four attackers entered a home, were they members of the GoS and/or Janjaweed? What were the attackers wearing, and did they have any particular insignia on their uniforms or any noticeable marks, such as tattoos, scars, or disfigurements, that might help to identify them later?).

At the conclusion of each day, the investigators completed a one-page “preliminary atrocity field coding sheet” that included some thirty-six items or “event codes” (e.g., witnessed an immediate family member being killed; had been wounded; heard any racial epithets, and if so, what they were; had livestock stolen from him/her, and, if so, what kind and how many of each; witnessed aerial bombing; experienced destruction of personal property, and, if so, what; experienced the looting of personal property, and, if so, what; was personally raped; witnessed others being raped; witnessed a shooting in home village). Additionally, there were about twelve “perpetrators codes” (e.g., GoS troops, Janjaweed, other).

Findings

Ultimately, the State Department statistically analyzed 1,136 interviews conducted during the month-long ADP. Following the compilation and analysis of the survey data,⁷ State’s Bureau of Intelligence and Research reported that “analysis of the refugee interviews points to a pattern of abuse against members of Darfur’s non-Arab communities.”⁸ More specifically, the interviewees reported personally witnessing or experiencing the following: killing of family member (61%); killing of non-family member (67%); shooting (44%); death from displacement (28%); abduction (25%); beating (21%); rape (16%); hearing racial epithets (33%); village destruction (81%); theft of livestock (89%); aerial bombing (67%); destruction of personal property (55%); and looting of personal property (47%).⁹

Significantly, the State Department report notes that “numerous credible reports corroborate the use of racial and ethnic epithets by both the *Jingaweit* and GOS military personnel: ‘Kill the slaves! Kill the slaves!’; and ‘We have orders to kill all the blacks’ are common.”¹⁰

With respect to those who carried out the attacks against the black Africans and their villages, the refugees’ responses indicated the following: “both the *Janjaweed* and the GOS military (48%); the GOS alone (26%); the *Janjaweed* alone (14%) and unknown (12%).”¹¹

The Factors Resulting in the Genocide Finding

Once the study was completed, the findings and analysis were turned over to US Ambassador-at-Large for War Crimes Pierre-Richard Prosper and US Secretary of State Colin Powell. Kostas, who interviewed Prosper in order to ascertain how the United States arrived at its “genocide determination,” reports that “Craner and Prosper presented the State Department’s approach as dispassionate and clinical. The purpose was ‘to make a pure decision’—a ‘clean legal and factual analysis’ free of policy considerations—[. . . and in doing so they] ‘analyzed the facts with the breadth of the law in mind—meaning, genocide, crimes against humanity, war crimes . . .’”¹²

Through a series of wide-ranging telephone conversations and meetings (between Powell and Prosper and between Powell and various assistant secretaries within the State Department) in which the participants compared and contrasted the findings of the ADP with the wording in the UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCG), it was gradually determined that genocide had been, and possibly continued to be, perpetrated in Darfur.

In speaking with Kostas and Eric Markusen during the course of a telephone interview, Prosper noted that he and Powell had had a long and detailed discussion regarding the important but always sticky issue of “intent” (i.e., the intent of the perpetrators). Among the issues they discussed were “how they [the GoS] created these militias [the Janjaweed]; how they [the GoS] had the ability to rein them [the militias] in and then did not; how they [the GoS troops] acted in concert with the Janjaweed . . . in attacking these [black African] villages . . . the aerial bombardment and then Janjaweed would come in; and then the fact that the government of Sudan would block humanitarian assistance to people in need.”¹³ The aforementioned actions (and, in certain cases, failures to act) led the State Department to infer genocidal intent.

Prosper also spelled out the factors State Department officials considered in coming to their determination of genocide, among the most significant of which were the following:

- the villages of the black Africans were attacked and destroyed, while nearby Arab villages were not;
- a large number of men were killed, while a large number of women were raped;
- the means to existence, such as livestock and water, were, respectively, killed and polluted; and
- the GoS prevented both medical care (and medicine) as well as humanitarian assistance from being delivered to the internally displaced persons camps, where people were dying from a lack of food, water, and medical attention.¹⁴

Ultimately, Powell, Prosper, and the other State Department personnel involved in the determination “concluded that there was a deliberate targeting of the groups with the intent to destroy.”¹⁵ Speaking about the latter, Prosper stated that while examining and discussing the concepts of unlawful killing and the causing of serious bodily and mental harm, any of which constitutes an act of genocide under the UNCG,

the real one that got us . . . was the deliberate infliction of conditions of life calculated to destroy the group in whole, or in part. . . [With respect to the situation in the IDP camps, Prosper and Powell could not find any] logical explanation for why the Sudan government was preventing humanitarian assistance and medicine [into the camps] other than to destroy the group.¹⁶

Kostas notes that “the government of Sudan was seen as offering unbelievable excuses, leading Powell to conclude that there was a clearly intentional effort to destroy the people in the camps who were known to be almost exclusively black African.”¹⁷

Finally, and tellingly,

Prosper’s experience as a prosecutor supported his understanding that genocidal intent could be inferred from the evidence as well as proved by express statements. As Prosper explains, Powell and he asked each other if the government of Sudan was not committing genocide then “What else are they trying to do?” “What else could their intent be but to destroy this group?” First, Powell and Prosper looked at the coordination and collaboration between the government of Sudan and the *Jinjaweid*. Then, Powell and Prosper examined how the government acted once they were shown to have knowledge of the perpetrators of violence, the targeting of black African tribes, and the scale of human destruction in Darfur. This part was most convincing: The government of Sudan “had knowledge across the board. Let’s pretend that it wasn’t coordinated. They knew what was going on and not only did they do nothing to stop it, they intentionally obstructed assistance that would have bettered the situation. So when you have knowledge, you take no steps to stop it, and then when people are trying

to help you block the assistance, what else could you want other than for these people to die or to be destroyed?”¹⁸

On 9 September 2004, in testimony before the US Senate Foreign Relations Committee, Secretary of State Colin Powell stated that, “based on a consistent and widespread pattern of atrocities (killings, rapes, the burning of villages) committed by the *Janjaweed* and government forces against non-Arab villagers,” the State Department had concluded that “genocide has been committed in Darfur and that the Government of Sudan and the *Janjaweed* bear responsibility—and genocide may still be occurring.”¹⁹ Continuing, Powell stated that

- the United States was continuing to press the GoS to rein in the *Janjaweed* and that the GoS needed to “stop being complicit in such raids”;²⁰
- the United States continued to strongly support the work of the AU monitoring mission in Darfur, and, in fact, “initiated the Mission through base camp set-up and logistics support by a private contractor”;²¹ and
- the United States had also called for an “expanded AU mission in Darfur through the provision of additional observers and protection forces” and “identified \$20.5 million in FY04 funds for initial support of this expanded mission.”²²

Then, acting under Article VIII of the UNCG,²³ Powell reported that the United States was calling on the United Nations to initiate a full investigation into the situation in Darfur. In doing so, he said, “We believe in order to confirm the true nature, scope and totality of the crimes our evidence reveals, a full-blown and unfettered investigation needs to occur.”²⁴

Finally, Powell concluded his statement with these words:

Mr. Chairman, some seem to have been waiting for this determination of genocide to take action. *In fact, however, no new action is dictated by this determination* (emphasis added). We have been doing everything we can to get the Sudanese government to act responsibly. So, let us not be preoccupied with this designation of genocide. These people are in desperate need and we must help them.²⁵

Strengths and Limitations of the Investigation, the Genocide Finding, and Action Based upon the Genocide Finding

The strengths of the ADP were many. More specifically, a methodologically sound study resulted from the thought, effort, and expertise put into the development of the questionnaire and the way the investigation was carried out. As part of the methodology, every one of the twenty-four investigators asked the same set of questions listed on the questionnaire and documented the findings using the same coding methods. The number of interviews conducted was large enough to result in statistically significant findings. Also, “the final data set used for the *Documenting Atrocities in Darfur* report represented three successive waves of data entry.”²⁶ More specifically, as Jonathan Howard, an analyst with the US Department of State’s Office of Research, reports,

As successive teams of interviewers rotated through Chad, the Office of Research hired an international public opinion research company to create a data set from the remaining questionnaires. [T]he company’s team of professional coders read each questionnaire thoroughly, verifying and correcting if necessary the interviewer’s field codes. In all three rounds of data entry, a fifth of the questionnaires were randomly selected and recorded by an additional analyst to ensure accuracy in the coding process.

Each questionnaire's demographic information, event codes and attendant information were entered into the data set. Every questionnaire was entered by two different data entry specialists, or double-punched, to verify that the correct information had been entered. Once the two data entry specialists separately entered the data from a questionnaire, a computer compared the two and flagged any discrepancies.

From the final data set, two databases were created. The first was the respondent database, in which each line of data represents an individual refugee with all related demographics and event codes for that refugee. 1,136 refugees are represented in the refugee database. The respondent data set was used to generate the atrocity percentages in the final report . . .

Because each respondent may have experienced the same event multiple times—numerous refugees had experienced several attacks during their journey to Chad—during the analysis stage it was necessary to write a syntax to prevent the statistical software from counting multiple events towards the total for the survey population . . .

A second event database was also created in which the multiple events from each refugee's story were separated so that each line of data in the event database reported a single event. 10,304 events are represented in the event database. . . . From the outset, the team decided to adopt a conservative approach to reporting the data collected during the documentation mission. To this end, during all three stages of data entry, events were coded as either eyewitness or hearsay. Eyewitness events were those reported to have been directly witnessed by the respondent, while hearsay events took place outside the respondent's presence. The atrocity statistics eventually reported reflected only events reported as eyewitnessed by the refugees.²⁷

The efforts of the State Department's people on the ground in Chad and those involved in the analysis of the data were seemingly impeccable. Indeed, State's personnel were serious, hardworking, dedicated, and demanding. From the outset, they seemed determined to collect and analyze the data in the most methodologically sound and accurate manner possible. Furthermore, the study resulted in findings that are statistically significant.²⁸

Be that as it may, the investigation had certain weaknesses and limitations. First, the most obvious limitation is that the investigation was conducted solely in Chad, rather than Darfur *and* the refugee camps in Chad. Had the ADP been given access to both those black Africans in IDP camps in Darfur and those who remained in any villages not destroyed (and, for that matter, to those Arab villagers who were not attacked but may have witnessed the attacks on the black Africans), the data would have been much richer. Entry into Darfur for the purpose of an investigation was not, it seemed, an option—or, at least, not one that the US government wanted to pursue at the cost of either totally alienating the Sudanese government or being rebuffed. Second, the respondent pool was largely limited to refugees from the westernmost states of Darfur, as well as those who, for the most part, had the shortest distance to travel to Chad. Again, the data would have been richer had the investigators been able to interview a wider swath of the black African population in Darfur. Third, as the interviews were being conducted in the first two weeks of the ADP, various investigators found that they were collecting information about certain categories/codings not listed on the questionnaire (e.g., questions about disappearances, sexual violence other than rape, separation by gender, targeting of the elderly, rebel activity in and/or near the villages). As a result, the coordinators of the ADP passed on such concerns and suggestions to other investigators spread out along the Chad/Sudan border. The question that remains is this: Were the other investigators informed in a timely manner about the additional categories? If not, did the investigators, of their own accord, add additional categories where they saw fit? If only some

of the investigators added additional categories, then the information collected in new categories would be incomplete. That said, *the major categories that the State Department used to make the determination of genocide were included on the questionnaire every investigator used, and thus the latter concern did not have much bearing, if any at all, on the final determination of genocide.* Finally, the process of delineating the data on the questionnaires could have been much more detailed (and uniform) had the investigators been directed to write up the most detailed narratives possible, as opposed to delineating the findings, as many did, in an outline format in which they highlighted and, in various cases, succinctly commented on key points.

According to sources within the US State Department, the final determination of genocide was arrived at in a methodical and deliberate manner whereby the evidence gathered during the investigation was compared to the exact wording and concepts delineated in the UNCG. Be that as it may, numerous scholars have called into question the motive(s) behind the determination of genocide. Some have not only questioned these motives but questioned, or attempted to refute, the validity of the determination.

Prior to highlighting some of the many debates surrounding the motives and validity of the determination, this author (one of the twenty-four ADP investigators, and one who believes that the determination of genocide was the correct one to make) wishes to raise some issues already alluded to in this article. Earlier comments quoted here indicate that the Bush administration felt pressed to display its concern over Darfur. For example, as Kostas notes, “U.S. policy in Sudan was already of special interest to the Bush administration, and had an important domestic constituency: the evangelical Christian community. Evangelicals had taken an interest in the plight of black Christians in southern Sudan and there was a growing left–right coalition on Darfur.”²⁹ Furthermore, as Lorne Craner has explained, “the Bush administration was eager to point to its leadership on Sudan policy to demonstrate that they could speak with authority on grave issues of human rights at a time when issues around the treatment of detainees, particularly at Guantánamo and Abu Ghraib, threatened to strip the administration’s voice of legitimacy on human rights issues.”³⁰ These comments raise several questions: Was the determination of genocide truly as “dispassionate and clinical” (*cum* “apolitical”) as some within the Bush administration claim? Was there possibly a bias going into the investigation that genocide would be found (or, at the least, was there, as strange as this sounds, an ardent hope that it would be found?), and did that somehow tip the scale in favor of such a determination? And was there already a plan that, if a genocide determination was made, the White House would simply pass the matter onto the UN, thus being able to claim, as it did, that the United States need not do any more than it had already done? At this point, such questions are simply that: questions; however, they do merit further examination and study. It should be duly noted that these questions are raised here not to question the validity of the determination of the genocide but to acknowledge that there may have been certain factors at work that favored a particular determination—that is, a certain propensity in favor of making such a determination versus not doing so.³¹

A host of other questions also come to mind. In “*A Problem from Hell*”: *America and the Age of Genocide*, Samantha Power reports that after being elected and while reading about the Clinton administration’s failure in Rwanda, George W. Bush “wrote in firm letters in the margin of the memo: ‘NOT ON MY WATCH.’”³² Power goes on to

comment that “While he [George W. Bush] was commander in chief, he was saying, genocide would not recur.”³³ While Bush has obviously reneged on the promise he made to himself, it is possible that he may have thought that by declaring genocide (something the Clinton administration failed to do regarding Rwanda—that administration, in fact, as is well known, even went so far as to warn its officials/bureaucrats not to use the so-called g-word), his administration was, at least in part, taking the high road.

Alex de Waal, an expert on the Sudan, has raised two questions about the genocide determination, and his own responses to each of these questions further complicates the issue of the possible motive(s) behind that determination:

Is the U.S. government’s determination that the atrocities in Darfur qualify as “genocide” an accurate depiction of the horrors of that war and famine? Or is it the cynical addition of “genocide” to America’s armoury of hegemonic interventionism—typically at the expense of the Arabs? The answer is both. The genocide finding is accurate according to the letter of the law.³⁴ But it is no help to understanding what is happening in Darfur, or to finding a solution.

And this description merely serves the purposes of a philanthropic alibi to the U.S. projection of power.³⁵

In addressing the political nature of the determination of genocide, de Waal asserts that

The 9 September [2004] determination is the first time the Genocide Convention has been used to diagnose genocide (rather than prosecute it)... What does the U.S. determination signify? At one level, it is the outcome of a very specific set of political processes in Washington, D.C., in which interest groups were contending for control over U.S. policy towards Sudan. In this context, the call to set up a State Department inquiry into whether there was genocide in Darfur was a tactical manoeuvre destined to placate the anti-Khartoum lobbies circling around Congress (an unlikely alliance of liberal journalists and human rights advocates, and the religious right), while buying time for those in the State Department committed to pushing a negotiated settlement...³⁶

But at another level, the genocide determination reveals much about the U.S. role in the world today, and the unstated principles on which U.S. power is exercised. Those principles are shared by both the advocates of U.S. global domination and their liberal critics, and are revealed in the commonest narrative around genocide, which takes the form of a salvation fairy tale, with the U.S. playing the role of the savior.³⁷

... For six decades, Americans have been dreaming of redeeming that historic fatal tardiness, and dispatching troops in time to save the day. Their failure to do so in Rwanda and Bosnia ten years ago sparked another round of soul searching and led directly to the Kosovo bombing campaign and the Darfur genocide determination.³⁸

De Waal’s criticism that the 9 September determination was the first time the UNCG had been used to diagnose genocide, rather than to prosecute it, is, to my mind, misplaced. Indeed, it seems to me that using the UNCG for the purpose of diagnosing genocide should, at least when done seriously and conscientiously, be praised rather than criticized. (Furthermore, the findings of the ADP led the United States to refer the matter to the United Nations, and the latter, following its own investigation, referred the matter to the International Criminal Court. As a result, the ICC is now conducting an investigation into the atrocities in Darfur for the express purpose of bringing suspected perpetrators to trial. Thus, in fact, the ADP has contributed to the current effort to bring the perpetrators to trial.) Indeed, why should the UNCG not be used to diagnose genocide? If and when it can serve that purpose, then it should do so.

Too often scholars, political analysts, activists, politicians, and the media posit guesses (some of them wild) as to whether or not a crisis constitutes genocide, and that is problematic. Is it not better to gather solid data—*granted, preferably early on, and certainly much earlier than the United States did vis-à-vis Darfur*—prior to making a determination? *This is not to say that the international community should wait until a genocide determination is made to act to halt mass killing. Indeed, whenever any threat or actual outbreak of mass killing takes place, then strong, effective measures should be taken to halt it immediately.* Surely, however, an accurate determination is preferable to guesswork.

As for de Waal's point that the pressure to establish a State Department investigation was "a tactical manoeuvre destined to placate the anti-Khartoum lobbies circling around Congress... while buying time for those in the State Department committed to pushing a negotiated settlement," a question that comes to mind is, What is the evidence for such an assertion? If, though, even for the sake of argument, one assumes de Waal is correct, then a further question arises: Just how significant is his point? First, it is almost a given that most countries will attempt to negotiate a settlement before resorting to military means. And, generally, this is a good idea. That said, negotiating with actors that are intransigent and not likely to negotiate in good faith is not only a waste of time but unconscionable when large numbers of people are being killed during the negotiation process. As we now know, the ongoing attempt to negotiate with both the GoS and the rebel groups has largely proved fruitless. Furthermore, it quickly became apparent that "talk" by the international community served, once again, as a substitute for action, and at the same time the killing and the dying (as a result of both murder and genocide by attrition) in Darfur continued unabated. That was, and is, unconscionable. It seems that a better target for de Waal's criticisms would have been the incessant talk carried out by the international community, rather than the implementation of the ADP.³⁹

Undoubtedly, intervention to halt the killing would have been preferable (at least to some) to the ongoing negotiations that got nowhere but that was not in the cards for the United States, in light of its ongoing "war against terrorism" in Afghanistan and Iraq. That is, it is dubious that the Pentagon would readily—or, for that matter, begrudgingly—have agreed to send troops into another potential quagmire, especially when the armed services were already having difficulty recruiting enough personnel for the war in Iraq. Over and above this fact, the so-called Somalia Factor still haunts many within the US government.⁴⁰ Finally, some prognosticators have also ventured that, in light of the US–Sudanese collaboration on the "war on terror," the Bush Administration would not countenance an intervention that would put such cooperation at risk.

If de Waal is correct that the ADP was used as a ploy to stave off criticism while focusing on negotiations, it is also true that governments are not known for acting in the most altruistic manner possible. It is also a fact that governments act for a multiplicity of motives, some more—and some less—altruistic than others. Also, except in totalitarian states, governments are not monolithic entities, and some branches or departments may address issues and make decisions that are not necessarily shared by, or in accord with, other branches or departments. Aside from all is it so grievous if the ADP was initiated under pressure, and not for the best of reasons? Is that any reason to dismiss an investigation that was handled in a highly professional manner and resulted in a methodologically sound analysis? At the very least, the United States was doing something besides talking.⁴¹

Another possible motive behind the ADP, which de Waal does not take into consideration, was the fact that sanctions had been threatened time and again by the UN but were never carried out, and thus they soon became little more than “paper tigers.” This continued to happen even when the United States introduced resolutions aimed at Sudan only to have them watered down by various members of the UN Security Council, purportedly to avoid “upsetting Khartoum.” The point is that it is just as likely that the US carried out the ADP, as Craner suggests,⁴² in the hope of moving the international community to action. If so, this could hardly be construed as a questionable or despicable aim.

De Waal is undoubtedly correct that the Darfur crisis did release, as he says, “another round of soul searching.” But is that necessarily bad? I would submit that it is not. Would de Waal, one wonders, prefer the opposite reaction?

Granted, some critics of the ADP have inferred that the ADP was largely a cosmetic action—something fairly innocuous in the place of real action.⁴³ This is possible. But, then, who would have thought that a finding of genocide would constitute an innocuous action? Certainly not such actors as Natsios and Craner, the two prime movers behind the ADP. Still, the fact is that, sadly, in many ways—and particularly in light of the lack of action by the United States to truly push the international community to halt the killing and death—the assertion that it was largely cosmetic is difficult (if not impossible) to refute. Again, the only saving grace is that the finding of the ADP has led to the ICC’s current attempt to bring the perpetrators to trial. Be that as it may, that has done virtually nothing to protect the victims of the GoS and the Janjaweed over the past year and a half.

De Waal’s assertion that the United States conducted the investigation in order to enact a “salvation fairy tale” so that it could play “the role of the saviour” is, at least in one sense, so outlandish as to be utterly absurd.⁴⁴ Possibly many at the State Department and some within the executive branch felt that the investigation constituted a kind of salvation affair, but in the long run no one, it seems, including Powell and Bush, could conclude that the United States, in any way whatsoever, played the role of savior—and that is true for the simple but profound reason that the United States did the very minimum it could to *prevent* the killing and rape of the black Africans of Darfur. The minimum this side of doing nothing, that is.

De Waal sees the determination of genocide as even more problematic than the motive(s) behind the investigation, and this is because, as he puts it, “the fact that the group labelled as genocidaire in this [the Darfur] conflict are ‘Arab’ is no accident.”⁴⁵ More specifically, he asserts that

There’s no covert masterplan in Washington to brand Arabs genocidal criminals, but rather an aggregation of circumstance that has led to the genocide determination. It has special saliency in the shadow of the U.S. “global war on terror,” misdirected into the occupation of Iraq and seen across the Arab and Muslim worlds as a reborn political Orientalism.⁴⁶

After 11 September 2001, the U.S. sees Muslim Arabs as actual or potential terrorists targeting the homeland. After 9 September 2004 . . . Arabs (and perhaps all Muslims too) are actual or potential genocidaires, and their targets are Africans. It’s sad but predicable that too many Africans will fall for this trap and that the brave efforts of the African Union to build a continental architecture for peace and security will be impaled on an externally constructed divide.⁴⁷

The latter argument is likely to attract considerable debate. One must, at the least, question the validity of his assertion and argument in light of the fact that

the Bush administration has reached out to the GoS, an Arab-run government, for help in its fight against terrorism. More specifically, in May 2005, the CIA flew Salah Gosh, head of Sudan's National Security and Intelligence Service, to CIA headquarters in Langley to confer with top CIA administrators. At the time, the CIA must have known that Gosh was enmeshed in the Darfur crisis and was likely issuing directives to GoS troops and the Janjaweed.⁴⁸ The point is that to paint the United States with such large swaths of opprobrium is somewhat misdirected—and, some would no doubt claim, sorely so.

It must also be pointed out, however, that the relationship between the United States and Sudan in the so-called war on terror raises the very real issue of just how much pressure the United States is really willing to place on the Sudanese government. Desperate for allies on the anti-terrorism front, the United States is highly unlikely to risk losing out on major assistance in the area of intelligence gathering, especially in an area as "fecund" as Sudan.

Howard Adelman, a philosophy professor who has written extensively about genocide and issues of intervention, is another who vehemently disagrees with the US determination of genocide and has also raised a host of questions regarding the motives of the United States. Among some of the many questions he has raised are these: "What influence did the desire not to repeat American inaction on Rwanda have on characterizing Darfur as genocide?", "What was the influence of the Christian lobby on the resolutions?", and "What was the influence of the immanence [*sic*] of the 2004 election?"⁴⁹

There is no point in repeating the discussion above as to whether the United States had honorable or ulterior motives in carrying out the investigation. As for Adelman's criticism of the determination, he cites all the actors who were and are in disagreement with it (e.g., the United Nations, the European Union, Doctors without Borders) and asserts that the atrocities and other actions constitute, at worst, crimes against humanity. Over-reliance on the UN Commission of Inquiry's findings, however, seem ill advised.⁵⁰

As for Doctors without Borders, Adelman asserts that such a reputable group, whose leader called for an intervention early on during the 1994 Rwandan genocide and whose personnel have been on the ground for extended periods in Darfur, should be duly recognized when it claims that genocide has not been perpetrated in Darfur. But that is dubious advice for numerous reasons. First, Doctors without Borders has never conducted its own investigation to ascertain whether or not the crisis in Darfur constituted genocide. Second, Doctors without Borders did not provide empirical, let alone conclusive, evidence to support its pronouncement. Third, Adelman has a relatively close relationship with the African Union and has previously asserted that he believes calling for an international intervention undermines the will and efforts of that organization. Ultimately, only he can know how his association with the African Union affects his stance on how to categorize the atrocities and deaths in Darfur.

One of the fiercest critics of the determination of genocide by Powell and Bush was (and continues to be) Professor Eric Reeves of Smith College in Northampton, Massachusetts. In fact, Reeves agrees with the determination; his caustic criticism is the result of the lack of action that has followed. In a piece entitled "Secretary of State Colin Powell's Genocide Determination: What It Does, and Doesn't, Mean for Darfur," Reeves asserts that "by arguing in yesterday's testimony before the Senate Foreign Relations Committee that the obligation to 'prevent' genocide entails so very little, Powell has done what his State Department spokesmen have done for months; he has

made it less likely that the Genocide Convention will ever be used as a tool to serve the primary purpose for which it was created.”⁵¹ Continuing, Reeves argues that

Powell’s genocide determination may actually signal the end of the Genocide Convention as a tool of deterrence and prevention. For if a finding of this sort, rendered in light of the most conspicuous evidence of ongoing genocide, prompts no action, then the precedent created during yesterday’s Senate testimony by the US Secretary of State is wholly unfortunate.

The insistence that, despite a genocide finding, “no new action is dictated” reflects in part US impotence at the UN, a function in many ways of diplomatic capital expended on the war in Iraq. Indeed, under questioning by Senators on the Foreign Relations Committee, it became painfully clear that the new US draft resolution being circulated at the UN Security Council is not so much a draft as a plea. The purposed resolution is vague, without a clear or explicit threat of sanctions, and establishes no meaningful new benchmarks for Khartoum.⁵²

This provides a certain ghastly clarity in the new world of the 21st century: even genocide, even the crime that defined the actions in Rwanda and Eastern Europe during the Holocaust, does not entail any special response or effort of prevention. If this indeed marks the end of any particular obligations under the Genocide Convention, we may legitimately wonder whether the price paid for Powell’s determination is not exorbitantly high.⁵³

Reeves is certainly justified in his disappointment in and criticism of the US assertion that it had done all it could do for the targeted population in Darfur and its subsequent lack of action following the determination. Indeed, once the US government declared that Sudan had committed genocide, the United States, aside from providing hundreds of millions of dollars, did the minimum it could (i.e., referring the matter to the UN Security Council) without totally losing face. Furthermore, its justification that it had done everything it could do was not only disingenuous but a brazen lie. Be that as it may, Reeves’s assertion that Powell, and thus the United States, had “made it less likely that the Genocide Convention will ever be used as a tool to serve the primary purpose for which it was created” is, or so it seems, nothing short of hyperbole. Of course, only time will tell if Reeves is correct, but “ever” is a long time. Even if the international community takes another hundred years or more to act in good faith when it comes to genocide and make effective use of the UNCG to prevent or halt genocide, then all will not have been for naught—and it will “prove” that Reeves’s statement is, in fact, hyperbole. Nevertheless, one can certainly empathize with his sense of utter disappointment and share his dismay at the disastrous impact that the United States’ timid and unconscionable response not only will have on the black Africans of Darfur but is likely to have on the wide range of other groups that will, inevitably, face major human rights violations, including crimes against humanity and genocide, in the near and the distant future.

As for Reeves’s criticism of Powell’s assertion that “no new action is dictated,” Powell, of course, was talking about any action by the United States. Legally, Powell was absolutely correct. Be that as it may, many are bound to find Powell’s, and the United States’, position morally questionable, at best. Others are likely to counter that preventing and/or halting genocide should be a shared responsibility and not something to be left to a single nation, no matter how powerful. Still, when all is said and done—and not even taking into consideration the possibility of unilateral intervention—Reeves is correct in asserting that the United States could have done far more than it did.

Reeves is also highly critical of the lack of “teeth” in the resolution that the United States submitted to the UN Security Council. As Reeves puts it, “What is most striking about Powell’s testimony concerning the proposed US resolution for the Security Council is its utter lack of enforcement provisions.”⁵⁴ One can hardly argue with Reeves’s grievance, and I see no point in doing so. Again, the “actions” (or lack thereof) following the genocide finding left a lot to be desired, and that is a major understatement. And, in the past year and a half since the declaration, such lack of action is what has caused the greatest consternation among critics of the US government’s approach to Darfur.

Finally, Reeves blasts the US government for its tardy response to the ongoing crisis:

Powell...attempt[s] to suggest that the State Department responded in a timely fashion to the threat of genocide. This is not true. Ample evidence was available at the end of 2003, clearly suggesting that genocide was occurring (by December 2003 the nature of the fall offensive by Khartoum and the Janjaweed became fully evident). Human rights reports, alluded to at one point in Powell’s testimony, were filled with details suggesting that genocide was unfolding. Certainly by February of 2004, as attacks on the African tribal populations of Darfur again dramatically increased, there was more than enough evidence to justify a genocide investigation. And yet the State Department deployed an investigative team only in July, almost half a year later. This was shamefully belated action—shamefully.⁵⁵

Reeves’s criticism is both fair and justified. The investigation could—and should—have taken place earlier. A government truly dedicated to genocide prevention would have seen to that. That said, to bring to fruition such an investigation is not within the purview of any single individual within a government, and thus it takes considerable time to move such an idea through the necessary channels. One must also take into account the fact that there was a lot of infighting within the Department of State over Darfur, and it no doubt took a great deal of effort and time to overcome objections to such an investigation. This is not, in any way whatsoever, to condone the tardiness of the investigation, but simply to acknowledge the reality of how governments work. Such a reality underscores the need to establish a strong anti-genocide regime that is buffeted as little as possible by partisan politics and *realpolitik*. Currently, however, that is solely a goal and dream of genocide scholars and many human rights activists—and, skeptics, of course, might venture that it is little more than a utopian idea. Again, time will tell.

Gérard Prunier, an expert on East Africa, the Horn, Sudan, and the Great Lakes of Africa and the author of *Darfur: The Ambiguous Genocide*, has also weighed in on the motives of the investigation, the genocide determination, and the aftermath of the latter. With respect to the motive(s) behind the investigation, Prunier seems to suggest that the ever-increasing pressure—from constituents, non-governmental organizations, Congress, and others—for the US government to act may have prompted Bush to support a “genocide investigation” into the Darfur crisis:

On 1 June 2004 the members of Congress who sympathized with the SPLA sent President Bush a list of twenty-three names of *Janjaweed* supporters, controllers and commanders who were either members of the GOS or closely linked to it. The message was clear: do something about these people. President Bush seemed to have been embarrassed by the implicit demand, all the more because supporters of the anti-Khartoum legislation tended to be more “on the left” (in so far as this political category has relevance in US politics) within both parties and within the fairly tight Black

Caucus. President Bush could not be expected to care too much about “the left,” but unfortunately for him there was a core group of anti-Khartoum activists at the opposite end of the political spectrum, from where he drew most of his electoral support. Many fundamentalist Protestant organizations had rallied to the anti-Khartoum lobby activated by Nina Shea. Then by mid-2004 vocal Jewish groups such as the Committee for the Holocaust Memorial [*sic*] in Washington had joined in the indignant chorus of protests about Darfur. The President thus found himself under pressure from an array of public opinion elements too wide to be ignored during an election year. But since the “realists” in the intelligence community kept insisting that Khartoum was too important to be harshly treated, these contradictory pressures led the White House to compromise on all fronts—supporting the Naivasha negotiations, [and] not putting too much practical pressure on Khartoum but nevertheless passing legislation which could be used as a sword of Damocles in case of non-compliance. . . .⁵⁶

Continuing, Prunier drops a bombshell of sorts, especially if the assertion is true: “This author was assured that Secretary of State Colin Powell had practically been ordered to use the term “genocide” during [his] high profile 9 September 2004 testimony to the Senate Committee on Foreign Relations but that he [had] also been advised in the same breath that this did not oblige the United States to undertake any sort of drastic action, such as a military intervention.”⁵⁷ Prunier’s source for the latter assertion is a “confidential interview with a high-ranking member of the US administration, [in] Washington [in] October 2004.”⁵⁸ It is certainly possible, of course, that Powell had received a “push” in that direction. Be that as it may, there are three sticking points in the statement. First, it comes from an unidentified source and cannot readily be followed up. That, of course, does not mean it is not true, but it does complicate matters. Second, Prunier uses the words “practically been ordered.” So Powell, ostensibly, was not ordered but was strongly encouraged, pressured, prodded, or goaded to do so. Third, Prunier uses the word “advised.” Being “advised,” of course, is not the same as being told, directed, or ordered to do something. The questions that arise from such wording are many, including but not limited to the following: Was Powell, in fact, “practically ordered” to use the word “genocide,” and did he cave in to the pressure or act the part of the “good soldier”? Or was the analysis of the data collected by the ADT persuasive “enough” that Powell felt comfortable using the word “genocide” of his own accord? Or was the analysis of the data persuasive enough that Powell did not feel guilty using the word “genocide” when all but ordered to do so? The same sorts of questions, of course, are germane to his statement about the United States’ not being obligated to do any more than it already had done vis-à-vis Darfur.

Prunier concludes by asserting that “President Bush tried to be all things to all men on the Sudan/Darfur question. Never mind that the result was predictably confused. What mattered was that attractive promises could be handed around without any sort of firm commitment being made. Predictably, the interest level of US diplomacy on the Sudan question dropped sharply as soon as President Bush was reelected.”⁵⁹ Prunier is certainly correct with respect to his comment about a lack of “firm commitment” being made in the aftermath of the determination. As for US diplomatic efforts vis-à-vis Darfur, they have actually waxed and waned time and again over the course of the past year and a half. There have been spikes of interest (most recently in pushing for the deployment of UN troops and NATO involvement in Darfur), but there have also been mixed messages issued by Bush’s underlings in the State Department (e.g., as to whether the situation in Darfur still constitutes genocide and whether there is a need to push for tough sanctions on Khartoum and/or prod the

UN to undertake an intervention). Ultimately, Prunier is correct in suggesting that “talk” over action has been the *modus operandi* of the Bush administration’s approach to protecting the black Africans of Darfur.

Ramifications of the ADP

The development and implementation of the ADP, aside from the determination based on the data collected by its team, has numerous ramifications. So too, of course, does the genocide determination by the US government. As one might surmise, some are positive and some are negative.

First, the development and implementation of the ADP set a precedent of sorts in terms of the way in which an individual nation can develop and conduct an investigation for the express purpose of attempting to ascertain whether genocide is being perpetrated in some part of the world. Indeed, it proves that it can be done fairly quickly, efficiently, and effectively and relatively inexpensively. That, in itself, is significant, for far too often, in the past, individual nations, the media, human-rights activists, and the international community have relied more on guesswork and piecemeal information seeping in from different sources than on carefully collected and analyzed data to ascertain the nature of a violent conflict.

Second, the precedent has now been established for an individual nation to conduct an investigation into atrocities while they are being perpetrated for the express purpose of ascertaining whether genocide has been perpetrated or not. While this may appear to be of little note, it is nothing of the sort. If nothing else—and this is significant—there is no excuse for nations with sufficient financial wherewithal to fail to conduct such investigations when it appears that a situation may be spiraling toward crimes against humanity or genocide. In other words, a new bar has been set in making a genocide determination. Now it is up to citizens, human-rights activists, NGOs, genocide scholars, and others to insist on such investigations.

Third, the ADP has provided a solid model for one essential component of an anti-genocide regime. Such investigations should become an integral part of any anti-genocide regime, and, thanks to the ADP, this is not a component that will need to be developed from scratch. Given that the ADP was not perfect (but what is?), developers of future investigations can learn from both the strengths and weaknesses of the ADP.

As for the genocide determination, a precedent has been set in which one sovereign nation (the United States) has accused another sovereign nation (Sudan) of committing genocide while the atrocities were still ongoing. This, in itself, was a historic event and thus significant. That is, the determination broke, if you will, a certain taboo against individual nations’ making such an accusation when not only justified in doing so but, if signatories to the UNCG, morally obligated to do so.

Be that as it may—and ironically and sadly—there is also the danger, as numerous scholars and commentators have asserted, that, in the end, the genocide determination by the United States could prove counterproductive. More specifically, the fact that the determination was made and then the matter was simply and solely referred to the UN Security Council does not bode well for those in favor of a proactive stance against genocide. Indeed, the fact that the determination did not result in *any concrete action* by the United States to attempt to halt the ongoing genocide may, in the short run (but even here we are talking about throwing into the lurch precious and fragile lives of untold numbers of people)—if not in the long run—result in minimizing the “weight” and significance of such a finding. That is, other nations and international bodies may

now perceive such determinations simply a matter of course and of no great consequence.

As the cliché goes, only time will tell. That said, de Waal makes the interesting point that “although Colin Powell insisted the U.S. policy towards Sudan would remain unchanged—thereby seeming to defeat the purpose of making the determination in the first place—there is no doubt that declaring genocide creates legal and political space for intervention.”⁶⁰ It is still possible, of course, for a military intervention to take place in Darfur. While most would agree that if an intervention is eventually carried out it will have been horrifically late in coming, it is crucial to recognize and appreciate the fact that some 2 million displaced persons are still at the mercy of the GoS and the Janjaweed and are in need of all the help they can get in staving off even more terror and mayhem. And if an intervention does take place, then the genocide determination by the US may well have served the important purpose, at least in part, of having “created the legal and political [and one might add, moral] space” for doing so.

Conclusion

Aside from continuing to provide humanitarian aid, which was not, of course, inconsequential, the only other major action that the United States undertook following its determination of genocide was to refer the matter to the UN Security Council. In doing so, it called for a more comprehensive study of the Darfur crisis. At the time, many scholars and activists raised the issue of whether another study was really needed, especially in light of the fact that no one—other than Khartoum, perhaps—doubted that grave crimes against humanity had been perpetrated against the black Africans in Darfur and that they continued to perish in huge numbers as a result of the actions of the GoS and Janjaweed.

A question that has been asked by many, though it was largely rhetorical, was, Did the United States actually do all it could? The answer was, and continues to be, an emphatic “No!” Among some of the many options that the United States could have pursued but chose not to—no doubt for reasons of *realpolitik*—were to push implacably for a multilateral effort to establish a no-fly zone over Darfur, or do it alone; to apply unrelenting pressure on the UN Security Council to establish a strong, mandate under chapter VII of the UN Charter that would allow the AU troops (and others) to truly protect the black Africans at risk; to apply equally unrelenting pressure on the African Union to allow UN troops to join the AU forces in Darfur; to provide the AU troops and recruits with top-notch training prior to their deployment to Darfur; to provide the AU with ample military materiel and equipment, along with a guarantee of fuel and personnel to service that equipment, such as four-wheel vehicles, planes, and so on, instead of providing dribbles of military support; and to serve notice on Khartoum that if it continued to interfere with or outright block humanitarian aid from reaching the IDP camps, the repercussions would be serious—and then act on such notice in a timely and effective manner. Noticeably absent from this list is the possibility of the United States’ actually sending its own troops to Darfur, whether as a multilateral or a unilateral effort, supported or not supported by the UN Security Council. Again, as discussed above, this was never, at least as far as the Bush administration was concerned, a real option. The point is, however, that there is plenty that the United States could have done—and still should do—but it has not. And that is nothing short of shameful.

Acknowledgments

I sincerely thank Dr. Herb Hirsch, Dr. Alex Alvarez, and Dr. Eric Markusen for their solid critiques of this article and for their helpful suggestions. I also sincerely thank Ms. Debb Bodkin for her unique insights into the UN's Commission of Inquiry on Darfur.

Notes

1. United Nations, "Sudan: World's Worst Humanitarian Crisis" (press release, 22 March 2004).
2. Stephen A. Kostas, "Making the Determination of Genocide in Darfur," in *Genocide in Darfur: Investigating the Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen (New York: Routledge, forthcoming).
3. Ibid., 4. For an informative and detailed discussion as to what prompted the State Department to investigate the internal conflict in Sudan, see Kostas, *ibid.*
4. It is also important to note that "the U.S. was exasperated by international inertia, and Craner believed that if the U.S. could authoritatively call it [the killings and deaths in Darfur] genocide, it might mobilize European governments to take a more aggressive approach." Ibid., 8
5. US Department of State, *Documenting Atrocities in Darfur* (Washington, DC: Bureau of Democracy, Human Rights and Labor and Bureau of Intelligence and Research, 2004), 2.
6. The questionnaire was used to conduct the semi-structured interviews. For a detailed discussion of the methodology used by the ADT, see Jonathan Howard, "Survey Methodology and the Darfur Genocide," in *Genocide in Darfur: Investigating the Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen (New York: Routledge, forthcoming).
7. In regard to the findings, the State Department issued the following caveats: "Several characteristics of the survey must be underscored. First, accounts of atrocities may be dated, depending on when the individual refugee fled his or her village. Second, the data may actually undercount the extent of atrocities because mass attacks often leave few survivors. Third, most respondents come from villages within 50 miles of the border in Western Darfur and Northern Darfur States. Fourth, it is very likely that rapes are under-reported because of the social stigma attached to acknowledging such violations of female members of one's family.
"The results are broadly representative of Darfurian refugees in Chad but may not be representative of internally displaced persons still in Darfur because they were not included in the sample. A margin of error for this sample cannot be calculated because of the lack of accurate demographic information about the refugee camps and settlements. The methodology was designed to achieve as broadly representative a sample as was feasible under the prevailing conditions. . . .
"The field data for the 1,136 interviews were compiled using a standardized data entry process that involved the collection and coding of detailed information from each refugee respondent's set of answers. The researchers then used a statistical program to aggregate the data and analyze the results." US State Department, *Documenting Atrocities*, 7-8.
8. Ibid., 3.
9. Ibid., 1. "Reported atrocities were included in the data set only if the respondent directly witnessed the event. For the purpose of this study [*Documenting Atrocities in Darfur*], a respondent is considered to have 'directly witnessed' an atrocity if she or he was an eyewitness to the event, visually confirmed the death of victims, or, in cases of rape, was directly told about the atrocity by the victim. Hearsay accounts were excluded from the data set." Ibid.
10. Ibid., 4.
11. Ibid.
12. Kostas, "Making the Determination," 13. A key question that arises is whether political appointees are truly capable of being "dispassionate and clinical" when making such a

- judgment. Furthermore, can any decision made by governmental officials or entities truly be considered “pure”? That is, are not all decisions political in one way or another?
13. Ibid., 14.
 14. US State Department, *Documenting Atrocities*, 1.
 15. Ibid.
 16. Quoted in *ibid.*, 15.
 17. Ibid.
 18. Ibid.
 19. Colin Powell, “The Crisis in Darfur” (written remarks before the Senate Foreign Relations Committee, 9 September 2004), <http://www.state.gov/secretary/former/powell/remarks/36032.htm> (accessed 21 April 2006), 4.
 20. Ibid., 2.
 21. Ibid.
 22. Ibid., 3.
 23. *Convention on Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, http://www.unhchr.ch/html/menu3/b/p_genoci.htm (accessed 21 April 2006).
 24. Ibid., 4.
 25. Ibid., 5 (emphasis added).
 26. Howard, “Survey Methodology,” n. pag.
 27. Ibid., n. pag.
 28. For a discussion of this matter, see US State Department, *Documenting Atrocities*.
 29. Kostas, “Making the Determination,” n. pag.
 30. Quoted in *ibid.*, 7.
 31. While State Department officials were conferring and coming to a decision as to whether the atrocities in Darfur constituted crimes against humanity or genocide, rumors leaked that the final decision could “go either way.” This suggests, if the rumors were correct, that the determination of genocide may not have been a foregone conclusion. It also suggests that State Department officials, including Colin Powell, were determined to make the most accurate determination they possibly could.
 32. Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Basic Books, 2002), 511.
 33. Ibid.
 34. Speaking of the atrocities committed by the GoS and the Janjaweed, de Waal asserts that “they have killed, burned, raped and starved their way across the central belt of Darfur. In doing so, they have killed thousands of people and deliberately starved thousands more. They have also managed to stop a running insurgency that was rapidly seizing control of the entire region.” Alex de Waal, “What Does Adding the ‘Genocide’ Label to the Darfur Crisis Really Mean?” *Index on Censorship*, 2 February 2005, www.indexonline.org/en/news/articles/2005/1/international-true-meanings-and-consequences.shtml (accessed 26 April 2006), para. 9. He also asserts that “Powell is correct in law. According to the facts as known and the law as laid down in the 1948 Genocide Convention, the killings, displacement and rape in Darfur are rightly characterised as ‘genocide.’ But his finding has significant political implications.” Ibid., para. 13. Elsewhere, de Waal has asserted that “famine in Sudan is a crime, and has been a crime for the last 20 years, and the form of genocide that we are seeing in Darfur is, I would argue, a famine crime.” Quoted in “The Crisis in Darfur with Jennifer Leaning, Eric Reeves, Alex de Waal, and William Schulz,” John F. Kennedy Library and Foundation, 9 December 2004, www.jfklibrary.org/forum_darfur.html (accessed 10 March 2006), 5.
 35. De Waal, *ibid.*, para. 2.
 36. Ibid., para. 30.
 37. Ibid., para. 33.
 38. Ibid., para. 35.
 39. Some have also argued that the United States’ initiation of the ADP was a cynical ploy by the Bush administration to “try to have it both ways”; that is, it allowed the Bush

administration to assert that it was attempting to defend and protect human rights in Darfur while also allowing it, in the end—especially by not pushing for an intervention—to attempt to solidify its relationship with the GoS. See Prunier, *Darfur*, 140–41; Eric Reeves, “Secretary of State Colin Powell’s Genocide Determination: What It Does, and Doesn’t Mean for Darfur” (10 September 10 2004), <http://www.sudanreeves.org/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=214&page=1> (accessed 26 April 2006), paras. 17–19.

40. The “Somalia Factor” is the legacy of the October 1993 disaster in which US troops attempting to capture top advisors to Mohammed Farah Aideed were attacked by Somali militia and eighteen US soldiers were killed and seventy-three wounded. A Black Hawk helicopter pilot was also kidnapped, and a dead US soldier was dragged through the streets of Mogadishu.
41. I am not so naïve as to think or believe that the investigation might not have been used as a way to show concern that was not all that costly in terms of financial, political, or human capital (meaning lives lost), and thus used in place of calling for—if not leading—a major intervention to halt the killing. That is another issue, and one that needs to be addressed. If the latter is true, then the initiation of the ADP certainly was a problematic, if not a sordid, affair.
42. See Kostas, “Making the Determination.”
43. Including Gerald Caplan, Eric Reeves, and Gérard Prunier.
44. De Waal, “What Does Adding,” para. 35.
45. *Ibid.*, para. 45.
46. *Ibid.*, para. 41
47. *Ibid.*, para. 42.
48. Tellingly, Gosh reportedly is the number-two person on the list forwarded by the United Nations to the ICC of those who are suspected of having a hand in the killings in Darfur.
49. Howard Adelman, “Reading History Backwards: Rwanda and Darfur” (abstract of a talk given at the conference of the International Association of Genocide Scholars, Boca Raton, FL, 4–7 June 2005), 1. For a discussion of these and related questions (e.g., What is the evidence for genocide in Darfur? Why have other states not fallen into line with the United States in characterizing Darfur as genocide? What impact did the characterization of the crisis in Darfur as genocide have on the effort to get the Security Council to endorse sanctions against Sudan?), see *ibid.*
50. Debb Bodkin, a police officer based in Canada and the only person who served as an investigator for both the ADP and the COI, told me that the data collected by the COI were unsystematic and less focused than the ADP’s. More specifically, in recent correspondence, Bodkin commented as follows: “During our briefing [about the COI] in Geneva, we were given no format or indication as to how the investigation and interviews were to be conducted. As a result every investigator conducted his/her investigation and interviews in whatever fashion he/she preferred. I cannot believe that with the vast difference in expertise of each investigator there would be any semblance of consistency in regard to the gathering of evidence. . . . The UN investigation did not have any laid out parameters whatsoever and as a result an untrained interviewer could easily ask questions in a manner that would elicit whatever response the interview hoped to obtain. . . . [Also,] each investigator was open to choose who they interviewed and how. . . . As far as the soundness of the COI, when I compare it to any of the sexual assault or homicide investigations which I was part of during my police service in Waterloo, Ontario, it would not [have gone forward] due to the low probability of a conviction, mainly because of the fact that the investigators did not meet the required adequacy standards to be conducting interviews and did not have the knowledge, skills or ability to be doing so. . . .” Debb Bodkin, e-mail message to author, 15 April 2006.
Furthermore, Bodkin asserts that while the COI team was in Geneva, prior to entering the field, Antonio Cassese, who oversaw the COI, implied that the COI would not result in a finding of genocide. More specifically, Bodkin, in recent correspondence, conveyed the

following: “Commissioner Antonio Cassese, who had traveled to Khartoum and some parts of Darfur for a few days and had conducted some interviews, stated that he felt that we would find that there were two elements of genocide missing: (a) target group (victims are from mixed tribes) and (b) *mens rea* (intent). He talked for a while and my personal opinion was that he was telling us that the outcome of the investigation would show that it was not genocide which was occurring. He did not specify how long he had visited nor how many interviews he had conducted but I don’t believe either were extensive. I felt it was very inappropriate for him to plant this opinion in the investigators’ minds prior to starting the investigation and other investigators felt uncomfortable about it as well . . . The female Commissioner [Ms. Hina Jilani from Pakistan] stated: ‘Go with an open mind.’ During the briefing I got the distinct impression that there was some tension between Commissioner Cassese and Commissioner Jilani as their comments often conflicted with one another and he was expressing what he thought our findings would be whereas she always made comments about us doing our job open-mindedly.” Ibid.

Lending further credence to the claim that the UN’s Commission of Inquiry’s findings are, at best, problematic is Gérard Prunier’s cogent observation that “the Report of the UN Commission of Inquiry on the Darfur Violence was the latest but perhaps not only the final example of the world body . . . acting . . . in a . . . show of egregious disingenuousness. The report documented violations of international human rights by ‘people who might have acted with genocidal intentions’; yet the situation was not genocide . . .” Gérard Prunier, *Darfur: The Ambiguous Genocide* (Ithaca, NY: Cornell University Press, 2005), 143.

51. Reeves, ‘Secretary of State,’ para. 1.
52. Ibid., paras. 3–4.
53. Ibid., para. 7. Reeves’s criticism does not stop there. Continuing, he states that “despite his finding of genocide on the part of Khartoum, Powell preemptively pardons the regime by saying ‘we are not trying to punish them.’ But shouldn’t genocidaires be punished? Shouldn’t there be, as Powell explicitly suggests elsewhere, be an international tribunal to punish the crimes of genocide in Darfur and those guilty of this monstrous crime? . . . How can Powell simultaneously find the regime guilty of genocide, but then declare that ‘we are not trying to punish the Sudanese government’ and indeed we may have ‘a mutual interest with the Sudanese government?’” Ibid., para. 17. Actually, Powell’s words could be understood in various ways (and thus could be misconstrued). Possibly he was “pardoning” the regime, but that seems dubious. At worst, Powell seemed to be apologizing for the genocide finding while also stating that the US wanted to maintain relations, even if shaky, with Sudan. Then again Powell may simply have misspoken when he used the words “not trying to punish Sudan.” Or, possibly, Powell was trying to send a distinct message: Khartoum had better rein in its troops and the Janjaweed if it did not want the United States to come down hard on Sudan. Of course, in retrospect, we now know that if the latter were the actual meaning of the words, they were idle for, again, the United States has done little to nothing since September 2004 to halt the killing and death in Darfur.
54. Ibid., para. 29.
55. Ibid., para. 27.
56. Prunier, *Darfur*, 139–40.
57. Ibid., 140.
58. Ibid., 191.
59. Ibid., 140.
60. De Waal, “What Does Adding,” para. 31. De Waal perceives this as a negative, playing into the hands of the US “hegemonic” push across the globe.

GENOCIDE STUDIES AND PREVENTION

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The Endless Debate over the 'G Word'

Major Brent Beardsley

***Canadian Forces Leadership Institute, Royal Military College
of Canada***

I am an infantry officer in the Canadian Army of the Canadian Armed Forces. In 1993–1994, I served as the personal staff officer to then Major-General Roméo Dallaire, the Force Commander of the United Nations Assistance Mission for Rwanda (UNAMIR). As such, I was a witness, a bystander, and an occasional rescuer and helper to what the Organization of African Unity labeled “the Preventable Genocide.”

One of the major reasons the genocide in Rwanda was not prevented or stopped was the endless debate in April, May, and June 1994, when the majority of attention and effort was focused on debating whether or not genocide was taking place in Rwanda instead of on preparing and conducting a multi-disciplinary (including military) intervention to stop the killing. For days, weeks, and months the discussions went back and forth between those who labeled the catastrophe a genocide, and demanded that the international community live up to its obligations under the UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) and intervene to suppress the genocide, and those who argued that the situation in Rwanda was not a genocide but “just gross violations of human rights, crimes against humanity and war crimes” (as if these were acceptable crimes to ignore). The failure to intervene permitted the genocide to largely run its course, consuming between 500,000 and 1 million innocent men, women, and children.

On too many occasions, especially during the genocide in Rwanda and the current genocide in Darfur, the organs of the international community have been far more focused on conducting some form of academic or legal debate over the use of the word “genocide” to describe these catastrophes than on focusing our attention and efforts toward actually doing something to stop the killing. Never were we more frustrated and saddened in Rwanda during the genocide than when we were informed on a Friday that the Security Council had adjourned for the weekend, without decision. We knew that while the diplomats and bureaucrats would be enjoying the culinary delights of Manhattan, another 10,000 to 20,000 innocent men, women, and children would die while the world discussed, debated, contemplated, and, inevitably, let the genocide run its course. While the determination of genocide is not a matter to be taken lightly, it must also not become an excuse to procrastinate while thousands are dying.

As a witness to the events of 1994, I have had to live with the failure of the international community to identify the catastrophic killings in Rwanda as genocide in a sufficient matter of time in order to intervene to stop the killing and save Rwandan lives. I have also had to live with my own role as a member of UNAMIR for our failure, for my failure, to prevent or stop the genocide. I do not wish to see the same mistake made again, and, therefore, I appreciate the opportunity the editors of this new professional journal have given me to presenting this opinion piece on the current situation in Darfur. I do not claim to be a genocide scholar or an expert in anything other than my chosen profession, and I do not consider my opinions any more valid

than others'. I approach this topic with the experience of a witness to a genocide, and a witness to the failure of humanity to stop the Rwandan genocide; I only wish to offer some ideas, which I hope will spark a far greater debate among better men and women than I and a greater effort in developing a more effective response to the ongoing genocide in Darfur.

In 2004, on the tenth anniversary of the Rwandan genocide, leaders from across the world or their representatives, scholars, activists, and survivors gathered in Kigali, Rwanda, to commemorate the genocide and lament the failure of humanity and the international community to prevent or stop it in 1994. The sacred, yet hollow, words "Never Again" were echoed by virtually every speaker, and vague and false assurances and commitments were made, declaring that such a failure must never happen again. As too many spoke these shallow words, a few thousand kilometers north of Rwanda, in the Darfur region of Sudan, the first reports were emerging in the Western media of a humanitarian catastrophe, clouded in a civil war or counter-insurgency campaign, which had at that time claimed the lives of at least 30,000 civilians, forced at least 200,000 into exile as refugees, and displaced at least a million inside Darfur. Little, if anything, was said in Kigali of what was happening in Darfur, and the killings continued.

Since 2004 we have seen an US-sponsored investigation concluding that genocide is taking place in Darfur; a United Nations investigation concluding that genocide is not taking place in Darfur; sporadic, ill-informed media coverage; division within the diplomatic, non-governmental, and academic communities over the question of genocide in Darfur; and an endless debate that rapidly deteriorates into legal tail-chasing and stale academic debates. All the while, Darfurians die, and the response to date by the United Nations, the European Union, the African Union (AU), and others has not stopped the killing, which is now conservatively estimated to have claimed the lives of more than 300,000 people and forcibly displaced over 2 million others. And the debate continues as people—innocent men, women, and children—die at a rate of almost 10,000 per month.

Is genocide taking place in Darfur? First, the UNCG states that genocide involves "the intent to destroy in whole or in part members of a national, ethnic, racial or religious group as such."¹ The people of Darfur are black Africans with distinct tribal and ethnic affiliations, which are recognized as such by the perpetrators and fellow Darfurians. They, in fact, constitute members of specific ethnic and racial groups. Second, genocide is committed by "killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and/or] forcibly transferring children of the group to another group."² The Janjaweed militia has murdered tens of thousands of human beings in Darfur; subjected men to execution and women to gang rape and branding; separated men from women, thus preventing births; and abducted children, who allegedly are being sold into slavery. In addition, it has destroyed homes, wells, farms, and crops for the express purpose of making the area uninhabitable and thus forcing the population into camps within and outside Sudan. These camps are located in desert areas, with the most extreme weather conditions, and people must live without access to water, food, firewood, shelter, or medical support, in conditions of life that are very likely, over time, to result in death. Each of the above facts, well documented by international, governmental, non-governmental, and media organizations, is an act of genocide; yet we continue to

debate endlessly whether or not the "threshold of intent" has been met. When anyone starts killing people and the death rate rises in two years from zero to 300,000 dead, I would suggest, common sense should dictate that a genocidal intent is being clearly demonstrated.

Under the UNCG, the contracting parties "may call upon the competent organs of the United Nations take such action under the Charter of the United Nations as they consider appropriate for preventing and suppressing these acts of genocide."³ Therefore, if it can be concluded that genocide is taking place in Darfur, then the international community has a moral obligation to intervene to stop this latest genocide.

As the current situation in Darfur continues to develop, the catastrophe in the region has been labeled a genocide by the Bush administration, by numerous genocide scholars, by large parts of the media, and by non-governmental organizations such as Genocide Watch. To date, efforts to respond to the genocide have been limited to ineffectual diplomacy with the Sudanese government in Khartoum; the deployment of a weakly mandated and inadequately led, trained, equipped, and supported AU peacekeeping force; and the provision of money, humanitarian aid, and some cast-off equipment. The international community is slowly coming to the conclusion that the lack of will and means to respond effectively to the situation in Darfur is in fact permitting another genocide to unfold on the African continent, regardless of the pontificating statements of 2004 in Kigali, when all present committed to "Never Again."

What will be required to stop the genocide in Darfur? First, an honest and common-sense admission that genocide is taking place there. Second, an honest admission that we, in the international community, especially those of us in the West, have a moral obligation to intervene to stop that genocide. Third, doing just that: threatening, while preparing a full humanitarian intervention, and, if the government of Sudan does not stop the killing in Darfur, actually intervening with the full military might of the international community to force the government of Sudan to stand down its armed forces, police, and militia or risk losing some or all of these forces. The armed forces of Sudan are all that keep the current regime in power. If it were to lose its military capability, the regime's survival would be at an end.

The endless debate over the "G-word" and the totally inadequate response to the genocide in Darfur have not to date stopped, and will not stop, the killing. We should not be surprised. For forty years, regimes in Khartoum have employed genocide as a tool in their ethnic, racial, and religious consolidation of power. For twenty years, African Christians in the south of Sudan were subjected to genocidal violence. In the 1980s, the Dinka people were almost exterminated. In the 1990s, the Nuba people were almost exterminated in yet another genocide. Successive governments of Sudan, with virtual immunity, have repeatedly resorted to genocide as a matter of domestic policy that has claimed the lives of up to 2 million of their citizens.

It is unlikely that the government of Sudan will change its behavior until it believes that, this time, the international community is serious and recognizes that it has more to lose than to gain by continuing a policy of genocide in Darfur.

Every problem is not a nail that can be solved by using a hammer. But some problems are nails that do require the use of a hammer. The genocide in Darfur is such a situation, and, despite our best efforts—or our worst efforts, or no effort at all—the situation in Darfur has exponentially worsened. While the debate and deliberations seem to continue endlessly, Darfurians continue to die each and every day. How many

must die—500,000? One million? Two or 3 million?—until we in the West with the means (if not the greatest will) accept our responsibility and obligation to intervene, and, if necessary, to use the hammer to stop the killings in Darfur? The time for debate is over. The time to give meaning to the cry “Never Again” is upon us.

Notes

1. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, http://www.unhcr.ch/html/menu3/b/p_genoci.htm (accessed 21 April 2006), art. 2.
2. *Ibid.*
3. *Ibid.*, art. 8.

Introduction to the Special Issue on Darfur

Samuel Totten and Eric Markusen

In launching the first issue of *Genocide Studies and Prevention*, we, the four editors (Alex Alvarez, Herb Hirsch, Eric Markusen, and Samuel Totten), feel compelled to address one of the most pressing issues facing genocide scholars today—the current crisis in Darfur, Sudan. It is a crisis that erupted in early 2003 and continues today. It is one in which government of Sudan troops (GoS) and the Janjaweed (Arab militia) are responsible for the mass murder of an estimated 180,000 black Africans (primarily from the Fur, Zaghawa, and Massaleit tribal groups) and possibly more than 250,000 others as a result of genocide by attrition (depriving the more than two million internally displaced persons of adequate food, water, shelter, and medical care).

Once again—as happened in Rwanda in 1994 and in Srebrenica in 1995, to mention but two instances—the international community’s response to the unfolding crisis was late in coming and far too tepid and anemic when it did come. As far back as December 2003, Jan Egeland, UN undersecretary general for humanitarian affairs, declared Darfur to be the worst humanitarian crisis in the world, and yet the international community proffered words over action in “addressing” the crisis. While various non-governmental organizations decried the situation in Darfur, the UN Security Council dithered by issuing one timid resolution after another in which it made idle threats to sanction Sudan if the killing, mass displacement, mass rape, and destruction continued. The mass murder—some, including the US government, deemed it genocide, while others, including the UN, deemed it crimes against humanity—continued unabated, but the United Nations did not see fit to alter its response in any real way.

Instead of taking firm steps to halt the mass killing, rape, and wholesale destruction of the black Africans’ villages and their way of life (it is estimated that more than 2,000 black African villages have been utterly destroyed and burned to the ground), the UN Security Council welcomed the African Union’s offer to deploy troops as monitors in the Darfur area. The UN Security Council knew full well that the AU mission would be not only undermanned and under-resourced but working with an inadequate mandate, but it did not seem to care about such critical limitations and liabilities. It is also true that the AU mission ostensibly provided the UN Security Council with an easy “out.” That is, as long as the African Union was on the ground in Darfur—and continued to demand that it be allowed to handle the crisis on its own—the UN Security Council was more than willing to capitulate to these demands, for the simple but profound reason that this provided the council with a rationale for not acting. Such an approach also met the specific wishes of at least three of the permanent members of the Security Council: China (which has huge petroleum interests in Sudan), Russia (which has a large and extremely lucrative arms deal with Sudan), and the United States (which now considers Sudan a partner in its so-called war on terrorism). Once again, *realpolitik* won out over real humanitarian concern.

This special issue on Darfur provides a glimpse into various aspects of the crisis. René Lemarchand, an expert on the Great Lakes region of Africa, contributes an

overview of the crisis that places it within the larger context of Sudan's history. Scott Straus, a political scientist at the University of Wisconsin–Madison, presents a comparative study of the genocides perpetrated in Rwanda (in 1994) and in Darfur. Samuel Totten, a scholar of genocide studies at the University of Arkansas, Fayetteville, provides a critique of the US State Department's Atrocities Documentation Project—whose data resulted in the determination by the US government that genocide had been (and possibly continued to be) perpetrated in Darfur—along with a critique of the motives and ramifications of the “finding” of genocide. Kelly D. Askin, a lawyer, scholar, and expert on mass rape, delineates and discusses the crimes that have been perpetrated against girls and women in Darfur since early 2003. Jerry Fowler, a lawyer and the staff director of the Committee on Conscience at the United States Holocaust Memorial Museum, presents an argument as to why and how, under international law, the situation in Darfur constitutes genocide. Finally, Canadian military officer Major Brent Beardsley, who served as personal assistant to the force commander of the United Nations Mission in Rwanda during the 1994 Rwandan genocide, reflects on the failure of the international community to stop the genocide in Rwanda and the significance of the latter vis-a-vis the ongoing tragedy in Darfur.

The aim of this special issue on Darfur is to provide readers with a sense of what is taking place on the ground in Darfur, the international community's reaction to the crisis, and the ramifications of the latter for the people of Darfur, and for efforts to develop effective means for preventing and/or stanching genocide. In many ways, it is also a lamentation for lives lost and an expression of frustration and anger over what could have been but wasn't, since the international community seems stuck in its affinity for *realpolitik*.

Contributors

Kelly Dawn Askin currently serves as Senior Legal Officer, International Justice, with the Open Society Justice Initiative. She has also served as an expert consultant, legal advisor, and international law trainer to prosecutors, judges, and registry at the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Serious Crimes Unit in East Timor, and the International Criminal Court. Among her publications are *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Transnational Publishers, 1997) and the three-volume treatise *Women and International Human Rights Law* (Transnational Publishers, 1999, 2001, 2002), of which she is co-editor. Askin be reached at kaskin@justiceinitiative.org.

Major Brent Beardsley has served for twenty-six years as an Infantry Officer in the Royal Canadian Regiment. In 1993–1994, he served as General Roméo Dallaire’s personal staff officer in UNAMIR, before and during the genocide in Rwanda; he is the co-author of General Dallaire’s memoir *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Random House Canada, 2004). He is currently serving as a research officer at the Canadian Forces Leadership Institute at the Canadian Defence Academy. He is also completing a master of arts degree in War Studies at the Royal Military College of Canada, where the focus of his studies is on genocide and humanitarian intervention. Major Beardsley can be contacted at brent.beardsley@rmc.ca.

Jerry Fowler is staff director of the Committee on Conscience, which guides the genocide prevention efforts of the United States Holocaust Memorial Museum. He is a graduate of Princeton University and has a law degree from Stanford University. He has taught at George Mason University Law School and at George Washington University. His publications include “Out of That Darkness: Preventing Genocide in the 21st Century,” in *Century of Genocide: Eyewitness Accounts and Critical Views* (Routledge, 2004). Fowler can be reached at jfowler@ushmm.org.

René Lemarchand is professor emeritus of political science at the University of Florida (Gainesville). He has written extensively on Rwanda, Burundi, and the Congo. His book *Rwanda and Burundi* (Praeger, 1970) received the Melville Herskovits Award of the African Studies Association in 1970. He served as Regional Advisor on Governance and Democracy with USAID from 1993 to 1998, first in Abidjan and then in Accra. He has been visiting professor at Smith College, Brown University, the University of Copenhagen, the University of Bordeaux, and the University of California, Berkeley. Lemarchand can be reached at renelemar@aol.com.

Eric Markusen (MSW, University of Washington; PhD, University of Minnesota) is Professor of Sociology and Social Work at Southwest Minnesota State University and a senior researcher with the Department of Holocaust and Genocide Studies of the Danish Institute for International Studies. He has written about nuclear weapons policy; the nature of modern war; the Holocaust; and the genocides in Cambodia,

Bosnia, Rwanda, and Sudan. Markusen served as an investigator on the US government's Atrocities Documentation Team, interviewing refugees from the genocide in Darfur. Markusen can be reached at markusen@southwestmsu.edu

Scott Straus is Assistant Professor of Political Science and International Studies at the University of Wisconsin. He is the author of two forthcoming books on Rwanda: *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press) and, with Robert Lyons, *Intimate Enemy: Images and Voices of the Rwandan Genocide* (Zone Books). He has also published articles in *Foreign Affairs*, *the Journal of Genocide Research*, and *Patterns of Prejudice*. Straus can be reached at sstraus@wisc.edu.

Samuel Totten, a scholar of genocide studies, is based at the University of Arkansas, Fayetteville. Totten was one of the twenty-four investigators on the US Department of State's Darfur Atrocities Documentation Team, whose express purpose was to collect data to enable the US government to ascertain whether genocide or not had been perpetrated in Darfur. Among the books Totten has most recently edited, co-edited, or written on genocide are *Century of Genocide: Critical Essays and Eyewitness Accounts* (Routledge, 2004); *Genocide at the Millennium* (Transaction Publishers, 2004); and *The Prevention and Intervention of Genocide: An Annotated Bibliography* (Routledge, 2006). Totten can be reached at stotten@uark.edu.