

December 2009

## Full Issue 4.3

Follow this and additional works at: <https://digitalcommons.usf.edu/gsp>

---

### Recommended Citation

(2009) "Full Issue 4.3," *Genocide Studies and Prevention: An International Journal*: Vol. 4: Iss. 3: Article 1.  
Available at: <https://digitalcommons.usf.edu/gsp/vol4/iss3/1>

This Front Matter is brought to you for free and open access by the Open Access Journals at Digital Commons @ University of South Florida. It has been accepted for inclusion in *Genocide Studies and Prevention: An International Journal* by an authorized editor of Digital Commons @ University of South Florida. For more information, please contact [digitalcommons@usf.edu](mailto:digitalcommons@usf.edu).

---

## Editor's Introduction

---

Upon its inception in 2006, *Genocide Studies and Prevention: An International Journal* 1:1 published a special issue entitled "Genocide in Darfur." At that time, the crisis in Darfur had already been the focus of international attention for some three years. That special issue provided an overview of the crisis, the crimes perpetrated against black African women and girls of Darfur by government of Sudan (GoS) troops and the Janjaweed, the legal implications of the US determination that the atrocities in Darfur constituted genocide, a comparative analysis of the atrocities perpetrated in Rwanda in 1994 and Darfur in the early 2000s, and a critical analysis of the US government's Atrocities Documentation Project whose data were used by the US government to make its determination of genocide.

Today, the Darfur crisis is about to enter its seventh year. Rebel groups and GoS troops continue to engage in battle, but just as often rebel groups fight among themselves. Periodic attacks continue to be carried out by the GoS against civilians, which have resulted in the continuance of spasmodic but still relatively massive refugee flows. It is now estimated that over 2.5 million black Africans are internally displaced in Darfur and some 275,000 to 300,000 are refugees in Chad. Girls and women continue to be raped, but not just by Janjaweed and GoS forces but also by members of various rebel groups (in other words, by black African males).

The African Union, which finally came to the realization that it did not have the requisite mandate, manpower, firepower, and resources to handle the mission in Darfur, acquiesced to international pressure and, in conjunction with the United Nations, formed the hybrid United Nations–African Union Mission in Darfur (UNAMID). Unfortunately, UNAMID is now suffering many of the same handicaps faced by its predecessor.

As time has crept by, the GoS has played cat to the international community's mouse. Indicative of this is how the GoS treats and mistreats those agencies providing humanitarian aid, periodically declaring certain groups and individuals *personae non gratae* and kicking them out of Darfur, thus leaving the internally displaced persons (IDPs) to desperately fend for themselves in an already harsh and forbidding climate and situation. Another classic illustration of the cat and mouse game the GoS plays is the fact that it has, more than once, breached the agreement that it would no longer off-load military personnel or material in Darfur. Not only has it breached the agreement but, in the process of doing so, it has also stooped to whitewashing planes and affixing UN insignias to them before flying them into Darfur.

It is little wonder that the situation in Darfur has been described by various actors, including UNAMID personnel, as chaotic and "a conflict of all against all."

Yet, it is also true that the international community's various threats and actions have, in various ways though to an extremely limited extent, pushed the GoS into being somewhat more pliable vis-à-vis certain Darfur-related issues. For example, the GoS allowed the UNAMID force onto Sudanese territory. But, even then, the GoS used brinkmanship and, in the end, significantly limited the ultimate effectiveness of the new force.

It is also true that the number of killings that peaked between 2004 and 2005 has fallen precipitously in the years since. Still, the GoS and the Janjaweed continue to kill black Africans civilians, and many continue to die from unattended injuries, dehydration, malnutrition, and disease.

The exact number of black Africans who have been killed and who have perished due to other causes continues to be a matter of great, and in some ways, maddening debate. By late 2004, various scholars and groups proffered estimates ranging from 180,000 to 400,000. In 2005, though, US Deputy Secretary of State Robert B. Zoellick asserted that the US State Department's estimate of deaths in Darfur was 60,000 to 160,000. While roundly lambasted by many for sorely underestimating the number of Darfurian deaths, he was praised by others for presenting a more "sensible" number. Since then, the numbers cited have ranged from the low 100,000s to the high 500,000s and above.

An example of how the numbers of dead have been bandied about is evident in the way various individuals and organizations mindlessly latched on to a number issued by the World Health Organization (WHO) in 2004. WHO reported that 70,000 had died, and the number was readily accepted by many, without question, as being the "new" total of deaths. In fact, WHO was only referring to deaths that had occurred over a seven-month period and not the entire twenty-six months that the crisis had spanned by that point in time. Furthermore, the 70,000 deaths referred solely to those who died from malnutrition and disease and *not* from violence. Furthermore, the number only referred to the deaths in those areas in the region to which WHO had access.

A constant in the discussion over the crisis in Darfur is whether the actions by the GoS and Janjaweed amount to genocide or crimes against humanity. Following the US Atrocities Documentation Project's investigation into the alleged crimes perpetrated by the GoS and the Janjaweed, the United States government declared, in September 2004, that the GoS and Janjaweed had perpetrated genocide in Darfur in 2003 and 2004. The United States then referred the matter to the United Nations. In late January 2005, following its own investigation—the Commission of Inquiry into Darfur (COI)—the United Nations asserted that what had taken place constituted crimes against humanity but not genocide (though it did leave the door open for a finding of genocide contingent upon more detailed data indicating such). Subsequently, it referred the matter to the International Criminal Court (ICC).

Following an extensive investigation by the ICC, its lead prosecutor Luis Moreno-Campo submitted an application on 14 July 2008 for the issuance of a warrant of arrest for the Sudanese president Omar al-Bashir.

Ultimately, by a majority, the ICC judges found that the materials presented by the prosecutor failed to provide reasonable grounds to indicate that the GoS acted with the specific intention to destroy in whole or in part the Fur, Massaleit, and Zaghawa peoples. Subsequently, the judges issued an indictment charging Sudanese president Omar al-Bashir with five counts of crimes against humanity (murder, extermination, forcible transfer, torture, and rape) and two counts of war crimes (directing attacks on the civilian population and pillaging). One judge, Anita Usacka from Latvia, wrote a dissent, stating that she believed the charge of genocide was accurate.

Moreno-Ocampo filed an appeal in which he asserted that the judges' standard for adding the genocide charge to the warrant was too high, that the judges' desire for him to prove beyond a reasonable doubt that al-Bashir committed genocide was not required for a warrant and only required a reasonable inference of guilt, and that the judges were asking for "a level of evidence that is the level of evidence required at the trial stage, not at the beginning of the process."

Scholars find themselves embroiled in much the same debate, some arguing that it is, at the very least, clear that the GoS committed genocide early in the crisis (2003–2005), while others argue, for various reasons, that while the GoS certainly committed crimes against humanity it did not commit genocide. In doing so, the latter focus largely on what they claim is the lack of intent by the GoS to destroy in whole or in part the Fur, Massaleit, and Zaghawa. Straddling these two poles are those who have deemed the atrocities everything from “an ambiguous genocide” to “genocide-like.”

Early on in the crisis, the media provided extensive coverage of what was taking place in Darfur. Over the past year and a half to two years (2007 through the summer of 2009), though, the coverage has tapered off to a great extent. Indeed, following the Beijing 2008 Summer Olympics, the stream of news about Darfur fell off sharply. Likewise, coverage of the fact that UNAMID continues to struggle mightily in Darfur is slight. All of this is reminiscent of a trenchant observation made many years ago by Milan Kundera in *The Book of Laughter and Forgetting*:

the bloody massacre in Bangladesh quickly covered the memory of the Russian invasion of Czechoslovakia; the assassination of Allende drowned out the groans of Bangladesh; the war in the Sinai desert made people forget Allende; the Cambodian massacre made people forget Sinai; and so on and so forth, until ultimately everyone lets everyone be forgotten.<sup>1</sup>

Fortunately, we're not totally at that stage yet vis-à-vis Darfur, but it's also true that other issues and events have pushed it out of the headlines, including but not limited to the wars in Iraq and Afghanistan, worry over the fate of Pakistan, the ongoing bellicosity between the Palestinians and the Israelis, and the recent political turmoil in Iran.

In comparison to the decline in media attention, scholars and activists are focusing ever-increasing attention on Darfur, and over the past several years well over a dozen books have appeared in print about various aspects of the Darfur crisis. Among some of the more notable include *Darfur: A Short History of a Long War* by Julie Flint and Alex De Waal; *War in Darfur and the Search for Peace* edited by Alex De Waal; *Genocide in Darfur: Investigating Atrocities in the Sudan* edited by Samuel Totten and Eric Markusen; *A Long Day's Dying: Critical Moments in the Darfur Genocide* by Eric Reeves; *Darfur: Genocide Before Our Eyes* edited by Joyce Apsel; *Darfur: The Ambiguous Genocide* by Gérard Prunier; *Darfur: A 21st Century Genocide* by Gérard Prunier; *The World and Darfur: International Response to Crimes Against Humanity in Western Darfur* edited by Amanda Grzyb; *Darfur and the Crime of Genocide* by John Hagan and Wenona Rymond-Richmond; *Darfur's Sorrow: A History of Destruction and Genocide* by M.W. Daly; *The Devil Came on Horseback: Bearing Witness to the Genocide in Darfur* by Brian Steidle and Gretchen Steidle Wallace; and *The Translator: A Tribesman's Memoir of Darfur* by Daoud Hari.

Several of the contributors to this special issue of *Genocide Studies and Prevention (GSP)* are some of the most active scholars on Darfur. It is worth noting that whereas the first *GSP* special issue on Darfur provided a roadmap of the crisis, this special issue focuses critical attention on what has transpired in Darfur over the past five years (2004–2009), with a particular focus on the events leading up to and eventuating in the ICC charges against President Omar al-Bashir.

In this special issue's first article, “Darfur: Strategic Victimhood Strikes Again?” Alan J. Kuperman offers a provocative argument regarding various facets of the crisis in Darfur, particularly in relation to the ongoing demand by many for an intervention

in Darfur. More specifically, he asserts that he and a group of select others “contend that the prospect of luring Western intervention to tip the balance of power in their favor is what drives the rebels to fight a war that they cannot win on their own. If not for the prospect of such intervention . . . the rebels long ago would have sued for peace, which the government would have accepted, thereby ending the violence. Thus, . . . Western calls for intervention have backfired, perpetuating fighting in Darfur and the resultant suffering of its civilians.” Kuperman offers a new way of examining the potential seeds and prolongation of the crisis, and raises a host of issues that demand to be analyzed and weighed by diplomats, politicians, and scholars, even if the argument initially puts them off and/or counters their past way of thinking about what has transpired in Darfur.

In “The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur,” Victor Peskin sets out to “highlight the ways in which the ICC and Sudan have and are likely to continue to wage the battle over Sudan’s legal obligation to comply with international prosecutions by handing over suspects and otherwise assisting the pursuit of international justice.” Based on a series of interviews, the author provides readers with an in-depth examination of far-reaching and thorny political and legal issues that are not only germane to the case in Darfur but also likely to impact future ICC cases. In his conclusion, Peskin, in part, cogently argues, “The struggle with Khartoum is not only about fulfilling the Court’s central mission of prosecutions in its most high-profile situation. Also at stake is the ICC’s legitimacy and viability as a permanent court of global justice.”

In the third article, which complements Peskin’s, Alex De Waal and Gregory H. Stanton engage in an exchange of views as to whether the president of Sudan should be charged and arrested by the ICC. In “Should President Omar al-Bashir of Sudan Be Charged and Arrested by the International Criminal Court? An Exchange of Views,” they each raise a host of thought-provoking issues and challenge one another, and the reader, to ruminate long and hard over the value (or, conversely, the danger) of pursuing charges against al-Bashir.

In “A Critical Analysis of the United Nations Commission of Inquiry into Darfur,” Samuel Totten critiques both the UN investigation in Darfur and its finding that crimes against humanity but not genocide had been perpetrated against the black Africans by the GoS and the Janjaweed. Ultimately, Totten asserts that the COI was possibly short-circuited by (1) a biased view of what the findings might lead to before the investigation was even conducted, (2) an investigation that was unsystematic and hastily carried out, and (3) an incorrect analysis of the facts and data collected by the COI.

This special issue is rounded out with reviews of two book on Darfur: Alex De Waal’s *War in Darfur and the Search for Peace*, and Samuel Totten and Eric Markusen’s *Genocide in Darfur: Investigating Atrocities in the Sudan*.

*Samuel Totten*  
*GSP Editor*

## Notes

1. Milan Kundera, *The Book of Laughter and Forgetting* (New York: Viking, 1979), 7.

---

# Darfur: Strategic Victimhood Strikes Again?

Alan J. Kuperman

*LBJ School of Public Affairs, University of Texas, Austin*

*Although most humanitarians advocate more international intervention in Darfur, some analysts urge the opposite on grounds that intervention has backfired due to the problem of moral hazard. These contrarians argue that the expectation of benefiting from intervention is what emboldens Darfur's rebels to fight, which provokes state-sponsored retaliation against their perceived civilian supporters, thereby exacerbating and prolonging the humanitarian emergency. This article tests the moral-hazard hypothesis against four other potential explanations for why Darfur's militants launched and perpetuated their rebellion despite being unable to protect their civilians from genocidal retaliation. The evidence indicates that moral hazard—the expectation of humanitarian intervention—increased both the magnitude and duration of Darfur's rebellion, and therefore the retaliation it provoked against civilians. Competing hypotheses are less plausible but cannot be ruled out completely based on available evidence. The article explores the policy implications for intervention in Darfur and other humanitarian emergencies, and offers suggestions for further research.*

*Key words: Darfur, Sudan, humanitarian, intervention, moral hazard, genocide*

---

## Introduction

For over five years, Western media, politicians, and non-governmental organizations have criticized the relatively modest level of international intervention in Darfur, a region of northwest Sudan that was obscure until war broke out in 2003. Nearly all of these critics argue that intervention has been inadequate in light of the scope of violence and suffering, which includes 3 million displaced persons and a death toll estimated up to half a million. But a small band of contrarians, including me, has argued that the problem is essentially the opposite: the prospect of more intervention. We acknowledge that violence has been perpetrated mainly by Sudan's army and state-supported Arab Janjaweed militias against villages accused of supporting African tribal rebels, and that intervention to date has been inadequate to protect civilians. But we contend that the prospect of luring Western intervention to tip the balance of power in their favor is what drives the rebels to fight a war that they cannot win on their own. If not for the prospect of such intervention, we argue, the rebels long ago would have sued for peace, which the government would have accepted, thereby ending the violence. Thus, we conclude, Western calls for intervention have backfired, perpetuating fighting in Darfur and the resultant suffering of its civilians.

If correct, this radical hypothesis has important implications for intervention in Sudan and elsewhere. Indeed, I have argued previously for redesigning intervention policy so as not to reward rebels unless state retaliation is grossly disproportionate, and for promoting instead the cause of nonviolent protest movements.<sup>1</sup> The hypothesis, however, has yet to be tested rigorously in Darfur, so this article represents a first attempt to do so. It starts by summarizing the recent literature on the “moral hazard

of humanitarian intervention.” Next, it lays out a methodology to assess the hypothesis in Darfur, and then conducts such a test. The final section analyzes the policy implications for intervention in Darfur and beyond, and offers recommendations for further research.

### **Moral Hazard and Its Critics**

In economics, “moral hazard” is the phenomenon in which the provision of insurance against risk unintentionally encourages the insured to act irresponsibly or fraudulently based on the expectation that any resulting short-term loss will be compensated by the subsequent insurance payout. Analogously, I have argued that the emerging norm of humanitarian intervention, now subsumed in the concept of the “Responsibility to Protect” as explained below, inadvertently encourages rebellion by members of sub-state groups that are vulnerable to retaliation by increasing their expectation of success and decreasing their expected cost.<sup>2</sup> Moral hazard can be caused by a wide range of humanitarian intervention, not confined to military deployment but including “any international action that is primarily motivated by the humanitarian desire to protect civilian targets of state violence,”<sup>3</sup> if that intervention also encourages rebellion. This includes rhetorical condemnation and economic sanctions against states, diplomatic recognition of secessionist entities, and covert military assistance to rebels. When such intervention encourages members of a sub-state group to launch or perpetuate an armed challenge, the state often retaliates against the group’s civilians. Intervention ultimately may assist the rebels to attain their political goals but typically is too late or inadequate to protect the civilians from state retaliation. Thus, the emerging norm sometimes backfires by helping to cause the tragic outcomes that it intends to prevent. I have demonstrated this phenomenon in two cases from the Balkans in the 1990s, Bosnia and Kosovo, by testing the hypothesis against competing explanations based on evidence, including interviews with the leaders of each armed challenge.<sup>4</sup>

Some advocates of the Responsibility to Protect norm claim that it is more expansive and less belligerent than the older concept of humanitarian intervention, because it emphasizes first the responsibility of states to protect their own people and second the responsibility of other states to offer consensual assistance. Only failing those efforts does the new concept contemplate more intrusive international measures, and it explicitly relegates military intervention to a last resort. In reality, however, this ostensibly innovative concept merely codifies the practice of humanitarian intervention as it has emerged since 1991. Typically, when civilians have been threatened by a state, the international community has first exhorted the state to desist, next offered assistance ranging from mediation to peacekeeping, then imposed non-military coercive measures such as economic sanctions, and only as a last resort contemplated non-consensual military intervention. This escalatory ladder of intervention, ranging from least to most intrusive, is driven by the dual objectives of providing humanitarian protection while minimizing the violation of traditional state sovereignty. The attempted “re-branding” of the intervention norm as the Responsibility to Protect may have broadened its nominal support among developing states but has neither altered the substance of the emerging norm nor mitigated the moral-hazard problem.<sup>5</sup>

In a previous essay, I suggested reforming the practice of humanitarian intervention in five ways. First, do not help sub-state rebels unless state retaliation is grossly disproportionate, so that both sides have incentive to restrain their violence. Second, deliver humanitarian aid to affected civilians in ways that minimize the benefit to

rebels, such as via transportation corridors and displaced-person camps that are patrolled to exclude militants or at least their weapons. Third, expend substantial resources to persuade states to address the legitimate grievances of non-violent domestic groups, to further discourage rebellion. Fourth, do not coerce states to surrender territory or authority to a domestic opposition unless and until a robust peace-keeping force is deployed to protect against the potential violent backlash. Fifth, do not falsely claim humanitarian motives for interventions that are driven primarily by other objectives—such as securing resources, fighting terrorism, or preventing nuclear proliferation—because this can inadvertently increase the expectation of sub-state groups elsewhere that they can attract intervention by provoking a humanitarian emergency.<sup>6</sup>

Timothy Crawford has refined the theory by specifying more precisely the potential causes and consequences of moral hazard.<sup>7</sup> First, he differentiates four possible sources of expectations within a sub-state group about prospective intervention: recent signals by a potential intervener regarding the specific case; recent interventions elsewhere, especially nearby; older interventions in the region; or the more general emerging norm of humanitarian intervention. Second, he differentiates two putative effects: the initiation of an armed challenge and the perpetuation of such a rebellion. He argues deductively that moral hazard should be most intense when third parties signal their intention to intervene in a specific case, and that moral hazard is more likely to perpetuate than to initiate a rebellion.

Other critics of the moral-hazard theory dispute or refine its claims about the Balkans. Jon Western argues that the armed challenges in Bosnia and Kosovo were triggered not by hopes of intervention but by an escalatory spiral of grievance and insecurity.<sup>8</sup> Arman Grigorian insists that the US threat of intervention in Kosovo was motivated not by humanitarian concern but by a desire for vengeance against Serbian leader Slobodan Milosevic.<sup>9</sup> In that same case, Harrison Wagner emphasizes that the expectation of intervention compelled the state to perpetrate ethnic cleansing in anticipation of, but prior to, the ultimate rebel escalation anticipated by the theory.<sup>10</sup>

### **Moral Hazard in Darfur?**

Since 2004, several Western analysts have argued that calls for intervention in Darfur have backfired by emboldening the rebels, thereby prolonging that region's conflict and the resultant suffering of its civilians. But these contrarians have cited little evidence in support of their claims and typically have failed to distinguish between the outbreak and perpetuation of rebellion. None of these critics, including me, heretofore has tested the moral-hazard hypothesis against other potential explanations for the rebellion in Darfur.<sup>11</sup>

A rigorous examination of moral hazard in Darfur entails three steps. First, the hypothesis should be tested against other plausible explanations for the rebellion. Next, if moral hazard is determined to play some causal role, that role should be pinpointed as either triggering the rebellion, perpetuating it, or both. Finally, the sources of the rebels' expectations about intervention should be specified, in accordance with the critiques of Crawford and Grigorian. All three steps are susceptible to the case-study inferential method of "process-tracing," by positing the evidence that would prove or disprove each hypothesis and then searching for such proof in primary and secondary sources.<sup>12</sup>

As I have argued previously, there are only five plausible reasons, including moral hazard, why members of a sub-state group would launch and perpetuate a rebellion



Table 1: Possible Explanations for Suicidal Rebellions

1	Do not expect retaliation
2	Perceive victimization as inevitable
3	Expect victory without intervention
4	Expect intervention to enable victory
5	Not driven by strategic calculus

that provokes massive state retaliation against the group’s civilians, which I call “suicidal rebellion” (Table 1).<sup>13</sup> First, the militants may not expect the state’s reaction, which could explain the initial rebellion although not its perpetuation in the face of retaliation. Second, prior to the rebellion, these militants may expect the state inevitably to attack the group’s civilians, so that they perceive nothing to lose by rebelling even without an expectation of victory. Third, the militants may expect the rebellion to succeed without intervention and may view the retaliation against their civilians as an acceptable cost. Fourth—the moral hazard explanation—the militants may rebel only because they expect state retaliation to trigger international intervention that enables them to prevail at an acceptable cost. Finally, the rebellion may be driven by something other than strategic calculus, such as frustration. Each hypothesis could be confirmed by evidence that either supported it or disproved all the others.

### **Rebellion, Retaliation, and Resistance to Compromise**

Sudan has endured multiple civil wars since independence in 1956, often arising from challenges to the traditional Arab Islamic elite in the northern capital of Khartoum who monopolize power and wealth. The first war, pitting Khartoum against racially and religiously distinct rebels from the south, persisted from 1956 to 1972. That fight resumed in 1983 and raged until the July 2002 Machakos Protocol, which laid out principles of a power-dividing settlement that subsequently was codified in a January 2005 Comprehensive Peace Agreement. The north–south wars were brutal, as the government employed its armed forces and allied militias in a scorched-earth counter-insurgency against rebel areas, inflicting an estimated 2 million deaths, many from war-induced deprivation.

In Darfur, conflict has multiple roots that stretch back more than four decades, including the spillover of the war between neighboring Libya and Chad; land disputes between settled tribes and nomadic Arab pastoralists, exacerbated by increasing desertification; an Arab supremacist movement sponsored by Libya; political reforms that disempowered local tribes; and monopolization of power and wealth by Khartoum.<sup>14</sup> Despite widespread grievances and a history of low-level conflict, however, Darfur avoided full-scale civil war until 2003. Indeed, in 1991, when southern Sudan’s rebels attempted to spread war to Darfur by sponsoring an invasion from neighboring Kordofan province, the outsiders received little local support and were quickly defeated by Sudan’s army and an allied Arab militia.<sup>15</sup>

Starting around 1999, however, militants among Darfur’s largest African tribes prepared for rebellion. In that year, Masalit militants traveled to Eritrea to be trained by rebels from southern Sudan. In 2000, Fur rebels set up training camps in central Darfur and extracted taxes from the local populace. In 2001, Masalit and Fur militants traveled to southern Sudan to gain combat skills by fighting alongside the rebels there. Then, in February 2002, Zaghawa, Fur, and Masalit rebels launched their first

joint attack, under the rubric of the Darfur Liberation Army, burning an army garrison in central Darfur and seizing arms. A year later, these militants launched a full-blown rebellion under a new name: the Sudan Liberation Army (SLA). Days later, a second Darfur rebel group, comprising mainly Zaghawa and closely tied to the Islamist leader Hassan Turabi, who recently had been purged by the Khartoum regime, announced itself as the Justice and Equality Movement (JEM).<sup>16</sup> The SLA had more grass-roots support and concentrated its demands on Darfur, while the JEM enjoyed greater resources from its external Islamist connections and announced a nationwide reform agenda, in keeping with Turabi's political aspirations.

The SLA's first major attack, in February 2003, killed 200 soldiers in Golu, in western Darfur. More spectacularly, in April 2003, both rebel groups attacked two army outposts in central and southern Darfur, killing dozens of soldiers, destroying several fixed-wing aircraft and helicopters, and capturing a base commander. Over the next four months, the rebels killed hundreds more soldiers in three attacks on north Darfur.<sup>17</sup>

Sudan's government responded initially by trying to negotiate with the rebels. In March 2003, Khartoum dispatched North Darfur's governor to London to forge a deal with JEM leader Khalil Ibrahim, but "the governor came back empty-handed." Additional overtures by government officials later that spring also failed, reportedly due to opposition from hardliners on both sides.<sup>18</sup> It is difficult to assess Khartoum's sincerity in these early talks, but it is notable that the government's first response to the rebellion was to negotiate rather than to deploy overwhelming force. Only after four months of rebel attacks and failed peace talks did Khartoum, in June 2003, switch to a devastatingly violent counterinsurgency strategy, combining the army, popular defense forces, aerial bombardment, and local Janjaweed Arab militias to attack hundreds of villages suspected of supporting the rebels. Typically, the attacks started with imprecise bombing from aircraft to sow terror, after which militias arrived on horseback to loot and then burn the villages, often killing or raping a few residents and generally compelling most of the rest to flee. By late 2003, thousands of Darfur's Africans had been killed, while hundreds of thousands were displaced from their homes. International relief organizations began delivering aid in 2003 to the displaced in camps in Darfur and neighboring Chad, and African Union (AU) monitors entered Darfur in 2004. But persistent low-level fighting has perpetuated the humanitarian deprivation of many Darfuris. Over the course of the war, thousands have been killed directly by fighting, while tens of thousands of additional deaths are attributed to higher than normal mortality inside and outside the camps.<sup>19</sup>

Despite the rebels' inability to defeat the government forces and militia or to defend civilians against retaliation, they repeatedly refused to test the sincerity of the government's overtures to end the fighting, which potentially could have alleviated humanitarian suffering via negotiated compromise. Some critics of Sudan's regime claim that it does not sincerely want peace in Darfur because a power-sharing deal would weaken the central government prior to south Sudan's secession referendum in 2011, increasing the risk of the country's disintegration. More likely, however, Khartoum seeks to maximize its military potential prior to the 2011 referendum, in order to coerce the south not to vote for secession or otherwise to defeat it. In that light, Khartoum has a very strong incentive to end the war in Darfur, so it can free up its security forces to deter or win a renewed war in the south.

The sincerity of Khartoum's peace offers in Darfur remains unknown because the rebels have refused to explore them in good faith. In November 2003, the Sudan Liberation Movement (SLM), the political arm of the SLA, abandoned peace talks in

Chad. The following month, despite rapidly diminishing prospects on the battlefield and mounting humanitarian suffering, the rebels actually increased their demands, blocking any chance for peace.<sup>20</sup> From April to July 2004, both main rebel groups refused to attend peace talks in Chad and Ethiopia.<sup>21</sup> In December 2004, the SLA failed to attend peace talks in Nigeria. In September 2005, following a split in the SLA, the representative of the Zaghawa wing failed to attend another round of those talks. In November 2005, the rebels stalled negotiations by unrealistically demanding 90 percent of the positions in local government. (Even under the north-south peace deal, negotiated by rebels who were much stronger, the government retained 70 percent of such positions.) Finally, in May 2006, when Sudan's government signed the Darfur Peace Agreement, brokered by the United States and the African Union, only the SLA's Zaghawa faction (led by Minni Minawi) signed, while the JEM (led by Khalil Ibrahim) and the SLA's Fur wing (led by Abdel Wahid) rejected it.<sup>22</sup> As a result, the war continued, rebel factions splintered, Darfur descended into anarchy, and attacks mounted against relief organizations, which reacted by cutting back their operations, thereby increasing humanitarian suffering.

The puzzle addressed in this article is why the Darfur rebels, who could neither defeat the government nor defend civilians from retaliation, chose to launch and perpetuate a rebellion that provoked such massive violence against their own civilians, while persistently rejecting government overtures for a negotiated peace. This does not imply that the rebels bear primary responsibility for the violence, nor does it deny the legitimate grievances and aspirations of Darfur's African tribes, nor does it excuse as mere retaliation the crimes committed by Sudan's government forces and allied militias. Rather, the question is about motivation and strategy: Why did the rebels pursue a course that imposed such a high cost on the civilians that they purported to represent, if this course also offered little prospect of attaining their political goals through military success? A rigorous explanation also must address timing: Why did Darfur's rebels launch and perpetuate their armed challenge from 2003 onwards, when the region's African tribes had overwhelmingly rejected calls for rebellion since at least 1991?

### **Hypothesis 1: Surprised by Retaliation?**

All available evidence contradicts the first hypothesis: that Darfur's rebels were surprised when their rebellion provoked widespread government retaliation against civilians.<sup>23</sup> First, government authorities previously had issued explicit threats of such retaliation. On a visit to Darfur in November 2002, Sudan's vice-president Ali Osman Taha warned militants "not to repeat in your area the colonial error which has paralyzed Southern Sudan," because Darfur would "be pulled backward for many years." In March 2003, just days after the rebels' first major attack, the governor of south Darfur threatened that "if dialogue does not work in Darfur, the Army can solve the situation in 24 hours."<sup>24</sup>

The rebels had every reason to perceive such threats as credible, given the government's nearly two decades of brutal response to previous rebellions in Sudan. During the north-south civil war, the government and its typically Arab militias targeted civilians throughout the south: in Bahr el Ghazal starting in 1986, Wau in 1988, Juba in 1992, the Nuba Mountains in 1992-1995 (the government aimed to relocate the entire Nuba population), and the upper Nile in 1998-2003. As Julie Flint and Alex DeWaal observe, when Sudan's government was faced with rebellion, "scorched earth, massacre, pillage, and rape were the norm." Darfur's rebels surely were aware of these preceding events elsewhere in Sudan, but they also had precedent in Darfur

itself. In 1987, in retaliation for incursions by rebels from southern Sudan, Arab militias in southeast Darfur killed more than 1,000 Dinka civilians who had been displaced from the south and thus were perceived as rebel sympathizers.<sup>25</sup> In 1991, when southern rebels sponsored their invasion of Darfur, Sudan's army and allied militia "burned entire villages on suspicion of having welcomed" the invaders. In 1999, when the Khartoum regime crushed a low-intensity Masalit insurgency in west Darfur, government forces killed an estimated 2,000 and displaced more than 100,000. In 2001, when southern rebels launched an offensive toward Darfur from Bahr el Ghazal, government-allied Arab militias retaliated in that neighboring state with "indiscriminate attacks on civilians."<sup>26</sup> Moreover, when the Darfur rebels launched their initial, small-scale operations in 2002, they provoked the Janjaweed's first significant attacks on Fur civilians in south Darfur in October 2002. By the end of that year, such retaliation had killed hundreds of civilians and burned hundreds of villages across Darfur, vividly illustrating the costs of rebellion well before Darfur's rebels escalated to the high-profile attacks of 2003.<sup>27</sup>

The strongest evidence that Darfur's rebels expected their insurgency to provoke retaliation against the region's African tribes is that those tribes opposed the rebellion on precisely such grounds. When Fur militants attempted to recruit in 1999, according to Flint and de Waal, "the Masalit were hesitant to take action that might exacerbate their suffering. They had bitter recent experience of how any action, however small, could escalate."<sup>28</sup> Similarly, when Zaghawa militants in the late 1990s argued that rebellion was the best course, they "found that most Zaghawa disagreed."<sup>29</sup> Even after the fighting started, according to field researchers Abdul-Jabbar Fadul and Victor Tanner, "many Darfurian intellectuals criticized the decision to take up arms against the government. The brutality of Khartoum's reaction was predictable, they argued."<sup>30</sup>

If any rebels failed to anticipate such retaliation prior to their first large attacks of early 2003, they could not have maintained that wishful thinking for long. By June 2003, Khartoum had reinstated in Darfur the notorious leader of the Janjaweed, Musa Hilal, whom the government had exiled the previous year in a failed effort to conciliate the African tribes. During the next four months, the Janjaweed expanded its attacks, initially targeting rebel strongholds in the region's northwest and then broadening to African villages elsewhere in Darfur.<sup>31</sup> Sudan's president, Omar al-Bashir, issued a clear threat in January 2004: "We will use all available means, the army, the police, the *mujahideen*, the horsemen, to get rid of the rebellion."<sup>32</sup> In March 2004, a Janjaweed leader explicitly threatened atrocities if Masalit chiefs failed to seal the border with Chad against an exodus of refugees: "If you don't make this security, I will kill all your civilians."<sup>33</sup>

Both before and after initiating their attacks, Darfur's rebel leaders had overwhelming reason to believe that rebellion would provoke massive retaliation against the region's African tribes. Failure to anticipate this cost cannot credibly explain either the launching or the perpetuation of their rebellion.

## **Hypothesis 2: Nothing to Lose?**

Some claim that Khartoum and its allied Arab militias initiated a genocide plan against Darfur's African tribes prior to any revolt, thus explaining the rebellion as an act of self-defense by targets of violence. For example, Flint and DeWaal quote a Masalit rebel offering this justification in retrospect: "We had no choice but to organize. We were fighting for our lives." Such narratives assert that Darfur's Africans turned to rebellion because they "felt they had nothing left to lose." Fur militants

offered this explanation when they began mobilizing in 1998: “The Arabs will not allow us to stay in our land unless we defend ourselves. It is a war of ‘to be or not to be.’”<sup>34</sup> The SLA’s founder, in July 2002, months prior to the first large-scale rebel attack, averred that the Fur people already were victims of “genocide.”<sup>35</sup>

But such claims raise several questions: Was genocide actually underway prior to the rebellion? If not, did Darfur’s Africans nevertheless perceive that genocide was ongoing or impending? If not, then after the rebellion initially provoked retaliation, did Darfur’s Africans come to believe that genocide was inevitable and therefore favor the rebellion on grounds that they now had nothing to lose? If not, then why did Darfur’s rebel leaders falsely make such claims?

Without question, starting in the 1970s, Darfur harbored Arab militants who sought to usurp African land and political authority, and in the 1990s Khartoum increasingly supported them. Political reforms favored the Arabs, prompting some African tribes to resist violently, which in turn spurred attacks by Arab militias. These attacks concentrated on Masalit villages that were perceived to support the uprising of 1994–1999, and less frequently targeted the Fur or the Zaghawa.<sup>36</sup> In 2000, Sudan’s government bolstered Darfur’s Janjaweed militias. The next year, Arab tribesmen killed seventy Zaghawa in a dispute over an important water resource, and the government defended the Arabs.

But Darfur experienced no genocide—by any reasonable definition of the word including that in the UN Convention—prior to the rebellion. The greatest violence, by the army in January 1999, was intended not to destroy civilians but to crush the Masalit insurgency, as evidenced by the fact that the army desisted after the insurgents were defeated.<sup>37</sup> The government armed the Janjaweed in 2000 as a preventive and deterrent measure because a schism in Khartoum, combined with incipient rebel mobilization, prompted fears that the recently purged Islamist politician Turabi would organize a revolt from Darfur (as he soon did through the JEM).<sup>38</sup>

Nor did Darfur’s African tribes believe that Sudan’s government was committing genocide against them, or intended to, prior to the rebellion. Throughout this time, Darfur’s African populace refused to support mobilization for a rebellion. The SLA’s founder confesses that in the late 1990s when he sought to raise funds for rebellion in the face of such opposition, “I lied to the people”—falsely assuring them that their donations would be used only to defend against local Arab militants, not to attack the state.<sup>39</sup>

When Darfur’s African rebels began training in 1999, and then escalated to their first joint attack in February 2002, the government supported vicious retaliation by local Arab militias. As early as April 2002, the militias attacked Masalit areas in north Darfur. In May 2002, Fur parliamentarians reported that 420 of their civilians had been killed in 181 attacks on 83 villages. During the final four months of that year, another 100 or more Fur civilians reportedly were killed.<sup>40</sup> But this increased violence, provoked by the rebels’ initial attacks, did not qualify remotely as genocide, and was not perceived as such by Darfur’s African tribes, who continued to oppose rebellion. Even the Sudan Federal Democratic Alliance, which previously had mobilized Darfur’s African tribes for armed defense, opposed the rebellion. The group’s leader, an expatriate Fur living in London, “thought it would be counter-productive and withheld his support.”<sup>41</sup>

After the first year of war, which included the worst violence against African civilians, Darfur’s African tribes still did not believe that the government planned to target them in the absence of rebellion. According to field surveys in north and west Darfur in June 2004, all groups regardless of ethnic or tribal affiliation “stated both

their opposition to armed rebellion and their belief that the current violence escalated in response to the insurgency.” Strikingly, most respondents were “supportive of the rebels’ agenda for change,” which underscores that they opposed the rebellion not over its stated goals but because they felt its violent means endangered rather than protected them.<sup>42</sup>

After two more years of displacement and humanitarian deprivation, in May 2006, Darfur’s African civilians still favored ending the rebellion by embracing the Darfur Peace Agreement (DPA) that was signed by the government. Although two of the three rebel factions rejected the deal, a former Darfur government official reported soon afterward that “independent groups are the strongest supporters of the DPA because they . . . believe that even a flawed peace deal is better than continuing the war.”<sup>43</sup> Field researchers concur that the local populace supported the DPA because “Darfurians firmly believed that UN troops could and would bring an end to the violence” under the agreement.<sup>44</sup> This demonstrates that as late as mid-2006, the rebellion still was not driven by any popular perception that government violence against civilians was inevitable.

A close analysis of these peace negotiations also suggests that the Fur faction of the SLA rejected the agreement for reasons other than security. This rebel faction initially had expressed concerns about the proposed security provisions, but on 14 May 2006 Khartoum accepted in writing the faction’s two main security demands: enhanced rebel roles in both protecting the return of displaced persons and monitoring the disarmament of Arab militia. The leader of this rebel faction, Abdel Wahid, then declared the security provisions “acceptable.” But he still rejected the agreement, citing not security concerns but other complaints about insufficient sharing of wealth and power, according to members of the African Union’s mediation team.<sup>45</sup> It is impossible to know whether the government would have honored its security commitments if all three rebel factions had signed the DPA, but it is noteworthy that the Fur faction did not cite mistrust of these commitments as the reason it rejected the deal, but rather its additional demands for wealth and power. This suggests that the rebellion, at least at this juncture, was motivated by something other than a fear of inevitable government violence.

Only after two of the three rebel factions rejected the DPA, causing Darfur to descend into anarchy starting in June 2006, did Darfuris begin to view violence as inevitable and thus a reason to embrace rebellion. According to field researchers, Darfur’s African tribes still sought peace, but now “they believed that only force could achieve that for them.” The same Darfuris who previously had opposed militancy now “believed armed rebellion was the only solution.”<sup>46</sup> Thus, it is possible that the second hypothesis—the expectation of inevitable victimization—explains the insurgency after May 2006, but not during the preceding three and a half years of rebellion.

### **Hypothesis 3: David Expects to Beat Goliath?**

The third possible explanation for the rebellion is that Darfur’s African militants expected to defeat Sudan’s army and allied Arab militias and thereby attain their political goals—without requiring humanitarian intervention—and viewed the expected retaliation against their civilians as an acceptable price. Such an expectation of victory seems implausible, in light of the weakness of Darfur’s rebels, the relative strength of the Sudanese armed forces and Arab militias in Darfur, the Sudanese government’s track record of brutal counterinsurgency, the failure of the better-armed southern Sudan rebels to defeat the army for nearly two decades, the advent in 1999

of oil exports that provided new revenue for the army, and the army's availability to fight in Darfur because of a north–south peace process that relieved it of deployment requirements in the south. But history is replete with cases of optimistic miscalculation leading to war,<sup>47</sup> so it is necessary to explore whether Darfur's rebels ever believed that they could win, even if they never actually stood a chance.

Darfur's rebels had three potential reasons for optimism prior to launching their rebellion. First, they had multiple sources of support: finance from their diaspora and Islamists; training in Eritrea and in southern Sudan; and weapons from these sources as well as from ethnic Zaghawa in the armies of Sudan, Chad, and Libya. The JEM enjoyed greater financing from its connections to Islamist sources and thus more reason for optimism on these grounds.<sup>48</sup> Second, the rebels might have expected large-scale defections from Sudan's security forces to tilt the balance of power in their favor. Since 1989, Khartoum successfully had recruited Darfur's African Muslims to wage "Jihad" against southern Sudan's Christian and animist rebels. But such recruits were much less likely to fight against fellow Darfuri African Muslims and might even jump to their side. Third, some of the SLA's Zaghawa rebels previously had tasted military victory, having fought successfully in Chad to bring Idriss Deby to power in 1990.<sup>49</sup> Although Khartoum represented a far more formidable opponent, it is possible that these rebels' past success had bred overoptimism.

On the other hand, Darfur's rebels initially lacked the two most crucial requirements for an insurgency: reliable supply lines and a rear base.<sup>50</sup> Based on geography, only Chad was optimally suited for either task. But until mid-2006, Chad honored a deal with Sudan not to support each other's rebels. Chad's President Deby not only rejected requests from Darfur's rebels for support starting in 2002, but in 2003 he even deployed 500 troops to Sudan to help fight against the rebels.<sup>51</sup> Some of Chad's soldiers individually may have provided unauthorized support for their Zaghawa brethren in Darfur prior to 2006, but Chad's government denied the rebels a secure rear base or supply lines before or during the first three years of war.

There is as yet too little evidence about the rebels' military expectations prior to rebellion to rule out the possibility that they initially expected to prevail without humanitarian intervention. If so, however, they suffered from substantial optimistic miscalculation, in light of the objective factors weighing against them. Moreover, given the likelihood of sparking state retaliation against their own civilians, the rebels would have had to accept in advance that such humanitarian suffering was a price worth paying.

After launching the rebellion, the only period when the rebels may have had reason for optimism was during the first few months of the war in 2003, when Khartoum attempted to negotiate and fought only half-heartedly by deploying lackluster army recruits while shunning the more motivated and vicious Arab militias. During this phase, "Eritrea welcomed the SLA and JEM to Asmara, and quickly became the main conduit for external support including fuel, food, and weapons," which enabled the rebels to make rapid progress.<sup>52</sup> In mid-2003, however, Sudan's government switched to a scorched-earth counterinsurgency policy, embracing the Arab militias and quickly reversing the rebel gains.

After the summer of 2003, the rebels never again posed a substantial threat, even though Khartoum could not suppress them entirely because of terrain that was vast and sometimes inaccessible (which enabled one rebel faction to mount a small but disastrous attack toward the capital in 2008, as discussed below). As one member of the AU's 2006 mediation recalls: "The government regarded the rebels as unworthy military, political, and negotiating opponents: it believed that they did not pose a

serious military threat.”<sup>53</sup> In June 2006, the AU formally acknowledged this military imbalance in an extraordinary press statement directed at critics of the DPA: “An elementary reality, that sometimes appears to be lost on some commentators, is that the [rebel] Movements did not win a military victory and were therefore not in a position to impose their terms on the Government of Sudan.”<sup>54</sup>

In mid-2006, Darfur’s rebels did receive a boost when Chad’s President Deby, for domestic political reasons, finally aided them—but even this did not substantially alter the balance of power in Darfur. Deby had been besieged and nearly overthrown by Chadian rebels in April 2006, and so in desperation sought help from Darfur’s JEM, after which he returned the favor by supporting the JEM and a faction of the SLA (combined briefly as the National Redemption Front), starting in spring 2006.<sup>55</sup> At roughly the same time, however, the rebels lost some support from a key backer, Eritrea, which had cut a deal with Khartoum on oil, trade, and security. Eritrea pressured Darfur’s rebels to make concessions and arrested several senior officials of the SLA’s Fur faction in June 2006, even reportedly torturing one of them.<sup>56</sup> The JEM accordingly grew more powerful relative to the SLA and other splinter factions, and in May 2008 launched a small attack toward Khartoum. Within hours, however, Sudan’s security forces had halted and decimated the attackers, revealing that although the JEM was now the most powerful rebel faction, it still was quite feeble.<sup>57</sup>

The rebels as a whole did not benefit from any significant increase in strength or prospect of victory in mid-2006. In fact, the signing of the DPA by one rebel faction, and internal disputes within all three factions over whether or not to sign, caused them to fracture and to begin fighting against each other, which further reduced their prospects against Khartoum. Some rebels still may have dreamed of prevailing without humanitarian intervention, perhaps envisioning an unlikely alliance with disgruntled local Arabs,<sup>58</sup> but most senior rebels had long abandoned any such hopes. Indeed, most of the top rebel officials had been living abroad since 2004, rather than pursuing military victory in Darfur, as discussed in the following section.

The final question for Hypothesis 3 is whether the rebels rejected peace overtures after mid-2003 because they expected to acquire greater bargaining leverage in the future—not from humanitarian intervention—to compel more generous peace terms that would justify any interim costs. Although the rebels could not have expected to defeat Khartoum after mid-2003, they might have anticipated that an eventual boost in support from Chad, Eritrea, southern Sudan, or another strategic ally—or simply the perpetuation of a stalemate—would enable them eventually to extract concessions from Khartoum, while viewing the continued displacement and suffering of their own people as an acceptable price. This possibility cannot be excluded, although there is more evidence for Hypothesis 4, detailed in the next section.

To summarize, Darfur’s militants had no reason to expect victory in the absence of humanitarian intervention, either prior to or after the first few months of rebellion, and must have expected massive retaliation against their own civilians. Still, the available evidence does not exclude the possibility that the rebels miscalculated wildly prior to and during the first few months of rebellion, expecting to prevail without intervention, while viewing retaliation against their civilians as an acceptable price of victory. After mid-2003, when the government implemented its brutally effective counterinsurgency, the rebels could not have expected to prevail without humanitarian intervention. But the available evidence does not exclude the possibility that the rebels continued to reject peace overtures because they anticipated that some other factor eventually would increase their bargaining leverage, while accepting the



suffering of their own civilians in the meantime. Although there is little evidence for the third hypothesis, it cannot yet be rejected.

#### **Hypothesis 4: Gambling on Intervention?**

The evidence is strongest for the fourth hypothesis—that the expectation of humanitarian intervention caused both the initial rebellion and its perpetuation. As documented below, this expectation had four main sources: previous humanitarian intervention in southern Sudan; intervention elsewhere in the world since 1990; gradual intervention in Darfur, including by peacekeepers starting in 2004; and vocal international demands by states and non-governmental organizations for greater intervention in Darfur.

Darfur's initial rebellion was triggered mainly by the immediately preceding international intervention in Sudan that compelled Khartoum in 2002 to agree to share power and wealth with southern rebels. The international community had intervened because Khartoum's retaliation against the southern rebellion created a humanitarian emergency. The intervention included economic sanctions against Khartoum, support of the rebels, and pressure for cease-fires, in addition to more traditional relief operations. Although the South's civilians paid a terrible price during the southern rebellion, the humanitarian intervention ultimately rewarded the rebels and promoted their political agenda. The resulting 2005 peace agreement installed the rebels as political authorities in the newly autonomous southern Sudan, gave them considerable control over the south's rapidly growing oil revenue, and promised them a referendum on independence in six years. As Flint and DeWaal aptly note, the "agreement is a remarkably good deal for Southern Sudan."<sup>59</sup>

Based on the southern rebels' achievements, Darfur's militants apparently inferred that they too would be rewarded with power and wealth if they launched a rebellion that provoked retaliation against civilians and thereby attracted humanitarian intervention. The evidence comes mainly from the reporting and inferences of Western experts close to Darfur's rebels. For example, Gérard Prunier observes, "It was largely the changes in the diplomatic north-south relationship which finally worked as an eye-opener for the young people of [Sudan's] west and drove them to take up arms."<sup>60</sup> Khartoum's concessions toward the south had been compelled not by rebel strength but by intense international intervention. As Prunier notes, in the north-south negotiations, the "actors appeared driven to compromise more by American pressure than by any inner conviction that peace should actually be negotiated."<sup>61</sup> Thus, the international community's well-intentioned humanitarian intervention in south Sudan had the tragic unintended consequence of encouraging rebellion in Darfur, which in turn provoked massive retaliation against civilians.

Unlike the competing hypotheses, moral hazard also explains the timing of Darfur's rebellion. The region's African tribes had opposed rebellion for decades, despite persistent grievances, until in 2002 they saw humanitarian intervention compel Khartoum to make substantial concessions to the southern rebels. Based on this precedent, DeWaal says, "Part of Darfur's non-Arab elite . . . decided they could no longer wait on the sidelines of the north-south negotiations," and instead should launch their own rebellion.<sup>62</sup>

After Khartoum's brutal retaliation starting in mid-2003 eliminated any plausible rebel hope of victory on their own, the evidence shows that moral hazard—the expectation of humanitarian intervention—is also why the rebels kept fighting and rejecting government offers of compromise. By 2004, the SLA's two main leaders stopped even trying to lead their troops to victory in Darfur and instead went abroad seeking intervention. As Julie Flint writes: "Within a year of launching the rebellion, Abdel

Wahid and Minawi were spending all their time outside Darfur, setting up headquarters in Asmara [Eritrea] and lobbying for international support and assistance. Fur leaders who had respected Abdel Wahid . . . grumbled that he had become a ‘hotel guerrilla.’” Indeed, for eighteen months from April 2004 to October 2005, Abdel Wahid did not set foot once in his ostensible rebel headquarters in central Darfur. Likewise, the SLA’s Zaghawa leader, Minni Minawi, was denounced by subordinates for “command by remote control.”<sup>63</sup>

By spring 2004, however, the rebels’ international lobbying had started to pay dividends, as the Darfur crisis became a humanitarian cause célèbre, spurring calls for intervention. Western media fostered support for the rebels by romanticizing them as freedom fighters who were defending their people against a premeditated, racially inspired genocide, even though the killing actually was a response to the uprising. A respected Sudanese commentator aptly observed: “As the rebellion grew, the main support for Darfur came from the international community, which provided humanitarian assistance to Darfurians and the logistics for the rebel movements to organize.”<sup>64</sup>

The African Union’s initial military deployment, authorized in May 2004, comprised fewer than 450 personnel to oversee relief operations, but the broad array of humanitarian intervention ramped up steadily.<sup>65</sup> In July 2004, the United Nations imposed an arms embargo on Darfur’s Arab militias. In September 2004, the United States accused Sudan of genocide. In October 2004, the AU increased its authorized deployment to 3,320 personnel, and five months later to 7,731 personnel. In January 2005, a UN panel declared Sudan guilty of “serious violations of international human rights and humanitarian law.” In March 2005, the UN expanded the arms embargo to encompass Sudan’s government and referred Darfur to the International Criminal Court (ICC). In summer 2005, NATO approved logistical support to the AU peacekeepers.<sup>66</sup> In May 2006, the United States successfully pressured Sudan to sign the Darfur Peace Agreement and then make further concessions. In July 2007, the United Nations authorized a joint UN-AU peacekeeping force (UNAMID) of 26,000 personnel.<sup>67</sup> In March 2009, the ICC indicted Sudan’s President al-Bashir for crimes against humanity and war crimes. (The UN Security Council has the authority to postpone the ICC prosecution but so far has not, apparently in hopes of deterring future violence against civilians.<sup>68</sup> Contrary to these hopes, however, Sudan reacted to the indictment by expelling humanitarian aid groups—which it accused of collaborating with the court—thereby exacerbating Darfur’s humanitarian suffering. The indictment, therefore, can be viewed as another element of humanitarian intervention that has backfired.)<sup>69</sup>

Negotiations for the failed Darfur Peace Agreement of May 2006 demonstrate that at least two of the three rebel factions had continued to fight because they expected to benefit from additional humanitarian intervention. Minni Minawi, leader of the SLA’s Zaghawa faction, agreed to sign only when the US negotiator, Deputy Secretary of State Robert Zoellick, convinced him that no further intervention would be forthcoming. The American official issued a blunt ultimatum: “I won’t support any change in this document . . . If you want to choose whoever, like JEM, you can do it—or you can choose the United States . . . I am a good friend and I am a fearsome enemy.”<sup>70</sup> Minawi reluctantly acceded, explaining his decision the next day: “I calculated the balance of forces and I knew I had to sign.”<sup>71</sup> Just as the rebels had been emboldened by anticipated intervention, now Minawi was chastened by the loss of international support. As Fadul and Tanner observe, “Darfurians perceived a shift in international opinion . . . [They] are assiduous listeners of . . . Western radio broadcast

services ... [and they] felt a growing international impatience with ... rebel intransigence.”<sup>72</sup>

The SLA's Fur wing, which had fewer warriors than the Zaghawa wing and fewer resources than the JEM, was motivated even more than the others by the expectation of humanitarian intervention. As de Waal observes, “Abdel Wahid saw that his military option had closed, but he hoped for third-party military intervention in his favor.”<sup>73</sup> To address Abdel Wahid's security concerns, Zoellick presented a letter from US President George Bush assuring the rebel that—if he signed—the United States would guarantee the agreement.<sup>74</sup> Then Zoellick issued an ominous warning: “If you pass up this historic opportunity, to whom do you intend to turn? If you pass this up you will remain victims forever.”<sup>75</sup> Abdel Wahid, however, dismissed this as a bluff, expecting that by rejecting the deal he could attract still more intervention. The rebel leader even told Zoellick what he anticipated: American and British intervention “like in Bosnia.”<sup>76</sup> In that earlier Balkan conflict, the United States had helped arm and train the weaker side, launched air strikes to forge a peace deal, and then deployed peacekeepers.<sup>77</sup> Abdel Wahid's comment reveals not only why he kept fighting—the expectation of humanitarian intervention—but how his expectation arose in part from a seemingly unrelated intervention a decade earlier and a continent away. It also demonstrates that he was willing to perpetuate the suffering of his own civilians as leverage to compel additional intervention in Darfur.

The third rebel faction, the JEM, had the least grass-roots support in Darfur at the time but the greatest external resources, initially from Islamist connections and, after spring 2006, from Chad. Accordingly, this faction's rejection of the DPA may not have been driven by expectations of humanitarian intervention.

All three rebel factions, consistent with the moral-hazard hypothesis, knowingly accepted massive retaliation against their own tribes as the price of achieving their political aims. Such callousness may be explained in part by a principal-agent dynamic: the African militants who agitated for rebellion were largely distinct from the African civilians who paid the price of retaliation. As Flint and DeWaal reveal, it was members of the Darfur diaspora, facing virtually no risk of retaliation, who led the charge for rebellion in 2001: “Zaghawa outside Darfur—expatriates in Libya, merchants and students in Khartoum—now agreed that there was a need to form an organized resistance.”<sup>78</sup> Similarly, at the peace talks in 2006, the two rebel advisers who urged Abdel Wahid not to sign the DPA were “Canadians of Darfurian origin.”<sup>79</sup> Intertribal divides also played a role. In 2003, Zaghawa rebels attacked government forces in Fur territory, knowing that retaliation would fall on local Fur civilians, not fellow Zaghawa who lived far away.<sup>80</sup> Within individual tribes, as well, there was disconnection between rebel leaders and the civilians whom they ostensibly represented. For example, Abdel Wahid rejected the DPA in 2006, even after Khartoum satisfied his security conditions, because he continued to demand greater sharing of wealth and power, even though Darfur's common “people always stressed these were secondary to security,” according to field researchers.<sup>81</sup> Even within his own delegation at the negotiations, “the majority was for signing, but Abdel Wahid refused to put the question to a vote.”<sup>82</sup> As an AU negotiating-team member later complained bitterly, the international mediators “had always been guided by concern for the people of Darfur and responsibility for ending their suffering. None of the parties could have made any of these claims.”<sup>83</sup>

The above evidence demonstrates that two of Darfur's three rebel factions—the Fur and Zaghawa wings of the SLA—continued to fight in early 2006 only because their leaders expected additional humanitarian intervention. If not for such expecta-

tions, it is reasonable to infer that these two factions previously would have agreed to peace, if they had rebelled at all. The rebellion thus would have been substantially diminished because the remaining rebel group, the JEM, enjoyed relatively little grass-roots support in Darfur during the first years of war. Khartoum's retaliatory violence against Darfur's African tribes, which was a direct response to the rebellion, logically should have been mitigated, too. The unavoidable implication is that the prospect of humanitarian intervention, as envisioned by the Responsibility to Protect, unintentionally exacerbated civilian suffering in Darfur.

### **Hypothesis 5: Non-strategic Rebels?**

The final hypothesis contends that Darfur's militants were driven to rebel by something other than strategic calculation. Obviously, many factors—including ideological beliefs and past grievances—may have driven elements of Darfur's African tribes to desire change. But the relevant question for this study is whether such factors drove Darfur's African militants to embrace rebellion without—or despite—a strategic assessment of the likely consequences. No available evidence supports this hypothesis for the initial rebellion, which appears to have been a strategic attempt by Darfur's African militants to mimic the success of Sudan's southern rebels by attracting international intervention. In contrast, the perpetuation of Darfur's rebellion may be explained partly by several non-strategic dynamics. Overall, however, these explanations are less consistent with the evidence than the preceding moral-hazard hypothesis.

The literature on internal war explains that non-strategic action may arise partly from rebels being insufficiently consolidated to make unified decisions based on shared preferences. For example, rebels sometimes lack a “valid spokesperson,”<sup>84</sup> so that rank-and-file rebels do not follow a leader's decisions. In September 2003, according to Prunier, the SLA's Zaghawa leader Minni Minawi agreed to a cease-fire and cantonment of weapons, but the truce “could not hold since the local guerrilla fighting units never accepted the cantonment principle.”<sup>85</sup> A related explanation is “escalatory outbidding,” in which rebel factions reject compromises that otherwise would be acceptable to them because they fear accusations of treason by other factions.<sup>86</sup> During the 2006 DPA negotiations, says DeWaal, “the only way in which the two SLMs and JEM could adopt a united position at the peace talks was to agree on the most hard-line stance.”<sup>87</sup> A third such explanation stems from the principle-agent dynamic in which a rebel leader rejects a peace deal, despite it being favored by his constituents, because of personal concerns such as his own safety.<sup>88</sup> Darfur's rebel leaders had reason for such concerns considering that in March 2003, when they agreed to a brief cease-fire, Arab militias attacked and killed the most senior Masalit sheikh.<sup>89</sup>

Non-strategic dynamics also can result from rebels acting irrationally. For example, militants may be driven by emotions of vengeance, based on past grievances, to rebel without contemplating the consequences. Flint and DeWaal offer anecdotes of Darfur rebels who ostensibly were driven by such emotions.<sup>90</sup> In addition, senior militants may suffer from psychiatric disorders. This possibility was raised by the Libyan representative at the DPA negotiations, who alleged that the JEM's leader, Khalil Ibrahim, was simply “mad.”<sup>91</sup> Finally, one AU mediator claims that the rebels were “frightened of being outwitted in the negotiations,” because they had little experience in high-level bargaining, and so rejected deals that actually were in their rational interest.<sup>92</sup>

Many or all of these non-strategic dynamics may have helped perpetuate the rebellion. But in May 2006, none of these factors prevented the most powerful rebel faction's leader, Minni Minawi, from signing the Darfur Peace Agreement. His deci-

sion spurred the defection of some subordinates and was criticized as treason by other factions, but he nevertheless signed when he judged that no further intervention was forthcoming. In return, the government honored its pledge to ally with his forces and appoint him as senior assistant to the president of Sudan. This demonstrates that even though Darfur's militants were not consolidated, rebel leaders still could act rationally, abandoning rebellion when peace offered greater rewards.

Although non-strategic factors affected the rebels, their most fateful actions are better explained by strategic calculation. For example, even though vengeful emotions mounted during the first three years of war, Minawi still was able to sign the DPA—indeed, mere hours after learning that his own brother had been killed in the fighting. Khalil might have been “mad,” but he also had rational reasons to reject the DPA: the agreement failed to address the JEM's national agenda, and his rebel group could sustain itself with support from Islamist sources and Chad.<sup>93</sup> Abdel Wahid's rejection is best explained not by irrationality but by his expressed strategic assessment that he could hold out for greater intervention “like in Bosnia.” (This calculation appears to have been wrong, perhaps resulting from imperfect information or motivated bias, which often cause strategic decisions to be suboptimal.) Finally, although the rebels initially may have lacked experience in high-level negotiations, by the time of the DPA they were advised by senior diplomats from African and Western states, which helped to level the bargaining table. Diplomatic inexperience did not stop Sudan's southern rebels from signing a peace agreement in 2005, nor Minawi from signing the DPA the following year. The non-strategic factors above may have inhibited the rebels from quick and efficient decision-making but did not prevent them from acting strategically on key decisions of war and peace.

## **Summary and Conclusions**

In an effort to explain Darfur's rebellion since 2003, the first rigorous test of competing hypotheses finds strong evidence for moral hazard (Hypothesis 4). The expectation of humanitarian intervention explains when and why Darfur's African militants launched their rebellion, and why they persisted in the face of massive state-sponsored retaliation against their own civilians despite little apparent chance of victory. Darfur's rebels aimed to repeat the success of southern Sudan's rebels in attracting humanitarian intervention to compel Khartoum to share wealth and power. Darfur's militants launched the rebellion in 2003, immediately after seeing the south's rebels rewarded in a 2002 peace protocol that resulted from intense international pressure on Khartoum. After Darfur's rebellion provoked massive retaliation against local African tribes, the leaders of the main rebel group ceased attempting to command their forces to victory and instead went abroad to lobby for humanitarian intervention. In 2006, the leader of the SLA's Zaghawa wing agreed to peace when he was persuaded by a senior American official that no further intervention was forthcoming. The leader of the SLA's Fur wing rejected that peace deal because he still expected more robust humanitarian intervention “like in Bosnia.” The other rebel group of the time, the JEM, had national ambitions and other sources of external support, especially after spring 2006, so the moral-hazard hypothesis may not explain as fully its rebellion. The sources of moral hazard in Darfur—that is, the reasons the rebels expected to benefit from humanitarian intervention—are similar to those identified by Crawford and include the following: previous intervention in other countries, including the Bosnia precedent cited explicitly by the founder of Darfur's main rebel group; recent and nearby intervention in Sudan's north–south civil war; gradual escalation of intervention in Darfur starting with humanitarian aid in 2003 and peacekeepers in 2004;

Table 2: Assessing Explanations for Darfur's Suicidal Rebellion

Hypothesis	Initiation	Perpetuation
Do not expect retaliation	No	No
Perceive victimization as inevitable	No	No (through May 2006)
Expect victory without intervention	?	?
Expect intervention to enable victory	Probably (SLA especially)	Probably (SLA especially)
Not driven by strategic calculus	No	No

and persistent calls by Western states and non-governmental organizations for greater intervention in Darfur.

Competing explanatory hypotheses are not as well supported, but some cannot be rejected for certain periods of Darfur's rebellion based on available evidence (see Table 2). Hypothesis 1 is refuted because Darfur's militants had overwhelming reason to expect that rebellion would provoke retaliation against their own civilians based on past experience in Darfur and elsewhere in Sudan. Regarding Hypothesis 3, it is possible that the rebels initially expected to win without humanitarian intervention during the first months of 2003, or that following the government's devastating retaliation the rebels still expected to extract future concessions from Khartoum, but there is little if any supporting evidence. In the wake of brutal retaliation, the rebels may have been inhibited from strategic decision making (Hypothesis 5) by lack of consolidation, desire for vengeance, and inexperience in negotiation, but these factors were not decisive because the strongest rebel faction at the time still managed to embrace peace in 2006. When the other two rebel factions rejected the DPA in May 2006, and Darfur descended into anarchy, the rebellion may have been prolonged by a new-found perception among the region's African tribes that violence had become unavoidable (Hypothesis 2). But no such perception can explain the preceding three years of rebellion.

As with any claim about causality, assessing the impact of moral hazard in Darfur involves a counter-factual thought experiment. Simply put, if not for the expectation of humanitarian intervention, would there have been a rebellion, would it have been as large and protracted, and would it have provoked as much violence against civilians?<sup>94</sup> The findings above suggest that, even without the prospect of humanitarian intervention, Darfur still might have experienced small-scale intergroup skirmishes over land, water, and livestock. But Darfur's African tribes would have been unlikely to escalate to full-blown rebellion because, without an expectation of intervention, such rebellion was widely perceived as counter productive, if not suicidal.

If Darfur's militants had suffered from severe optimistic miscalculation, they still might have launched a rebellion. But without an expectation of intervention, the government's initial brutal retaliation likely would have compelled the SLA to accept peace in the first year, because the subsequent evidence indicates that both factions of this rebel group continued fighting only in hopes of attracting such intervention. The JEM might have fought on because of its national agenda and external sources of support but, in light of its initially weak grass-roots support in Darfur, this sole rebel faction would not have represented as significant a threat. Considering that

Khartoum escalated its retaliation against civilians only after the rebels escalated their own attacks in 2003, a smaller rebellion probably would have provoked less retaliatory violence against civilians.<sup>95</sup> Although no counter-factual scenario ever can be proved definitively, the evidence suggests that moral hazard—the expectation of humanitarian intervention—increased both the magnitude and duration of Darfur’s rebellion, and therefore the retaliation it provoked against civilians.

This study represents an initial effort to assess rigorously the moral hazard of humanitarian intervention in Darfur. Further research is required to assess more precisely the expectations and motivations of Darfur’s militants prior to and during their rebellion, in order to determine with greater confidence the relative explanatory power of Hypotheses 3 and 4. Moreover, to address the concern raised by Grigorian in a previous case, additional research should explore whether international intervention in Darfur actually was driven by humanitarian concerns, as this study assumes, or by other goals such as changing Khartoum’s regime.

In previous work, I have recommended modifying how the Responsibility to Protect is implemented to reduce its perverse, unintended consequences and to foster its intent of protecting civilians.<sup>96</sup> The essence of my proposal is that intervention should not reward rebels, unless state retaliation is grossly disproportionate, but rather should aim to induce states to address the legitimate grievances of nonviolent domestic groups. Had this policy guided intervention in 2003, and had Khartoum nonetheless perpetrated its grossly disproportionate retaliation to the Darfur rebellion, then intervention to aid the rebels would have been called for. But this policy also might have deterred Khartoum from perpetrating disproportionate retaliation, hoping to avert intervention, or dissuaded Darfur’s militants from rebelling in the first place by reducing their expectation of benefiting from intervention, so that they instead pursued non-violent resistance.

Some skeptics may reject non-violent protest as useless against a state that is willing to brutalize defenseless civilians in response to rebellion, but historical evidence suggests that it can work in Sudan. In 1985, for example, protests by Sudanese who had been displaced by famine helped end the authoritarian rule of President Jaafar Nimeiri. In 1988, nonviolent demonstrations persuaded Sudan’s government to continue bread subsidies and “to begin taking seriously the conflict in Darfur,” according to a former Darfur government official.<sup>97</sup> The Responsibility to Protect should be implemented in ways that promote such non-violent paths to progress in Sudan and elsewhere, rather than encouraging rebellion that provokes genocidal retaliation.

## **Acknowledgements**

The author is grateful for comments from Costantino Pischedda and three anonymous referees and for financial support from the Policy Research Institute at the LBJ School of Public Affairs, University of Texas at Austin.

## **Notes**

1. See, most recently, Alan J. Kuperman, “Rethinking the Responsibility to Protect,” *Whitehead Journal of Diplomacy and International Relations* 10 (2009): 33–43.
2. *Ibid.*
3. Alan J. Kuperman, “The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans,” *International Studies Quarterly* 52 (2008): 49–80, 52.
4. See Kuperman, *ibid.*, which also reviews previous literature on this subject.

5. Alan J. Kuperman, review of *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, by Gareth Evans, *Political Science Quarterly* 124 (2009): 590–91.
6. Alan J. Kuperman, “Mitigating the Moral Hazard of Humanitarian Intervention: Lessons from Economics,” *Global Governance* 14 (2008): 219–40.
7. Timothy W. Crawford, “Moral Hazard, Intervention and Internal War: A Conceptual Analysis,” in *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion and Civil War*, ed. Timothy Crawford and Alan J. Kuperman (New York: Routledge, 2006), 26–44.
8. Jon Western, “Illusions of Moral Hazard: A Conceptual and Empirical Critique,” in *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion and Civil War*, ed. Timothy Crawford and Alan J. Kuperman (New York: Routledge, 2006), 74–85.
9. Arman Grigorian, “Third-party Intervention and Escalation in Kosovo: Does Moral Hazard Explain It?” in *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion and Civil War*, ed. Timothy Crawford and Alan J. Kuperman (New York: Routledge, 2006), 45–63.
10. R. Harrison Wagner, “The Hazards of Thinking about Moral Hazard,” in *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion and Civil War*, ed. Timothy Crawford and Alan J. Kuperman (New York: Routledge, 2006), 86–96.
11. The best methodological analysis to date is Kelly Whitty, “Darfurian Rebel Leaders and the Moral Hazard of Humanitarian Intervention,” *Paterson Review* 9 (2008): 19–34. The article details how the moral-hazard hypothesis could be tested against alternative explanations for the rebellion in Darfur but by its own admission does not conduct such a rigorous test. Based on a brief review of evidence, Whitty concludes that “there is preliminary evidence to support the hypothesis that the Darfurian rebel leadership launched a suicidal rebellion against the government of Sudan with the intention of provoking retaliation against their own people. The ensuing humanitarian catastrophe was meant to garner international attention and intervention as a means to advance their political objectives . . . Evidence therefore suggests Kuperman’s theory of moral hazard accurately describes the case study of the Darfur rebellion” (20). Previous analyses consistent with this hypothesis include the following: Sam Dealey, “Misreading the Truth in Sudan,” *New York Times*, 8 August 2004, 4:11; Samantha Power, “Dying in Darfur,” *New Yorker*, 30 August 2004, 56–73; Morton Abramowitz and Samantha Power, “A Broken System,” *Washington Post*, 13 September 2004; International Crisis Group, “Darfur: The Failure to Protect,” *Africa Report*, 8 March 2005, 9; Scott Anderson, “How Did Darfur Happen?” *New York Times Magazine*, 17 October 2004, 52ff; Alan J. Kuperman, “Next Steps in Sudan,” *Washington Post*, 28 September 2004, A27; Alan J. Kuperman, “Strategic Victimhood in Sudan,” *New York Times*, 31 May 2006, 19; Roberto Belloni, “The Tragedy of Darfur and the Limits of the ‘Responsibility to Protect,’” *Ethnopolitics* 5 (2006): 327–46; Mahmood Mamdani, “The Politics of Naming: Genocide, Civil War, Insurgency,” *London Review of Books*, 8 March 2007, [http://www.lrb.co.uk/v29/n04/mamd01\\_.html](http://www.lrb.co.uk/v29/n04/mamd01_.html) (accessed 22 September 2009).
12. Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca, NY: Cornell University Press, 1997). See also, Marc Trachtenberg, *The Craft of International History: A Guide to Method* (Princeton: Princeton University Press, 2006).
13. Alan J. Kuperman, “Suicidal Rebellions and the Moral Hazard of Humanitarian Intervention,” in Timothy W. Crawford and Alan J. Kuperman, eds., *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion and Civil War* (New York: Routledge, 2006), 1–25. See also, Kuperman, “The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans.”
14. A fuller discussion of the conflict’s roots was deleted from this article for reasons of space, but may be obtained by contacting the author.
15. Julie Flint and Alex de Waal, *Darfur: A Short History of a Long War* (New York: Zed Books, 2005), 25, 57; and Gérard Prunier, *Darfur: The Ambiguous Genocide* (Ithaca, NY: Cornell University Press, 2005), 73.



16. Prunier, *Darfur: The Ambiguous Genocide*, 92–96; Flint and de Waal, *Darfur: A Short History*, 71, 77, 83; and Julie Flint, “Darfur’s Armed Movements,” in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 150.
17. Prunier, *Darfur: The Ambiguous Genocide*, 92–96. Flint and de Waal, *Darfur: A Short History*, 99–104, claim that from April to July 2003 the rebels won thirty-four of thirty-eight military engagements.
18. Prunier, *Darfur: The Ambiguous Genocide*, 95.
19. Debarati Guha-Sapir and Olivier Degomme, “Counting the Deaths in Darfur: Estimating Mortality from Multiple Survey Data” (working paper, Households in Conflict Network, 15 April 2006), <http://www.hicn.org/papers/wp15.pdf> (accessed 16 July 2009). Their conservative analysis estimates 112,000 excess deaths—including approximately 35,000 resulting directly from violence—in Darfur between September 2003 and January 2005, a time-frame that encompasses most of the war’s intense violence and the resulting humanitarian deprivation prior to the institutionalization of aid provision. Death rates after this period were much lower, sometimes beneath the normal peacetime death rate in Darfur. See Fabrice Weissman, “Humanitarian Dilemmas in Darfur,” Médecins sans frontières (July 2008), 7–8, <http://www.msf.fr/drive/214a9aa0483c6e560e05cdfb00beb11.pdf> (accessed 16 July 2009). Other death estimates are up to several times higher but based on less conservative assumptions. See John Hagan and Alberto Palloni, “Death in Darfur,” *Science*, 15 September 2006, 1578–79.
20. Prunier, *Darfur: The Ambiguous Genocide*, 106–108.
21. Nima Elbagir, “W. Sudan Rebels Say Unlikely To Go To Peace Talks,” Reuters (15 April 2004), <http://www.sudantribune.com/spip.php?article2501> (accessed 16 July 2009); “Darfur Rebels Reject Invitation To Hold Talks with Sudan’s Govt in Ethiopia,” *Sudan Tribune* (22 May 2004), <http://www.sudantribune.com/spip.php?article3022> (accessed 16 July 2009); Opheera McDoom, “Darfur Rebels Won’t Attend Peace Talks,” Reuters (2 July 2004), <http://www.swissinfo.ch/eng/index.html?siteSect=143&sid=5056075> (accessed 16 July 2009); Anderson, in “How Did Darfur Happen?” noted in October 2004: “In recent months, the SLA has repeatedly stalled peace talks being brokered by the African Union by setting unrealistic preconditions or quibbling over such details as where the talks should be held; for its part, the [JEM] had, until recently, boycotted the talks altogether.”
22. Dawit Toga, “The African Union Mediation and the Abuja Peace Talks,” in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 214–44.
23. Flint and de Waal, *Darfur: A Short History*, 95–96, suggests this hypothesis: “In the first months of 2003, these half-formed and inexperienced rebel fronts were catapulted out of obscurity to face challenges for which they were totally unprepared. They should perhaps have had more foresight.”
24. *Ibid.*, 98; Prunier, *Darfur: The Ambiguous Genocide*, 91–93.
25. Flint and de Waal, *Darfur: A Short History*, 24–25; Alex de Waal, “Sudan: The Turbulent State,” in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 6.
26. Flint and de Waal, *Darfur: A Short History*, 25, 57; Prunier, *Darfur: The Ambiguous Genocide*, 73–75, 87.
27. Flint and de Waal, *Darfur: A Short History*, 64, 77, 81.
28. *Ibid.*, 72.
29. *Ibid.*, 75.
30. Abdul-Jabbar Fadul and Victor Tanner, “Darfur after Abuja: A View from the Ground,” in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 288.
31. Flint and de Waal, *Darfur: A Short History*, 80, 98, 101–104; Prunier, *Darfur: The Ambiguous Genocide*, 96–97.
32. Prunier, *Darfur: The Ambiguous Genocide*, 109.

33. Flint and de Waal, *Darfur: A Short History*, 116, citing interviews in the Masalit area in March–April 2004. (The book’s footnotes in that chapter are off by one. Personal communication with Julie Flint, 7 January 2009.)
34. Flint and de Waal, *Darfur: A Short History*, 66, 69, 71.
35. Flint, “Darfur’s Armed Movements,” 146.
36. Flint and de Waal, *Darfur: A Short History*, 58–60, 63, 72–73; Flint, “Darfur’s Armed Movements,” 144, 147.
37. Prunier, *Darfur: The Ambiguous Genocide*, 74–75; Flint and de Waal, *Darfur: A Short History*, 58–60.
38. Flint and de Waal, *Darfur: A Short History*, 63.
39. Flint, “Darfur’s Armed Movements,” 144.
40. Prunier, *Darfur: The Ambiguous Genocide*, 88; Flint and de Waal, *Darfur: A Short History*, 77, 81.
41. Flint, “Darfur’s Armed Movements,” 148, referring to Ahmad Diraige.
42. Fadul and Tanner, “Darfur after Abuja,” 288.
43. Adam Azzain Mohammed, “The Comprehensive Peace Agreement and Darfur,” in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 210.
44. Fadul and Tanner, “Darfur after Abuja,” 293. This suggests that at this point Darfurians may have believed that government-sponsored violence against civilians was not inevitable because the international peacekeepers to be deployed under a peace agreement could stop it.
45. Toga, “The African Union Mediation,” 242–43. Rebel faction leader Abdel Wahid demanded greater representation in the legislative and executive branches at the state and local level of government, and an increase in initial compensation from \$30 to \$200 million. Khartoum refused to make such concessions at the time. See also, Alex de Waal, “Darfur’s Deadline: The Final Days of the Abuja Peace Process,” in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 267–76, who notes that earlier in May 2006, US negotiators had obtained another concession on security from the government—a pledge to retrain 3,000 rebels in addition to integrating 5,000 into the government’s forces—which helped persuade rebel faction leader Minni Minawi to sign the DPA. Even prior to the government’s concessions on security, Abdel Wahid’s demands to Zoellick for modification of the DPA on 5 May 2006 focused mainly on other concerns: “The document must be developed, in the fields of power sharing and compensation” (35). Alex de Waal, “The Book Was Closed Too Soon on Peace in Darfur,” *The Guardian* (29 September 2006), <http://www.guardian.co.uk/commentisfree/2006/sep/29/comment.sudan> (accessed 15 October 2009), reports that de Waal “was present in the final negotiating session when Wahid declared the DPA’s security arrangements ‘acceptable.’”
46. Fadul and Tanner, “Darfur after Abuja,” 288. The interviewees were mainly men. Women reportedly still opposed the rebellion. An anonymous reviewer reports that in unpublished field research conducted during 2007–2008, some of Darfur’s African tribes were willing to abandon rebellion if UN peacekeepers provided adequate protection.
47. Geoffrey Blainey, *The Causes of War*, 3rd ed. (New York: Free Press, 1988).
48. Jerome Tubiana, “Darfur: A War for Land?” in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 72. In *Darfur: The Ambiguous Genocide*, 82–87, Prunier says Turabi arranged weapons from Eritrea and from the southern rebels for the JEM as early as 2001. Flint, in “Darfur’s Armed Movements,” 144, 147, says that the southern rebels provided the SLA a satellite phone in late 2002, and then heavy rifles and anti-aircraft artillery in early 2003 by air shipment to Zaghawa territory in north Darfur. This account also says that Eritrea began providing weapons in early 2003. The supply of weapons to the rebels is also reported in United Nations, *Report of the Panel of Experts established pursuant to paragraph 3 of resolution 1591 (2005) concerning the Sudan*, UN DOC S/2006/65 (30 January 2006), 28.
49. Flint and de Waal, *Darfur: A Short History*, 75.

50. Paul Staniland, "Defeating Transnational Insurgencies: The Best Offense Is a Good Fence," *Washington Quarterly* 29 (2005–2006): 21–40.
51. Flint, "Darfur's Armed Movements," 149.
52. *Ibid.*, 150.
53. Laurie Nathan, "The Making and Unmaking of the Darfur Peace Agreement," in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 255.
54. African Union, "African Union Responds to International Crisis Group Report of 20 June 2006 'Darfur's Fragile Peace Agreement'" (Press Release), [http://www.africa-union.org/root/ua/Actualites/2006/juin/PR\\_AU\\_ICG\\_Report\\_23\\_06\\_06.pdf](http://www.africa-union.org/root/ua/Actualites/2006/juin/PR_AU_ICG_Report_23_06_06.pdf) (accessed 13 February 2009).
55. Flint, "Darfur's Armed Movements," 151; Alex de Waal, "Prospects for Peace in Darfur," in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 373.
56. de Waal, "Prospects for Peace in Darfur," 384–86.
57. Stephanie McCrummen, "IncurSION Crushed, Sudan Reports," *Washington Post*, 11 May 2008, A1; Jeffrey Gettleman, "After a Quixotic Attack in Sudan, a Question Lingers: Why?" *New York Times*, 12 May 2008, A6.
58. de Waal, "Prospects for Peace in Darfur," 387.
59. Flint and de Waal, *Darfur: A Short History*, 32.
60. Prunier, *Darfur: The Ambiguous Genocide*, 79.
61. *Ibid.*, 89.
62. Tubiana, "Darfur: A War for Land?" 72.
63. Flint, "Darfur's Armed Movements," 154–55. Flint and de Waal, in *Darfur: A Short History*, 87, observe that "instead of building their political cadres, the SLA's leaders became ambassadors."
64. Ahmed Kamal El-Din, "Islam and Islamism in Darfur," in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 109.
65. Prunier, *Darfur: The Ambiguous Genocide*, 116–19. The initial authorization was for 300 peacekeepers and 132 military observers (including 60 from the AU). For background information, see <http://www.amis-sudan.org/history.html>. Sudan and the rebels approved this deployment in an agreement on 28 May 2004. The first military observers arrived in June 2004. Full deployment to authorized levels typically lagged behind authorization by six to twelve months.
66. Belloni, "The Tragedy of Darfur," 337–39. See also, <http://www.amis-sudan.org/history.html>.
67. United Nations, "Darfur—UNAMID—Facts and Figures," <http://www.un.org/depts/dpko/missions/unamid/facts.html> (accessed 23 December 2008).
68. "Braced for the Aftershock," *Economist*, 7 March 2009, reported that a potential UN deferral was opposed by those who "fear the return to a 'climate of impunity.'" See <http://www.economist.com/world/international/>.
69. Lynsey Addario and Lydia Polgreen, "Aid Groups' Expulsion, Fears of More Misery," *New York Times*, 23 March 2009, A6. Although unintended, these negative consequences were foreseeable. See Alan J. Kuperman, "Ocampo and Bashir: The Milosevic Precedent," SSRC Blogs, Making Sense of Darfur (23 June 2008), <http://www.ssrc.org/blogs/darfur/2008/06/23/ocampo-and-bashir-the-milosevic-precedent/>.
70. de Waal, "Darfur's Deadline," 273. US negotiators had successfully pressured Khartoum to make multiple concessions to the rebels. In this light, Zoellick's statement presumably intended to convey to Minawi that no further such assistance to the rebels would be forthcoming, not that the United States actually would ally with Khartoum against the rebels.
71. de Waal, "Prospects for Peace in Darfur," 376.
72. Fadul and Tanner, "Darfur after Abuja," 293.
73. de Waal, "Prospects for Peace in Darfur," 373.
74. de Waal, "Darfur's Deadline," 274.

75. Ibid., 274, 277. After Abdel Wahid rejected the agreement, Zoellick tried one last time to persuade him that the ultimatum was sincere: “If you think there is an alternative, you are dead wrong. And I mean, dead wrong . . . You are making a decision; you will live with it and you will die with it.”
76. de Waal, “Darfur’s Deadline,” 276. See also, de Waal, “Prospects for Peace in Darfur,” 379–80: “Along with American activists, Darfurians had inflated hopes and fears for what UN troops might be able to do. When Abdel Wahid al Nur demanded guarantees ‘like Bosnia’ in the early hours of May 5 [2006], this is what he had in mind.” See also, 376: “The vision of international troops bringing safety to Darfurian victims of genocide complicated the search for peace.”
77. For a case study of the Bosnia intervention, see Alan J. Kuperman, “Humanitarian Intervention,” in *Human Rights: Politics and Practice*, ed. Michael Goodhart (Oxford: Oxford University Press, 2009), 334–53.
78. Flint and de Waal, *Darfur: A Short History*, 75.
79. de Waal, “Prospects for Peace in Darfur,” 373, 412.
80. Flint and de Waal, *Darfur: A Short History*, 86.
81. Fadul and Tanner, “Darfur after Abuja,” 286.
82. de Waal, “Darfur’s Deadline,” 279.
83. Nathan, “The Making and Unmaking of the Darfur Peace Agreement,” 266.
84. I. William Zartman, *Elusive Peace* (Washington, DC: Brookings Institution, 1995), 23, 340.
85. Prunier, *Darfur: The Ambiguous Genocide*, 106–108.
86. Fred Charles Ikle, *Every War Must End*, rev. ed. (New York: Columbia University Press, 1991); Donald Horowitz, “Making Moderation Pay,” in *Conflict and Peacemaking in Multiethnic Societies*, ed. Joseph V. Montville (New York: Lexington Books, 1991).
87. de Waal, “Prospects for Peace in Darfur,” 373; Nathan, “The Making and Unmaking of the Darfur Peace Agreement,” 258, notes a further complication that may have exacerbated the outbidding: “JEM had a national political agenda that would not be met by a peace agreement for Darfur.” See also, Prunier, *Darfur: The Ambiguous Genocide*, 122.
88. Graham T. Allison and Morton H. Halperin, “Bureaucratic Politics: A Paradigm and Some Policy Implications,” *World Politics* 24, Supplement: Theory and Policy in International Relations (1972), 40–79.
89. Flint and de Waal, *Darfur: A Short History*, 98.
90. Ibid., 67–68.
91. de Waal, “Darfur’s Deadline,” 275.
92. Nathan, “The Making and Unmaking of the Darfur Peace Agreement,” 257.
93. de Waal, “Darfur’s Deadline,” 274–75, details the JEM’s numerous complaints about the DPA.
94. James Fearon, “Counterfactuals and Hypothesis Testing in Political Science,” *World Politics* 43 (1991): 169–95.
95. It is possible that Khartoum was deterred from greater violence by the threat of intervention. In light of such potential dynamics, my proposed policy calls for intervention to help rebels in the event of “grossly disproportionate” state retaliation, to deter excessive state violence.
96. Kuperman, “Mitigating the Moral Hazard of Humanitarian Intervention”; Kuperman, “Rethinking the Responsibility to Protect.”
97. Mohammed, “The Comprehensive Peace Agreement and Darfur,” 202.

---

# The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur

Victor Peskin

*School of Politics and Global Studies, Arizona State University*

*This article analyzes the political challenges confronting the International Criminal Court (ICC) in its efforts to bring war crimes suspects to trial in connection with mass atrocities committed in the Darfur region of Sudan. It chronicles and examines the battles over cooperation between the ICC and the defiant Sudanese government that have forestalled the handover of suspects such as Sudanese president Omar Hassan al-Bashir. It also seeks to explain why the Security Council, in its ambivalence toward the ICC, has not vigorously pressed Sudan to fulfill its legal obligation to cooperate.*

*Key words: International Criminal Court, Darfur, war crimes, Security Council*

---

## I. Introduction

In its difficult early years, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was likened by its founding chief justice to a giant without arms and legs.<sup>1</sup> The analogy sought to describe the paradoxical nature of the ICTY insofar as it is both a powerful institution—given its authority to prosecute high-level government officials—and a powerless one—given its lack of any enforcement powers. Today's ad hoc international tribunals and the permanent International Criminal Court (ICC) have no direct power to compel states to arrest war crimes suspects and hand them over for trial. State cooperation is as vital for tribunals as it is resisted by governments complicit in mass atrocities. Although the tribunals and the ICC prosecute individuals only, governments and their leaders often perceive such trials as an assault on the state itself. Nowhere is this more evident than when a head of state is targeted, as is now occurring with the ICC's arrest warrant for Sudan's Omar Hassan al-Bashir on charges of war crimes and crimes against humanity in Darfur.

Without power to enforce, the contemporary war crimes tribunals would seem to lack any leverage whatsoever to bring recalcitrant states into compliance. However, the hard-won success of the ICTY—which has obtained custody of scores of suspects—demonstrates that today's international courts can mount effective challenges against targeted states. For tribunals, garnering support from key international actors, or “surrogate enforcers,”<sup>2</sup> is the key to wresting cooperation from a recalcitrant state. In the face of international pressure, targeted states such as Serbia and Sudan often mobilize their foreign policy machinery to thwart the tribunals. To counter the tribunal's attempt to delegitimize the state as an international outlaw, the state seeks to knock the tribunal off its moral pedestal by highlighting its real and perceived shortcomings.<sup>3</sup>

When it comes to the ICC's quest for cooperation from Sudan, the battle for international intervention has become even more contentious, particularly given the Security Council's authority to suspend controversial cases. Under Article 16 of the Rome Statute, the ICC's founding document, the Security Council can actually halt ICC cases for renewable one-year periods when they are determined to pose a threat to international peace and security. Thus, even as the ICC looks to the Security Council to press Sudan to comply with its obligation to cooperate, the Sudanese government has—in the aftermath of the chief prosecutor's application for an arrest warrant for President al-Bashir in July 2008—tried to push the Council to invoke Article 16 by arguing that the ICC is a spoiler of the peace process in Darfur. Long before the chief prosecutor's bid for al-Bashir's arrest warrant, the Sudanese government sought to play up the damaging consequences of international justice in Darfur by discouraging international support for the ICC and mobilizing African and Arab allies to magnify the government's opposition to the Court. Ever since ICC Chief Prosecutor Luis Moreno-Ocampo announced his intention to prosecute al-Bashir—and ever since the ICC pre-trial chamber<sup>4</sup> issued a warrant for al-Bashir's arrest on 4 March 2009—the Sudanese government has been increasingly emphatic in its warnings about the hazards posed by The Hague-based ICC.

To counter Sudan's framing of the issue, Moreno-Ocampo has argued that a failure by the international community to back the ICC's pursuit of al-Bashir and two other Sudanese suspects will only embolden Khartoum's criminality. Unless al-Bashir is forced to account for his alleged crimes, asserts Moreno-Ocampo, the Sudanese president will be in a position to direct more violence against vulnerable civilians in Darfur.<sup>5</sup> When it issued the warrant for al-Bashir's arrest in March 2009, the ICC pre-trial chamber granted the prosecutor's request for war crimes and crimes against humanity charges, but rejected his request for genocide charges. The prosecutor subsequently filed an appeal of the pre-trial chamber's rejection of the genocide counts.<sup>6</sup> It is too early to determine when or even whether al-Bashir and two other Sudanese suspects tied to state violence in Darfur will ever face trial at the ICC. Their fate will depend in no small part on whether Sudan or the ICC wins the peace versus justice debate by drawing the Security Council, the African Union, and other key international actors to its side.

A decade and a half after the establishment of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), we know a great deal about the dynamics and outcomes of their battles for cooperation with the states of the former Yugoslavia and Rwanda. Much less is known about the ICC's ongoing efforts to obtain cooperation from the Sudanese government as well as from the three other African countries in which the Court has initiated formal investigations. The aim of this article is to identify and examine the dynamics of the battles over cooperation fought between the ICC and the Sudanese government. The foregoing analysis is of course incomplete, given the ICC's relatively recent intervention in Sudan and the developing nature of the case against President al-Bashir. Still, this account aims to highlight the ways in which the ICC and Sudan have and are likely to continue to wage the battle over Sudan's legal obligation to comply with international prosecutions by handing over suspects and otherwise assisting the pursuit of international justice.

## **II. Khartoum's Strategic Defiance of the ICC**

The last day of March 2005 represented a watershed for the ICC when the Security Council authorized the ICC to open investigations in Darfur.<sup>7</sup> Because Sudan has not ratified the Rome Statute which established the ICC, and is therefore considered a

non-State Party, the Court would have had no authority to investigate atrocities on Sudanese soil unless it received a referral from the Security Council to do so. However, as will be discussed below in section IV, it was by no means certain that the Council would authorize ICC intervention in Darfur, given that the United States, China, and Russia—all permanent members of the Security Council and each with the power to veto the Darfur referral—are also non-State Parties.

Well before the start of the ICC's investigation of the Darfur atrocities,<sup>8</sup> the Sudanese government had reason to fear that even cases brought against mid-level government officials and members of the government-supported Janjaweed militia could implicate senior leaders, including President al-Bashir himself. Yet, up until Moreno-Ocampo brought the first charges against two Sudanese suspects in early 2007, the relations between Khartoum and the ICC were at times cordial.<sup>9</sup> While the al-Bashir government did not allow the Court to open up an office in Khartoum,<sup>10</sup> it permitted ICC investigators to meet with government and judicial officials on five separate occasions,<sup>11</sup> primarily to determine if Sudanese courts had the capacity and willingness to prosecute the cases under ICC investigation. Under the complementarity principle, the ICC can only prosecute cases that a state is either unable or genuinely unwilling to prosecute itself. If the ICC determines that a state is unable or unwilling to prosecute a case, it then becomes admissible for ICC prosecution. The government's best-case scenario was to be seen to cooperate with Moreno-Ocampo's admissibility probe and then have the ICC conclude that domestic courts in Sudan should retain the authority to prosecute war crimes suspects sought by the chief prosecutor.

Khartoum's limited cooperation with Moreno-Ocampo came to an end following the chief prosecutor's February 2007 announcement designating two Sudanese suspects for ICC prosecution.<sup>12</sup> The prospects for state cooperation grew even dimmer a few months later when the ICC pre-trial chamber issued arrest warrants for the two suspects—Ahmad Harun, Sudan's minister of humanitarian affairs, and Ali Kushayb, a leader of the pro-government Janjaweed militia.<sup>13</sup> Harun, the former interior minister, and Kushayb face fifty-one counts of crimes against humanity and war crimes relating to atrocities in 2003–2004.<sup>14</sup> From early 2007, the government has been largely hostile toward the ICC. This antagonism has only intensified in the wake of Moreno-Ocampo's bid to prosecute President al-Bashir. In response to Sudan's defiance, the once conciliatory Moreno-Ocampo has become increasingly critical of the government and of Security Council inaction.

Well before Moreno-Ocampo sought an arrest warrant for al-Bashir in mid-2008, Sudan attempted to sideline the ICC and discourage international pressure to cooperate with the Court. In its campaign against the ICC, the government has honed a number of strategies used by other states, such as Serbia, Croatia, and Rwanda, whose nationals have been investigated and targeted for prosecution by the ICTY and ICTR. First, the al-Bashir government has argued that the ICC prosecutor has no legal right to prosecute Sudanese citizens and that the prerogative belongs exclusively to the Sudanese courts. To bolster its case, the government argues that it has not ratified the Rome Statute of the ICC nor consented to the obligations binding on State Parties. However, a Security Council referral to the ICC obliges a non-State Party, such as Sudan, to fully cooperate with the Court. By the terms of the UN Charter, a Security Council resolution adopted under Chapter VII of the Charter is binding on Sudan as a UN member state.

Sudan has also waged an intensive lobbying campaign to discredit the Court and its claims of impartiality. That the ICC has been imposed on Sudan against its will, just as the ICTY was created without Serbia's consent, has been used by Khartoum

as evidence that the ICC is a political weapon controlled by the powerful states of the Security Council. Here, the government has accused the ICC of executing “a political agenda of countries targeting Sudan”<sup>15</sup> and pursuing a Western-instigated “conspiracy” against the government.<sup>16</sup> The government has sought to portray the ICC as “a tool for the exercise of the culture of superiority” of Western states to punish weak states in Africa and elsewhere in the developing world.<sup>17</sup> Key to the government’s bid for impunity is its argument of “double standards,”<sup>18</sup> specifically, that more powerful countries such as the United States are effectively immune from ICC scrutiny for crimes that their military may have committed overseas.<sup>19</sup> Yet, at least in Darfur, the ICC’s pursuit of prosecutions is not one-sided. Moreno-Ocampo has also targeted Darfuri rebels implicated in war crimes. Toward this end, he is seeking to prosecute three Darfuri rebels for the September 2007 killing of twelve African Union peacekeepers in Darfur. In May 2009, one rebel commander, Bahr Idriss Abu Garda, voluntarily appeared at the ICC for an initial hearing pursuant to a Court summons.<sup>20</sup> The ICC’s targeting of Darfuri rebels has so far done little to soften Khartoum’s defiance. Indeed, there is the strong likelihood that for the foreseeable future only rebels and not Sudanese officials will face justice in The Hague.

The Sudanese government has taken the argument of Western bias one step further by launching a pan-African appeal for solidarity to thwart the ICC and its bid to prosecute President al-Bashir. It has portrayed the ICC as a neo-colonial institution bent on punishing not only Sudan but Africa as a whole. Khartoum has also sought and received public backing from Arab states by casting the ICC as an enemy of the Arab world. It is a pillar of Sudan’s claim that the ICC is an anti-African court because it has so far only opened formal investigations (also referred to as country situations) on the African continent. This claim of bias ignores the significant ways in which some African states have engaged the ICC and sought international prosecutions. Indeed, three of the ICC’s four situations (Uganda, Democratic Republic of Congo, and the Central African Republic)<sup>21</sup> were initiated by state referrals to the Court. The allegations of the ICC’s purported anti-African bias deserve deeper analysis than can be afforded in this article. Suffice it to say here that the question of how the chief prosecutor selects country situations and particular war crimes cases has been the subject of increasing scrutiny even among ICC advocates.<sup>22</sup> Even as ICC officials refute the allegations of anti-African bias they are particularly troubling to the Court. “It is a very harmful debate for us . . . and it is harmful to perceptions” of the Court, lamented a high-ranking ICC official in a December 2008 interview.<sup>23</sup>

Sudan’s strategy has not yet derailed the chief prosecutor’s case against al-Bashir. As of mid-July 2009, the Security Council has not invoked Article 16 of the Rome Statute to suspend the al-Bashir case. And the near term prospects for such a suspension seem low, according to ICC observers and diplomats interviewed in mid-2009.<sup>24</sup> Nevertheless, Sudan’s anti-ICC campaign, which has been heavily backed by Libya (whose leader, Muammar el-Qaddafi, has held the chair of the African Union since early 2009) has borne fruit by rallying African and Arab states to publicly oppose the Court’s pursuit of President al-Bashir. This opposition has so far culminated in an African Union statement, adopted in early July 2009 at an AU summit in Libya, calling on members not to cooperate in efforts to arrest al-Bashir and turn him over to the ICC.<sup>25</sup> The AU sought to justify its action at the summit by pointing to the Security Council’s failure to heed the call from African states to suspend the al-Bashir case.<sup>26</sup> A campaign, backed by Sudan and Libya, to press African State Parties to the Rome Statute to withdraw from the ICC has to date not succeeded.<sup>27</sup> However, the potential for this scenario remains troubling for ICC supporters.<sup>28</sup>



In the immediate aftermath of Moreno-Ocampo's mid-July 2008 request for an arrest warrant for al-Bashir, the African Union and the Arab League came out in opposition to the chief prosecutor's bid to prosecute the Sudanese president and called for the Security Council to suspend the case.<sup>29</sup> The Arab League and the African Union again called for Security Council intervention after the ICC pre-trial chamber issued a warrant for al-Bashir's arrest in March 2009. The Arab League decision garnered significant international media attention, in part because it occurred at a summit meeting in Qatar in which al-Bashir attended and was warmly embraced by fellow Arab leaders.<sup>30</sup> In an apparent attempt to flout the ICC arrest warrant and call attention to his considerable regional support, al-Bashir also traveled to Eritrea, Ethiopia, Libya, Egypt, and Saudi Arabia in March and April. Along with Qatar, these states have not ratified the Rome Statute and therefore do not have a legal obligation to arrest al-Bashir. In this respect, the ICC is at a significant disadvantage relative to the ICTY and ICTR insofar as all UN member states have a legal obligation to cooperate with these two UN tribunals. The Arab League's vocal support for al-Bashir is not surprising because of the lack of pre-existing support for the ICC among Arab States. Only three Arab League states (Jordan, Djibouti, and the Comoros Islands) have ratified the Rome Statute. However, the strong backing Sudan has received from the African Union has come as a particular disappointment to ICC supporters because thirty African countries are State Parties to the Rome Statute.<sup>31</sup>

The disappointment of ICC advocates has been sharpened in the wake of the AU's July 2009 statement in which African State Parties appeared to disavow their legal obligation to arrest al-Bashir if he should travel to their countries. The AU's statement, which poses a significant challenge to the authority of the ICC, has triggered strong criticism from human rights activists. "This resolution, the result of unprecedented bullying by Libya, puts the AU on the side of a dictator accused of mass murder rather than on the side of his victims," said Reed Brody of Human Rights Watch.<sup>32</sup>

Meanwhile, Sudanese officials have trumpeted the AU statement as a virtual invitation for al-Bashir to travel freely to African states that have ratified the Rome Statute and a sign of African unity against the ICC.<sup>33</sup> However, the actual level of popular opposition in Africa to the al-Bashir case and the ICC more generally is far from clear. Moreover, not all African states that attended the Libya summit appear to have strongly backed the AU statement.<sup>34</sup> However, in the days following the summit, Botswana appeared to be the only African state to publicly condemn the AU statement. Botswana's vice president, Mompoti Merafhe, criticized Libya for not allowing adequate debate on the matter and called on African leaders not to "try to undermine the work of the ICC simply because one head of state . . . has been indicted by the Court."<sup>35</sup>

An important element in Sudan's campaign against the ICC is to heighten world fears that support for the Court will undermine the elusive quest for a negotiated peace in Darfur as well as jeopardize the tenuous 2005 Comprehensive Peace Agreement that brought an end to Sudan's devastating north-south civil war. The government's apparent aim is to shift international scrutiny from its role in the Darfur atrocities to the ICC's alleged interference in a possible peace settlement. As far back as the Security Council meeting of 31 March 2005, Khartoum warned that the ICC would subvert the peace process.<sup>36</sup> Subsequently, the government called Moreno-Ocampo "enemy number one of peace in Darfur."<sup>37</sup> In the aftermath of the chief prosecutor's request for an al-Bashir arrest warrant in July 2008, government officials, including al-Bashir himself, intensified this line of attack, going so far as to threaten retaliation if the ICC pre-trial chamber was to issue a warrant for the president's

arrest. Beyond that, Sudanese officials issued thinly veiled threats against the vulnerable, undermanned international peacekeeping force in Darfur.<sup>38</sup> The threats of bloodshed have hardly demonstrated Sudan's peaceful motives. The recent governor of south Darfur, for example, warned that if the al-Bashir case moved forward there would be "more genocide such as has never before been seen by anyone."<sup>39</sup>

On the one hand, the government has denied a role in atrocities, as when President al-Bashir in October 2008 dismissed allegations of mass rapes of Darfuri women as fabrications.<sup>40</sup> But on the other hand, the government has at times strategically acknowledged its hand in the violence, apparently to signal to the ICC and the world that its threats for yet more violence are deadly serious.

Khartoum has sought to blame any increase in violence and danger to Darfuris on Moreno-Ocampo's misguided pursuit of prosecutions. However, in the immediate aftermath of the March 2009 arrest warrant, al-Bashir retaliated by targeting the international humanitarian presence in Darfur that provided a lifeline to millions of Darfuris. Al-Bashir expelled thirteen international and three domestic aid organizations that together had been responsible for providing crucial humanitarian relief to more than four million vulnerable civilians in Darfur.<sup>41</sup> The expulsions sparked dire warnings over the fate of the vulnerable Darfuris. Al-Bashir sought to justify the expulsions by accusing these humanitarian organizations of spying on behalf of the ICC.<sup>42</sup>

For Chief Prosecutor Moreno-Ocampo, al-Bashir's actions have confirmed his criminal intent, making his arrest even more urgent. Still, the unfolding crisis triggered by the expulsions have, at least in the short term, appeared to soften international pressure for the president's arrest as Western diplomats have focused on obtaining Khartoum's cooperation to allow other humanitarian aid organizations to replace the expelled groups. In this respect, the United States appears to have taken a conciliatory approach toward Sudan, apparently aimed at ameliorating the Darfur crisis and preventing the collapse of the Comprehensive Peace Agreement.<sup>43</sup>

The Sudanese government's repudiation of the ICC is both strategic and deeply felt, according to Western diplomats. "If there is one thing that can get them out of their chair, it's the ICC issue. It's really, really upsetting for them," remarked a European diplomat who has met with Sudanese officials in Khartoum.<sup>44</sup> Beyond declaring its intent never to hand over indicted suspects, the government has taken steps to marginalize the ICC and prevent international intervention on behalf of the Court. Well before the issuance of the al-Bashir arrest warrant, the government used incendiary rhetoric in an apparent attempt to demonstrate that its non-compliance is non-negotiable. In March 2007, for instance, Interior Minister Al-Zubayr Bashir Taha promised to "cut the throat of any international official . . . who tries to jail a Sudanese official in order to present him to the international justice."<sup>45</sup> Then in April 2008, Sudan's ambassador to the UN, Abdel-Mohmood Mohamad, called for the arrest of Moreno-Ocampo, accusing him of "jeopardizing the political settlement in Darfur."<sup>46</sup> In early June 2008, President al-Bashir reportedly told members of a Security Council delegation visiting Khartoum that he would cooperate with the Court "over his dead body."<sup>47</sup> The day after the ICC pre-trial chamber issued a warrant for his arrest, al-Bashir told a pro-government rally in Khartoum that Sudan is "ready for any battle" against the "new colonization" represented by the ICC.<sup>48</sup> Taken together, these statements may be interpreted as a government bid both to signal the futility of international pressure and the political price the international community will have to pay for exerting such pressure.

Yet even as the chief prosecutor's request for an arrest warrant for al-Bashir provoked hostile reactions in Khartoum, including government-sponsored protests

against the ICC,<sup>49</sup> government officials in the second half of 2008 offered slender olive branches to the international community, but not to the ICC. The Sudanese government promised that the situation in Darfur would improve, although it only offered minor concessions toward this end.<sup>50</sup> Behind what Human Rights Watch called a “dual strategy of threats of further violence and promises of progress on the ground”<sup>51</sup> was a drive to convince the Security Council to invoke Article 16 and suspend the al-Bashir case. However, by the end of 2008, the government’s strategy had not persuaded the Security Council.

In its quest for an Article 16 suspension of the al-Bashir case in the second half of 2008, the government argued, as it had when Moreno-Ocampo first opened his investigation in 2005, that under the Rome Statute’s complementarity principle its courts are capable of handling Darfur-related prosecutions. Sudan’s allies in Africa and the Arab world sought to broker a compromise to the crisis over the impending ICC warrant by encouraging Khartoum to develop a plan for credible domestic war crimes prosecutions.<sup>52</sup> Toward that end, the government announced the appointment of a special prosecutor for Darfur.<sup>53</sup> And in October 2008, the Sudanese government announced that it had arrested Ali Kushayb.<sup>54</sup> (Government authorities had previously arrested Kushayb, but then released him in 2007.) But by the end of 2008 scant progress had been made toward domestic prosecutions and there was little sign that the government planned to prosecute Kushayb or Ahmad Harun, the other Sudanese suspect facing an ICC arrest warrant.<sup>55</sup> Chief Prosecutor Moreno-Ocampo was emphatic in his criticism of how little Sudan had done in the realm of domestic war crimes prosecutions, telling the Security Council in December 2008 that “in spite of recent announcements and appointments, nothing—nothing—has been done.”<sup>56</sup> In another attempt to sideline the ICC, a deal was reportedly explored whereby the Sudanese government would send Harun and or Kushayb for trial in The Hague in exchange for an Article 16 suspension of the al-Bashir case. In August 2008, the idea surfaced with potential support from France and Britain, ostensibly the ICC’s two strongest backers among the Security Council’s five permanent members. But in October, momentum for such a deal died after Khartoum stood by its long-held refusal to hand over the two suspects or to make significant concessions in regard to ameliorating the conflict in Darfur.<sup>57</sup>

In the aftermath of the chief prosecutor’s application of an arrest warrant for al-Bashir, some Western diplomats and many ICC supporters have scoffed at the suggestion that the Court’s work would jeopardize a resolution to the Darfur crisis given the moribund state of the peace negotiations. “Show me the peace process, please,” one high-level ICC official said in a December 2008 interview.<sup>58</sup> Still, the prospect that the Court’s pre-trial chamber would issue an arrest warrant raised fears in many capitals that the Darfur crisis would grow worse at the hands of an embattled leader. Many diplomats also feared that casting al-Bashir as a pariah would, for as long as he remains in power, make it difficult for the international community to directly engage him to find a resolution to the Darfur conflict or ensure the success of the fragile Comprehensive Peace Agreement. To be sure, the indictment of a sitting head of state is bound to be highly controversial, even if it is enabled by a Security Council referral. The central concern is that a cornered al-Bashir would have no incentive to bring the war in Darfur to an end and perhaps every reason to prolong it. Yet, by holding the keys to the Darfur conflict—either by unleashing more violence or by working toward its resolution—al-Bashir’s behavior may yet be restrained in the hopes of obtaining the golden prize of an Article 16 suspension.

Even before the emergence of the al-Bashir case, some Sudan experts expressed concern that the ICC's expected charges against senior officials in Khartoum could provoke further instability in Darfur, trigger violence in the fragile oil-rich Abyei region leading to a resumption of the north–south war, and prompt government retaliation against humanitarian workers and peacekeepers. For instance, former US Special Envoy to Sudan Andrew S. Natsios warned of a doomsday scenario in which new ICC indictments “will drive the country closer to dissolution.”<sup>59</sup> This, Natsios feared, could destabilize neighboring countries, disrupt Sudan's oil exports, and force an increase in world prices.<sup>60</sup> The concern that the pursuit of justice could damage the prospects of an already elusive peace in Darfur have been sharpened in the wake of the chief prosecutor's bid to bring al-Bashir to trial in The Hague and the issuance of the warrant for the Sudanese president. Yet other experts, including representatives of prominent international human rights organizations, view the move to prosecute al-Bashir as a potential catalyst to confronting and ultimately ending the atrocities in Darfur.

Even prior to the chief prosecutor's targeting of al-Bashir, the Sudanese government argued that the ICC interfered with efforts to bring the Darfur conflict to an end. Specifically, Khartoum warned that the arrest warrants for Harun and Kushayb could disrupt the bid for the deployment of an expanded African Union-UN peacekeeping force in Darfur. President al-Bashir argued that his previous refusal to allow UN peacekeepers into Darfur was based on his fear that the ICC would take advantage of evidence possibly collected by the peacekeepers.<sup>61</sup> This argument has been refuted by some analysts who contend that Sudan disingenuously blamed the Court for the government's long-running resistance to a robust peacekeeping force. These analysts point to the fact that Sudan's foot-dragging on allowing an effective peacekeeping force had begun a year and a half before the Security Council's 2005 referral of the Darfur case to the ICC. Moreover, their contention that the government's announced fear that the peacekeeping force would be used on the ICC's behalf is a distortion of the force's limited mandate.<sup>62</sup>

While the ICTY and ICTR have often been stymied by non-cooperation, the states of the former Yugoslavia and Rwanda have frequently sought to portray themselves as cooperative in order to avoid international condemnation. When these states have been accused of non-cooperation, they have often advanced “good faith” reasons for their behavior, such as a lack of state capacity to locate and arrest fugitives.<sup>63</sup> But Sudan has frequently been unambiguous in its determination to withhold cooperation. Sudan's open defiance may serve both as a way to further undermine the ICC and as an expression of its confidence that the international community will not punish the government for its non-compliance.

Khartoum has also taken a number of provocative actions to emphasize its opposition to the ICC. The government has retained Harun in his position as minister of humanitarian affairs, where he has responsibility over vulnerable refugees in camps in Darfur. And Khartoum has actually given him the responsibility of investigating human rights abuses in Darfur and serving as the government's liaison with the AU-UN peacekeeping force. “It's a real slap to the ICC and the arrest warrants,” remarked a Western diplomat based in The Hague.<sup>64</sup> In the fall of 2007, the government announced it released Kushayb, who had been arrested by Sudanese authorities on charges unrelated to the ICC case against him. Then in January 2008, the government promoted Musa Hilal—a notorious Janjaweed leader implicated in atrocities and rumored to be a potential target of the ICC chief prosecutor—as a special advisor

to President al-Bashir. Court advocates lament that by failing to formally condemn Khartoum's defiance, the international community has given Sudan more political space to thwart the ICC's calls for compliance.<sup>65</sup>

Still, the crisis brought on by the prosecutor's request for an al-Bashir arrest warrant has, as discussed earlier, prodded some Sudanese officials to signal a show of willingness to change their behavior in Darfur. Time will tell whether this takes the form of substantive concessions and whether this will persuade the Security Council to exercise its prerogative to suspend the pending ICC case against President al-Bashir.

### **III. The Changing Approach of the ICC Chief Prosecutor**

The decision of Chief Prosecutor Moreno-Ocampo to target a sitting head of state and to seek charges of genocide, crimes against humanity, and war crimes have brought the ICC to the center of world attention. The genocide charge in particular has sparked controversy and renewed the contentious debate over whether the Darfur atrocities deserve to be categorized as "the crime of crimes." Key flashpoints in this controversy have occurred with the release of the UN-authorized International Commission of Inquiry report in 2005, which did not find that genocide had taken place in Darfur,<sup>66</sup> and the United States government's 2004 determination that genocide had occurred.<sup>67</sup> The genocide debate has received extensive treatment in the academic literature.<sup>68</sup>

The chief prosecutor's high-profile campaign for al-Bashir's arrest, together with his pursuit of Ahmad Harun and Ali Kushayb, have cast him as a confrontational prosecutor not unlike his former ICTY counterpart, Carla Del Ponte. However, Moreno-Ocampo's adversarial approach particularly applies to Sudan, the only country in which the Security Council has asked the prosecutor to investigate violations of international humanitarian law.<sup>69</sup> By virtue of this Security Council referral, Moreno-Ocampo, as with his counterparts at the ICTY and ICTR, possesses the ostensible backing of the highest UN body to target senior political and military officials. This stands in decisive contrast to the ICC's involvement in Uganda, the Democratic Republic of Congo, and the Central African Republic, where the Security Council has played no role in initiating the Court's work. With the Security Council's referral, the prosecutor is given a level of authority he lacks in the three other country situations in which he is currently pursuing war crimes prosecutions. Moreover, when it comes to the Darfur situation, the prosecutor has access to the high-profile forum of the Security Council chambers in New York where he issues biannual progress reports and can thus garner significant international media attention and political leverage in his quest for cooperation.

For the chief prosecutors at the UN ad hoc tribunals, and particularly at the ICTY, confrontation has often been critical to securing cooperation. Since the Security Council had given them the task of holding scores of trials within a finite period of time and equipped them with a legal mandate to demand full and immediate cooperation, the ICTY chief prosecutors often had reason to take a hard line with non-compliant states. But as seen in key provisions of the Rome Statute, the founders of the ICC envisioned a more consensual relationship between Court and states. Whereas the Security Council established the ad hoc ICTY and ICTR, the ICC was created by a multilateral treaty to which states have to consent in order to join. And whereas the ICTY and ICTR have enjoyed primacy vis-à-vis states and the legal authority to usurp domestic judiciaries, the ICC is more deferential because it is only authorized to prosecute when a state is either unwilling or unable to do so itself. The spirit if not the letter of

the Rome Statute also seemed to call on the ICC chief prosecutor to pursue a more harmonious relationship with states.

Adopting a conciliatory approach in his external relations also appeared to be a prudent political strategy for Chief Prosecutor Moreno-Ocampo to increase the prospects that powerful states opposed to the Court would reconsider their position. A crusading chief prosecutor could quickly alienate State Parties and provoke the wrath of powerful non-State Parties—the United States in particular—that the Court hoped to count on for vital assistance. Accordingly, Moreno-Ocampo signaled his deference to state sovereignty by declining to initiate investigations himself, although the *pro prio motu* powers in Article 15 of the Rome Statute allows him to do so. Article 15 had been a hard fought victory at the 1998 Rome Conference and is viewed by advocates as crucial to ensuring the prosecutor's independence.<sup>70</sup> However, as the first chief prosecutor of a fledgling institution that relies on state support and seeks to increase the number of State Parties, Moreno-Ocampo initially seemed more concerned with signaling his accountability to states than in maintaining his independence from them.<sup>71</sup> Still, under pressure from supporters and skeptics alike to demonstrate the Court's relevance, Moreno-Ocampo could not wait indefinitely for State Parties to come to him with referrals of new country situations.

Laboring under these constraints, Moreno-Ocampo adopted a policy of actively encouraging referrals from State Parties.<sup>72</sup> In effect, the prosecutor asked these states to ask *him* to open investigations. This is apparently the route by which the Office of the Prosecutor came to investigate atrocities in Uganda<sup>73</sup> and Congo.<sup>74</sup> The strategy of self-referrals allowed Moreno-Ocampo to avoid the image of an adversarial prosecutor and helped secure the state's cooperation in the ICC's investigations, at least as long as he did not actually target the Ugandan and Congolese governments' role in atrocities. That these states invited the ICC into their countries could also be later used by Moreno-Ocampo and other Court officials to deflect the accusations that the ICC is an anti-African court imposing justice on Africa.<sup>75</sup> However, a central concern of critics, including some prominent legal scholars, is that Moreno-Ocampo's reliance on state referrals can lead to a *quid pro quo* that insulates state officials from ICC prosecution.<sup>76</sup>

The chief prosecutor's strategic conciliation vis-à-vis Uganda and Congo initially seemed a harbinger of a timid approach toward Sudan. To the dismay of some international human rights activists, Chief Prosecutor Moreno-Ocampo at first avoided confronting the al-Bashir regime for its insufficient cooperation.<sup>77</sup> These activists asserted that he did little to build the necessary international pressure that might have bolstered the prospects of cooperation, but instead advanced an acquiescent image of the ICC and the Office of the Prosecutor.<sup>78</sup> Moreno-Ocampo has not been alone in employing conciliation in a bid for cooperation. The chief prosecutor's counterparts at the ICTY and ICTR have at times also believed that a softer approach offers the best opportunity to persuade recalcitrant states to provide some cooperation.<sup>79</sup> "He had a strategy ... [that] if he played nice with the regime he would have much more chance of getting a degree of cooperation," said a prominent NGO official who has watched Moreno-Ocampo since he began his tenure as chief prosecutor. "It is a legitimate kind of thing for him to think about, but I think it was a complete misreading of the way in which his investigation was perceived [by Khartoum] ... This was a threat to the regime."<sup>80</sup> Moreno-Ocampo came under fire from human rights activists for two apparent overtures to Sudan. First, in his early reports to the Security Council in 2005 and 2006, he provided favorable assessments of the government's limited cooperation. Next came his request to the ICC's pre-trial chamber in early 2007 for

a summons rather than arrest warrants for Harun and Kushayb. The request for a summons—which is usually reserved when there is reason to anticipate voluntary surrender—was apparently made to lower the domestic political fallout to President al-Bashir of relinquishing the suspects, since it might have allayed the perception of government acquiescence.<sup>81</sup> Nevertheless, the government spurned Moreno-Ocampo's overtures. The ICC's pre-trial chamber did as well, deciding to issue warrants for Harun's and Kushayb's arrests after citing Sudan's declarations of resistance.<sup>82</sup>

Some observers maintain there was a sound basis for a conciliatory approach, at least during the investigation phase when Khartoum was not unequivocally hostile to the ICC.<sup>83</sup> Alex de Waal, a prominent Sudan expert, believes that because Harun and Kushayb were not from the highest levels of government, Khartoum could have sent them to The Hague without significant domestic fallout.<sup>84</sup> (In the wake of Moreno-Ocampo's bid to prosecute al-Bashir, de Waal has grown sharply critical of the prosecutor's "overreach"<sup>85</sup> as well as his overall performance as chief prosecutor).<sup>86</sup> Moreno-Ocampo has also said that the government indicated some interest in surrendering Harun after the arrest warrants for him was issued. "Khartoum was discussing internally the possibility to remove Harun from the government; they were asking us questions about the consequences of surrender," Moreno-Ocampo said.<sup>87</sup> It was at this point, he asserts, that international pressure on Khartoum could have played an important role in the arrest and transfer of Harun and Kushayb to The Hague. But the UN and European actors declined to make the arrests a priority.<sup>88</sup> "The international community preferred to deny the facts and the need to enforce the judges' decision," Moreno-Ocampo said in a stinging rebuke of UN and European acquiescence.<sup>89</sup>

Moreno-Ocampo's decision to adopt a confrontational stance toward Khartoum, which became evident in mid-2007, likely stemmed from a realization that his previous approach was not yielding results.<sup>90</sup> The nature of his relationship with Sudan had fundamentally changed with the issuance of the first arrest warrants of Sudanese suspects that implicated the government in a campaign of ethnic cleansing in Darfur. In the eyes of the al-Bashir government, the warrants for Harun and Kushayb confirmed its long-held fear that the ICC would target the regime itself. Still, for Moreno-Ocampo to maintain a conciliatory stance by not criticizing Sudan's blatant non-compliance would have sorely undercut his leverage and hopes of building international pressure for the arrests of Harun and Kushayb.

Since the issuance of the arrest warrants for Harun and Kushayb, Moreno-Ocampo has taken an increasingly adversarial stance toward the Khartoum government. Moreno-Ocampo's confrontational approach reached its apex with his request for an arrest warrant for al-Bashir and the prosecutor's subsequent campaign, in the aftermath of the March 2009 warrant, for the president's arrest. Well before the al-Bashir case, the chief prosecutor demonstrated more resolve to obtain arrests, as seen in his audacious plan, in conjunction with some third-party states, to divert an airplane that Harun was expected to be on en route to the haj pilgrimage in Saudi Arabia in December 2007. The plan was unsuccessful because Harun got off the plane after being tipped off. Still, Moreno-Ocampo has used the disclosure of the arrest attempt to project his determination and the ICC's global reach. "As soon as Harun leaves Sudan he will be arrested," Moreno-Ocampo said in June 2008. "He is a fugitive. Inside Sudan he could have freedom. Outside Sudan he will be in jail."<sup>91</sup> The Khartoum government responded to the news by denouncing the prosecutor's action as "piracy,"<sup>92</sup> calling for his ouster, and announcing that it had filed domestic terrorism charges against him.<sup>93</sup>

A key component of Moreno-Ocampo's strategy for international support has been to argue that the arrests of all three suspects, but particularly al-Bashir and Harun, are imperative to stopping the violence against Darfuris. Moreno-Ocampo contends that al-Bashir, as president, and Harun, as minister of humanitarian affairs, are responsible for ongoing attacks against civilians in Darfur. Even as the magnitude of atrocities in Darfur has receded from the height of the conflict in 2003–2004, there is still violence that the prosecutor maintains poses a threat to the survival of members of the Fur, Masalit, and Zaghawa tribes in Darfur. In his December 2007 address to the Security Council, the prosecutor sought to implicate Harun in ongoing abuses against Darfuris in refugee camps, maintaining that the displaced "are left with no hope for the present and no prospect for the future."<sup>94</sup> Moreno-Ocampo pursued a similar line of attack in his December 2008 speech to the Security Council, his first address to the Council following his application for the al-Bashir arrest warrant. He reported on the continuation of rapes, military attacks against civilians leading to deaths and wide-scale displacement, and government hindering of humanitarian aid. "Genocide continues," Moreno-Ocampo alleged in his address to the Security Council.<sup>95</sup> Then in his June 2009 address to the Council he charged that al-Bashir's expulsion from Darfur of more than a dozen humanitarian aid organizations amounted to a policy of extermination.<sup>96</sup> Moreno-Ocampo also has highlighted the emptiness of al-Bashir's promise to his citizens, which he made in the fall of 2008, to provide "justice to the oppressed."<sup>97</sup> Pointing to the regime's effort to cover up crimes by arresting and torturing human rights activists who have given information to the ICC, the prosecutor sardonically told the Security Council: "This is the 'justice to the oppressed' that President Al-Bashir is talking about."<sup>98</sup> In sum, in his recent speeches to the Security Council and other public statements, the prosecutor has tried to deflect charges that the ICC undermines peace by framing the pursuit of justice as "the only realist solution"<sup>99</sup> to preventing the suspects from endangering more civilians.

Without naming art. 16, Moreno-Ocampo, in his December 2008 speech, also countered the Sudanese government's efforts to obtain a suspension of the al-Bashir case. By casting the regime's attempts at an Article 16 resolution as a means to win impunity for its crimes, the prosecutor sought to pre-emptively shame the Security Council from taking this course of action. "President Al-Bashir is trying to convince organizations and the Security Council that they have to protect him," Moreno-Ocampo told the Council. "The international community cannot be part of any cover-up of genocide or crimes against humanity."<sup>100</sup> Even as Moreno-Ocampo's speeches attest to his increased confrontation with the Sudanese government, they also have underscored his growing impatience with the Security Council for its timid approach toward Khartoum.<sup>101</sup> Beyond that, the prosecutor has argued that Sudan's defiance of the ICC is defiance of the Security Council itself.<sup>102</sup>

#### **IV. The ICC in Sudan: Security Council Authorization and Ambivalence**

Following their March 2005 referral of the Darfur situation to the ICC, Security Council members extolled the virtues of the Court and its potential to advance the pursuit of peace. The French ambassador to the UN, Jean-Marc de la Sablière, hailed Security Council Resolution 1593 as evidence that the "Council will remain vigilant to ensure that there is no impunity."<sup>103</sup> And UN Secretary-General Kofi Annan called the ICC "an appropriate mechanism to lift the veil of impunity that has allowed human rights crimes in Darfur to continue unchecked."<sup>104</sup> Yet, as the discussion herein shows, the Security Council grew ambivalent over whether prosecutions of Sudanese officials



would aid the quest for a durable solution to the Darfur crisis. The Council's ambivalence has become particularly apparent in regard to the ICC's bid to prosecute President al-Bashir. As a result, the Security Council's referral of the Darfur situation has not materialized into a sustained commitment to press Sudan to cooperate with the ICC.

Since its 2005 referral, the Security Council has taken no punitive steps against Sudan despite its blatant non-cooperation and public declarations that it will never cooperate with the Court. With the exception of a June 2008 Security Council statement calling on Khartoum to assist the ICC, the Council as a collective has been silent about Sudan's obligation to cooperate.<sup>105</sup> Analysis of the numerous resolutions and statements the Security Council has adopted on Sudan, prior to the June 2008 statement, finds no formal criticism or explicit acknowledgement of Sudan's non-compliance. Beyond that, Security Council resolutions and statements on Sudan prior to June 2008 included no mention of the ICC and on only two occasions made reference to the Council's referral to the Court. When the Council did list the international obligations Sudan must fulfill—such as supporting the peace process, halting attacks on civilians and peacekeepers, and expediting humanitarian relief—cooperation with the ICC was noticeably omitted.<sup>106</sup> The Council mentioned the need for justice in some of its resolutions and statements on Sudan. But it either did so in vague terms,<sup>107</sup> did not specify the ICC's role in undertaking prosecutions, or indicated, as it did in a July 2007 resolution, that justice is the responsibility of Sudan's domestic courts.<sup>108</sup> In so bypassing the ICC, the Council (prior to its June 2008 statement calling for Sudan's cooperation) backed away from its own commitment to the ICC. Although hardly noticed by the international media and the outside world, this eliding of the ICC appeared to reduce the pressure that the government would have otherwise faced from the Council. ICC advocates have expressed concern that the Council's failure to demand Sudanese cooperation threatens to magnify the Court's impotence.<sup>109</sup>

The Security Council's reluctance to confront Sudan for its non-cooperation with the ICC bears a striking parallel to the Council's reticence to take action against Serbia in the 1990s for failing to cooperate with the ICTY. In both instances, the prospect of war crimes prosecutions provided the Council with leverage to curtail state violence insofar as the tribunals served to warn state leaders that they might one day face prosecution. The Council's establishment of the ICTY and the Council's referral of the Darfur situation to the ICC have also served other political functions such as insulating the UN from its failure to take decisive action to halt mass killings by, instead, taking the moral high ground of seeking international justice. In this respect, both the creation of the ICTY and the Darfur referral can partially be seen as a way to distract attention from the UN's failure to end the violence in the former Yugoslavia and Darfur.

The Security Council's reticence to press Sudan to cooperate with the ICC goes beyond its hope that the government will agree to a negotiated peace settlement in Darfur. It has also looked to Khartoum to fulfill its promise to allow the full deployment of an expanded 26,000-strong joint African Union–UN peacekeeping force in Darfur. (By early March 2009, approximately 15,000 international peacekeepers and other members of the AU–UN force had been deployed in Darfur.<sup>110</sup>) Moreover, the international community has continued to rely on the government to permit the unfettered delivery of humanitarian relief to vulnerable civilians in Darfur who have been internally displaced by the violence. This dependence on Sudan has, at times, led even strong ICC supporters such as the European Union to avoid applying sustained pressure on Sudan to cooperate with the Court. As a senior EU diplomat with first-hand

knowledge of Sudan explained in a May 2008 interview, the ICC fits in the diplomatic landscape “like a stone in a shoe.”<sup>111</sup> Said the EU diplomat: “It would require robust pressure on the government to [hand over suspects] to the ICC, robust pressure we’re not inclined to put because of the need to engage” on several agendas.<sup>112</sup> In sum, obtaining Khartoum’s cooperation in the quest for peace, peacekeeping, and humanitarian relief—as well as its continued support for the endangered Comprehensive Peace Agreement that brought an end to the north–south civil war in early 2005—has so far trumped the ICC’s quest for the international community’s political backing in the prosecution of war crimes.

Since mid-2007, Chief Prosecutor Moreno-Ocampo has issued increasingly strong calls for the Security Council to press Khartoum to comply with the ICC. Following the prosecutor’s June 2007 speech to the Security Council, the UN body effectively shielded Sudan from public criticism by discussing his remarks in private sessions.<sup>113</sup> The Council held a public discussion of the cooperation issue following the chief prosecutor’s next report to the Council in December 2007. But, again, Moreno-Ocampo’s criticism of Khartoum did not lead to punitive Council action or even the less serious step of issuing a Council statement rebuking Sudan for its non-compliance. Even the rejected Council statement under consideration was relatively mild, at most a reminder of Sudan’s legal obligation to cooperate with the ICC.<sup>114</sup> The most pro-ICC states on the Council—France, Britain, and Belgium—maintained that the Council should hold Sudan to its obligation to fully cooperate because the quest for justice complemented the pursuit of peace in Darfur while the anti-ICC states—China, Russia, and Qatar—countered that Council support for the ICC should be subordinated to the security question. The Russian delegation called for “a constructive dialogue” between Khartoum and the ICC.<sup>115</sup> Yet, without Council pressure on Khartoum, the call for such dialogue would only benefit Sudan and foster the impression that the Court’s work was vulnerable to political bargaining.

By spring 2008, the ICC chief prosecutor appeared to gain more international support for his uphill struggle for cooperation. Moreno-Ocampo’s criticisms of Khartoum’s non-compliance and international inaction, as well as a concerted NGO campaign that amplified the prosecutor’s calls for cooperation, appeared to strengthen the prosecutor’s hand, particularly in Europe.<sup>116</sup> At the end of March 2008, the presidency of the European Union issued a statement expressing its “profound dismay”<sup>117</sup> with Sudan’s lack of cooperation, indicating that further non-compliance would lead to EU action against Khartoum.

At the Security Council, there was not enough political support for punitive measures against Sudan in 2008. Still, when Moreno-Ocampo addressed the Council in early June 2008, he received more backing than ever before, with a majority of members favoring a Council statement addressing Khartoum’s non-compliance. In the prosecutor’s speech to the Council, he called “the entire Darfur region a crime scene,” implicated the “entire state apparatus” in atrocities, and excoriated Khartoum for a cover-up.<sup>118</sup> Ten days after this no-holds barred speech, the Council approved a statement “urging” the government “to cooperate fully with the Court . . . in order to put an end to impunity for the crimes committed in Darfur.”<sup>119</sup> The prosecutor’s accusations of Ahmad Harun’s ongoing responsibility in attacks against victims in refugee camps may have prompted the Council to break its silence. Significantly, the United States which held the Council presidency that month also came out in favor of such a statement and by doing so indicated its strongest support of the ICC to date.<sup>120</sup> In the ensuing months, the United States would increasingly play a supportive role for an institution it had only recently been determined to undermine. Washington’s refusal

to contemplate supporting an Article 16 suspension of the al-Bashir case even as France and Britain indicated openness to doing so highlighted the significant evolution in the United States' relationship with the ICC.

That Moreno-Ocampo sought and received a Security Council statement in June 2008 seemed designed to bolster his leverage with the Council ahead of his request for an al-Bashir arrest warrant a month later in July.<sup>121</sup> Human Rights Watch hailed the Council's June statement, characterizing it as a criticism of Khartoum's non-compliance and as a sign of the UN's impatience with impunity in Darfur.<sup>122</sup> Yet the Council statement lacked any explicit criticism of Khartoum's non-compliance. Moreover, the Council dropped the explicit reference in the draft statement demanding Sudan's compliance with the ICC arrest warrants. Libya, a non-permanent member of the Council, reportedly would not endorse the statement unless the reference to the warrants was replaced with the vague and less consequential call for an "end to impunity."<sup>123</sup> For its part, the European Union issued a much stronger statement of its own. After Moreno-Ocampo addressed the EU foreign ministers on 16 June, the ministers issued a statement deploring the government's failure to cooperate and calling for the handover of Harun and Kushayb.<sup>124</sup> Still, at their June meeting, EU leaders decided to hold off on imposing sanctions against Khartoum. For the rest of the year, European leaders backed away from their threat of taking concrete action against the Sudanese regime even as the now targeted President al-Bashir flouted his defiance of the ICC.

The lack of concerted Security Council action on the ICC issue is a product of the political interests and divisions among its five permanent members, particularly the United States, China, and Russia. Yet what is commonly overlooked is that the ICC's strongest backers on the Council, Britain and France, have also been ambivalent about strongly supporting the ICC's struggle with Sudan. Even as London, Paris, and other European capitals have been at the forefront of the effort to establish the ICC, their lack of forceful and sustained pressure on Khartoum has disappointed ICC officials and Court advocates.<sup>125</sup> Still, the ICC's more fundamental problem has been with the United States, China, and Russia. All three states have not ratified the Rome Statute and have generally not been eager to embolden the ICC. However, the nature of their views toward the ICC and their role in Sudan have differed in key respects.

Despite its leadership role in establishing the contemporary ad hoc tribunals, the United States under the Bush administration vehemently opposed the ICC, which it accused of being unaccountable and a danger to American interests. Particularly in the early years of the Bush administration, this opposition translated into a diplomatic assault on the Court and a coercive campaign to press states to sign bilateral agreements with Washington promising not to send any American war crimes suspects to the ICC.<sup>126</sup> Thus, the United States was initially loath to take any action that could legitimize the fledgling court.<sup>127</sup> Toward that end, US officials made it clear in early 2005 that the US opposed the nascent plan for the Security Council to refer the Darfur situation to the ICC.<sup>128</sup> Instead, the Bush administration floated a plan for an ad hoc tribunal for Sudan jointly run by the UN and the African Union. Washington's ad hoc tribunal plan did not gain political traction and was effectively criticized by other states, ICC supporters, and American Darfur activists as a costly and unnecessary alternative.<sup>129</sup> In time, the threat of a US veto of the Security Council's proposed Darfur referral became untenable because of the likely political damage of blocking international prosecutions for atrocities the Bush administration had itself labeled genocide

only a half a year earlier.<sup>130</sup> Not wanting to publicly endorse the ICC, Washington decided to abstain on the vote to refer the Darfur situation to the ICC.

In time, Washington came to regard the ICC's work in Darfur in a favorable light, perhaps in no small part due to the high-profile status of the Darfur issue in the United States and the formidable pressure exerted by the American-based Save Darfur movement to stand against impunity in Sudan.<sup>131</sup> Moreover, just as the ad hoc ICTY had been a useful tool for the United States and its allies to isolate the rogue leader of Serbia, there was no reason why the ICC, at least in the context of the Darfur situation, could not serve a similar purpose for the United States. Indeed, the Security Council referral could serve American interests because the Council's action had, in effect, deputized the global court to serve as an ad hoc tribunal for Darfur. Late in the Bush years, US officials reached out to the Court, indicating they would actually cooperate with the ICC in its Darfur investigations if so requested.<sup>132</sup> Yet the strongest form of US support came in the second half of 2008 when the Bush administration announced its opposition to any Security Council attempt to invoke Article 16 to suspend the al-Bashir case. Even as France and Britain explored a possible deal to suspend the case, Washington, in sharp contrast to its earlier position on the ICC, claimed the moral high ground. "There is no compromise on the issue of justice," said Alejandro Wolff, the deputy US representative to the UN, in early August.<sup>133</sup> Remarkably, in only the span of a few years, the United States has gone from being the ICC's arch-nemesis to its most reliable ally, at least when it perceived that providing backing for the Court in Darfur advanced American interests. Yet finding common cause with the ICC did not mean that the United States government, under Republican George W. Bush or Democrat Barack Obama, would fully embrace the Court by becoming a State Party to the Rome Statute.

American opposition to an Article 16 suspension, at least in the run-up to the pre-trial chamber's decision on the al-Bashir arrest warrant, greatly diminished the prospects of such a suspension since an opposing vote of only one permanent Council member can block a suspension. Anticipating failure may have thus dissuaded China and Russia from mounting a vigorous public campaign. Such a campaign was not only likely to fail but also could incur a blow to their global standing by closely linking Beijing and Moscow in the effort to immunize President al-Bashir from prosecution.

As Sudan's most important political patron, China has reaped concrete benefits from its relationship with Khartoum, not least of which has been substantial crude oil imports—Sudan is China's largest foreign supplier<sup>134</sup>—and the extension of Chinese influence in a strategic part of Africa. Sudan, too, has enjoyed the benefits of its relationship with China, given Beijing's role as a major supplier of arms<sup>135</sup> and China's significant investment in Sudanese industry.<sup>136</sup> Beyond that, China's political backing during the Darfur crisis has proven indispensable for Sudan. China's support has helped to soften the blow of international condemnation and to avoid some punitive measures from the international community, such as a maritime blockade of its ports,<sup>137</sup> which might have forced Khartoum to alter its policy in Darfur. Significantly, however, the political protection China has offered Sudan did not extend to a Chinese veto of the Security Council referral of the Darfur situation to the ICC.

China is no friend of the ICC. Since the Rome Conference of 1998, it has been strongly opposed to key provisions of the Court's Statute. Yet, when it came time to the vote on the Darfur referral, Chinese leaders preferred to avoid risking the condemnation that may have come from scuttling any possibility of international justice for Darfur. Instead, Beijing, like Washington, abstained. China "could not vote no since

the crimes in question are unjustifiable,” observed Jean-Pierre Cabestan, a French expert on China. “It often finds itself in this neutral position since it does not want to have the finger of blame pointed at it.”<sup>138</sup>

As the Darfur crisis has worn on, China has found itself increasingly subject to international censure, especially from human rights activists in the West, who have criticized Beijing for complicity in atrocities by enabling and arming the Khartoum regime. As international scrutiny of Chinese human rights practices at home and abroad intensified during the long run-up to the 2008 August Olympics in Beijing, China sought to enhance its international image by being seen to play a constructive, diplomatic role in Darfur.<sup>139</sup> Thus, Chief Prosecutor Moreno-Ocampo’s request for an arrest warrant for President al-Bashir, less than a month before the Olympics, came at a particularly sensitive time for the Chinese government. In this context, China risked a deep, self-inflicted wound if it had lead or strongly supported efforts to suspend the case against a potential genocide suspect.

To be sure, China did express opposition to Moreno-Ocampo’s bid to prosecute al-Bashir, criticizing the move as “an inappropriate decision taken at an inappropriate time”<sup>140</sup> that could make it more difficult to resolve the Darfur crisis. Beyond that, an arrest warrant would obviously complicate Chinese diplomacy in Sudan. As Liu Guijin, China’s envoy for Darfur, asked rhetorically, “How can you rely on a criminal suspect to be a responsible partner for the Darfur political process?”<sup>141</sup>

Not long after the chief prosecutor’s mid-July 2008 request for an arrest warrant, China signaled support for “the reasonable request”<sup>142</sup> of Sudan’s African and Arab allies for an Article 16 resolution at the Security Council. Yet Beijing was careful not to go beyond these measured statements of support for Sudan and its African and Arab backers. However, as the global spotlight on China faded several months after the Olympics and the announcement of the ICC’s pre-trial chamber’s decision appeared imminent, Beijing in early January 2009 signaled stronger support for halting the al-Bashir case, arguing that an ICC indictment would lead to “disastrous” consequences for Darfur.<sup>143</sup> Still, China indicated that it preferred to have one of the Security Council’s three African members take the lead by introducing an Article 16 resolution.

For the most part, Russia has followed China’s lead when it has come to the ICC and the al-Bashir question. However, in contrast to both China and the United States, Russia voted to refer the Darfur situation to the ICC. While Russia has supplied the Sudanese military with arms—including airplanes and helicopter gunships linked to Sudanese bombing attacks in Darfur.<sup>144</sup>—its relationship with Khartoum is not as close as China’s. Still, like Beijing, Moscow has criticized Moreno-Ocampo’s bid to prosecute al-Bashir, indicated support for the African and Arab campaign for a suspension of the case, and credited Sudan’s role in working toward a diplomatic resolution of the Darfur conflict.<sup>145</sup>

## **VI. Conclusion**

In Sudan, the ICC faces a government as defiant as any that the other contemporary international war crimes tribunals have confronted. When it comes to the prosecution of members of their own national, political, or ethnic group, states employ a range of strategies to withhold cooperation and to limit the political cost of doing so. But with its statements of contempt and intimidation—and its expulsion of more than a dozen humanitarian aid groups from Darfur after the issuance of the arrest warrant for President al-Bashir—Khartoum has taken such defiance to a new level.

In June 2008, the Security Council's statement calling for Sudanese compliance with the ICC appeared to demonstrate a new resolve to press the government and defend the integrity of the Council's authority. After more than a year of allowing Sudan's resistance to go unchallenged, the Council's statement indicated there may be a limit to its passivity. But then a month later in July, Chief Prosecutor Moreno-Ocampo's request for an arrest warrant for President al-Bashir seemed to weaken the Council's new backing of the ICC. The question then shifted from whether the Security Council would act as a "surrogate enforcer" on behalf of the ICC to whether it would instead intervene on Sudan's behalf by bringing the wheels of international justice to a halt. As the ICC pre-trial chamber quietly considered Moreno-Ocampo's request for an arrest warrant, Sudan and its regional advocates—the African Union and the Arab League—called on the Security Council, the court of last resort, for an Article 16 suspension of the al-Bashir case.

Sudan's bid for an Article 16 suspension has proven difficult, given the power of any of the five permanent members of the Security Council to block such a move. Moreover, for the Council to suspend the case could be interpreted as a repudiation of its original justification for referring the Darfur situation to the Court. The Council's referral was premised upon the assumption that international justice would help counter the threat to international peace and security posed by the inhuman violence in Darfur. But a decision to suspend the al-Bashir case would require the Council, in effect, to find that the ICC's case vis-à-vis Darfur posed a threat to peace and security.

For the ICC's predecessors, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, such direct Security Council intervention is disallowed because it would be viewed as blatant obstruction of international justice. But the ICC operates under different ground rules and a different conception of the proper relationship between the Security Council and the prosecutorial and judicial wings of the Court. In a compromise agreed to in the final days of the founding Rome conference, states adopted Article 16,<sup>146</sup> the provision in the Statute that permits the Security Council to suspend for renewable one-year periods *any* ICC case it deems a threat to international peace and security. That the Security Council is required to make such a finding regarding peace and security provides the incentive for targeted states as well as rebel groups to frame their assault against the ICC on the claim that international justice endangers peace.

As the ICC pre-trial chamber deliberated over the legal merits of the prosecutor's application for an arrest warrant in the second half of 2008, Sudan called on the Security Council to heed the alleged disastrous consequences of allowing the ICC to proceed. However, by the end of 2008, there were signs of growing support among key Council members to refrain from suspending the al-Bashir case.<sup>147</sup> There were also indications that some of Sudan's African and Arab allies had grown wary of Khartoum's truculence, particularly its refusal to engage the Court by not seriously pursuing credible domestic war crimes prosecutions as an alternative to ICC trials.<sup>148</sup> Instead, the al-Bashir government maintained its campaign of fear, telegraphing to the world how much it stands to lose by not intervening to stop the ICC's judicial intervention in Sudan. In this campaign, Khartoum has skillfully played the "instability card,"<sup>149</sup> painting grim scenarios in which an unaccountable and remote ICC would reignite the Darfur crisis and perhaps even the dissolution of Sudan itself. The prospect that the ICC could trigger a deterioration of the Darfur crisis—even if the violence was cynically driven by Khartoum to substantiate its claims that justice undermines peace—has been Sudan's most potent weapon in its fight with the ICC. While

Sudan has not won an Article 16 suspension of the al-Bashir case, it has nevertheless undermined the standing of the Court. This is punctuated by the African Union statement of early July 2009 that calls on African states not to cooperate in arresting the Sudanese president. The backlash against the ICC—which some ICC supporters have feared could lead African State Parties to withdraw from the Court—points to the inherent risks in targeting an African head of state.

Even as Moreno-Ocampo's announced intention to prosecute al-Bashir greatly increased the ICC's profile and thrust the tarnished Sudanese president on the defensive, the chief prosecutor has found himself facing accusations of spoiling the prospects of peace in Darfur. It is in this highly politicized context that Moreno-Ocampo and his advocates in the international human rights community have sought to gain the upper hand by reframing the peace versus justice debate in their own favor. The struggle with Khartoum is not only about fulfilling the Court's central mission of prosecutions in its most high-profile situation. Also at stake is the ICC's legitimacy and viability as a permanent court of global justice. Whether or not the Security Council invokes Article 16, the al-Bashir case will be closely watched by present and future targeted states and rebel groups looking to win reprieves from international justice. Central to the chief prosecutor's campaign for cooperation in Sudan has been to argue for the indispensable role that the ICC can play, in conjunction with a resolute international community, in ameliorating the ongoing humanitarian crisis in Darfur. Giving no ground to his critics, Moreno-Ocampo has argued that it is a pragmatic imperative for the world to press for the arrest of Sudanese suspects most responsible for atrocities—atrocities that pose an enduring threat to stability in the region and to the survival of entire communities in Darfur.<sup>150</sup>

In his quest for Sudan's cooperation and Security Council backing, Moreno-Ocampo has presented himself as a determined, uncompromising prosecutor willing to challenge state sovereignty. In this respect, the chief prosecutor we see in the Darfur situation stands in marked contrast to the same chief prosecutor who has been careful to avoid targeting state authorities in Uganda, Congo, and the Central African Republic. When it comes to Darfur, Moreno-Ocampo has warned the Security Council that "inaction and business as usual"<sup>151</sup> are acts that help perpetuate the crimes. But even as he stands apart from the Security Council—going as far as to cast himself as its moral conscience—the prosecutor has emphasized that targeting Sudanese suspects and campaigning for state cooperation is not the work of a rogue prosecutor, but a responsibility mandated to him by the Council itself. "The Security Council requested judicial intervention," Moreno-Ocampo reminded the Council in December 2008, as a prelude to calling for decisive action in seeking al-Bashir's arrest. It remains to be seen whether the Security Council heeds or abandons its own request for international justice.

## **Acknowledgments**

The author is grateful to Harvey Peskin, Neva Peskin, and three anonymous reviewers for their helpful comments on earlier drafts of this manuscript.

## **Notes**

1. In a 1995 speech to the UN General Assembly, ICTY President Antonio Cassese said, "Our tribunal is like a giant who has no arms and legs. To walk and work he needs artificial limbs. These artificial limbs are the state authorities." Address to the UN General Assembly, UN Doc. A/50/PV.52 (7 November 1995).

2. Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (New York: Cambridge University Press, 2008): 12.
3. *Ibid.*, 7.
4. Pre-Trial Chamber 1 is assigned to the Darfur situation.
5. For instance, see Luis Moreno-Ocampo, "Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)" (3 December 2008), [http://www.iccnw.org/documents/iccProsecutorStatementUNSC\\_3dec08.pdf](http://www.iccnw.org/documents/iccProsecutorStatementUNSC_3dec08.pdf).
6. Tsegaye Tadesse, "ICC Genocide Charge Sought for Sudan's Bashir," Reuters, 7 July 2009.
7. UN Security Council Resolution 1593, UN Doc. S/RES/1593 (31 March 2005).
8. On 6 June 2005, Moreno-Ocampo announced his decision to officially begin an investigation into the Darfur situation.
9. Fieldwork interviews with ICC officials, The Hague, June and November 2007.
10. Alex de Waal, "Darfur, the Court and Khartoum: The Politics of State Non-Cooperation," in *Courting Conflict? Justice, Peace and the ICC in Africa*, ed. Nicholas Waddell and Phil Clark (London: Royal African Society, 2008), 30.
11. "Ending Sudan's Impunity," *The Economist*, 3 March 2007, 54.
12. Moreno-Ocampo determined that these charges were admissible at the ICC because Sudanese courts were not investigating Harun and were pursuing Kushayb for different crimes.
13. See Warrant of Arrest for Ahmad Harun, Pre-Trial Chamber I (27 April 2007), [http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf); and Warrant of Arrest for Ali Kushayb, Pre-Trial Chamber 1 (27 April 2007), [http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf).
14. *Ibid.*
15. "Sudanese Justice Minister Rejects ICC Indictments on Darfur," *Sudan Tribune*, 11 February 2008, <http://www.sudantribune.com>.
16. "Sudan War Crimes Suspect Says Charges 'Political,'" *Agence France-Presse*, 28 February 2007, <http://www.afp.com/afpcom/en/>.
17. Statement of Elfatih Mohammed Erwa, Sudanese Ambassador to the UN, 5158th meeting of the Security Council, UN Doc. S/PV.5158 Provisional (31 March 2005).
18. *Ibid.*
19. Sudan criticized the provision in the Security Council's referral of the Darfur situation to the ICC that exempted non-State Parties, such as the United States, from the jurisdiction of the Court for any violations of international humanitarian law committed in Sudan. See Security Resolution 1593.
20. Marlise Simons, "Rebel Leader Becomes First Suspect in Darfur Violence to Appear in Hague Court," *New York Times*, 19 May 2009, A10.
21. As of April 2009, the ICC chief prosecutor has opened preliminary investigations in Kenya, Cote d'Ivoire, Colombia, Georgia, and Afghanistan.
22. For example, see William Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," *Journal of International Criminal Justice* 6 (2008): 731–61; Phil Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," in *Courting Conflict? Justice, Peace and the ICC in Africa*, ed. Nicholas Waddell and Phil Clark, 37–44 (London: Royal African Society, 2008).
23. Fieldwork interview with ICC official, The Hague, December 2008.
24. Fieldwork interviews with ICC observers and diplomats, The Hague, June 2009.
25. "AU Nations 'Will Not Arrest Bashir,'" *Al Jazeera* (English), 4 July 2009, <http://english.aljazeera.net/news/africa/2009/07/200973195375587.html>.
26. *Ibid.*
27. Fieldwork interviews with international human rights activists, The Hague, June 2009.
28. *Ibid.*



29. Tesfa-alem Tekle, "Africa Urges Suspension of ICC Indictment Process against Sudan's Bashir," *Sudan Tribune*, 22 July 2008, <http://www.sudantribune.com/>.
30. Michael Slackman and Robert F. Worth, "Setting Aside Divisions, Arab Leaders Rally behind Sudan's President at Meeting," *New York Times*, 31 March 2009, A5.
31. For a listing of the 110 States Parties, see <http://www.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm>.
32. "AU to Shelter Bashir from War Crimes Warrant: Delegates," *Agence France-Presse*, 3 July 2009, <http://www.afp.com/afpcom/en/>.
33. Andrew Heavens, "AU Ruling Means Bashir Can Travel in Africa: Sudan," Reuters, 4 July 2009.
34. During the Libya summit meeting, Chad and Ghana reportedly resisted the AU statement regarding the Bashir case. See "AU Agree To Protect Sudanese President from Arrest," *Sudan Tribune*, 4 July 4 2009, <http://www.sudantribune.com/>. A week after the summit, the Ugandan government appeared to distance itself from the AU position on the Bashir case by issuing a statement reaffirming its commitment to the Rome Statute. However, the Ugandan statement did not explicitly refute the AU statement. See "Uganda Says Committed to ICC as Sudan's Bashir Plans a Visit," *Sudan Tribune*, 11 July 2009, <http://www.sudantribune.com/>.
35. "Botswana Condemns AU Resolution on Sudan's Bashir," Reuters, 7 July 2009.
36. See statement of Elfatih Mohammed Erwa, 31 March 2005.
37. "Sudan Demands the Arrest and Prosecution of the ICC Prosecutor," *Sudan Tribune*, 6 April 2008, <http://www.sudantribune.com/>.
38. Colum Lynch, "U.N. Fears Embattled Sudan Taking Aim at Peacekeepers," *Washington Post*, 20 July 2008, <http://www.washingtonpost.com/>.
39. As quoted in Luis Moreno-Ocampo, Statement to the UN Security Council (3 December 2008).
40. "Sudan President Says Only DNA Test Can Prove Rape in Darfur," *Sudan Tribune*, 20 October 2008, <http://www.sudantribune.com/>.
41. Victor Peskin, "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan," *Human Rights Quarterly* 31 (2009): 676.
42. Ibid.
43. Colum Lynch, "Sudan's 'Coordinated' Genocide in Darfur is Over, U.S. Envoy Says," *Washington Post*, 18 June 2009, <http://www.washingtonpost.com/>.
44. Fieldwork interview with European diplomat, Brussels, May 2008.
45. "Sudanese Minister Threatens Action against International Court Proponents," text of report by London-based newspaper *Al-Hayat*, supplied by BBC Worldwide Monitoring, 1 March 2007.
46. "Sudan Demands the Arrest and Prosecution of the ICC Prosecutor," *Sudan Tribune*, 6 April 2008, <http://www.sudantribune.com/>.
47. Louis Charbonneau, "Prosecutor Accuses Sudanese State of Darfur Crimes," Reuters, 5 June 2008.
48. Neil MacFarquhar and Marlise Simons, "Sudan's Leader Scolds the West and Assails Aid Groups," *New York Times*, 6 March 2009, A10.
49. Lydia Polgreen, "Sudanese Protest War Crimes Case against President at Scripted Rally in Capital," *New York Times*, 14 July 2008, A10.
50. Human Rights Watch, *World Report 2009–Sudan*, 14 January 2009, <http://www.unhcr.org/refworld/docid/49705f8f64.html>.
51. Ibid.
52. "Arab League Chief Visits Sudan To Present Plan on Stalling ICC Indictments," *Sudan Tribune*, 21 July 2008, <http://www.sudantribune.com/>; "AU Report to UNSC Say [sic] Sudan Serious about Combating Impunity," *Sudan Tribune*, 7 October 2008, <http://www.sudantribune.com/>.
53. Ibid.

54. Jeffrey Gettleman, "Sudan Arrests Militia Chief Facing Trial in The Hague," *New York Times*, 14 October 2008, A10.
55. Human Rights Watch, *World Report 2009–Sudan*.
56. Moreno-Ocampo, Statement to the UN Security Council (3 December 2008).
57. "Sudanese Officials Tell France 'No Dealings with ICC,'" *Sudan Tribune*, 9 October 2008, <http://www.sudantribune.com/>.
58. Fieldwork interview with ICC official, The Hague, December 2008.
59. "Former U.S. Special Envoy to Sudan Warns against ICC Darfur Indictments," *Sudan Tribune*, 27 June 2008, <http://www.sudantribune.com/>.
60. Andrew S. Natsios, "Beyond Darfur: Sudan's Slide toward Civil War," *Foreign Affairs* (May/June 2008), <http://www.foreignaffairs.org/20080501faessay87306/andrew-s-natsios/beyond-darfur.html>.
61. Golzar Kheiltash and Julia Fitzpatrick, "No Peace without Justice: U.S. Must Cooperate with the International Criminal Court on Darfur," *Briefing Paper* (Washington, DC: Citizens for Global Solutions, 2006), 5.
62. These arguments are drawn from Nick Grono and David Mozersky, "Sudan and the ICC: A Question of Accountability," *Open Democracy* (31 January 2007), [http://www.opendemocracy.net/democracy-africa\\_democracy/sudan\\_icc\\_4301.jsp](http://www.opendemocracy.net/democracy-africa_democracy/sudan_icc_4301.jsp).
63. Peskin, *International Justice in Rwanda and the Balkans*, 11.
64. Fieldwork interview with Western diplomat, The Hague, November 2007.
65. Fieldwork interview with international human rights official, Brussels, May 2008.
66. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1546 of 18 September 2004*, UN Doc. S/2005/60 (25 January 2005), [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).
67. Colin Powell, testimony before the Senate Foreign Relations Committee, Washington, DC, 9 September 2004.
68. For instance, see Samuel Totten and Eric Markusen, eds., *Genocide in Darfur: Investigating the Atrocities in the Sudan* (New York: Routledge, 2006); Gerard Prunier, *Darfur: A 21st Century Genocide*, 3rd ed. (Ithaca, NY: Cornell University Press, 2008); Julie Flint and Alex de Waal, *Darfur: A New History of a Long War* (London: Zed Books, 2008); John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (New York: Cambridge University Press, 2009).
69. For an analysis of the ways in which Moreno-Ocampo has adopted an adversarial pursuit of cooperation in Uganda and Sudan, see Peskin, "Caution and Confrontation," 655–91.
70. Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (New York: Routledge, 2005), 47–60.
71. Fieldwork interviews with Western diplomats and international NGO officials, The Hague, June and November 2007; Brussels, May 2008.
72. Schabas, "Prosecutorial Discretion v. Judicial Activism," 751–52.
73. Clark, "Law, Politics and Pragmatism," 43.
74. Benjamin N. Schiff, *Building the International Criminal Court* (New York: Cambridge University Press, 2008), 212.
75. Fieldwork interviews with ICC officials, The Hague, December 2008.
76. For instance, Schabas writes, "Prosecutions of only one side in the conflict seems to be the price of the self-referral strategy of the Office of the Prosecutor." See Schabas, "Prosecutorial Discretion v. Judicial Activism," 753.
77. Fieldwork interviews with representatives of international NGOs, Brussels, May 2008.
78. Fieldwork interviews with representatives of international human rights organizations, Brussels, May 2008; Antonio Cassese, "Is the ICC Still Having Teething Problems?" *Journal of International Criminal Justice* 4 (2006): 434–41.
79. Peskin, *International Justice in Rwanda and the Balkans*, 12, 239–43.
80. Fieldwork interview with NGO representative, Brussels, May 2008.
81. Fieldwork interview with Western diplomat, The Hague, June 2007.

82. *Prosecutor v. Harun*, Warrant of Arrest for Ahmad Harun, ICC-02/05-01/07 (27 April 2007).
83. Fieldwork interview with Western diplomat, The Hague, November 2007.
84. Alex de Waal, "Darfur, the Court and Khartoum," 31.
85. Alex de Waal, "Justice and Peace: The ICC, Sudan, and the Crisis of Human Rights," African Arguments Online Blog, posted 5 March 2009, <http://africanarguments.org/2009/03/the-icc-sudan-and-the-crisis-of-human-rights/>.
86. See Julie Flint and Alex de Waal, "Case Closed: A Prosecutor Without Borders," *World Affairs* (Spring 2009), <http://www.worldaffairsjournal.org/2009%20-%20Spring/full-DeWaalFlint.html>.
87. Luis Moreno-Ocampo, "The Rome Statute and the International Center for Transitional Justice" (speech, International Center for Transitional Justice, New York, 20–21 May 2008), <http://www.ictj.org/images/content/9/0/905.pdf>.
88. *Ibid.*
89. *Ibid.*
90. Fieldwork interviews with Western diplomats, The Hague, June 2007; and with representatives of international human rights organizations, Brussels, 2008. See also Peskin, "Caution and Confrontation," 655–91.
91. Wasil Ali, "ICC Planned to Divert Plane of Darfur War Crimes Suspect," *Sudan Tribune*, 25 June 2008, <http://www.sudantribune.com/>; see also Louis Charbonneau, "International Prosecutor Is 'Terrorist'—Sudan Envoy," Reuters, 11 June 2008.
92. Charbonneau, "International Prosecutor Is 'Terrorist'—Sudan Envoy."
93. "Sudan to Press Terrorism Charges against the ICC Prosecutor," *Sudan Tribune*, 25 June 2008, <http://www.sudantribune.com>.
94. Luis Moreno-Ocampo, "Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005)" (5 December 2007), <http://www.icc-cpi.int/NR/rdonlyres/1ADB9ADC-D65B-441A-863D-1139C5E42ED7/277794/OTPST20071205UNSCMOENG.pdf>.
95. Luis Moreno-Ocampo, Statement to the UN Security Council (3 December 2008).
96. Moreno-Ocampo, "Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)" (5 June 2009), [http://www.icc-cpi.int/NR/rdonlyres/8A4EAC94-694F-4365-90E4-862438D1731D/280453/OTPSpeech05062009\\_Eng1.pdf](http://www.icc-cpi.int/NR/rdonlyres/8A4EAC94-694F-4365-90E4-862438D1731D/280453/OTPSpeech05062009_Eng1.pdf).
97. *Ibid.*
98. *Ibid.*
99. Moreno-Ocampo, Statement to the UN Security Council (5 December 2007).
100. Moreno-Ocampo, Statement to the UN Security Council (3 December 2008).
101. *Ibid.*
102. Moreno-Ocampo, Statement to the UN Security Council (5 June 2009).
103. Statement of Jean-Marc de la Sablière, the French Ambassador to the UN, 5158th meeting of the Security Council, UN Doc. S/PV.5158 Provisional (31 March 2005).
104. UN Secretary-General Kofi Annan (Press Release), UN Doc. SG/SM/9797 AFR/1132 (31 March 2005).
105. It is important to note that in July 2008 the Security Council adopted a resolution that emphasized "the need to bring to justice the perpetrators of . . . crimes and urging the Government of Sudan to comply with its obligations in this respect." However, this resolution did not explicitly mention Sudan's obligation to cooperate with the ICC. See Security Council Resolution 1828, UN Doc. S/RES/1828 (31 July 2008).
106. For instance, see Statement by the President of the Security Council, UN Doc. S/PRST/2007/15 (25 May 2007).
107. For instance, a 24 October 2007 Council statement on Sudan included the following sentence: "The Council also recognizes that due process must take its course." "Security Council Presidential Statement Calls for Cessation of Hostilities in Darfur as Weekend Peace Talks Date Approaches," UN Doc. SC/9156 (24 October 2007).
108. See Security Council Resolution 1769, UN Doc. S/RES/1769 (2007) (31 July 2007).

109. Fieldwork interview with representatives of international human rights organizations, Brussels, May 2008.
110. “Braced for the Aftershock,” *The Economist*, 7 March 2009, 66; Human Rights Watch, *World Report 2009–Sudan*. The lack of progress in deploying the peacekeeping mission has been attributed to Sudan’s intransigence, insecurity, and UN bureaucracy. See Report of the Secretary-General on the Deployment of the African Union-United Nations Hybrid Operation in Darfur, UN Doc. S/2008/304 (9 May 2008); “The Genocide Continues,” *New York Times*, 17 June 2008, A22.
111. Fieldwork interview with European Union diplomat, Brussels, May 2008.
112. *Ibid.*
113. Luis Moreno-Ocampo, Address to the Security Council (7 June 2007); Official communiqué of the 5688th (closed) meeting of the Security Council, UN Doc. S/PV.5688 (7 June 2007).
114. Official communiqué, *ibid.*
115. Statement of Ilya Rogachev, Russia’s deputy permanent representative to the UN, 5789th meeting of the Security Council, UN Doc. S/PV.5789 Provisional (5 December 2007).
116. Fieldwork interviews with European Union officials and representatives of international human rights organizations, Brussels, May 2008.
117. Declaration by the Presidency on behalf of the European Union on the Anniversary of the referral of the situation in Darfur/Sudan to the ICC, Council of the European Union, 31 March 2008, [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/cfsp/99624.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/cfsp/99624.pdf).
118. Luis Moreno-Ocampo, Address to the UN Security Council, 5 June 2008.
119. Security Council Presidential Statement, UN Doc. S/PRST/2008/21, unanimously adopted (16 June 2008).
120. Neil MacFarquhar, “U.S. Encourages a Court to Help Prosecute Sudan,” *New York Times*, 6 June 2008, A10.
121. Fieldwork interview with ICC official, The Hague, December 2008.
122. “UN: Council Faults Sudan Inaction on War Crimes Suspects” (Press Release), Human Rights Watch, 16 June 2008, <http://www.hrw.org/en/news/2008/06/15/un-council-faults-sudan-inaction-war-crimes-suspects>.
123. Louis Charbonneau, “UN Council Says Sudan Must Heed Court on Darfur,” Reuters, 16 June 2008.
124. Council of the European Union, “General Affairs and External Relations,” 10726/08 (Presse 177) (16 June 2008), [http://www.eu2008.si/en/News\\_and\\_Documents/Council\\_Conclusions/June/0616\\_GAERC-pr-EXTR.pdf](http://www.eu2008.si/en/News_and_Documents/Council_Conclusions/June/0616_GAERC-pr-EXTR.pdf).
125. Fieldwork interviews with ICC officials and international human rights advocates, The Hague, June and November 2007 and December 2008; Brussels, May 2008.
126. Mieczyslaw P. Boduszynski and Kristina Balalovska, “Between a Rock and a Hard Place: Croatia, Macedonia, and the Battle over Article 98,” *Problems of Post-Communism* (2004): 18–28.
127. Warren Hoge, “U.S. Lobbies U.N. on Darfur and International Court,” *New York Times*, 29 January 2005, A5.
128. *Ibid.*
129. For instance, see Samantha Power, “Court of First Resort,” *New York Times*, 10 February 2005, Op-ed.
130. The United States, China, Brazil, and Algeria abstained. The remaining eleven countries on the Security Council voted in favor of referring the Darfur situation to the ICC.
131. For an analysis of the American-based Darfur movement, see Rebecca Hamilton and Chad Hazlett, “‘Not on Our Watch’: The Emergence of the American Movement for Darfur,” in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 337–66.

132. Nora Boustany, "Official Floats Possibility of Assistance to Hague Court," *Washington Post*, 12 June 2007, A20.
133. "U.S. Toughens Stance against Freezing Indictment of Sudan President," *Sudan Tribune*, 4 August 2008, <http://www.sudantribune.com/>.
134. Prunier, *Darfur: A 21st Century Genocide*, 178.
135. "China Key Arms Supplier to Human Rights Abusers," *Inter Press Service*, 6 August 2008; Maggie Farley, "China, Russia Faulted for Sudan Arms Sales," *Los Angeles Times*, 9 May 2007, <http://www.latimes.com>; "The Facts: China's Arms Sales to Sudan" (Fact Sheet), *Human Rights First*, <http://www.stoparmstosudan.org/pages.asp?id=22>.
136. Prunier, *Darfur: A 21st Century Genocide*, 178.
137. *Ibid.*, 179.
138. Christine Chaumeau, "Beijing's Calculated Prudence," in *ICC in 2006: Legal and Political Issues Surrounding the International Criminal Court* (Paris: International Justice Tribune, 2006), 109.
139. "China in a Deep Dilemma as Sudan's Bashir Faces Charges," *Reuters/Sudan Tribune*, 15 July 2008, <http://www.sudantribune.com/>.
140. "U.S. Toughens Stance," *Sudan Tribune*, 4 August 2008, <http://www.sudantribune.com/>.
141. Andrew Heavens, "China Urges Deferral of Bashir War Crimes Case," *Reuters*, 7 January 2009.
142. *Ibid.*
143. Andrew Heavens, "China Urges Deferral of Case."
144. Farley, "China, Russia Faulted."
145. "Russia Concerned by UN Resolution on Sudan President Indictment," *Sudan Tribune*, 2 August 2008, <http://www.sudantribune.com/>.
146. Glasius, *The International Criminal Court*, 54.
147. Neil MacFarquhar, "Council Backs Idea to Indict Sudan Leader," *New York Times*, 4 December 2008, A12.
148. Fieldwork interview with ICC official, The Hague, December 2008.
149. Peskin, *International Justice in Rwanda and the Balkans*, p. 91.
150. Moreno-Ocampo, Statement to the UN Security Council (3 December 2008).
151. *Ibid.*

---

# Should President Omar al-Bashir of Sudan Be Charged and Arrested by the International Criminal Court?

An Exchange of Views

Alex de Waal  
*Social Science Research Council*

Gregory H. Stanton  
*Institute for Conflict Analysis and Resolution, George Mason University, Arlington, VA*

*The recent activity at the International Criminal Court (ICC) at The Hague concerning the case of President Omar al-Bashir and the crisis in Darfur has set off a firestorm of commentary amongst international lawyers, human rights activists, genocide scholars, experts on Sudan, and journalists, among others. Some argue that the ICC prosecutor, Luis Moreno-Ocampo, was correct in charging al-Bashir with genocide and crimes against humanity; others believe that he had little to no grounds for doing so. Furthermore, while some see the prosecutor's charges of genocide as questionable, at best, and highly counterproductive, if not dangerous, at worst, others see the genocide charge as positive and a move toward ending impunity for genocide. The same is largely true of the arrest warrant that the ICC has issued for President al-Bashir's arrest. Dr. Alex de Waal, an Oxford-trained social anthropologist, a fellow of the Global Equity Initiative at Harvard University, and the director of Justice Africa in London; and Dr. Gregory H. Stanton, a Yale University-educated lawyer and University of Chicago-trained cultural anthropologist, professor of Genocide Studies and Prevention at George Mason University, president of Genocide Watch, and immediate past president of the International Association of Genocide Scholars, kindly accepted GSP editor Samuel Totten's invitation to debate the merits and demerits of the prosecutor's charges and the ICC's issuance of the warrant.*

*Key words: al-Bashir, International Criminal Court, Darfur, Sudan, justice, peace*

---

## The Case against Prosecution of Omar al-Bashir by the International Criminal Court

Alex de Waal

The chief prosecutor of the International Criminal Court, Luis Moreno-Ocampo, is making a misjudgment in demanding an arrest warrant against Sudan's President Omar al-Bashir. The arrest warrant is an immense gamble, which has the potential to set back the cause of peace and democracy in Sudan and is unlikely to advance the cause of justice and human rights. As I write this (in January 2009), I hope that the outcome will not be adverse, but my judgment is that the risks of contributing to a further disaster in a volatile country and unraveling its tentative steps toward democracy are greater than the opportunities for striking a blow against impunity.

Alex de Waal and Gregory H. Stanton, "Should President Omar al-Bashir of Sudan Be Charged and Arrested by the International Criminal Court?" *Genocide Studies and Prevention* 4, 3 (December 2009): 329–353. © 2009 *Genocide Studies and Prevention*. doi:10.3138/gsp.4.3.329

Heinous crimes have been committed during the last two decades in Sudan as a whole and during the last five years in Darfur. In fact, I have devoted much of my adult life to documenting human rights violations in Sudan. I have no doubt that President al-Bashir carries much responsibility for counterinsurgency campaigns that have involved countless abuses against civilians, for the repression of Sudan's civil society and dismantling of its democratic institutions, and for the infliction of famine, displacement, and other forms of misery on millions of Sudanese citizens. He carries responsibility, not only in his capacities as head of state and commander in chief of the armed forces, but also in a more personal capacity in the specific actions he has taken to incite, encourage, and organize excessive violence in war and against the political opponents of his government. It is precisely because such grievous violations of human rights have been perpetrated, and because a ruthless government which is ready to disregard human rights remains in power, that it is important to be especially careful in framing any charges against senior members of that government and in ensuring that a strategy for pursuing justice is fully aligned with strategies for securing peace, defending human rights, and promoting democracy.

I will not provide here a critique of the substance of the 14 July 2008 Public Application and especially the genocide charges it contains. It is important, though, to stress that the Application is a substandard piece of work, riddled with ethnographic and other factual errors as well as copyediting mistakes.<sup>1</sup> The genocide charges are breathtakingly ambitious, based upon extremely contentious lines of argument which run contrary to the case put forward by the most sophisticated academic advocates of the point of view that genocide occurred in Darfur.<sup>2</sup> If Luis Moreno-Ocampo were to try to prosecute President Omar al-Bashir for genocide using the arguments outlined in the Public Application, he would face huge challenges in obtaining a conviction. An acquittal of al-Bashir following a trial on genocide charges would not be a triumph for the ICC and international justice.

The main thrust of my argument is that the arrest warrant is a gamble with the future of Sudan.

In 2001, the international community, led by the neighboring countries of north-east Africa plus the United States, Britain, and Norway, resolved that the best way to deal with the war in south Sudan, its disastrous domestic humanitarian consequences, and its destabilizing impact on the region, was to support negotiations toward a peace agreement. After three years of talks, the Sudanese government and the Sudan People's Liberation Movement/Army (SPLM/A)—the largest, though not the only, armed opposition group—signed the Comprehensive Peace Agreement (CPA). The CPA promises a referendum for southern Sudanese on the right of self-determination (scheduled for January 2011) and, prior to that, national elections and a host of processes designed to reform the laws, promote human rights, and redistribute wealth and power in favor of historically marginalized groups.

The CPA was heralded as "Sudan's second independence." Implementing it was always going to be a challenge, demanding hard political work, common understanding and cooperation between two mutually suspicious formerly belligerent countries, and international guidance and support. The two exercises of democratization and self-determination are inextricably linked, because unless the government that presides over a southern decision for independence or unity is truly legitimate, the result will surely be contested. The price of CPA failure is as high as it can be. Another north-south war, this time a contested partition of the country, would be a truly disastrous outcome.

While the talks were ongoing in a Kenyan resort, a new war exploded in Darfur. While major hostilities in Darfur ended in January 2005, the same month that the CPA was signed, the legacy of the killing and displacement in Darfur continues to fester. The hope and anticipation for the CPA was that it would provide the framework whereby Darfuris and other discontented northern Sudanese groups could participate in this process of democratic transformation. That did not happen—in part because of the untimely death of John Garang, the SPLM leader whose political vision of a “New Sudan” of racial and religious equality had inspired the leaders of the Darfuri rebellion. Today, Darfur is a lawless place, most of it beyond the control of either government or rebels, in which one third of the population is displaced and largely dependent on one of the world’s largest humanitarian operations. Perhaps 150 people are killed each month in violence, about two-thirds of them by government forces and their proxies. There seems little prospect of this misery ending soon.

The CPA remains the keystone of Sudan’s hopes for democratization and peace.<sup>3</sup> In Sudanese national politics, the relationship between north and south is the fundamental question. The two north–south civil wars since independence have been longer, bloodier, and costlier than the Darfur war of 2003–2004. Resolving the north–south war was a signal triumph. Achieving peace in Darfur is more tactically difficult because of the fragmentation and political immaturity of the Darfuri rebel groups and because the post-CPA Government of National Unity (which includes both the dominant northern National Congress Party and the SPLM) are unwilling to revisit the central tenets of the CPA. There can be no progress on peace in Darfur if the CPA does not remain intact.

Two-thirds of the way through the CPA’s six-year interim period, less than half of the political work of democratization and preparation for the southern vote on self-determination has been done.<sup>4</sup> An immense political task lies ahead, involving complex legislation, the technical tasks of preparing for elections and demarcating borders, and building confidence among the parties in the broad-based government. Into this stressed and volatile situation, the chief prosecutor of the ICC has demanded that the head of state surrender himself for arrest and trial in The Hague.

The optimists see two possible positive outcomes. One is that Sudan decides to rid itself of al-Bashir and his henchmen, either by a democratic uprising or an internal coup in which NCP moderates decide that the president is such a liability that they are better off without him and his henchmen. There is a Sudanese tradition of peaceful popular protest—known as *intifada*—to bring down military dictatorships, and for this reason the security apparatus systematically dismantled the civil society organizations that had led previous *intifadas*. Security surveillance and repression of human rights groups and the media has intensified in recent months. The popular uprising scenario is most improbable. An internal coup cannot be ruled out—but the most likely putchists are the senior security chiefs who have good reason to fear that the ICC would be after them, too, especially as the ICC prosecutor insists that the entire Sudanese government is a criminal apparatus. The most probable outcome is that al-Bashir and the other leading members of the NCP and security apparatus will conclude that their safest place is in power. Rather than considering stepping down at the next election, they will want the protection bestowed on them by an electoral mandate. Rather than sharing power, they will ensure they keep the levers of sovereignty in their own hands.

A second optimistic outcome is that the ICC arrest warrant becomes a bargaining chip to be used by Western nations, which would offer a twelve-month deferral under Article 16 of the Rome Statute as an incentive for political concessions, either in



Darfur or regarding the CPA. This may occur. But it faces three difficulties. First, there is no international consensus on what concessions to look for. Second, it is only a year-long suspension, and the Sudanese government expects that another set of concessions will be demanded as the precondition for a renewal, and so on, leading ultimately to regime change. Khartoum's incentives for compliance are low. And thirdly, the ICC is not designed to be used as a political lever in this way. It is a court whose creation has taken away any power of granting amnesty.

The darkest pessimists fear that the ICC arrest warrant will lead to pre-emptive military action in Darfur, a reversal of the recent gains for civil and political rights, further restrictions on the UN and humanitarian operations, and an end to the CPA.<sup>5</sup> They fear emboldened rebels, who took their war to the national capital in May 2008. There are certainly ominous signs on all these fronts, and the president of south Sudan, Salva Kiir, has warned that the CPA would be endangered if its northern signatory—President al-Bashir—becomes a wanted man.<sup>6</sup> Some of the damage could be self-inflicted by supporters of the ICC, for example if the UN were to debar its senior representatives from meeting with al-Bashir or his ministers and officials, or if states parties to the ICC were unable to dispatch ambassadors to Sudan, or if international agencies were to evacuate all nonessential personnel fearing violence against them.

While these scenarios are all credible and consistent with the habitual reactions of security chiefs in Khartoum, none have yet come to pass. The record of the last six months is one of limited political opening—the “Sudan People's Initiative” whereby for the first time the NCP admitted errors in Darfur and involved other parties in discussing its Darfur policies—along with clear threats of repression.

An intermediate scenario is equally plausible. This is that the ICC arrest warrant becomes the dominant and defining issue in Sudanese politics, until such time as the Sudanese government learns to adapt to the pariah status it thought it had escaped four years ago or there is dramatic political change. Under this scenario, the SPLM struggles with the question of how to deal with being part of an internationally illegitimate government, while the Darfur rebels wait it out. The result is paralysis or slow-motion business as usual. But in the fifth year of the CPA's Interim Period, business as usual at stalling velocity is not a viable option. If the essential political business—formal and informal—is not transacted during this year, then the referendum in southern Sudan will be held with a host of unresolved political issues and no political bargain between the northern and southern elites on how their interests will be catered for in its aftermath. Given that most southerners are likely to vote for secession, this entails a southern attempt to separate without the preconditions for an orderly, consensual, and legitimate partition of the country. That, I fear, spells war.

African leaders are terrified of this scenario because they know that a meltdown of Sudan or a new war will bring in neighboring countries and paralyze the African Union. This fear underpins their anger against the ICC. Africa's leaders have little respect or patience for President al-Bashir, but they are more alarmed at the prospect of an ungovernable Sudan. In the early days of the court, African countries were among its most enthusiastic backers. During 2008, they became its critics. Coming on the heels of the arrest of the Congolese opposition leader Jean-Pierre Bemba while visiting Brussels, and arrest warrants by French and Spanish magistrates against Rwandan government officials,<sup>7</sup> the al-Bashir application unleashed the prospect of the political fate of the continent being decided by judicial activists in Europe. It is inconceivable that another African state will refer a case to the ICC in the foreseeable future, and most unlikely that any will cooperate with the ICC in executing arrest

warrants. Africa may become a jurisdiction-free zone as a result, scarcely a victory for human rights.

With faint prospect of getting Sudan's leader in the dock, Luis Moreno-Ocampo has chosen a strategy that seeks to have President al-Bashir tried in the court of world opinion. It is a gamble with serious perils, especially for the people of Sudan.

## **The Case for Prosecution of Omar al-Bashir by the International Criminal Court**

**Gregory H. Stanton**

The prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has charged President Omar al-Bashir of Sudan with three counts of genocide, five counts of crimes against humanity, and two counts of murder as a war crime committed in Darfur since 2002. The ICC's pre-trial chamber I has now issued a warrant for his arrest on the charges of crimes against humanity and war crimes, but not for genocide. It has left open the possibility that the prosecutor could produce additional evidence to justify amendment of the arrest warrant to include genocide.<sup>8</sup>

### *I. Is the ICC prosecutor right to charge Omar al-Bashir and seek an arrest warrant against him?*

Mr. Moreno-Ocampo is justified in his charges and in seeking an arrest warrant for President Bashir. Mr. Moreno-Ocampo is fulfilling his mandate as the ICC's prosecutor. The situation in Darfur was referred to the ICC by the United Nations Security Council in UN Security Council Resolution 1593 (2005).<sup>9</sup> The Security Council's referral was based on strong evidence gathered by a UN Commission of Inquiry of crimes against humanity and war crimes committed against specific ethnic and racial groups in Darfur: the Fur, Massalit, and Zaghawa. The Commission concluded that the Government of Sudan armed and otherwise aided and abetted Janjaweed militias who have committed crimes against those groups.<sup>10</sup> The UN Commission of Inquiry's report on atrocities in Darfur, while not concluding that the Sudanese government had the intent to commit genocide, nevertheless noted that "single individuals, including government officials" might be determined to have such genocidal intent. The UN Commission recommended referral of the situation to the International Criminal Court, and furnished the ICC with names of specific individuals to investigate. After a thorough investigation, the ICC prosecutor has amassed evidence of crimes against humanity and war crimes committed by Humanitarian Affairs Minister Ahmed Haroun, by Janjaweed leader Ali Muhammad Ali Abd al-Rahman, also called Ali Kushayb, and by President Omar al-Bashir. He has also found genocidal intent by Bashir. Arrest warrants were issued in 2007 for Haroun and Kushayb.<sup>11</sup> The ICC pre-trial chamber has now issued an arrest warrant for Bashir for crimes against humanity and war crimes, but found insufficient evidence to include genocide in the arrest warrant.<sup>12</sup>

Evidence of Sudanese government planning, complicity, and aiding and abetting systematic crimes against humanity, including genocide, in Darfur is strong. Use of Sudanese government aircraft to bomb and strafe Fur, Massalit, and Zaghawa villages in Darfur has been documented by numerous investigators. Such bombing has been coordinated with Janjaweed militia attacks on the same villages, in which significant proportions of the male populations have been killed, women have been systematically raped, and villages have been pillaged and burnt to the ground.<sup>13</sup> When the U.S. State Department sent its Atrocities Documentation Team to the

Chad/Darfur border in 2004, its own estimates of the death toll stood at over 50,000. By April 2008, the UN's Under-Secretary for Humanitarian Affairs said that 300,000 people had died above the normal mortality rate.<sup>14</sup> Over 2.5 million people are now in camps for refugees and internally displaced persons.

Sudan expert Alex de Waal does not disagree with the U.S. State Department's 2004 finding of genocide. He has written, "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."<sup>15</sup> He has called Sudan's policies "genocide by force of habit" and "famine that kills." The Bashir regime's twenty-year record of serial genocide against the Nuba, the Dinka, Nuer, and other groups in southern Sudan, and now in Darfur, lends weight to the prosecutor's charge.

As Sudanese head of state and commander in chief, President Bashir has sole responsibility for the atrocities he knows are being committed in Darfur by the Sudanese armed forces and the Janjaweed militias, many of whom Bashir has incorporated into the Sudanese government's reserve forces.<sup>16</sup> He has coordinated Sudan's policies that are intended to destroy a substantial part of the targeted ethnic groups and to drive them off their land.

It is clear that Bashir has direct responsibility for war crimes. The prosecutor has evidence that Bashir has directly ordered Sudanese troops to adopt a "scorched earth" policy and to "take no prisoners."<sup>17</sup> These are war crimes under the Geneva Conventions.

Under the Rome Statute, the prosecutor's mandate is to analyze the seriousness of the information he has received on crimes within the jurisdiction of the court, and if he concludes that there is a reasonable basis to proceed, he *shall* submit the case to the pre-trial chamber.<sup>18</sup>

The Rome Statute of the International Criminal Court specifically excludes any political office from providing immunity from prosecution. "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute."<sup>19</sup>

If the prosecutor were *not* to charge President Bashir, he would be ignoring the evidence against Bashir and contributing to the impunity that Sudan's leaders now brazenly anticipate they will carry out. He would fail to do his duty as prosecutor of the International Criminal Court.

## *II. Who has the authority to decide whether charging Bashir in the ICC would constitute a threat to international peace warranting a Chapter VII deferral of the case under Article 16 of the Rome Statute?*

The wisdom of bringing charges against Bashir is both a legal and a political question. Prosecutor Moreno-Ocampo rightly believes that the political decision must be made by a political body, the UN Security Council. There is good reason why the UN Security Council, not the ICC, is the proper body to make this political decision. The Security Council, under the UN Charter, has "primary responsibility for the maintenance of international peace and security."<sup>20</sup> Such responsibility is not conferred on the International Criminal Court by the Rome Statute. The ICC is a judicial body, and lacks the diplomatic and political means to make judgments about whether it is appropriate or not to proceed with a case that has been referred to it by the UN Security Council.

By referring the situation in Darfur to the ICC, the Security Council made that decision. It could decide to defer prosecution of the case against Bashir by a vote of

nine members of the Security Council<sup>21</sup> under Article 16 of the Rome Statute.<sup>22</sup> But the Security Council supports the case against Bashir.<sup>23</sup> Nine members of the UN Security Council have *not* voted to defer the case, and both France and the U.S. have declared their intention to veto any Chapter VII resolution requiring such deferral.<sup>24</sup>

Is the UN Security Council right to allow the case against Bashir to proceed?

To answer that question, we must try to answer a difficult question about probable consequences.

*III. Would charging Bashir in the ICC and arresting him have political consequences that would make the situation in Darfur and in Sudan more unstable and potentially more deadly than if Bashir were granted immunity, at least on a temporary basis? Will issuing an arrest warrant for Bashir result in intensified attacks by the Government of Sudan and cause it to become more recalcitrant?*

Alex de Waal rests his argument against charging President Bashir largely on his judgment that such charges could undo the Comprehensive Peace Agreement that has brought the twenty-year civil war in southern Sudan to an end. President Bashir has obliquely threatened to undo that agreement, and has even threatened the safety of UN and other relief workers who currently feed and provide shelter and health care to more than 2 million internally displaced persons in Darfur.

Since the ICC prosecutor brought charges against Bashir in July 2008, the Sudanese government bombed Kutum in November 2008, immediately violating a cease-fire it had promised to maintain, and has carried out other attacks in Darfur. UN officials met in September 2008 to discuss the “worsening situation” in Darfur. At that time Prosecutor Moreno-Ocampo said, “The evidence shows that crimes against Darfuris continue today. Al-Bashir has complete control of his forces, and they are raping women today, they are promoting conditions in the camps to destroy complete communities and they are still bombing schools.”<sup>25</sup> But the Sudanese government attacks have been no more intense than they were before the charges were brought in July 2008. Khartoum’s veiled threats against aid workers have not been carried out, though several have been murdered by militias. Relief assistance has continued to flow.

On 4 March 2009, immediately after the ICC issued its arrest warrant for Bashir, the Sudanese government revoked the licenses of ten major relief organizations that feed and care for displaced persons in the Darfur IDP camps. The cynicism of this move only underlines the long-term genocidal intent of the Bashir regime toward the ethnic groups in the camps.

*IV. Will the Government of Sudan actually be more active in restraining its Army and Air Force and Janjaweed militias from committing further crimes against humanity in Darfur as a result of the charges?*

Although the ICC’s arrest warrant for Bashir is its first against a sitting head of state, other sitting heads of state have been indicted by other international tribunals. Although situations are never completely congruent, one indicator of what effect charges against a head of state might have on his behavior may be gauged from the effects of similar charges of genocide and crimes against humanity brought against Slobodan Milosevic by the International Criminal Tribunal for the former Yugoslavia (ICTY) and against Charles Taylor by the Special Court for Sierra Leone while they were still in office and conflicts were still underway. In both cases, the charges in-

creased pressure on those leaders to negotiate peace. In both cases, the charges helped opponents displace them from power. And in both cases, the accused wound up in the dock.

When they were indicted, many of the same countries that now oppose the charges against an arrest of Bashir opposed the indictment of Milosevic and Taylor. The prosecutors in both courts were roundly criticized for “upsetting the peace process.” But the charges turned out to advance the peace process by putting each of the leaders on the defensive both from outside and within their countries. Peace agreements were reached after, not before, the indictments.

*V. Although many predicted Slobodan Milosevic and Charles Taylor would escape arrest, both were eventually handed over to international courts and put on trial. Does the same fate await Bashir? Or will he escape arrest and justice?*

The best predictor of the future is the study of the past and the understanding of the forces that drive the present. Forces in Sudan are only partially similar to the forces that resulted in the overthrow of Milosevic and Taylor.

In Yugoslavia, a youth movement trained in nonviolent resistance organized a united opposition to Milosevic. The dictator’s own miscalculation that he would win an election against a united opposition, followed by his transparent attempt to steal the election after losing, led to his downfall. The new government handed Milosevic over for trial as a condition of cooperation with the European community.

In Liberia, an Economic Community of West African States (ECOWAS) force led by Nigeria had intervened in the civil war in Sierra Leone and had largely defeated forces backed by President Charles Taylor of neighboring Liberia. On the first day of negotiations for peace in Liberia, the Sierra Leone Special Court prosecutor David Crane issued an indictment and arrest warrant for Taylor. The negotiations proceeded without Taylor, and one of the key provisions of the agreement was that Taylor would resign the Liberian presidency and be granted temporary asylum in Calabar, Nigeria. A condition of his exile was that Taylor stay out of Liberian politics, a condition he never honored.<sup>26</sup> Finally, fed up with Taylor and learning that he was planning to go back to Liberia to mount a coup d’état, the Nigerian government ordered police to arrest him for extradition to the Sierra Leone Special Court. They caught him as he was trying to escape across the border into Cameroon. The Special Court arranged for this habitual escape artist (years before, he had even escaped from the Charles Street Jail in Boston) to The Hague, where he currently is on trial. Elections in 2005 put Ellen Johnson-Sirleaf into the presidency, and Liberia is making a strong return to democracy. Again, indictment and an arrest warrant for a murderous dictator *preceded* peace, rather than obstructing it.

In the cases of both Milosevic and Taylor, their apprehension and trial required that they relinquish power, submit to arrest by a new government, and be handed over for trial by an international court. Is such a scenario likely in Sudan?

Sudan has different circumstances, but such a scenario might occur. Sudan has practically no tradition of democracy like Liberia’s (however imperfect) and has no united opposition like Liberia’s and Yugoslavia’s. But there are almost certainly people within the Sudanese military government who would like to overthrow Bashir. International criminal charges against him are an embarrassment to Sudan, despite Bashir’s loud denials. They are likely to hasten his downfall. Members of his government will realize that they, too, could be charged. If the atrocities in Darfur continue after they take over, they will also face the ICC, unless the UN Security Council

revokes its referral to the ICC. So, it is entirely possible that Bashir will eventually be tried by the ICC.

*VI. Will the charges against Bashir make the Government of Sudan more likely to work toward a peace agreement that is acceptable to the many sides in Sudan's conflicts and that will return Darfur's displaced persons to their homes?*

With over 2 million people displaced in Darfur and another half million refugees in neighboring countries, the Darfur genocide is again proof that every genocide is a threat to international peace and security. The conflict in Darfur has spilled over into Chad and the Central African Republic, and the Sudanese government provides support to the Lord's Resistance Army in Uganda and genocidal killers in eastern Congo. Yet Sudan claims that international intervention is a violation of Sudanese sovereignty, when Sudan has not only failed in its responsibility to protect its own citizens—the first duty of sovereignty—but also has been the perpetrator of atrocities against them. Acting under Chapter VII of the UN Charter, the UN has authorized a 26,000-person peacekeeping force for Darfur,<sup>27</sup> exercising, however weakly, the emerging norm called “the responsibility to protect” adopted in the World Summit Outcome Resolution.<sup>28</sup> The UN declared its intention to send the peacekeeping mission its authorized 26,000 personnel by the summer of 2009, but has failed to do so because UN member states have not volunteered enough forces.

The problem is that there is no peace to keep. For a peacekeeping mission to succeed, three elements are necessary: a peace to keep; a robust mandate to protect civilians with rules of engagement to match; and financial, military, and logistical resources to carry out the mandate. The Darfur peacekeeping operation has none of the three.

The vital first step toward peace in Darfur is a peace agreement that can be implemented. Yet the Sudanese government has few incentives to reach such an agreement. It has successfully driven millions of Fur, Massalit, and Zaghawa out of their villages into camps controlled by Sudanese troops. It can bomb and strafe Darfur's villages at will.

The Comprehensive Peace Agreement, which is comprehensive in name only because it completely leaves out Darfur, has returned millions of southerners to their homelands and suspended the civil war there. Having thus pacified the south and its oil fields, the Government of Sudan reaps billions of dollars from petroleum exports per year, creating an economic boom in the Arab-controlled north. It has cemented its alliance with China, which is dependent on Sudanese oil.

To arrive at a peace agreement that will include Darfur, this strategic imbalance must be changed. Multilateral diplomacy should be strengthened that involves Sudan's Arab neighbors. But the military imbalance must be changed as well. The Government of Sudan must be prevented from more bombing of Darfur's villages through imposition of an “after-bombing” No Fly Zone that is enforced by French and other NATO aircraft that will destroy Sudanese Air Force planes on the ground if they are used to bomb villages. If the government continues to fund and permit murderous raids into Darfur's villages, the Port of Sudan should be subjected to a blockade of petroleum shipments both out (crude) and in (refined) imposed by the U.S., British, and French navies. No permission for these measures should be sought from the UN, because China will undoubtedly veto them. The UN has proven incapable of preventing genocide largely because the Security Council is so often paralyzed by the veto. Although most international lawyers might argue that UN Charter Article 2(4) may render such actions illegal, others can argue that such actions are “consistent with

the purposes of the United Nations.” Like the Kosovo bombing that ended Serbian aggression there and helped bring down Milosevic, the aim of an “after bombing” No Fly Zone and a petroleum blockade is not to use force against the territorial integrity or independence of Sudan or to kill any Sudanese people, but rather to drive the Sudanese government to the negotiating table.

Omar al-Bashir has proven himself to be a serial genocidist. He has inflicted genocides in the Nuba Mountains, southern Sudan, and now Darfur. He must be overthrown from within before any meaningful negotiations can result in a peace agreement.

### *VII. Will the charges of genocide against Bashir clarify international criminal law?*

The UN’s International Commission of Inquiry on Darfur<sup>29</sup> left the law of genocide in a muddle. Citing my friend and colleague, Professor William Schabas, the UN Commission of Inquiry reasoned that Sudan’s IDP camps are proof that the Sudanese government lacks genocidal intent. They gave examples of massacres in which some of the men were allowed to live, although many were killed, concluding that such examples proved absence of genocidal “specific intent.” They failed to perceive a systematic plan in the killings against certain groups, even though by the time of their report over 100,000 people from three ethnic groups had been murdered or died of starvation and disease during forced displacement from their villages. They even claimed that ethnic groups in Darfur are not “objectively” distinguishable because “they all speak Arabic,” ignoring the fact that the Fur, Massalit, and Zaghawa ethnic groups speak their own languages *in addition to Arabic*. The commission treated the ethnic groups as protected groups only because they were distinguished “subjectively” by their Janjaweed killers. But they found that the Government of Sudan had no genocidal “specific intent” because the government’s intent seemed to be forced displacement, not destruction of the groups. They left it up to a later court to determine whether certain individuals had such genocidal intent, ignoring the preventive purpose of the UN Convention for the Prevention and Punishment of the Crime of Genocide.

The problem with the commission’s reasoning is that forced displacement into IDP camps is not an alternative to genocide. It often accompanies genocide. Legal scholars such as William Schabas who claim that “ethnic cleansing” (a euphemism for forced displacement that should be erased from the legal lexicon) and “genocide” are mutually exclusive crimes<sup>30</sup> are wrong. As any prosecutor knows, the same act may have two intents, one providing the *mens rea* for the crime of forced displacement, and the other the specific intent for genocide, the intentional destruction of a substantial part of an ethnic group.

The Commission of Inquiry also ignored the genocide convention’s specific language that defines genocide as the intentional destruction of a substantial *part* of a racial or ethnic group. Its observations that millions of people remain in camps for displaced persons misses the point that hundreds of thousands of other Fur, Massalit, and Zaghawa have died simply because of their racial and ethnic identity. That is called genocide.

The ICC pre-trial chamber’s refusal to issue an arrest warrant against Bashir for genocide may mean that the prosecutor’s charges against Omar al-Bashir for genocide will not be adjudicated by the ICC pre-trial chamber unless it allows amendment of the charges. That would be a pity. It will not permit the prosecutor to prove at trial that the Government of Sudan did indeed have the intent to commit genocide and that it committed the crimes of both genocide and forced displacement. The interna-

tional law of genocide will remain muddled, and the Genocide Convention will remain toothless as a deterrent while genocide is underway.

*VIII. Will the ICC's charges against Omar al-Bashir for crimes against humanity and war crimes have a sobering effect on other heads of state and their minions who are planning such crimes in the future?*

The charges against Omar al-Bashir should remind heads of state that even if their states do not ratify the Rome Statute and grant jurisdiction over such crimes to the ICC, the UN Security Council has the authority to subject them to ICC jurisdiction.

A new era of international law has dawned in which national leaders can no longer be sure that they can get away with mass murder. It is about time. The long dark age when war lords and dictators could commit atrocities with impunity is coming to an end. As Luis Moreno-Ocampo, has said, al-Bashir must be tried for his crimes.

## **The Case against Prosecution of President Bashir, Part 2**

Alex de Waal

Writing on 15 February 2009, on the eve of a week that is widely expected to see the pre-trial chamber of the ICC issue an arrest warrant for President Omar al-Bashir, I shall respond to the main points raised by Greg Stanton. My comments are organized in response to the questions that he raises.

*I. Is the ICC prosecutor right to charge President al-Bashir?*

The ICC prosecutor is undoubtedly within his rights to charge the most senior officials and commanders, including heads of state, with grave crimes and to demand their arrest. Should the prosecutor obtain evidence such that he has reasonable grounds to believe that a person has committed a crime within the jurisdiction of the court, he is obliged to submit an application for an arrest warrant. He operates under an assumption that it is in the interests of justice and the interests of the victim to mount a prosecution. There may be grounds such as the age or infirmity of the accused that might militate against prosecution (not relevant in this case) and issues of victim and witness protection that might counsel against pursuing a case (which are relevant in this case, but which I shall not discuss here).

I harbor considerable doubts as to whether the investigation into President al-Bashir counts as “thorough.” I am not privy to the redacted text in the Public Application presented on 14 July, but the empirics that were made public raise a number of serious doubts about the quality of the case that has been constructed. A strong case for superior responsibility for war crimes and crimes against humanity could be made, based on an elaboration of the indictments against Ahmed Harun and Ali Kushayb.

An argument can also be made for a genocide charge, but I would be very surprised if this could be made to stick. An argument that genocide was committed in Darfur is not the same as an argument that President al-Bashir possessed genocidal intent. In this regard, let me explain the import of my phrase “genocide by force of habit.” This phrase intended to contrast the atrocities in Darfur with prior campaigns mounted by the Sudanese government, especially in the Nuba Mountains in the early 1990s (driven by ideology) and in the oilfields in the late 1990s (driven by economic motives). The phrase was coined in an article entitled “Counterinsurgency on the Cheap,”<sup>31</sup> and the principal argument therein was that the means for counterinsurgency adopted by the Sudanese government—principally the use of proxy militia—



routinely (and hence predictably) led to mass killing, forced displacement, pillage, and rape that amounted to acts of genocide. The Sudanese government did nothing to stop these atrocities and, indeed, its own forces participated willingly in them. But these acts were confined in space and time to the conduct of the counterinsurgency—members of the same ethnic groups residing elsewhere (e.g., in the national capital) were not harmed and the atrocities largely ceased when the military objectives had been achieved (in early 2005). In this respect I agree with Antonio Cassese and the Commission of Inquiry he led. Lawyers do not agree on the question of whether, in such circumstances, it is possible to impute specific genocidal intent to the architects of the campaign.<sup>32</sup> My position would be that the *acti rei* of genocide (probably) occurred during that terrible period but the specific *mens rea* cannot be demonstrated for the president.

This brings me to a response to Stanton's point VI: will the charges help clarify international criminal law? I suspect that a genocide charge (as opposed to charges of crimes against humanity) will muddy international criminal law, by trying to develop the argument that genocide can be committed through common purpose of a group, without every individual in that group possessing specifically genocidal intent.

Moreover, I would strongly disagree with the ICC prosecutor that there was either the *actus reus* of genocide or the *mens rea* after January 2005 up to the present day. Speaking about the contemporary period, it seems to me that the prosecutor has simply got his facts wrong. He says, "Five thousand are dying each month, and we are presenting that as a humanitarian crisis. It's not; it's a crime . . . these are the facts."<sup>33</sup> I have searched every available source and I cannot find any data that back up these claims. If he is referring to general mortality due to hunger and disease, the best data indicate that these levels returned to near-normal during 2005–2006 and have not risen subsequently.<sup>34</sup> If he is referring to violent deaths, then the ICC's own data point to 35,000 violent fatalities in 2003 and 2004, and a fraction of that number since. United Nations monitoring data, which probably underestimate the number of fatalities (but not by a large amount) include 2,070 incidents and 1,449 violent deaths in Darfur during 2008, including intertribal fighting among Arab groups (the largest quotient at more than 550), battles between the army and rebels and among pro-government forces (the second largest number), bandit attacks and carjackings, attacks on displaced persons (58, including 38 in a single incident in Kalma camp on 25 August), and aerial bombardment (39) and attacks on villagers by soldiers and militia (37). The rebels and former rebels killed more civilians than government forces and pro-government militia—220 compared to 2,000. In popular usage, if not in law, there is a gravity threshold for defining genocide, and I think it is doubtful if this level of violence meets that (ill-defined) criterion. The pattern of violence gives little support to the prosecutor's inference of genocidal intent. This is important because, among other things, it takes the sting out of the charge that things could not get worse. They could get much worse.

## *II. Who should decide on whether a prosecution is in the interests of peace?*

Greg Stanton argues in this section that it is the job of the UN Security Council to assess such consequences, not the task of the prosecutor. I agree. Despite the possibility of interpreting Article 53(2)(c) of the Rome Statute to imply that the prosecutor should not pursue a case if it endangers the life of the nation and risks further crimes, I do not see how the office of the prosecutor could be competent to make such a political judgment, nor how it would navigate its conflict of interest were it to try to do so.

I would add that a deferral of prosecution under Article 16 of the Rome Statute is a poor instrument. It is made poorer by the reflex of the member states of the Security Council, especially the three permanent members (the United States, France, and Britain), to see a deferral as a lever to obtain political concessions. I think this would be the wrong road to take. The ICC is not an instrument of political leverage, and once it has become entangled in political conditions and the monitoring of such conditions, it falls into danger of losing its independence as a court. If the UN Security Council were to decide that a deferral is in the interests of peace and security, it would be better to make that decision unconditionally. This not only preserves the independence of the court but also leaves open the option of lifting the deferral unconditionally, avoiding any obligation of negotiating over whether political conditions have been met.

### *III. Will the Sudanese government be active in restraining its forces?*

The pattern of violence in Darfur bears out the hypothesis that the Commission of Inquiry report and ICC referral had a deterrent effect. The major violence subsided in January 2005, at the time when Cassese presented his report and recommended referral to the ICC. There are anecdotal reports that field commanders said that they had received instructions not to kill. Ironically, Moreno-Ocampo could have held this up as an example of the success of the court.

Since the prosecutor made his Public Application in July 2008, the pattern of violence in Darfur has not changed substantially. The majority of fatalities are due to interethnic conflict among Arab tribes and criminality (see above). Army and air force attacks are principally in response to rebel offensives. There has been no ceasefire.

However, there are also ominous signs that the government is preparing for the worst. It has intensified its security surveillance of opposition parties and human rights organizations. It has mobilized its army. It has refused to reform the security laws, as required by the 2005 Comprehensive Peace Agreement. It seems near-certain that the elections scheduled for this year, rather than being an exercise in democratic transformation, will be a tactical and cynical exercise in hanging on to power.

### *IV. The Taylor and Milosevic precedents give reason for optimism*

Stanton cites the encouraging examples of Charles Taylor, who was president of Liberia when the prosecutor of the Special Court for Sierra Leone, David Crane, demanded his arrest, and of Slobodan Milosevic, who was president of Yugoslavia when Carla Del Ponte of the ICTY demanded his arrest. In both these cases, fears that the arrest warrants would lead to escalated or intractable conflicts did not materialize.

I think it is important to examine the political contexts of these cases. Taylor was already in the process of being eased out of power by the combined efforts of African and international governments. Some Liberia specialists argue that the indictment delayed rather than hastened his departure, as he sought to negotiate an amnesty, and that it contributed to a round of violence in Monrovia. They believe that it was only the implicit offer of safe exile in Nigeria that allowed Taylor to leave, and had he known that this would not translate into a permanent asylum but rather into his deportation to face trial, he would have done his utmost to remain in power in Liberia. As I am not sufficiently familiar with the details of this case, I would not want to comment on this interpretation of events. However, it is clear that the indictment was in line with international policy toward Liberia, which was to remove Taylor.

In the Milosevic case, Del Ponte announced the indictment during the middle of a war in which NATO was bombing Serb positions in Kosovo and targets in Belgrade. In the calculus of coercion, the military weight of NATO surely counted for more than the arrest warrant of the ICTY.

By contrast, the international strategy for Sudan has, since 2001, focused upon a negotiated transition. This includes two peace agreements signed under international auspices, the Comprehensive Peace Agreement, signed in January 2005, and the Darfur Peace Agreement, signed in May 2006. The key provisions of the CPA, including the setting up of a Government of National Unity with senior positions provided for the former southern rebels of the Sudan People's Liberation Movement/Army, the withdrawal of the northern army from the south to be replaced by the SPLA, and the allocation of a substantial share of the nation's oil revenue to the autonomous Government of South Sudan, have been honored. Southern Sudan has enjoyed peace for the first time in more than twenty years. The government has agreed to elections scheduled for 2010 and to a referendum on self-determination in the south in 2011. It has agreed to two international peacekeeping missions, one for the CPA and one for Darfur. In short, the approach to Sudan has been one of negotiation, not coercion. Some believe that this approach is mistaken, and the ICC prosecutor and Stanton appear to be among them. It is correct that it will be extraordinarily difficult to negotiate in good faith with an individual under an ICC arrest warrant. While the only negotiations that were needed with Taylor and Milosevic were the terms of their respective surrenders, this is not the case with al-Bashir.

More relevant is the precedent of Joseph Kony's arrest warrant in the case of the Lord's Resistance Army of Uganda. When the ICC first announced the warrant for Kony and his lieutenants, it galvanized the peace process. Kony believed that the indictment was a form of political pressure and that it was intended to compel him to make concessions in the negotiations, which he duly made. But as the talks neared their conclusion, the issue of the arrest warrant could not be resolved and became the sticking point. Finally, Kony withdrew from the peace talks and instead launched a new military campaign in south Sudan and the Democratic Republic of Congo.

Sudan has moved more rapidly from the initial moment of political traction to the point of paralysis. As I outlined in my first contribution, I fear that paralysis spells disaster.

#### *V. Will the Sudanese government be more likely to work toward peace?*

The ICC has put immense pressure on the Sudanese government, and there is no doubt that this is one contributory factor that led it to sign a "declaration of intent" with the Justice and Equality Movement (JEM) in Doha, Qatar, on 17 February 2009. This did not mark the beginning of a real peace process, as JEM repudiated the agreement after the warrant was issued. Even if the government negotiates in good faith, it faces a divided set of negotiating partners, which are unable to agree on a peace agreement for the foreseeable future.

In military terms, the government is in reactive mode in Darfur. It has limited capacity to inflict gross harm on the population, because its army is demoralized and the Arab militia is selective in the orders it prefers to obey. The government will respond to rebel offensives, as they did when JEM attacked and occupied the town of Muhajiriya in January. Its aerial and ground attacks caused thirty deaths, including ten or so civilians. It is only if JEM is sufficiently emboldened by an arrest warrant to escalate the war, by taking control of a major city, by widening the war to next-door

Kordofan, or by again attacking the national capital, that we will see major repercussions in Darfur.

The key implications of an arrest warrant will most probably play out in the Sudanese national political arena. The stakes here are much higher: the survival of the Government of National Unity and, with it, the CPA and the possibility of democratization and a peaceful and legitimate exercise of the right of self-determination by the people of south Sudan. The CPA processes are all imperfect, but they are far preferable to the alternative of an attempted overthrow of the current government, either by external or internal forces. Stanton argues that al-Bashir “must be overthrown from within before any meaningful negotiations can result in a peace agreement.” I believe that this is a recipe for a new war between north and south, or of all against all, which will kill far more than the 1,500 to 2,000 Darfuris who are being killed on all sides each year. One of the reasons why the president of south Sudan, Salva Kiir Mayardit, criticizes the arrest warrant is that he trusts al-Bashir to implement the commitment to self-determination in southern Sudan more than he trusts any successor, who would surely want to revisit that provision in the CPA. Should that happen, then many southerners would argue for a unilateral declaration of independence for the south. Contested partitions such as this do not have a good record in terms of human rights and welfare.

Twice before, in 1964 and 1985, a peaceable popular uprising overthrew a military ruler in Sudan. Along with others, I dream of this happening again, but I fear that any attempt at regime change by anything other than the electoral process will spell disaster. The dangers are sufficiently real that they need to be taken very seriously, and it would be unwise to bank on a best-case scenario.

#### *VII. Will the ICC's charges have a sobering effect on other heads of state?*

On this issue, I have no doubt that the prosecutor's charge has had a very salutary effect on heads of state and senior officials who are contemplating heinous crimes. Even if they escape justice for a while, the fear of ending up in the dock sooner or later will certainly galvanize their thinking. The immediate fear among many Sudanese is that their president will be found guilty in the court of world public opinion and sentenced to life in the Republican Palace. But it seems most unlikely that al-Bashir would be able to sustain such a position indefinitely, and over the years the wider international norm of no impunity will surely become entrenched. These are real benefits, a genuine sign of secular moral progress, but I think that the medium-term risks to the Sudanese people of the arrest warrant are greater.

### **The Case for Prosecution of Omar al-Bashir, Part 2**

**Gregory H. Stanton**

Alex de Waal has responded to my opening argument for the prosecution of President Omar al-Bashir and I shall first answer his responses. Then I will consider the political risk that Dr. de Waal says President al-Bashir's prosecution will create for the implementation of the Comprehensive Peace Agreement for southern Sudan.

#### *Did Bashir possess the specific intent required to convict him of genocide?*

Although Alex de Waal concedes that Bashir might be convicted of command responsibility for crimes against humanity and war crimes in Darfur, he doubts that the ICC prosecutor can prove the specific intent required to convict him of the crime of genocide. The specific intent required is the deliberate destruction of a substantial part of a national, ethnic, religious, or racial group, as such.<sup>35</sup> Dr. de Waal argues that

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

*Will the prosecutor be able to prove that Bashir has such genocidal intent?*

The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu*<sup>36</sup> stated the following: "... the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."

The Cassese Commission and Dr. de Waal note that all members of the targeted ethnic groups were not targeted everywhere in Sudan. But that fact does not diminish the specific intent to destroy these groups, in substantial part, in Darfur.

Dr. de Waal argues that the genocide charge "will muddy international law, by trying to develop the argument that genocide can be committed through the common purpose of a group, without every individual in that group possessing genocidal intent." This argument confuses the specific intent required to prove genocide and how an individual can be convicted of intentionally participating in the crime.

Genocide is a group crime, which by its nature, involves what common law calls conspiracy and the civil law calls "joint criminal enterprise." To quote Professor William Schabas, who generally takes a narrow view of the definition of the crime of genocide, "Genocide is, by nature, a collective crime, committed with the co-operation of many participants. It is, moreover, an offence generally directed by the State. The organizers and planners must necessarily have a racist or discriminatory motive, that is a genocidal motive ... At the same time, individual participants may be motivated by a range of factors, including financial gain, jealousy, and political ambition."<sup>37</sup>

To prove specific intent for an individual, the prosecutor needs to demonstrate that the perpetrator was aware of a plan or policy to destroy at least part of a group. Such intent can be proven by evidence of direct orders, but may also be proven by conscious participation in a pattern of criminal activity that can only have arisen out of a plan or policy. The ICC prosecutor contends that the president of Sudan was aware of his own government's policy to destroy a substantial part of the Fur, Massalit, and Zaghawa ethnic groups in Darfur.

Dr. de Waal argues that most of the killing occurred in 2003 and 2004, and that there has been no genocide since. The prosecutor, on the other hand, contends that the genocide continues, and remains part of an overall plan to destroy these groups. Dr. de Waal points out that the number of "incidents" in 2008 was 2,070, resulting in 1,551 violent deaths. What he leaves out are the continuing deaths from starvation, disease, and rape in Darfur, even around the camps for displaced persons that are supposedly under the protection of the Sudanese government. Sociologist John Hagen and demographer Alberto Palloni estimated a total of 200,000 deaths by 2006,<sup>38</sup> and Eric Reeves has estimated the number of such deaths since April 2003 to be over 450,000.<sup>39</sup> The UN's Under-Secretary for Humanitarian Affairs places the overall death toll since April 2003 at 300,000 deaths.<sup>40</sup> This is evidence of a policy of what

Helen Fein has called “genocide by attrition.”<sup>41</sup> The Bashir regime has applied this policy not only in Darfur but also in the Nuba Mountains and in southern Sudan.

*What drives Bashir’s genocidal policies?*

Alex de Waal’s own work offers some answers about the origins of the Bashir regime’s motives and its genocidal intent. In two of Dr. de Waal’s works,<sup>42</sup> there are examinations of the “Arab Gathering,” a loose alliance of Arab supremacists and Islamic extremists, who have throughout Bashir’s rule advanced a policy of Arab domination of Sudan. In *War in Darfur*, Ahmad Kamal el-Din’s chapter “Islam and Islamism in Darfur” describes the development of this semi-secret group that is openly racist and intends to “change the demography of Darfur.”<sup>43</sup> Julie Flint and Alex de Waal, in their *Darfur: A New History of a Long War*, cite a directive from Musa Hilal dated August 2004 to “change the demography of Darfur and empty it of its African tribes.”<sup>44</sup> In their place, the Sudanese government has promoted instant citizenship and grants of land to Arab immigrants from Mali, Niger, Nigeria, and Egypt. With such a policy, can there be any hope for resettlement of the 2.5 million Fur, Massalit, and Zaghawa who have been driven out of their ancestral homes and off their land?

*Will ICC charges and an arrest warrant against Bashir scuttle the Comprehensive Peace Agreement for southern Sudan?*

Dr. de Waal states that the prosecutor and I favor a policy of coercion rather than negotiation with the Government of Sudan. On the contrary, I favor both. In fact, I believe that without coercion, negotiation will fail. The main reason that the Comprehensive Peace Agreement was reached between the SPLA and the government of Sudan is that the SPLA had fought the Sudanese army to a draw. It was in the interests of both sides to negotiate peace so they could divide the wealth that would flow from the vast oil reserves of southern Sudan.

These fundamental interests have not changed. The Government of Sudan will bluster and threaten renewed war in the south if an arrest warrant is issued for Bashir. It will ignore the arrest warrant, and Bashir will travel only to countries not party to the Rome Statute of the ICC or those that promise not to arrest him. If there are skirmishes in southern Sudan, the Sudanese army will soon learn that the SPLA remains a potent military force. Far more likely, the Government of Sudan will abide by the CPA, maintain a government of National Unity, and continue to divide the oil revenues. It will try to postpone elections as long as possible to remain in power, will try to steal elections if they are held, and it will never allow the referendum on self-determination for the south, which is scheduled for 2011. The Sudan central government’s main interest is to continue to earn oil revenues from the south.

So what is likely to happen to Omar al-Bashir? Gradually, those who support him now will see him as a liability in international relations, just as Yugoslav leaders concluded Milosevic was. They will find ways to ease him out of power. Milosevic’s loss in the Yugoslav elections was the result of a unified nationalist opposition led by non-violent resistance, not NATO bombing.

Eventually Bashir will be handed over for trial by the ICC. The Sudanese leaders who replace Bashir will realize that if they do not stop the crimes against humanity and war crimes in Darfur, they could be next in the dock. The UN Security Council’s referral of the situation in Darfur to the ICC remains in effect.

Alex de Waal is right that this positive scenario is not a certainty. Things could get worse, much worse. War could resume in the south and aid could be cut off to the IDP camps in Darfur. If that scenario begins to unfold, the great powers in the UN

will need to take strong military action, action they should have taken in 2004. With or without Security Council authorization, a No-Fly Zone should be imposed over Darfur and southern Sudan. A blockade of Port Sudan should keep crude oil from flowing out and refined petroleum products from flowing in. There is a much better chance in 2009 that with new administrations in the US, the UK, and France, such action is possible.

If these measures, coupled with increased diplomatic pressure on Sudan from its neighbors, do not reopen assistance to displaced persons in the IDP camps in Darfur, the humanitarian crisis predicted by Dr. de Waal, may indeed unfold. At that point, the US, UK, France, and other powers in the international “community”—if only such a community actually existed—must decide if they are going to back their brave words about “the responsibility to protect” with action to get humanitarian aid to the people of Darfur.

### **The Case against Prosecution of President al-Bashir, Part 3**

Alex de Waal

The judges of the ICC pre-trial chamber (PTC) made public their decision on the prosecutor’s application for an arrest warrant against President al-Bashir on 4 March 2009. As expected, they issued an arrest warrant. They caused some controversy by refusing (by a majority of two to one) to charge President al-Bashir with the three counts of genocide, leading the prosecutor to seek leave to appeal on 10 March. Within an hour of the decision being announced, the Sudan government began to expel international humanitarian agencies working in Darfur and gave clear signals that more steps against international presence in Sudan might be taken. In this final contribution, I examine two issues: the genocide decision by the PTC, and the immediate aftermath of the arrest warrant, before returning to the fundamental question of weighing competing ethical demands.

#### *The Genocide Decision*

The majority decision not to charge President al-Bashir with genocide was, in my opinion, the correct one. A case for genocide could have been made with respect to the events of 2003–2004, although there are important controversies surrounding the nature of genocidal intent and the mode of liability. John Hagan and Wenona Rymond-Richmond have constructed a more credible case with respect to those years (though I would still argue that it falls short of establishing genocidal intent by the head of state).<sup>45</sup> Prosecutor Luis Moreno-Ocampo chose not to make that case. The judges observed that the prosecutor presented no direct evidence for al-Bashir’s genocidal intent and sought to infer it from the facts of the case.

This decision reveals an important fact about the Public Application, namely, that the redacted sections did not in fact contain any “smoking-gun” evidence that pointed straight to President al-Bashir. In deciding not to proceed with the genocide charges, the judges of course did not rule out that additional evidence might later be adduced that might reinstate the charge at a later stage. Nor did they assert that genocide had not been committed by al-Bashir or anyone else. The judges made their decision solely on what was put before them by the prosecutor. Unfortunately, because the prosecutor’s evidence and argument were less substantial than those presented in some of the public debates on Darfur, this does not provide us with an opportunity to advance the scholarly discussion on whether Darfur constitutes genocide and what should be done about it.

The judges' rejection of the genocide charge has an important implication for how we weigh the consequences. If it were the case that there is ongoing genocide in Darfur and President al-Bashir is personally responsible, then it would certainly alter the calculus of risks and outcomes in favor of dramatic action to remove him from power or isolate, stigmatize, and humiliate him. However, if the violations in question occurred four or more years ago and the current situation is relatively stable and there is no ongoing genocide, then the balance of risks and outcomes is more in favor of maintaining the status quo with its ongoing negotiations.

### *The Consequences*

Immediately after the ICC decision was announced, the Sudan government expelled a dozen international agencies. This should have come as no surprise as the chief of the National Intelligence and Security Service, General Salah Abdalla Gosh, had made his intentions clear just a few weeks previously. He said, "Our message to those who stand behind the ICC is that we were Islamic fundamentalists but have become moderate and civilized and this continues to be our conviction. If they press us to return to our past position, we will no doubt return. And if they want us to return into hard-liners anew, that is a simple thing to do. And we are capable of doing it."<sup>46</sup>

This should serve as a reminder that Sudan was isolated, stigmatized, and humiliated before, during the 1990s, as a sponsor of *jihadi* terrorism. That was not only an atrocious situation for the Sudanese people but also led to some extremely adverse outcomes internationally. The international experience with handling Sudan during the decade was that isolating its leaders was counterproductive and that humiliating them only enraged them. The basic rule of diplomacy is that an adversary should be given a ladder to climb down. It is possible that an international strategy of isolating and stigmatizing the Sudanese leadership will succeed in the coming years, but it is salutary to reflect on the earlier failure of this approach.

Gosh's use of "we" also reminds us that the Sudanese government is a collective and that for almost all of its twenty years in power, President al-Bashir has been regarded as the front man for a cabal of security officers and civilian ideologues who wielded more real power than he did. Removing the head of state, and most probably replacing him with another member of the same Islamist-security clique, would not represent an improvement.

In the same interview, Gosh continued by saying that Sudan would protect civilians and the staff of international organizations as long as they did not stray beyond roles defined in country agreements: "But whoever contradicts this or tries to trespass the marked boundaries, they have only themselves to blame."<sup>47</sup> Looking back at the 1990s, when the Sudanese government (in its militant Islamist phase) prevented any humanitarian assistance from reaching millions of people affected by war and famine in southern Sudan, one need harbor no doubts about the reality of Gosh's threat and the implications should he carry it out.

The stated reason for the expulsion was that the agencies in question had provided information to the ICC. Several other agencies were not expelled, without reasons given. United Nations agencies remain. While some national human rights organizations were closed down and their staff harassed, no national service-providing agencies have yet been closed. A key part of the infrastructure for distributing food rations and providing medical and water and sanitation services to the in-need Darfuri population was removed at a stroke. Fortunately, the nutritional and health situation in the region is well short of emergency thresholds (with the important exception of a meningitis outbreak). But the expulsions leaves the Darfuri population vulnerable to



deteriorations in the humanitarian situation as well as removing important witnesses whose presence had undoubtedly helped to deter violence in some of the displaced camps.

In my first section above, I argued that the prosecutor's duty did not extend to making political judgments. However, having stated that there are about 3 million victims of violations in Darfur, it is concerning to note that the section in his December report to the UN Security Council on the Darfur case contained just four lines on the "interests of victims" and made no reference to any risks to the humanitarian provision to millions of Darfuris.

The law on "famine crimes" is underdeveloped. The Additional Protocols to the Geneva Conventions and the customary laws of war clearly prohibit the use of starvation as a method of warfare under certain circumstances.<sup>48</sup> The most recent attention to the subject has been focused on preserving the access of external humanitarian actors to populations in need rather than the right of victims of conflict to obtain essential assistance, or indeed the more basic question of whether actions that create humanitarian crises should be considered criminal. Regrettably, it is therefore not self-evident in law that an action that exposes a large civilian population to a significant risk of hunger, infectious disease and intolerable living conditions, constitutes a crime under international law. Given that such an action meets the basic requirement of a crime against humanity—it affronts the conscience of humankind—I hope that this shortcoming will be remedied.

I fear that the adverse consequences of the arrest warrant have yet to play themselves out. If the situation deteriorates, for example with more restrictions or expulsions of humanitarians, a crackdown on Sudanese civil society organizations, or stepped-up rebel offensives, then any criminal responsibility for these actions will lie with those in positions of power in Sudan who took the relevant actions. However, if it transpires that the situation in Sudan, including Darfur, was significantly better during the three or four years preceding the arrest warrant than it is over the coming years, and that the arrest warrant was at the minimum the pretext for the deterioration, then I believe the arrest warrant will be shown to have been an imprudent step.

### *Weighing the Outcomes*

Achieving justice in a court of law is both a right for victims of heinous crimes and good for national and international society. There are other rights and goods to be weighed as well. Among them are negotiated peace, the implementation of a national constitution that includes commitments to human rights, civil society, a free media, elections and the right of self-determination for the people of southern Sudan, negotiated humanitarian access to more than 3 million Darfuri people in need, the presence of international peacekeepers, ongoing dialogue and consultation among Darfuri communities leading to local outcomes in terms of reconciliation and restorative justice (though not yet compensation), and a level of international diplomatic engagement with the Sudanese government that, while frustrating, has nonetheless delivered substantial improvements in well-being and security for millions of Sudanese citizens.

I would like to believe that all these other outcomes are fully compatible with judicial accountability for the most heinous crimes. However, I fear that there are short-term clashes between them, and that we will see some of these contradictions play out in the next year or two.

My last point is about timing. There is no certainty that President al-Bashir will be arrested soon and he may remain at liberty, and indeed at the helm of Sudan, for some years. For the victims of the crimes for which he has been charged, the sense of

vindication may begin to wear thin. A year ago, there was serious talk among very well-informed people that President al-Bashir would step aside at the 2010 elections, marking his twenty years in power with retirement to his newly completed family house. Even had he not done so, the new Government of National Unity formed after the elections would have shared power more widely and cemented key elements of the democratic transition. Surely, it would have been better to have allowed the elections to proceed before proceeding with the demand for an arrest warrant. With al-Bashir either out of office or reduced in power, the risks of a backlash would have been commensurately reduced.

### **The Case for Prosecution of Omar al-Bashir, Part 3**

**Gregory H. Stanton**

*The Arrest warrant issued by the ICC has already had a positive effect on the safety of Darfuris in IDP camps in Sudan.*

One of the main goals of law is deterrence from criminal acts. There is evidence already that orders have gone out from Khartoum to minimize attacks on Darfuri villages and on people in IDP camps in Darfur.

Since the arrest warrant for Omar al-Bashir was approved by the ICC pre-trial chamber, the number of violent deaths in Darfur has decreased substantially. Despite veiled threats from Khartoum that it could not be responsible for the safety of IDP's if Bashir was indicted, and its expulsion of a dozen NGO relief groups from Sudan, ostensibly for providing information to the ICC, the death rate in Darfur has dropped, rather than increased. In 2008, UNAMID reported a total of 1,550 violent deaths. Less than 500 were civilians. More than 400 were combatants of various rebel groups and about 640 died in intertribal fighting.<sup>49</sup> On 17 June 2009, US Special Envoy to Sudan, Major General Jonathan S. Gration, declared that the situation in Darfur was now one of "remnants of genocide." His comments were quickly disowned by the State Department and US Ambassador to the UN, Susan Rice, but there is evidence in this useful exchange of views that, as Alex de Waal has argued, the active genocide in Darfur may now be over. We should not celebrate yet, however, because the lives of the 2.7 million Darfuris still in IDP and refugee camps are still at grave risk.

Even if the active genocide is now over, Omar al-Bashir can still be tried for crimes against humanity and war crimes committed under his command in 2003 and 2004. He should be. The ICC is, after all, a criminal court that sits in judgement on past crimes. If the prosecutor wins his appeal to the pre-trial chamber, Bashir may yet be tried for genocide. I have argued in earlier sections of this exchange that there is plenty of evidence that he should be.

Omar al-Bashir has been so embarrassed by the arrest warrant that he has undertaken a major diplomatic offensive to blunt its force. He has made numerous trips to neighboring countries to shore up his diplomatic support, the first to Ethiopia, which is now conducting brutal forced displacement of Somali populations in the Ogaden where large gas reserves have been discovered, and others to Eritrea, Egypt, and Qatar. But Bashir decided not to travel to Uganda when President Museveni said Bashir would be arrested and sent to the ICC in The Hague if he came there. Bashir's regime provides funds and arms to the maniacal Lord's Resistance Army that has abducted thousands of Ugandan children.

We may conclude that the arrest warrant for Omar al-Bashir has led to providing much more and not less protection for Darfuris, as his henchmen once threatened would happen and as many critics of the arrest warrant feared.

*The Bashir arrest warrant has not undermined the Comprehensive Peace Agreement (CPA) for southern Sudan*

Alex de Waal's strongest argument against the arrest warrant is that it would upset an already delicate peace process between the south and north, and could derail both the elections scheduled for February 2010 and the southern referendum on autonomy or independence scheduled for February 2011. There are two problems with this argument: (1) The CPA will stand or fall on the will of the Government of Sudan and the SPLM, not on the situation in Darfur, which was intentionally excluded from the CPA. If the CPA breaks down, it will be because either the Government of Sudan or the SPLM want it to fail, not because of failure to resolve the conflict in Darfur or because of an arrest warrant for Bashir. (2) The arrest warrant is unlikely to be enforced until after the elections and referendum. International diplomats can usually walk and chew gum at the same time, even though they are reluctant to impose forceful measures against genocide. They are well aware of the complexity of the situation in Sudan, and are unlikely to press for actual arrest of Bashir until the CPA is implemented. A parallel may be drawn with the arrest warrant of Slobodan Milosevic, which was not executed until after the Dayton Peace Accords ended the war in Bosnia and Milosevic had been defeated in Yugoslav elections.

The US Special Envoy to Sudan, Major General Jonathan S. Gration, has clearly stated that resolution of the conflict in Darfur is now only one of the four major US policy objectives for Sudan.<sup>50</sup> The others are implementation of the Comprehensive Peace Agreement between the south and north, creation of a stable Sudanese government, and cooperation against terrorism. US and EU foreign policies strongly support implementation of the CPA. Chinese and French interests also favor its implementation because they want continued access to Sudanese oil reserves. Russia remains on good terms with the regime in Khartoum and favors deferral of Bashir's arrest.

Eric Reeves has criticized Major General Gration's testimony as "phony optimism" that includes no plan for the resettlement of the 2.7 million Darfuris driven from their homes and now in IDP and refugee camps, with Janjaweed militias continuing to control Darfur.<sup>51</sup> Reeves also comments:

Most disturbingly, Gration gives no evidence in any of his public comments of understanding the ruthless nature of the security cabal that rules Sudan and is determined to retain its stranglehold on national wealth and power; like many before him, he is convinced that the National Islamic Front is controlled by men who can be reasoned with, cajoled, rewarded, made to do "the right thing." He ignores the basic truth about these men: during their twenty years in power they have never abided by any agreement with any Sudanese party—not one, not ever.<sup>52</sup>

Reeves has also detailed the lateness of preparations for the national elections in February 2010 and the referendum on independence for southern Sudan in February 2011. He warns that foot-dragging by the Sudanese government is the greatest obstacle to implementing the CPA.<sup>53</sup>

*The arrest warrant for Omar al-Bashir should remain as a deterrent to further crimes against humanity by him and his regime*

Field research by the International Crisis Group, the Enough Project, Human Rights Watch, Amnesty International, Genocide Watch, the Aegis Trust, and other anti-genocide groups provides plenty of evidence for Eric Reeves' concern that there could be another outbreak of civil war in southern Sudan. But the reason is not the arrest warrant for Bashir. It is because neither the Government of Sudan nor the SPLM

have withdrawn or disarmed troops in the south. Unemployed young men with Kalashnikovs are waiting for war, and several recent tribal conflicts have been exacerbated by the plethora of deadly weapons. The Government of Sudan's brutal destruction of the town of Abyei in May 2008, witnessed by Roger Winter, rendered the recent judgement of the Permanent Court of Arbitration in The Hague over a year too late.<sup>54</sup> It was further evidence of a racist general policy of Khartoum to change the demography of Sudan and drive non-Arab Africans off Sudan's rich oilfields.

Darfur is but the latest instance of that racist policy, documented by Alex de Waal and Julie Flint in *Darfur: A Short History of a Long War*. As mentioned above, they cite a "directive from Musa Hilal's headquarters" that calls for the

execution of all directives from the President of the Republic . . . [to] change the demography of Darfur and make it void of African tribes . . . [through] killing, burning villages and farms, terrorizing people, confiscating property from members of African tribes and forcing them from Darfur.<sup>55</sup>

I am perplexed that Alex de Waal, in Part 2 of his careful argument, states that "if the UN Security Council were to decide that a deferral [of the case against Bashir] is in the interests of peace and security, it would be better to make that decision unconditionally. This not only preserves the independence of the court but also leaves open the option of lifting the deferral unconditionally, avoiding any obligation of negotiating over whether political conditions have been met." de Waal probably means that if the Security Council were to defer the case under Article 16 of the Rome Statute, it should do so for twelve months unconditionally. But Article 16 actually provides that renewal of a deferral may be made "under the same conditions."

The important point, and I am sure that Alex de Waal would agree, is that there should be no impunity for the terrible crimes committed by Omar al-Bashir and his regime in Darfur. Eventually, to quote Luis Moreno-Ocampo, al-Bashir and his henchmen must "end up in the dock."

## Notes

1. Alex de Waal, "The Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al-Bashir: A Critique," Social Science Research Council (2009), <http://blogs.ssrc.org/darfur/wp-content/uploads/2009/01/bashir-public-application-critique-d6-250109.pdf> (accessed 15 October 2009).
2. John Hagan, and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge: Cambridge University Press, 2009).
3. Edward Thomas, *Against the Gathering Storm: Securing Sudan's Comprehensive Peace Agreement* (London: Royal Institute for International Affairs, 2009).
4. Ibid.
5. Andrew Natsios, "A Disaster in the Making," Social Science Research Council (2008), <http://www.ssrc.org/blogs/darfur/2008/07/12/a-disaster-in-the-making> (accessed 12 July 2008).
6. "Sudan's First VP Pleads Case Against ICC Arrest Warrant for Bashir," *Sudan Tribune*, 14 January 2009, <http://www.sudantribune.com/spip.php?article29859> (accessed 26 August 2009).
7. Rwandese presidential advisor Rose Kabuye was arrested in Germany in November 2008, and later released on bail.
8. International Criminal Court [ICC], "ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan" (press release, 4 March 2009), <http://www.icc-cpi.int/Menu/Go?id=0ef62173-05ed-403a-80c8-f15ee1d25bb3&lan=en-GB> (accessed 26 August 2009).
9. UN Security Council Resolution 1593, UN Doc. S/RES/1593 (31 March 2005).
10. UN Commission of Inquiry Report, UN Doc. S/2005/60 (1 February 2005).

11. "ICC-02/05-01/07," situation details page, International Criminal Court, <http://www.icc-cpi.int/Menu/Go?id=c7a002f5-4cfb-4cb7-89af-5acb6e0ffe0e&lan=en-GB> (accessed 26 August 2009).
12. ICC, "ICC Issues a Warrant."
13. See, e.g., Bureau of Democracy, Human Rights and Labor, and the Bureau of Intelligence and Research, "Documenting Atrocities in Darfur," <http://www.state.gov/g/drl/rls/36028.htm> (accessed 19 January 2009). This document has been removed from the State Department's Web site but is still available as Appendix 2 in Samuel Totten and Eric Markusen, eds., *Genocide in Darfur: Investigating the Atrocities in the Sudan* (New York: Routledge, 2006), 259–58.
14. Maggie Farley, "U.N. Puts Darfur Death Toll at 300,000," *Los Angeles Times*, 23 April 2008. <http://articles.latimes.com/2008/apr/23/world/fg-darfur23> (accessed 26 August 2009).
15. "News Monitor for February 1–14, 2005," *Prevent Genocide International*, <http://www.preventgenocide.org/news-monitor/2005feb1.htm> (accessed 26 August 2009).
16. *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1999–2002), art. 28, <http://untreaty.un.org/cod/icc/statute/romefra.htm> (accessed 23 September 2009).
17. Public Redacted Version of the Prosecutor's Application, para. 53, 14 July 2008 (ICC 02/05, Annex A), [http://www.genocidewatch.org/images/Sudan\\_08\\_07\\_14\\_Public\\_Redacted\\_Version\\_of\\_the\\_Prosecutor\\_s\\_Application\\_under\\_Article\\_58.pdf](http://www.genocidewatch.org/images/Sudan_08_07_14_Public_Redacted_Version_of_the_Prosecutor_s_Application_under_Article_58.pdf) (accessed 26 August 2009).
18. *Rome Statute*, art. 15.
19. *Ibid.*, art. 27.
20. *Charter of the United Nations*, 26 June 1945, art. 24, <http://www.un.org/en/documents/charter/> (accessed 15 October 2009).
21. *Ibid.*, art. 27.
22. *Rome Statute*, art. 16.
23. "Council Backs Idea to Indict Sudan Leader," *New York Times*, 4 December 2008, [http://www.genocidewatch.org/images/Sudan\\_08\\_12\\_04\\_Council\\_Backs\\_Idea\\_to\\_Indict\\_Sudan\\_Leader.doc](http://www.genocidewatch.org/images/Sudan_08_12_04_Council_Backs_Idea_to_Indict_Sudan_Leader.doc) (accessed 26 August 2009).
24. See "France Will Veto Any Resolution Deferring Sudan President Indictment," *Sudan Tribune* (France), 19 September 2008, [http://www.genocidewatch.org/images/Sudan\\_08\\_09\\_19\\_France\\_will\\_veto\\_any\\_resolution\\_deferring\\_Sudan\\_president\\_indictment\\_Official.doc](http://www.genocidewatch.org/images/Sudan_08_09_19_France_will_veto_any_resolution_deferring_Sudan_president_indictment_Official.doc) (accessed 21 January 2009); "France Will Veto Any Resolution Deferring Sudan President Indictment," *Sudan Tribune* (US), 23 September 2008, <http://74.125.47.132/search?q=cache:pK4nPV-ixlQJ:www.sudantribune.com/spip.php%3Farticle28738+UN+Security+Council+Darfur+Article+16+US+veto&hl=en&ct=clnk&cd=2&gl=us> (accessed 21 January 2009).
25. UN News Centre, "Senior UN, African Union Officials Outline Worsening Situation in Darfur," 22 September 2008, [http://www.genocidewatch.org/images/Sudan\\_08\\_09\\_22\\_Senior\\_UN\\_African\\_Union\\_officials\\_outline\\_worsening\\_situation\\_in\\_Darfur.doc](http://www.genocidewatch.org/images/Sudan_08_09_22_Senior_UN_African_Union_officials_outline_worsening_situation_in_Darfur.doc) (accessed 21 January 2009).
26. IRIN Africa, "LIBERIA: Taylor Still Looms Large as Election Countdown Begins," 30 June 2005, at <http://www.irinnews.org/report.aspx?reportid=55204> (accessed 26 August 2009).
27. UN Security Council Resolution 1769, UN Doc. S/RES/1769 (2007) renewed by UN Security Council Resolution 1868, UN Doc. S/RES/1868 (2008).
28. World Summit Outcome Resolution, UN Doc. A/RES/60/1 (2005), <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>.
29. UN Commission of Inquiry Report, UN Doc. S/2005/60 (1 February 2005).
30. William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 200.
31. Alex de Waal, Alex, "Counter-insurgency on the Cheap," *London Review of Books*, 1 August 2004, [http://www.lrb.co.uk/v26/n15/waal01\\_.html](http://www.lrb.co.uk/v26/n15/waal01_.html).
32. Andrew Cayley, "The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide," *Journal of International Criminal Justice* 6 (2008): 829–40.

33. Luis Moreno-Ocampo, "Seven Questions: Prosecuting Sudan," *Foreign Policy*, February 2009, [http://www.foreignpolicy.com/story/cms.php?story\\_id=4698&page=0](http://www.foreignpolicy.com/story/cms.php?story_id=4698&page=0) (accessed 26 September 2009).
34. U.S. Government Accountability Office, *Darfur Crisis: Death Estimates Demonstrates Severity of Crisis, but Their Accuracy and Credibility Could Be Enhanced*, GAO-07-24 (Washington, DC: US GAO, 2006), <http://www.gao.gov/new.items/d0724.pdf> (accessed 15 October 2009).
35. *Ibid.*, 222.
36. *Prosecutor v. Akeyesu*, Judgment, ICTR-96-4-T (2 September 1998), para. 477.
37. Schabas, *Genocide in International Law*, 255.
38. John Hagen and Alberto Palloni, "Death in Darfur," *Science* 313 (2006): 1578–579.
39. Eric Reeves, "Darfur Mortality: Shoddy Journalism at the New York Times," Sudanreeves, 14 August 2007, <http://www.sudanreeves.org/Article180.html> (accessed 26 August 2009).
40. Maggie Farley, "U.N. Puts Darfur Death Toll at 300,000," *Los Angeles Times*, 23 April 2008, <http://articles.latime.com/2008/apr/23/world/fg-darfur23> (accessed 15 October 2009).
41. Helen Fein, "Accounting for Genocide after 1945: Theories and Some Findings," *International Journal of Group Rights* 1 (1993): 79–106.
42. Alex de Waal, ed., *War in Darfur and the Search for Peace* (Cambridge, MA: Harvard University Press, 2007); Alex de Waal and Julie Flint, *Darfur: A New History of a Long War* (London: Zed Books, 2008).
43. Ahmad Kamal el-Din, "Islam and Islamism in Darfur," in *War in Darfur and the Search for Peace*, ed. Alex de Waal (Cambridge, MA: Harvard University Press, 2007), 114.
44. Alex de Waal and Julie Flint, *Darfur: A New History of a Long War* (London: Zed Books, 2008), 37.
45. John Hagan and Wynona Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge: Cambridge University Press, 2009).
46. Quoted in Associated Press, "Sudan Official Warns over Indicting President," 21 February 2009, <http://www.ap.org/> (accessed 26 August 2009).
47. *Ibid.*
48. Charles Allen, "Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law," *Georgia Journal of International and Comparative Law* 19 (1989): 1–85.
49. Testimony of Ambassador David Shinn, before the US Senate Committee on Foreign Relations Hearing on Sudan, 30 July 2009, <http://foreign.senate.gov/testimony/2009/ShinnTestimony090730a.pdf> (accessed 26 August 2009).
50. Testimony of Special Envoy Major General Jonathan S. Gration, before the US Senate Committee on Foreign Relations Hearing on Sudan, 30 July 2009, <http://foreign.senate.gov/testimony/2009/GrationTestimony090730a.pdf> (accessed 26 August 2009).
51. Eric Reeves, "The Phony Optimism on Darfur," *The Boston Globe*, 6 August 2009, [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/08/06/the\\_phony\\_optimism\\_on\\_darfur/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/08/06/the_phony_optimism_on_darfur/) (accessed 26 August 2009).
52. *Ibid.*
53. Eric Reeves, "Sudan Elections and Southern Self-Determination," Sudanreeves, 28 June 2009, <http://www.sudanreeves.org/Article246.html> (accessed 26 August 2009).
54. Roger Winter, "Abyei Aflame: An Update from the Field" (ENOUGH Strategy Paper, 21 May 2008), <http://www.enoughproject.org/publications/abyei-aflame-update-field-0> (accessed 26 August 2009).
55. de Waal and Flint, *Darfur: A Short History of a Long War*, 39.

---

# The UN International Commission of Inquiry on Darfur: New and Disturbing Findings

Samuel Totten  
*University of Arkansas, Fayetteville*

*Following a US referral of the Darfur crisis to the United Nations, the UN undertook the UN Commission of Inquiry into Darfur. In late January 2005, following an analysis of the data collected by the UN's COI team, the UN declared that while it found crimes against humanity had been committed by the government of Sudan (GoS) and the Janjaweed (Arab militia), it did not find evidence that the GoS had perpetrated genocide. Herein, Samuel Totten, argues that a correct analysis of the data collected by the COI team would have been genocide. In addition to offering a critique of the COI's analysis, Totten is critical of the hurried, unsystematic, and underfunded investigation.*

*Key words: crimes against humanity, Darfur, genocide, government of Sudan, Janjaweed, UN Convention on the Prevention and Punishment of the Crime of Genocide*

---

## Introduction

This article presents a critical analysis of the United Nations Commission of Inquiry (COI) into the conflict in Darfur—a conflict in which government of Sudan (GoS) troops and *Janjaweed* (Arab militia) carried out a scorched-earth policy that resulted in the deaths of tens of thousands of people and the displacement of well over two and a half million people from their villages and homes. Following the delineation of key background information vis-à-vis the inquiry, the major finding of the COI is discussed: that crimes against humanity had been perpetrated in Darfur but not genocide. Arguing from the position that genocide had, in fact, been perpetrated, I analyze three possibilities as to why the COI did not come to a finding of genocide: politics, a sloppy and incomplete investigation, and an inadequate analysis of the facts.

## Background to the Commission of Inquiry into Darfur

Following a US State Department-sponsored investigation in which over 1,100 black African refugees from Darfur were interviewed in refugee camps along the Chad/Darfur border, US Secretary of State Colin Powell declared, on 9 September 2004, that “based on a consistent and widespread pattern of atrocities—killings, rapes, burning of villages—committed by the *Janjaweed* and government [of Sudan] forces against non-Arab villagers” [Massaleit, Zaghawa and Fur], the State Department had concluded that “genocide has been committed—and genocide may still be occurring.”<sup>1</sup> Subsequently, the US referred the matter to the United Nations and called on it to undertake “a full-blown and unfettered investigation.”<sup>2</sup>

Acting under Chapter VII of the United Nations Charter, the UN Security Council, on 18 September 2004, adopted Resolution 1564 which called on UN Secretary

General Kofi Annan “to rapidly establish an international commission of inquiry in order to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, *to determine also whether or not acts of genocide have occurred.*”<sup>3</sup>

In October 2004, Secretary General Kofi Annan appointed the Commission of Inquiry, naming as chairperson Antonio Cassese, the former president of the UN’s International Criminal Tribunal for the former Yugoslavia (ICTY). Annan asked that the members of the COI provide him with a report of their findings within three months’ time.

The COI’s team comprised thirteen members: a chief investigator, four additional investigators; two female investigators “with a specialty in gender violence”;<sup>4</sup> four forensic experts; and two military analysts. Various commission members and commission staff were also involved in visits to Sudan, Chad, and other parts of the region. Ultimately, the data collected by the COI team were analyzed by the COI Commission members, with the assistance of five legal researchers and one political affairs officer.

Unlike the United States Atrocities Documentation Project (ADP), which was limited to conducting its investigation in refugee camps in Chad, the COI conducted a far broader investigation that included the three states of Darfur (including towns, villages, and internally displaced persons camps); Khartoum, the capital of Sudan; refugee camps in Chad; Eritrea (in order to meet with representatives of two rebel groups—the Sudanese Liberation Movement/Army [SLM/A] and the Justice and Equality Movement [JEM]); and Addis Ababa (in order to meet with officials of the African Union).

The COI team carried out its investigation in November and December 2004 and January 2005. Over and above determining whether or not acts of genocide had been perpetrated, the Commission’s mandate included three other major tasks: “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; to identify the perpetrators of violations of international humanitarian law and human rights law; and to suggest means of ensuring that those responsible for such violations are held accountable.”<sup>5</sup>

### **Major UN COI Finding—Crimes against Humanity, Not Genocide**

Based on its investigation and analysis of the data collected, the COI came to the determination that the government of Sudan and the Janjaweed were responsible for carrying out a scorched earth policy in Darfur. In doing so, the COI concluded that GoS forces and the Janjaweed

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 adsystematic basis, and therefore amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children.* The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Masaslit, Jebel, Aranga, and other so-called African tribes.<sup>6</sup>

In its report, the COI delineated a battery of criminal acts perpetrated by the GoS and the Janjaweed, including but not limited to the following:

- “According to some estimates over 700 villages in all three states of Darfur have been completely or partially destroyed. The Commission further received



information that the [local] police had made an assessment of the destruction and recorded the number of destroyed villages at over 2000.”<sup>7</sup>

- “Many villages are said to have been attacked more than once, until they were completely destroyed.”<sup>8</sup>
- Unlike the black African tribes, most of the other tribes in the area—the Arab tribes—“have not been targeted, if targeted at all.”<sup>9</sup>
- Attacks involved air bombardments and the use of Mi-8 helicopters, Mi-24 helicopters, and Antonov aircraft.<sup>10</sup>
- “The large number of killings, the apparent pattern of killing . . . including the targeting of persons belonging to African tribes and the participation of officials or authorities are amongst the factors that led the Commission to the conclusion that killings were conducted in both a widespread and systematic manner.”<sup>11</sup>
- Many of the attacks involved the killing of civilians, including women and children.<sup>12</sup>
- There was widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur.<sup>13</sup>
- “In addition to homes, *all essential structures and implements for the survival of the population were also destroyed*. Oil presses, flour mills, water sources such as wells and pumps, crops and vegetation and almost all household utensils were found scorched or smashed at the sites inspected.”<sup>14</sup>
- “*The Janjaweed took everything [the Black Africans] owned, involving all goods necessary to sustain life in the difficult conditions in Darfur, including . . . livestock, representing the key source of income of the affected people.*”<sup>15</sup>
- “[T]he Commission finds that pillaging, being conducted on a systematic as well as a widespread basis mainly against African tribes, was discriminatory and calculated to bring about the destruction of livelihoods and the means of survival of the affected populations.”<sup>16</sup>
- Black African females were forced to “take off their maxi (large piece of clothing covering the entire body), and if they [the perpetrators] found that they were holding their young sons under them, they would kill the boys.”<sup>17</sup> (UNCOI, 2005, paragraph 272)
- In certain instances, the GoS and Janjaweed carried out large scale massacres of men (reportedly “mainly intellectuals and leaders”).<sup>18</sup>
- Black African civilians were killed after they reached IDP camps.<sup>19</sup>

In light of the fact that it seems apparent that the the GoS and Janjaweed carried out such atrocities with the intent, at least to a certain extent, to destroy the black Africans of Darfur in whole or in part, numerous scholars and human rights activists<sup>20</sup> have questioned why and how the COI concluded, based on the evidence it collected, that the GoS did not “pursue a policy of genocide.”<sup>21</sup> That is not to say that the COI neglected to provide a rationale for its determination, for it did (see below); rather, for many, the rationale was not convincing and thus questions have been raised about the logic of (and/or politics and/or bias behind) the rationale vis-à-vis the final determination.

### **A Determination That Was Possibly Politically Influenced and/or Biased**

Some scholars suspect that Egypt might have been, at least in part, behind the COI’s determination that the GoS had not perpetrated genocide in Darfur.<sup>22</sup> First, they note, Egypt vigorously defended Sudan’s sovereignty despite the atrocities perpe-

trated by GoS troops and the Janjaweed in Darfur; and second, a powerful and influential Egyptian, Mr. Mohammed Fayek, was one of the five COI Commissioners.

Eric Reeves spelled out some of the main concerns that have been voiced about Egypt and its relationship with Sudan as it relates to the crisis in Darfur:

Few countries have provided more diplomatic or political cover for the NIF regime [than Egypt], particularly in its efforts to forestall humanitarian intervention. Cairo has offered an unqualified defense of Sudan's claim to national sovereignty (Egyptian Foreign Minister Ahmed Aboul Gheit insisted last month that Khartoum would have to approve the dispatch of U.N. troops to Darfur). And so long as Khartoum can count on Egyptian support, it can count on support from the Arab League as a whole. The group has served mainly as an extension of Egyptian foreign policy (it was no surprise last week when former Egyptian Foreign Minister Amr Moussa was named to a second five-year term as secretary general).<sup>23</sup>

Whether or not Egypt or Fayek actually influenced the COI determination is hardly conclusive, but that is not to say that it didn't happen. Additional digging among researchers is needed before such a conclusion can be made.

On a different note, at least one major figure with the COI, Antonio Cassese, seemingly had a preconceived notion as to what the data collected by the COI would add up to in the end. Whether it was a politically motivated opinion or a quick and dirty analysis on his part is hard to tell. More specifically, Debb Bodkin, a police officer based in Canada and the only person who served as an investigator with the US Atrocities Documentation Project and the UN's COI, told this author that while the COI team was in Geneva for its initial briefing prior to flying to Darfur, Antonio Cassese seemingly suggested that the COI would not result in a finding of genocide. In regard to this matter, Bodkin reported 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 (asserting that the victims were from mixed tribes, not a single one) and (B) *mens rea* (the actual intent to destroy in whole or in part). 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 or how many interviews he had conducted but I don't believe either was 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.<sup>24</sup>

It is possible, of course, that Cassese was simply offering a casual hypothesis with no intention of swaying the investigators' thoughts and actions. Whether or not that was the case, it was not a wise way to begin an investigation in which objectivity should have been paramount. No matter what, it raises a red flag in regard to how the data were ultimately analyzed and whether the COI (or at least certain members of the team responsible for conducting an analysis of the data) was, in one way or another, biased against a determination of genocide. If such a bias existed, then the investigation was compromised from the start.

## **A Rushed and Seemingly Unsystematic Investigation**

Based on a careful reading of the COI report *and* a first-person report by one of the COI investigators there is no doubt that the investigation was understaffed, hurried, and rather unsystematic.

At the outset of the COI report, the authors comment on the constraints faced by the investigatory team:

There is no denying that while the various task assigned to the Commission are complex and unique, the Commission was called upon to discharge them under difficult conditions. First of all, it operated under serious *time constraints*. [Second,] given that the Security Council had decided that the Commission must act urgently, the Secretary-General requested that the Commission report to him within three months of its establishment. The fulfillment of its complex tasks, in particular those concerning the findings of serious violations and the identification of perpetrators, required the Commission to work intensely and under heavy time pressure.<sup>25</sup>

This statement raises a host of critical issues that not only call into question the seriousness with which the UN undertook its investigation and its commitment to truly discovering the full extent of the nature of the crimes committed by the GoS and the Janjaweed, but, ultimately, the validity of the Commission's findings. In light of the seriousness of the investigation (ascertaining whether genocide had been perpetrated or not), it is unfathomable why the investigatory team would be forced to work under "serious time constraints" and under "heavy time pressure."<sup>26</sup> From the very outset, both Secretary General Kofi Annan and the Commissioners had to know that a rushed investigation would result in an incomplete study. As cynical as it sounds, one has to question whether *that* was the intent.

A key question that arises is: Why was there such a rush to complete the investigation?<sup>27</sup> This is a major concern, particularly in light of the fact that the UN ostensibly did not perceive a need to undertake the investigation until prodded to do so by the United States (in other words, the UN was hardly proactive in this regard).<sup>28</sup> If such an investigation was so critical to conduct—and in such a timely fashion—then why wasn't it undertaken a lot sooner? Indeed, why did the UN wait until until two years into the crisis, by which time an estimated 180,000 plus people had already been killed and over 1 million people had been forced from their villages into IDP or refugee camps?<sup>29</sup>

Furthermore, it is a fact that once the investigation was completed, the UN did not show a real sense of urgency in prodding the GoS to halt the killing, and ongoing rape. Yes, it passed one resolution after another, but it could not seem to find the political will to force the GoS to comply with key UN requests and demands inherent in the resolutions.<sup>30</sup> And while some sanctions were issued, they were relatively soft sanctions and hardly implemented in a way that spoke to their seriousness. The UN also did not display a sense of urgency in attempting to find a way to provide real protection for the black Africans of Darfur—not for those still residing in villages or for those eking out a mean existence in IDP camps, both of which continued to be viciously attacked by the GoS and the Janjaweed over the years.<sup>31</sup>

On a related note, the COI report states that "both [the COI's] fact-finding mission and its task of identifying perpetrators would have benefited from the assistance of a great number<sup>32</sup> of investigators, lawyers, military analysts, and forensic experts. The Commission's budget, [however,] did not allow for more than thirteen such experts."<sup>33</sup> It is not a little perplexing as to why such a significant undertaking was underfunded to the point that it could not hire the full complement of experts needed to carry out the most comprehensive investigation possible. Such a lack of funding calls into question the seriousness of UN officials vis-à-vis their commitment to protect people facing potential and actual death and rape at the hands of those who commit crimes against humanity and genocide. For all of the promises of "never again!"; all of the UN-issued

reports and statements on the need to prevent genocide and protect people from becoming victims of genocide;<sup>34</sup> all the meetings, conferences, and summits by UN officials in Khartoum, Darfur, Addis Ababa, and Abuja over the years (and all of the costs incurred for such), it seems as if the UN could have come up with enough funding to conduct a comprehensive investigation with enough experts to do the job right. Instead, what the UN ended up doing was conducting an investigation on the cheap, thus neglecting to collect all the data it could or should have due to self-imposed time constraints that were exacerbated by an inadequate number of personnel and funding dedicated to the effort. Seemingly, it was a classic case of “fiddling while Rome—read Darfur—burns,” literally!<sup>35</sup>

Ultimately, the lack of funding also calls into question just how serious the UN was in regard to not only carrying out a thorough investigation but meeting its stated goal of ascertaining whether or not genocide had been perpetrated against the black Africans. Everyone is well aware of the huge UN expenditures to keep its bureaucrats well paid, situated in nice offices in beautiful cities, housed in nice and costly abodes, and chauffeured in comfortable and expensive vehicles. Surely, for an investigation whose focus was to ascertain whether genocide was taking place, adequate funding could have been found if there was the will to do so.

Another concern is how the actual investigation was undertaken—that is, how the investigators were prepared to undertake the interviews, whether the investigators were expected to ask the same questions of all like actors (meaning, using one set of questions for internally displaced persons, another set for Sudanese officials, and still another for members of the rebel groups). Again, Debb Bodkin provides valuable insights into such concerns:

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 provide any parameters whatsoever and an untrained interviewer could easily have asked questions in a manner that would have elicited whatever response he or she hoped to obtain.<sup>36</sup>

Again, it is unfathomable as to why a single questionnaire was not developed and printed by the COI so that each investigator had the same set(s) of questions to ask specific members of a group throughout the investigation.<sup>37</sup> Having a single set of questions for each group of interviewees would not, of course, have precluded investigators from asking interviewees follow-up questions. Allowing each investigator, however, to ask his/her own questions, as the COI did, is likely to have resulted in a mish-mash of information (whether this was the result or not is unknown for the COI report does not comment on this matter), possibly resulting in a situation in which the full range of human rights violations were not reported, and critical information about ethnic slurs and threats issued by the perpetrators during the attacks possibly under-reported and/or not even collected by certain investigators.

As for the directives provided the COI investigators, Bodkin reports that

Because I had never been involved in a UN investigation before I truly didn't know what was going on. We were never instructed to be anywhere at certain times so when briefings did occur, some investigators were there and some were not . . . A few of us took notes during the briefings, but many did not. So, as far as everyone being on the same page about everything, impossible.<sup>38</sup>

According to Bodkin, the briefings did not address the need to collect information about any epithets made by the GOS troops and/or the Janjaweed during their attacks on the black Africans. The collection of such information is, however, critical in helping to establish what the perpetrators' thoughts, purposes, and animus were toward specific groups under attack—all of which could help to establish whether such attacks were being perpetrated against a group as a result of their ethnicity, race, and so on. In regard to the issue of racial epithets, Bodkin commented as follows:

I do not recall anything about the need to collect information regarding racial epithets. But I believe that it definitely should have been. I noted [such information] in a number of my interviews because I realized the importance due to the CIJ [Coalition of International Justice, which organized and carried out the U.S. State Department's ADP in Chad in July and August of 2004] questionnaire. However, I presume many of the investigators did not know to ask a question about such matters.<sup>39</sup>

Bodkin also pointed out that once in the field, each investigator was open to choose who they interviewed and how.<sup>40</sup> That included asking any questions that they thought particularly pertinent, but not asking the same set of questions.

Finally, a problem arose in regard to the background of some of the interpreters the COI hired for the investigation. The UN reportedly hired interpreters from Arab tribes, so the investigators had to convince the victims whom they were interviewing that it was safe for them to speak in front of the interpreters.<sup>41</sup> This matter, alone, could have greatly influenced the information (or lack thereof) collected by the COI investigators. It is very possible that, out of fear of being reported to the GoS authorities, the victims were not as forthcoming about various matters as they might have been had they had more trust that their words would not be used against them at some future point in time. Knowing full well that the victims were being attacked by a government that favored the Arab population and that there was a distinct possibility that some interpreters could be in the pocket of the GoS, it makes no sense at all for the UN to have hired Arabs as interpreters.

### **A Shoddy or Skewed Analysis?**

Since the express purpose of the UN's Commission of Inquiry in Darfur was to ascertain whether or not the government of Sudan had perpetrated genocide against the black Africans of Darfur, this section focuses on the evidence collected by the COI, the analysis of the evidence, and the rationale used in making the determination that crimes against humanity, not genocide, had been perpetrated in Darfur.<sup>42</sup> Under the heading entitled "Have Acts of Genocide Occurred?" the authors of the report state the following:

The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocidal intent appears to be missing, at least as far as the central government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes primarily for the purpose of counter-insurgency warfare.<sup>43</sup>

Prior to addressing the issue of intent, there is a need to address the problematic nature of the following assertion in the above statement: “the crucial element of genocidal intent appears to be missing, *at least as far as the central government authorities are concerned.*”<sup>44</sup> The problem is that the COI was not given the sole task of determining whether or not the GoS committed genocide. It was responsible for investigating “*reports of violations of international humanitarian and human rights law in Darfur by all parties, [and] to determine whether or not acts of genocide have occurred.*”<sup>45</sup> What, then, about the Janjaweed and their actions? Did their actions amount to genocide? The way in which the language is couched, it sounds as if the Commissioners are suggesting that that is a distinct possibility. If the Commissioners believed that the *Janjaweed* were responsible for genocidal actions, if not outright genocide, then that should have been boldly and clearly stated in the report.<sup>46</sup>

Furthermore, if the Janjaweed did commit genocide then the GoS is still culpable because the Janjaweed were recruited, outfitted, and paid by the GOS to help carry out the attacks.<sup>47</sup> This goes directly to the issue of command responsibility.<sup>48</sup>

Concomitantly, since the Janjaweed and GoS worked hand-in-hand in carrying out a vast majority of the attacks, there is no way—without outright lying—that the government can claim it did not know what the Janjaweed were doing throughout 2003 to early 2005. Concomitantly, the GoS cannot—at least not legitimately—blame the attacks on the Janjaweed alone. Not only were the hundreds of attacks largely carried out in the same fashion, but Janjaweed frequently rode on GoS vehicles (Land-Cruisers) during the attacks. So, it must be asked, did the COI purposely avoid accusing the Janjaweed of genocide in order to avoid casting aspersions on the GoS? If so, that constitutes simply one more flaw in the COI’s determination that genocide had not been perpetrated in Darfur.

Now for the issue of intent. Again, the key question is this: Was there the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such? There is no doubt that the issue of intent is, generally, the stickiest issue in determining whether or not genocide has been perpetrated.<sup>49</sup>

Most génocidaires are wily enough not to leave a written or oral record of their intentions. Indeed, most know better than to record their genocidal intentions in formal government records or statements, issue their genocidal directives via written orders, broadcast directives over radio and television (unless they simply do not care and/or are intent on calling on all actors to take part in the killing, as was the case in Rwanda in 1994 when Radio-Television Mille Collines urged all Hutu to kill all Tutsi). But, it is also true that intent can be ascertained from the events unfolding on the ground. For example, the ICC Elements of Crimes states that “existence of intent and knowledge can be inferred from relevant facts and circumstances.”<sup>50</sup>

After asserting that “the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds,” the COI goes on to argue that the main purpose of the GoS was to drive the black Africans from their homes and villages “primarily for purposes of counter-insurgency warfare.”<sup>51</sup> As part and parcel of explaining its determination, the COI report goes into great detail as to what *could* constitute proof of genocidal intent. In doing so, it cites various cases at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). For example, it states that “whenever direct evidence of genocidal intent is lacking, as is mostly the case, this intent can be inferred from many acts and manifestations or factual circumstances.”<sup>52</sup> Furthermore, in the Jelisić case at the ICTY, the appeals chamber noted that

as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.<sup>53</sup>

The report goes on to say,

A number of factors from which intent may be inferred were mentioned in Akayesu 523–4: “the general context of the perpetration of other culpable acts systematically directed against that same group where ... committed by the same offender or by others”; “the scale of atrocities committed”; the “general nature” of the atrocities committed “in a region or a country”; “the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups”; “the general political doctrine which gave rise to the acts”; “the repetition of destructive and discriminatory acts” or “the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundations of the group—acts which are not in themselves covered by the list ... but which are committed as part of the same pattern of conduct, in Musema (166) as well as Kayishema and Ruzindana (93 and 527): “the number of group members affected”; “the physical targeting of the group or their property”; “the use of derogatory language toward members of the targeted group”; “the weapons employed and the extent of bodily injury”; “the methodical way of planning”; “the systematic manner of killing” and the proportionate scale of the actual or attempted destruction of a group.”<sup>54</sup>

A number of these factors were evident during the course of events involving the GoS troops and the Janjaweed in Darfur between 2003 and January 2005, which I outline here:

*1. The perpetration of culpable acts systematically directed against the same group committed by the same offender or by others*

Over and above the systematic bombings and shootings of the black Africans by the perpetrators, the perpetrators committed the following acts time and again in a fairly systematic manner between early 2003 and early 2005: (1) poisoned wells by throwing dead human bodies and/or the carcasses of animals into them, which, in certain areas of Darfur that reach 90 to 130 degrees Fahrenheit, constitutes an effort to deprive the people of a basic source of sustenance; (2) blocked humanitarian aid from entering internally displaced persons camps, thus preventing desperately needed food, water, and medical supplies from reaching those in dire need; and (3) raped an untold number of girls and women.<sup>55</sup>

*2. Scale of atrocities committed*

The estimate of the number of those killed as a result of bombings, shootings, or stabbings and as a result of a lack of water or medical treatment after having been wounded ranged from a low of 120,000 to a high of 400,000.<sup>56</sup> The UN largely settled on the number of 200,000.<sup>57</sup> Since the government of Sudan continually blocked efforts by researchers to enter Darfur, it was (and continues to be) impossible to make an exact determination of the number who perished as a result of the attacks. While the number of black Africans who had been killed by the time of the COI investigation was certainly much, much lower than those who died in the Holocaust, Cambodia, or Rwanda, close to a quarter of a million dead is not insignificant.

*3. The systematic targeting of victims on account of their membership of a particular group*

It is irrefutable that the GOS and the Janjaweed targeted, specifically and solely, the black Africans of Darfur (particularly the Massaleit, Zaghawa, and the Fur). Hundreds upon hundreds of their villages were attacked, looted, and burned to the ground and their crops and orchards were destroyed. Black African villagers reported seeing and hearing attacks on villages miles away, knowing that it was only a matter of time before their own village would be attacked in much the same way (and that is exactly what happened). Month after month throughout 2003, 2004, and early 2005, attacks were carried out on a regular basis against black African villages, while their non-black African neighbors were largely unscathed.<sup>58</sup>

Concomitantly, in one attack after another, black African females (some as young as eight years old) were raped and gang-raped by the Janjaweed and the GoS troops, thus constituting another aspect of “the systematic targeting of victims on account of their membership of a particular group.”

*4. The general political doctrine that gave rise to the acts*

It is well known that the government of Sudan is an adherent of so-called Arab supremacism and supportive of the Arab Gathering. More specifically,

In Darfur, the first signs of an Arab racist ideology emerged in the early 1980s ... Around this time, leaflets and cassette recordings purporting to come from a group calling itself the Arab Gathering began to be distributed anonymously, proclaiming that the *zurga* [a derogatory term equivalent to the word “nigger” that is used by some to debase black Africans] had ruled Darfur long enough and it was time for Arabs to have their turn. The speakers claimed that Arabs constituted a majority in Darfur and should therefore prepare themselves to take over the regional government—by force if necessary ... The notion of Arab superiority had been a feature of northern Sudanese society for centuries, but this was something new. This was militant and inflammatory.<sup>59</sup>

*5. The perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundations of the group [and] which are committed as part of the same pattern of conduct*

Three main acts perpetrated by GoS troops and the Janjaweed are germane to this issue: the mass rape of black African females, the poisoning of the wells, and the effort to block humanitarian goods from reaching those in internally displaced persons camps. Individual rape, mass rape, and other types of sexual violence by GOS forces and the Janjaweed against black African females, both during the attacks on villages and on females venturing outside of IDP camps, were regular occurrences.<sup>60</sup>

Furthermore, a great amount of testimony collected by the ADP, various human rights groups, and the press attest to the fact that comments made by the rapists suggest that the rape was perpetrated, at least in part, as a direct attack on the racial and ethnic identities of the black African females. More specifically, various black African survivors have reported the following:

It happened last August [2004] when we were in our farms outside the village [in West Darfur]. We [three black African women, ages 25, 30, and 40] saw five Arab men who came to us ... [They] told us that we should have sex with them. We said no. So they beat and raped us. After they abused us, they told us that now we would have Arab



babies; and if they would find any Fur woman, they would rape them, [too,] to change the colour of their children.<sup>61</sup> In the town of Mukjara, two men separately described women being brought into a prison where they were being held and raped for hours by *Janjaweed*. They said the assailants said that they were “planting tomatoes”—the reference to skin red” because they are slightly lighter-skinned than ethnic Africans.<sup>62</sup>

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.”<sup>63</sup> 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.”<sup>64</sup>

The perpetrators knew that by raping female black Africans they were creating pariahs who would be shunned by their families and fellow villagers; that young girls and women who were not married would be hard pressed to find husbands as a result of having been defiled; and that any babies born of the rapes would result in “red” or “lighter” babies who would not be considered black African but Arab and that they, too, would be considered pariahs within the larger community.<sup>65</sup>

In discussing the the ostensible reasons or purposes for the perpetration of the mass and gang rapes, the COI concluded: “The patterns appear to indicate that rape and sexual violence have been used by the *Janjaweed* and Government soldiers (or at least with their complicity) as a deliberate strategy with a view to achieve certain objectives including terrorizing the population, ensuring control over the movement of the IDP population and perpetuating its displacement. [Certain cases] demonstrate that rape was used as a means to demoralize and humiliate the population.”<sup>66</sup> It is astonishing that the Commissioners limited the possible purposes of the mass and gang rape of the black African females to the above. More specifically, issuing racial slurs (and threats to make “lighter” and “red babies”) during the mass rape of the black African females, making threats to exterminate all of the black Africans as they raped the black African females, and perpetrating mass rape knowing full well the stigma attached to a female who has been raped in a Muslim society all suggest that the perpetrators did, in fact, have the intent, to destroy, at least in part, a specific group of people.

Furthermore, in all likelihood, girls and women who have been raped by a GoS soldier or a *Janjaweed*, if not a horde of rapists, suffer each and every day of their lives as a result of being raped. Indeed, one has to wonder how they even manage to go on with daily life having both been raped (not once, which is horrific enough, but often gang raped many times over for days and weeks on end) and forced to witness the rape of other girls and women (including their mothers, daughters, sisters, and aunts). The COI, itself, provides information about a victim who was raped “14 times over the period of one week.”<sup>67</sup> If the latter situation (and others like it) is not likely to “caus[e] serious . . . mental harm to members of the group,”<sup>68</sup> then what is?

In regard to the GoS’s response to the mass rape in Darfur, the Commissioners state that “on their part, the [GoS] authorities failed to address the allegations of rape adequately or effectively.”<sup>69</sup> Unfortunately, and ironically, the very same accusation can, and should, be made of the COI. This is true because the Commissioners certainly had to be cognizant of all of the above information (i.e, the racial slurs, the threats to make different color babies, the threats to exterminate the black African people, the stigma attached to rape in such a culture, and the killing of the babies), and at least be somewhat aware of how the trauma of being raped never subsides in a victim’s mind and

heart (e.g., those who suffer rape may relive the horror of the attack[s], which can result in crying jags, a sense of violation that never ends, severe and prolonged depression, the very questioning of the worth of life itself, suicidal thoughts, attempts at suicide, and a fear of being alone and/or around males they do not know).

Tellingly, the International Criminal Tribunal for Rwanda (ICTR) found Jean-Paul Akayesu guilty of genocide for overseeing the rape of Tutsi females during the 1994 Rwandan genocide. More specifically, he was convicted on the following grounds:

The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown . . . The *Interahamwe* who raped Alexia said, as he threw her on the ground and got on top of her, “let us now see what the vagina of a Tutsi woman tastes like.” Akayesu himself, speaking to the *Interahamwe* who were committing the rapes, said to them: “don’t ever ask again what a Tutsi woman tastes like.” *This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.*<sup>70</sup>

By substituting the words “black Africans” or “Massaliet, Zaghawa or Fur” for Tutsi and “Janjaweed” for “*Interahamwe*,” the explanation aptly describes the intent of the rapists in Darfur and the resultant horrors experienced by their female victims.<sup>71</sup>

Ultimately, though, the COI concluded the following:

It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the *Janjaweed* and Government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity . . . It further finds that . . . in some instances the crimes committed in Darfur may amount to the crime of sexual slavery as a crime against humanity. Furthermore, the Commission finds that the fact that rape and others forms of sexual violence were conducted mainly against three “African” tribes is indicative of the discriminatory intent of the perpetrators. The Commission therefore finds that the elements of persecution as a crime against humanity may also be present.<sup>72</sup>

When all is said and done, and as delineated above, both the context (e.g., the racial slurs, the intent to make different color babies, the threats of extermination) and ramifications of the rapes (the potential and severe ostracism faced by those girls and women who have been raped at the hands of the GOS troops and Janjaweed, for example, outright rejection of the victims by family and community members) are largely ignored by the COI. Oddly, the very real possibility of contracting and spreading the AIDS/HIV virus is also ignored. Granted, a final determination by a court as to what all of this constitutes is needed, but the COI’s stance still leads one to wonder if there was a purposeful disregard of such contextual issues and their ramifications—as well as the skirting the fact that, in one way or another, such acts might constitute genocide.

Over and above the mass rape of black African females, there was another attempt by the GoS troops and Janjaweed to destroy the black Africans in whole or in part and that was stealing and destroying most of the essentials black Africans needed for sustaining their lives. The COI report actually comments on this issue:

A particular pattern recorded by the Commission was the fact that the IDPs and refugees interviewed would place great emphasis on the crime of looting, and explain that the *Janjaweed* had taken everything these persons had owned, involving all goods necessary to sustain life in the difficult conditions in Darfur, including pans, cups, and clothes, as well as livestock, representing the key source of income of the affected people.<sup>73</sup>

The COI report goes on to assert that “the Commission found that the majority of cases involving looting were carried out by the *Janjaweed* and in a few cases by the Government forces. Looting was mainly carried out against African tribes and *usually targeted property necessary for the survival and livelihood of these tribes.*”<sup>74</sup> Thus, even the COI readily acknowledges that the survival of the black Africans was left in the balance as a result of such thievery. Such actions seemingly fall under Article 2c of the UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCG): “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” Again, though, the COI does not comment on such actions as they relate or do not relate to the issue of genocide. Rather, the COI calls the actions “war crimes” and asserts that they possibly constitute “a form of persecution as a crime against humanity.”<sup>75</sup> It just does not seem that the concept/crime of genocide was within the worldview of the COI.<sup>76</sup>

### *6. The methodical planning of the attacks and atrocities*

There are numerous indications that the planning by the GoS and *Janjaweed* was methodical. First, time and again, the attacks were generally carried out in the same manner against hundreds of villages all over Darfur.<sup>77</sup> Someone had to plan the flight patterns and arrivals of the Antonovs and helicopter gunships and synchronize the arrival of the Antonovs and gunships with that of the *Janjaweed* on horseback and camels and the GoS and *Janjaweed* on land cruisers. Furthermore, in some cases, villagers reported being tricked into toting all of their worldly goods to a central location purportedly to be taxed only to be attacked by the GoS and *Janjaweed*, which allowed for quick and easy theft of all the black African’s goods. This happened to one village and town after another on designated days.<sup>78</sup> Finally, there is ample evidence that the GoS has whitewashed planes and affixed UN insignias on such planes in order to offload both men and materiel in Darfur. Again, such flights take coordination and planning.

### *7. Systematic manner of killing*

Ample documentation exists that shows the killings took place day after day, week after week, and month after month in the three states of Darfur.<sup>79</sup> Furthermore, a vast majority of the attacks generally followed the same pattern with Antonovs bombing the fields and villages of black Africans early in the morning, which were followed up by hundreds of *Janjaweed* racing into villages on camels and horses and then GoS soldiers (often accompanied by *Janjaweed*) on four wheel vehicles and *dushkas* (four wheel vehicles with mounted automatic weapons). During the initial part of the attacks, men and older boys were often the target of killing while women and girls were often raped. Almost at once, the villages were ransacked and then torched as the black Africans were chased out into the forbidding hinterland. Before leaving the villages, the perpetrators often tossed the carcasses of dead animals and the bodies of dead black Africans into the wells in order to poison the water. In certain cases, black African men were rounded up and killed en masse in various areas such as in Mukjar.<sup>80</sup>

So, those are the hard facts. In light of the hurried nature of the COI investigation, it is natural to wonder about how much time, care and depth of thought went into the analysis of the data collected by the COI team and how much care and thought went into wrestling with what the findings added up to in the end. No one but those who conducted the analysis knows for sure, but this is what Bodkin had to say:

First, there is absolutely no way that there was any sort of consistent body of information submitted to the Commissioners. Also, in my humble opinion, unless they stayed awake 24 hours a day from Jan. 19–31 to read all the reports that we submitted, I do not see how the five Commissioners actually went through all of the information. It angered me so much when I read the report that I can honestly say I have never gotten through it in its entirety. Is HOGWASH a known legal term?<sup>81</sup>

Ultimately, in light of so much evidence that suggests the GoS and the Janjaweed were intent on destroying in whole or in part the black Africans, the major question that remains is: Exactly what sort of policy, evidence, and actions would evince—for the COI Commissioners—a specific intent to destroy, in whole or in part, a group distinguished on racial, ethnic, national, or religious grounds? More deaths? More racial and ethnic slurs? More wells poisoned? More humanitarian goods stolen or prevented from reaching those who are destitute, dying, and internally displaced? A smoking gun? The COI does not say.

### **The COI's Skewed Rationale for Not Coming to a Determination of Genocide**

In a section entitled “Do the Crimes Perpetrated in Darfur Constitute Acts of Genocide,” the COI report provides a rationale for its determination that the GOS troops and Janjaweed had not committed genocide. It opens with the following:

*There is no doubt that some of the objective elements of genocide materialized in Darfur. . . . The Commission has collected substantial and reliable materials 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).<sup>82</sup>*

However, it then goes on to assert the following:

*Some elements emerging from the facts including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show the lack of genocidal intent.<sup>83</sup>*

Ironically, while the evidence produced by the COI indicating genocidal intent is strong and convincing, the “evidence” it produces to question genocidal intent verges on the absurd. More specifically, the COI notes and argues: “[It is a] fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men . . .”<sup>84</sup> This line of thinking makes it seem as if the COI is totally ignorant of the UNCG definition of genocide and its wording, which states: “In the present Convention, genocide means *any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.*”<sup>85</sup> No genocide in modern times has resulted in exterminating the whole population—not the Armenian genocide, not the Holocaust, not the Cambodian genocide, not the Rwandan genocide. The COI also infers that the only individuals targeted for death were rebels or potential rebels, but there is ample evidence that everyone from infants to 100-plus-year-old men (and everyone in

between—girls, women, young boys) were killed; and individuals who were black Africans were targeted and killed as well.<sup>86</sup>

Continuing its argument, the COI next provides what it perceives as an example of the GoS's lack of intent to commit genocide against a group (in this case an ethnic group) protected under the UNCG. More specifically, it cites an attack in January 2004 in which the perpetrators rounded up all those black Africans who had survived the attack and not escaped into the mountains and desert. Scanning a list with numerous names, the perpetrators selected fifteen individuals, including seven *omdas*,<sup>87</sup> and killed them outright. Later, the perpetrators killed another 205 villagers who they asserted were rebels. Reportedly, they allowed some 800 others to remain alive. Subsequently, the COI argues that "[t]his case clearly shows that the intent of the attack was not to destroy an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population."<sup>88</sup> This line of thinking is faulty on several counts. First, the COI seems to take at face value the assertion by the GoS that those who were murdered were rebels. Time and again, the GoS has shown its true colors by lying to the international community, its own people, representatives of different states, and the press, among others. It has, for example, repeatedly denied its responsibility for the ongoing crisis in Darfur,<sup>89</sup> denied that it carried out ethnic cleansing or atrocities approaching extermination,<sup>90</sup> and denied that it backs the Arab militias.<sup>91</sup> It has also repeatedly and drastically minimized the number of dead in Darfur. So, why anyone, let alone an investigatory group attempting to ascertain whether the GoS had perpetrated genocide or not, would rely on assertions by GoS personnel is baffling.

Furthermore, as Fowler cogently argues, "The Commission's reference to the fact that the perpetrators did not 'exterminat[e] the whole population' is puzzling . . . The Commission itself had explained 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 or individuals' or 'a substantial part . . .'<sup>92</sup> The Commission failed to offer any reason why two hundred twenty-seven out of twelve hundred [actually, it was out of just over 1,000] 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."<sup>93</sup>

Fowler also addresses the COI's assertion that the GOS's primary objective was to kill rebels and force those who were suspected of harboring rebels out of the area:

[T]he Commission . . . distinguished[ed] between "the intent to destroy an ethnic group as such" and "the intention to murder all those men they considered to be rebels . . .," [y]et, on just the previous page, the Commission had included a number of quotes in which the perpetrators used ethnic identity, racial epithets, and terms like *Torabora* (slang for rebels) interchangeably. The whole point of the government's campaign against the civilian population of the the 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 Government's apparent definition, one and the same.<sup>94</sup>

According to the COI, the second element that demonstrates the GOS's lack of genocidal intent was that after the black Africans' villages were destroyed the black African survivors were "collected in IDP camps": "In other words, the population surviving attacks on villages are not killed outright, so as to eradicate the group; they are

rather forced to abandon their homes and live together in areas selected by the Government.”<sup>95</sup> There are numerous problems with this line of thinking as well. First, many of the black Africans ended up in makeshift camps in barren desert that they “selected” and erected. Second, hundreds of thousands of black Africans, out of sheer fear, fled to Chad. Third, if the the COI had existed between 1915 and 1919, would it have argued that the Ottoman Turks had not committed genocide due to the fact that “the [Armenian] population surviving attacks . . . [were] not killed outright, so as to eradicate the group; [rather, they were] forced to abandon their homes and live together in areas (e.g., the vast wasteland of Deir et Zor) selected by the Government”? Or, in the case of the deportation of the Jews to ghettos, concentration camps, and death camps, would the COI have offered the same argument about the tens of thousands of Jewish survivors who ended up in displaced persons camps at the end of World War II? As Fowler argues: “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 are not murdered outright. And the Commission offers no rationale why this element would be more indicative of intent than the scale and systematic nature of direct violence.”<sup>96</sup>

Eric Reeves, a scholar at Smith College in Northampton, Massachusetts, who has written extensively on the crisis in Darfur, is also highly critical of the COI’s assertion about the internally displaced:

This is an incomplete, finally deeply inaccurate characterization of the realities of internal displacement in Darfur (and into Chad). First, . . . mortality is exceedingly high following violent displacement . . . Of note here is a singularly important study of traumatic and early post-traumatic mortality resulting from violent displacement, published in *The Lancet* by authors from Doctors Without Borders/Medecins Sans Frontieres and others<sup>97</sup> . . . Secondly, a very large percentage of the displaced population . . . have been forced to flee into inaccessible rural areas presently beyond the reach of any humanitarian relief efforts. They are dying in great numbers . . . Moreover, to claim that “Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance” is a shocking distortion of the truth, if we look back as far as November/December 2003 (certainly a period of time within the purview of the Commission’s investigation). At the time, Tom Vraalsen, UN special envoy for humanitarian affairs in Sudan, declared in a memo to the UN humanitarian coordinator for Sudan (Mukesh Kapila) that Khartoum was “systematically” denying access to areas in which non-Arab/African tribal populations were concentrated.<sup>98</sup>

Continuing its argument that the establishment of the IDP camps was proof that the GoS did not intend to commit genocide, the COI claims, “This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong.”<sup>99</sup> Once again, the COI seems to believe that determination of genocide can only be made when it involves the total eradication of the group or, as it says, its extinction. The aforementioned statement by the COI blatantly disregards the fact that many thousands of internally displaced peoples were bereft when it came to food, water, shelter, and medicine. It also blatantly ignores the fact that the GoS repeatedly and aggressively interfered with the work of humanitarian groups, including the creation of administrative delays; harassing, threatening and intimidating humanitarian personnel; arresting humanitarian personnel;<sup>100</sup> and blocking entrance to camps thus preventing humanitarian aid from reaching the refugees.<sup>101</sup>

Finally, the COI report relates an incident in which the Janjaweed attacked a village and shot and killed a man who resisted their attempt to steal his camel but didn't kill the man's brother during their theft of his 200 camels. Based on this single instance involving two black Africans, the COI authors wildly and absurdly surmise the following: "Clearly, 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. Irrespective of the motive, had the attackers' intent been to annihilate the group, they would not have spared one of the brothers."<sup>102</sup> The use of an example involving two men out of literally millions affected by the attacks is not only ludicrous but irresponsible. Indeed, this argument by the COI exemplifies the shoddy thinking inherent in its ultimate determination.<sup>103</sup>

### What Standard of Evidence Was Needed for a COI Finding of Genocide?

In an attempt to explain its final determination that the GoS and the Janjaweed perpetrated crimes against humanity but not genocide, the COI asserted, "Courts and other bodies charged with establishing whether genocide has occurred must be very careful in the determination of subjective intent . . . Convictions for genocide can be entered only where intent has been unequivocally established."<sup>104</sup> Fowler, who is a Stanford University educated lawyer, raises an important issue that calls into question, once again, the logic used by the authors of the COI report:

[T]his standard [beyond a reasonable doubt] 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 only called upon 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 stage 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" (Art. 51.1). Having conducted an investigation, the Prosecutor may seek an arrest warrant if he/she can establish "*reasonable grounds to believe* that the person has committed a crime within the jurisdiction of the Court" (Art. 58). The Court next is 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" (Art. 61) [emphasis added]. Finally, at trial, an individual can only be convicted if the Court is "convinced of the guilt of the accused beyond *reasonable doubt*" (Art. 66.3) [emphasis in original].

Between "no reasonable basis to proceed" and beyond reasonable doubt" lies a continuum in 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* [emphasis added]. 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 as well as the continued commission 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.<sup>105</sup>

It is hard to believe that Cassesse and his team, along with the bevy of lawyers that could have provided advice to the Commission, were not cognizant of the various points that Fowler makes. If they were, then why did they settle on the “beyond a reasonable doubt” argument? Was it a case of planned subterfuge? If they weren’t cognizant of the various points Fowler makes then that calls into question their very level of expertise, which subsequently calls into question the validity of their analysis of the data collected by their investigators.

## Conclusion

Following its determination that the atrocities committed by the GoS and the Janjaweed amounted to crimes against humanity but not genocide, the COI recommended that the UN Security Council refer the crisis in Darfur to the International Criminal Court (ICC). Subsequently, on 31 March 2005, the Security Council, in a vote of 11–0, referred the matter to the ICC. Four countries abstained from voting, including China and the United States. It was the first time the Security Council had, as a result of a vote, referred a matter to the ICC. The ICC then began its own investigation into the Darfur crisis. On 14 July 2008, the ICC filed charges against President Omar al-Bashir for having perpetrated crimes against humanity and genocide. Subsequently, Bashir asserted that the ICC did not have the jurisdiction to charge him, decried the charges as “sheer lies,” and swore that he would not allow himself to be tried by the ICC. Time will tell.

## Notes

1. US Department of State, *Documenting Atrocities in Darfur* (Washington, DC: Bureau of Democracy, Human Rights and Labor and Bureau of Intelligence and Research, 2004), 4.
2. *Ibid.*
3. *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](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) (accessed 15 October 2009), Executive Summary, 2 (emphasis added) [UNCOI Report].
4. *Ibid.*, 13.
5. *Ibid.*, 2.
6. *Ibid.*, 3 (emphasis added).
7. *Ibid.*, para. 236.
8. *Ibid.*, para. 303.
9. *Ibid.*, para. 310.
10. *Ibid.*, para. 243.
11. *Ibid.*, para. 293.
12. *Ibid.*, para. 242.
13. *Ibid.*, para. 333.
14. *Ibid.*, para. 311 (emphasis added).
15. *Ibid.*, para. 385 (emphasis added).
16. *Ibid.*, para. 393 (emphasis added).
17. *Ibid.*, para. 272.
18. *Ibid.*, para. 275.
19. *Ibid.*, para. 269.
20. See Jerry Fowler, “A New Chapter of Irony: The Legal Definition of Genocide and the Implication of Powell’s Determination,” in *Genocide in Darfur: Investigating Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen, 127–39 (New York: Routledge, 2006); Gregory Stanton, “Proving Genocide in Darfur: The Atrocities Documentation Project and Resistance to Its Findings,” in *Genocide in Darfur: Investigating Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen, 181–88 (New York: Routledge, 2006);



- Physicians for Human Rights, *Darfur—An Assault on Survival: A Call for Security, Justice, and Restitution* (Cambridge, MA: Physicians for Human Rights, 2006); John Prendergast, “Acting to End Genocide in Darfur,” US House Foreign Affairs Committee (19 April 2007), [http://www.americanprogress.org/issues/2007/04/prendergast\\_testimony](http://www.americanprogress.org/issues/2007/04/prendergast_testimony) (accessed February 2008); John Prendergast, “So How Come We Haven’t Stopped It?” *The Washington Post*, 19 November 2006, <http://home/index.cfm?id=4516&l=1> (accessed February 2008); Eric Reeves, “Report of the International Commission of Inquiry on Darfur: A Critical Analysis,” Parts I and II (2 and 6 February 2005), <http://www.sudanreeves.org> (accessed February 2008); Mika Vehnamaki, “Darfur Scorched: Looming Genocide in Western Sudan,” *Journal of Genocide Research* 8 (2006): 51–82. Certainly not all human-rights activists and scholars question the findings of the COI. Among those who agree with its findings to one degree or another are Jimmy Carter, quoted in Tony Romm, “Carter Says Darfur Not Genocide,” *Eagle: American University’s Independent Student Voice*, 25 October 2007, <http://www.theeagleonline.com/news/2007/10/25/News/Carter.Says.Darfur.Not.Genocide-3055112.shtml> (accessed June 2008); Michael Clough, “It’s Hell in Darfur, But Is It Genocide?” *Los Angeles Times*, 14 May 2006, <http://articles.latimes.com/2006/may/14/opinion/op-clough14> (accessed June 2008); Alex de Waal, “ICC, Making Sense of Darfur: Moreno Ocampo’s Coup de Theatre,” SSRC Blogs, 29 July 2008, <http://www.ssrc.org/blogs/darfur/2008/07/29/moreno-ocampoc-coup-de-theatre> (accessed July 2009); Gérard Prunier, *Darfur: The Ambiguous Genocide* (Ithaca, NY: Cornell University Press, 2005); and William Schabas, “Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide,” in *The Criminal Law of Genocide*, ed. Ralph Henham and Paul Behrens, 39–48 (London: Ashgate, 2007).
21. UNCOI Report, Executive Summary, 4. The definition of genocide has two key parts: *actus reus* (specific physical acts) and *mens rea* (a particular mental state). Without the particular state of mind behind the acts (that is, the actual intent to destroy in whole or in part a specific group protected by the UNCG) then the physical acts do not and cannot amount to genocide. According to the COI, what was not evident was the intent by the GOS to destroy in whole or in part the black Africans as a group.
  22. Nadim Hasbani, “About the Arab Stance Vis-à-vis Darfur,” *Al-Hayat*, 21 March 2007, <http://www.crisisgroup.org/home/index.cfm%3Fid%3D4722> (accessed April 2008); Eric Reeves, “Egypt and Darfur: Cruel Intentions,” *The New Republic* (online), 4 April 2006, <http://www.sudanreeves.org/Sections-article546-p1.html> (accessed April 2008).
  23. Reeves, “Egypt and Darfur,” 1.
  24. Deb Bodkin, e-mail to author, 15 April 2006. In the same e-mail to the author, Bodkin also noted, “The female Commissioner [Ms. Hina Jilani from Pakistan] told the investigators: ‘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 openly-mindedly.” Note: The author sent queries to other investigators on the COI team, but none provided responses.
  25. UNCOI Report, para. 18 (original emphasis).
  26. *Ibid.*
  27. In regard to the issue of the amount of time allocated for the investigation, Bodkin commented as follows:

Besides all the other weaknesses in the investigation (the two big ones being no consistency in how interviews were conducted and no consistency in the expertise of the chosen investigators doing the interviews), the biggest problem was definitely the unreasonable time limit. I have never understood why such a short time frame would be allotted to such an incredibly important investigation. It boggled [my mind] when we all were given a week off at Christmas and flown back to Geneva. In my opinion it was a waste of valuable time and money and we should have stayed [in the field] working. Also, we were told by our drivers, interpreters, etc. that it was known by everyone that the killing would accelerate during the Christmas break as the Government knew we [the COI investigators] were going to be out of the country.

The killing had been going on for two years so why were we given less than three months to look into it I will never understand. When you look at the goals of the investigation and the reality that we would need physical evidence to back verbal evidence, it is blatantly obvious that it could not be successfully completed in that time frame.

When you take into account the days we were stuck in Geneva because the GoS wouldn't issue our visas, about four days in total in Khartoum, the Christmas break, the first day on the ground where we spent the entire day putting our truck together instead of interviewing, etc. . . . the real investigative days according to my notebooks totaled 33 days—days during which we were actually on the ground doing interviews!!! That is an absurd time frame to supposedly be able to figure out what was going on across the entire area of Darfur.

Debb Bodkin, e-mail to the author, 11 May 2008 (original emphases).

28. In October 2006, the London-based Minority Rights Group International issued a report that asserted that the United Nations' authorities were warned of ethnic tensions in Darfur as early as 2001 but chose to ignore the facts:

As early as 2001, the UN Commission on Human Rights' Special Rapporteur for Human Rights in Sudan began paying particular attention to Darfur, visiting the region in early 2002. His August 2002 report highlighted the violence in Darfur and noted Masalit claims that "the depopulation of villages, displacement and changes in land ownership are allegedly part of a government strategy to alter the demography of the region." Despite his concerns, the 2003 Commission on Human Rights removed Sudan from its watch-list and ended the mandate of the Special Rapporteur.

Sharath Srinivasan, *Minority Rights, Early Warning, and Conflict Prevention: Lessons from Darfur* (London: Minority Rights Group International, 2006) 6.

29. Evelyn Depoortere, Francesco Checchi, France Broillet, et al., "Violence and Mortality in West Darfur, Sudan (2003–04): Epidemiological Evidence from Four Surveys," *Lancet* 364 (2004): 1315–20; and US Department of State, *Documenting Atrocities in Darfur* (Washington, DC: Bureau of Democracy, Human Rights and Labor and Bureau of Intelligence and Research, 2004).
30. Samuel Totten, "Talk, Talk and More Talk: The International Community and Darfur," in *The World and Darfur: International Response to Crimes Against Humanity in Western Sudan*, ed. Amanda F. Grzyb, 554–607 (Montreal: McGill-Queen's University Press, 2009).
31. Ibid.
32. It is unclear what the authors mean here: do they mean simply a somewhat larger number was needed, or are they suggesting that a massive number of personnel would have been needed to carry out the investigation in a thorough, systematic and, ultimately, professional manner?
33. UNCOI Report, 13.
34. The International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (New York: United Nations, 2004).
35. In the UNCOI report the authors comment that even though the budget did not allow for more than thirteen experts/investigators, "[n]evertheless the Commission was able to gather a reliable and consistent body of material with respect to both the violations that occurred and those persons who might be suspected of bearing criminal responsibility for their perpetration" (para. 19). When asked if she thought that the small number of experts was adequate to carrying out a solid investigation or whether it was an impediment to the effort, Deb Bodkin first commented on the issue of the budget and then the number and use (actually, lack of use) of the expertise on the team:

The budget could have been better handled if we [had] stayed in Darfur for the entire investigation. I would love to know how much of that budget was eaten up flying us all back to Geneva for Christmas break. If it was felt the investigation could not go on during Christmas then why was this time frame chosen?

[Over and above that,] the thirteen experts were not even used in the fields of their own expertise. The analysts never did any analyzing of the information, they interviewed. The closest the forensic experts got to using their expertise was taking some photographs, otherwise they were trying to do interviews in their very broken English.

Debb Bodkin, e-mail to the author, 10 April 2008.

36. Deb Bodkin, e-mail to the author, 15 April 2008.
37. When asked by the author if she had any inkling as to why the COI investigators were not provided with a questionnaire and expected to use one set of questions, Bodkin replied: "There was never any sort of discussion about us using a questionnaire. There was never any discussion at all about how the interviews were to be conducted. We were just told to conduct interviews . . . and I am pretty certain that due to the variety of different vocations of those who were suddenly becoming investigators and interviewers—military analysts, forensics experts, etc.—that the format varied for each of us." E-mail to the author, 10 April 2008.
38. *Ibid.* It is significant to note that while the briefings were not all that formal and attendance at them was not mandatory, many key issues germane to the investigation were addressed (see below). Still, that still does not excuse the fact that the (1) investigators were not formally and thoroughly prepared to conduct interviews, and (2) that the investigators were not provided with and required to ask the same set of questions. In the same e-mail (10 April 2008), Bodkin reported that the following information was addressed in a briefing:

During this briefing, we were told the four goals of the investigation which were: 1. Investigate reports of serious violations of human rights (we were to try to determine the truthfulness of the responses and make our own findings through facts); 2. Decide whether or not genocide had been perpetrated; 3. Identify perpetrators; and 4. Propose to the UN Security Council possible solutions.

Some of the other comments I noted from a briefing with three of the Commissioners, including Antonio Cassese, were: "HAC men were Government spies; identify perpetrators through detailed questions—a consistent body of elements must exist in order to identify someone as a perpetrator; target two levels of perpetrators (those who killed and raped and those who were in command of ordering the actions); there is no doubt about the displacement, just must prove it was forced; determine rebel involvement, any attacks related to a village's support of rebels; rape is a crime that happened in the context of a larger attack, best to investigate it in that realm [Bodkin's Note: I am not sure what this meant]; be cautious about built-up stories; question military about use of helicopters, Antonovs, as often there are conflicting stories; prioritize, follow-up on investigations that appear to be solveable; note evidence of bombardment; interview airport personnel about schedules of aircrafts; follow-up claims of mass executions and mass graves; also investigate crimes committed by rebels; Categories of Crimes: 1. Indiscriminate acts on villages; 2. Execution/extermination; 3. Rape; 4. Forced expulsion; 5. Looting; 6. Torture; Protection of witnesses—revisit them to ensure they are not harmed after interview [Bodkin's Note: yeah right . . . we barely had time to interview . . . we did check on a few when possible]; SLA and rebel-controlled areas are possibly better and willing to show us evidence and bodies; check on wells when we see them.

With respect to the background, expertise, and abilities of the investigators/interviewers on the COI team, Bodkin made the following observation: "I know that the forensic experts were extremely upset that they were not there to use their expertise, i.e., exhume bodies, etc. and were expected to conduct interviews. Their first [primary] language was Spanish and their English was broken. So they had an extremely difficult time conducting interviews because they did not know the meaning of some of the English words that the translators would use when translating from Arabic" (*ibid.*).

39. *Ibid.* Even assuming, hypothetically, that the issue of racial epithets was addressed in the initial briefing and Bodkin neglected to include such in her notes, it drives home the point that the COI would have been wise to have developed a set of questions that each and every investigator was expected to ask in order to ensure some sort of consistency vis-à-vis the data collection.
40. Bodkin, e-mail to the author, 15 April 2006.
41. Bodkin, e-mail to the author, 10 April 2008.
42. Very little information is contained in the COI report regarding the process of analysis of the data collected by the COI team.
43. UNCOI Report, para. 640 (emphasis added).
44. *Ibid.*, Executive Summary, 4 (emphasis added).
45. *Ibid.*, 2 (emphasis added).

46. Broaching this issue should not be construed as suggesting that the GoS, itself, did not perpetrate genocide.
47. The GoS even went as far as recruiting Janjaweed to serve in the regional police force, which carried out government orders, including attacks on the villages of black Africans. Human Rights Watch, "Sudan: Janjaweed Camps Still Active" August 27, 2004, <http://www.hrw.org/english/docs/2004/08/27/darfur9268.htm> (accessed February 2008).
48. See, e.g., *Prosecutor v. Delalić et al.*, Judgment, ICTY-96-21-T (16 November 1998).
49. Genocidaires know that and they use it to their advantage. A classic example is that of a Paraguayan minister of defense who, when the charge of genocide of the Ache was leveled against Paraguay at the United Nations, said, "Although there are victims and victimizer there is not the third element necessary to establish the crime of genocide—the 'intent.'" Quoted in Leo Kuper, *The Prevention of Genocide* (New Haven, CT: Yale University Press, 1985), 12.
50. UNCOI, para. 18; see International Criminal Court, Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000), <http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html> (accessed 15 October 2009).
51. UNCOI Report, para. 640.
52. *Ibid.*, para. 502.
53. Quoted *ibid.*, 128.
54. *Ibid.*, 128, n. 185.
55. Human Rights Watch, "Sudanese Government Obstruction of Humanitarian" (2006), <http://www.hrw.org/backgroundunder/africa/sudan0506/5.htm> 2006 (accessed February 2008); Eric Reeves, "By Blocking Humanitarian Access, Sudanese Governments Acts to Eliminate Darfur's Population," *Sudan Tribune*, 7 March 2004, <http://www.sudantribune.com/spip.php%3Farticle203> (accessed February 2008); Eric Reeves, "Darfur Mortality Assessment: A Global Analysis of Death from Violence, Malnutrition, and Disease," Sudanreeves (2004), <http://www.sudanreeves> (accessed March 2008); US Department of State, *Documenting Atrocities in Darfur*; UNCOI Report.
56. Julian Borger, "Darfur by Numbers," *Guardian.Co.UK*, 4 September 2007, 1, <http://www.guardian.co.uk/world/2007/sep/04/diplomaticdispatch.julianborger> (accessed March 2008); J. Hagan, and A. Palloni, "Death in Darfur," *Science* 313 (2006): 1578–79; Reeves, "Darfur Mortality Assessment," 1; Jeffrey Gettleman, "Toll of Darfur Underreported, Study Declares," *The New York Times*, 15 September 2006, 1, <http://www.nytimes.com/2006/09/15/world/africa/15darfur.html%3Ffta%3D> (accessed March 2008).
57. In October 2004, based on data collected in refugee camps in Darfur, the World Health Organization (WHO) estimated that 10,000 people had died among the refugees each month between the end of 2003 and October 2004. Those deaths were mainly related to malnutrition and illnesses as the victims fled in the hinterland seeking sanctuary. By March 2005, WHO estimated the number of dead had reached 200,000. Based on the latter findings, the United Nations frequently used the number 200,000 as the estimated number of deaths, as did a vast majority of the newspapers across the globe. In contrast, the US State Department's Atrocities Documentation Study estimated that nearly 200,000 were dead from violent attacks alone. US State Department, *Documenting Atrocities in Darfur*.
58. This point is directly applicable to two other criteria cited by the COI: "the physical targeting of the group or their property" and "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups."
59. Julie Flint and Alex de Waal *Darfur: A Short History of a Long War* (London: Zed Books, 2007), 51.
60. Kelly Askin "Prosecuting Gender Crimes Committed in Darfur: Holding Leaders Accountable for Sexual Violence," in *Genocide in Darfur: Investigating Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen, 141–60 (New York: Routledge, 2006), 142.
61. Testimony quoted in Médecins sans Frontières [MSF], *The Crushing Burden of Rape: Sexual Violence in Darfur. A Briefing Paper by Médecins sans Frontières* (Amsterdam:

- MSF, 8 March 2005), <http://www.doctorswithoutborders.org/publications/reports/2005/sudan03.pdf> (accessed February 2008), 1.
62. Alfred de Montesquiou, "Darfur Women Describe Gang-Rape Horror," *Washington Post*, 28 May 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/27/AR2007052700634.html> (accessed February 2008).
63. Quoted in Askin, "Prosecuting Gender Crimes Committed in Darfur," 147.
64. *Ibid.*
65. The thinking (reasoning) behind such rejection is cultural and it is ingrained in every member of the society. In various societies, such as that of the Muslim world of the black Africans of Darfur, the rape of a female family member brings great shame and dishonour to the family. When females who have been raped are forced from their homes and villages by their families, it makes their survival, and that of their child, if they bear a child as a result of the rape, just that much more difficult. If they are married, they are frequently rejected by their husbands and often scorned by their fellow villagers. If they are single, they are deemed unmarriageable.
66. UNCOI Report, para. 94.
67. *Ibid.*, para. 345. It is important to note that once the black Africans were forced from their villages and began living in IDP camps, the rapes did not stop. As the females went out to forage for wood (which is needed to cook meals), the Janjaweed and some GoS troops attacked them and raped them. The females had no choice but to forage for the wood because the black African males feared they would be killed should they be caught outside of the confines of the IDP camps. Tellingly, the COI report notes that "*the impact of the violence [rape and other forms of sexual abuse] is exacerbated by the fact that women and their families depended on the collection of firewood for their livelihood and survival* (91; emphasis added).
68. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, <http://www2.ohchr.org/english/law/genocide.htm> (accessed 29 September 2009), art. 2b [UNCG].
69. UNCOI Report, para. 336.
70. *Ibid.*, para. 732 (emphasis added).
71. For important insights on how rape can affect a group and how this relates to the group becoming potentially genocidal, see Siobhan K. Fisher, "Occupation of the Womb: Forced Impregnation as Genocide," *Duke Law Journal* 46 (1996): 91–133; Nicole Hallett. "The Evolution of Gender Crimes in International Law," in *Plight and Fate of Females During and Following Genocide*, ed. Samuel Totten (New Brunswick, NJ: Transaction Publishers, 2009), 183–203; Catharine A. MacKinnon, "Rape, Genocide and Women's Human Rights," *Harvard Women's Law Journal* 17 (1994): 5–16; Catharine A. MacKinnon, "Genocide's Sexuality," in *Political Exclusion and Domination*, ed. Melissa Williams, and Stephen Macedo (New York: New York University Press, 2004), 313–56; Valerie Oosterveld, "Prosecution of Gender-Based Acts of Genocide under International Law," *Plight and Fate of Women During and Following Genocide*, ed. Samuel Totten (New Brunswick, NJ: Transaction Publishers, 2009), 205–18; Frances Pilch, "Rape as Genocide," *Plight and Fate of Women During and Following Genocide*, ed. Samuel Totten (New Brunswick, NJ, 2009), 169–82; Noelle N.R. Qunivet, *Sexual Offences in Armed Conflict and International Law* (Ardsley, NY: Transnational Publishers, 2005); C. Schiessel, "An Element of Genocide: Rape, Total War, and International Law in the Twentieth Century," *Journal of Genocide Research* 4 (2002): 197–210.
72. UNCOI Report, para. 360.
73. *Ibid.*, para. 385 (emphasis added).
74. *Ibid.*, para. 389 (emphasis added).
75. *Ibid.*, paras. 391, 393.
76. Again, even if the Janjaweed were primarily responsible for the looting, the fact remains that attacks in 2004 and early 2005 were carried out in concert by the Janjaweed and

GoS troops. Thus, even when GoS troops were not themselves engaged in the looting, they were still culpable for such actions in that they were either purposely “looking the other” way as the Janjaweed carried out their banditry or, more likely, provided the Janjaweed with its (the military’s) imprimatur. In fact, the COI report more or less says as much: “. . . it would appear that the looting carried out mainly by the *Janjaweed* in the context of attacks against villages has been conducted on a large scale and has been condoned by the Government of the Sudan through the propagation of a culture of impunity and the direct support of the Janjaweed” (Ibid., para. 392).

77. US State Department, *Documenting Atrocities in Darfur*.
78. Reported to Totten by interviewees during the US ADT investigation, 2004.
79. UNCOI Report; US State Department, *Documenting Atrocities in Darfur*; Totten, “Talk, Talk and More Talk.”
80. Totten, *ibid.*
81. When asked to rate—using a scale of one to five (one being poor, five being outstanding) how she would rate the overall efficiency, thoroughness and professionalism of the COI investigation, Bodkin replied as follows:

If I compare it to any police investigation I have been involved in and the investigation by CIJ [the Coalition for International Justice, which organized and implemented the US State Department’s Atrocities Documentation Project’s investigation in Chad in July and August 2004], it definitely ranks a 1. Being new to the United Nations way of doing things, I may have had a very naive and unreasonable expectation of how organized an investigation I expected given the organization. But, I can honestly say I found it to be the most unorganized and unfocused investigation I have ever been involved in during my 20 years of policing. Now, again, that might be partially because I was out of my realm of knowledge in regards to genocide and the scope of things required to prove it, but just on the surface it was clear that each of us were doing things in whatever way we thought would work, not in a uniformed, directed manner as it should have been. Couple the lack directions for conducting the interviews with the frustration of initially arriving [in Darfur] and not having translators (had my partner not been fluent in Arabic we would have spent the first two days doing nothing) and, then, the UN having hired translators who were from Arab tribes thus resulting in our having to convince victims they were safe to talk in front of them, the UN forgetting to ship computers for us so we had to start out by spending time finding a market and buying pens and school notebooks to write in, the computers arriving with uncharged batteries in a town that had hydro only occasionally so it took two days to charge them enough to use them . . . etc, etc., it was a mess. There was no portion of the entire investigation which I would say was well thought out. The lead investigator, John Ralston, I believe, tried very hard to put things together as best as possible but he was trying to do that at the same time he was trying to conduct interviews of political officials so I believe it was impossible for him to do that and try and direct the twelve interviewers stationed in three different villages.

Debb Bodkin, e-mail to the author, 11 May 2008.

82. UNCOI Report, para. 507 (emphasis added). Speaking of the discussion that Pierre Richard Prosper, US Ambassador for War Crimes, had with Colin Powell, US Secretary of State, regarding the analysis of the data collected by the ADP, Kostas reported: “Powell and Prosper examined how the [Sudanese] 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.” Stephen A. Kostas, “Making the Determination of Genocide in Darfur,” in *Genocide in Darfur: Investigating Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen (New York: Routledge, 2006), 122.
83. UNCOI Report, para. 513 (emphasis added).
84. *Ibid.*
85. UNCG, art. 2.

86. Physicians for Human Rights, *Darfur—An Assault on Survival*; US Department of State, *Documenting Atrocities in Darfur*; World Health Organization, “Survey Concludes Deaths in Darfur Exceed the Emergency Threshold” (Switzerland: WHO, 2004).
87. Omdas, who are one step above sheiks, are administrative chiefs. An omda may have up to fifty or more sheiks under his control.
88. UNCOI Report, para. 514.
89. Gail Smith, “The Darfur Catastrophe,” Center for American Progress, 30 May 2004, <http://www.americanprogress.org/issues/2004/05/b84769.html> (accessed February 2008).
90. “Sudan Denies Atrocities in Darfur,” *BBC News* (25 April 2004), <http://news.bbc.co.uk/1/hi/world/africa/3656693.stm> (accessed 15 October 2009).
91. Human Rights Watch, “Darfur Documents Confirm Government Policy of Militia Support” (HRW Briefing Paper, 20 July 2004), <http://www.hrw.org/english/docs/2004/07/19/darfur9096.htm> (accessed February 2008), 1.
92. UNCOI Report, para. 492.
93. Fowler, “A New Chapter of Irony,” 133.
94. *Ibid.*
95. UNCOI Report, para. 515.
96. Fowler, “A New Chapter of Irony,” 133.
97. Depoortere, Checchi, Broillet, et al., “Violence and Mortality in West Darfur, Sudan (2003–04).”
98. Reeves, “Report of the International Commission of Inquiry on Darfur,” 5, 6.
99. UNCOI Report, para. 515.
100. Human Rights Watch, “Sudanese Government Obstruction of Humanitarian Access” (Background Briefing, 2006), <http://www.hrw.org/backgrounder/africa/sudan0506/5.htm> (accessed February 2008).
101. Refugees International, “Humanitarian Access to Darfur Limited, Despite Sudan’s Claims” (13 February 2004), <http://www.globalpolicy.org/ngos/aid/2004/0213darfur.htm> (accessed February 2008); Reeves, “By Blocking Humanitarian Access, Sudanese Governments Acts to Eliminate Darfur’s Population.” Kostas, “Making the Determination of Genocide in Darfur,” reports the following: “Prosper recalls the group examining the concepts of unlawful killing, causing of serious bodily and mental harm, and ‘the real one that got us . . . was the deliberate infliction of conditions of life calculated to destroy the group in whole or in part.’ Looking at 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.’ The GOS 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” (121–22).
102. UNCOI Report, para. 517.
103. In regard to this example by the COI, Eric Reeves trenchantly asks and then asserts the following: “Does momentary and singular ‘mercy’ have anything to do with the vast patterns of human destruction that define the crime of genocide? There were of course examples of momentary or individual mercies in the Nazi death camps; this does not make them any less sites of genocidal destruction.” Reeves, “Report of the International Commission of Inquiry on Darfur,” 8.
104. UNCOI Report, para. 503.
105. Fowler, “A New Chapter of Irony,” 135–36.

---

## Book Review

Alex de Waal, ed., *War in Darfur and the Search for Peace*.  
Cambridge, MA: Global Equity Initiative, Harvard University Press,  
2007. Pp. 431, paper. \$24.95 US.

Reviewed by John H. Weiss, *Department of History, Cornell University, Ithaca, NY*

---

*War in Darfur and the Search for Peace*, edited by Alex de Waal, offers an enlightening tour of the contested intellectual terrain encountered by those who have concerned themselves with the fate of Sudan's westernmost region since the escalation of the conflict there at the beginning of the twenty-first century. The fact that one is contributing to a journal dedicated to preventing the radical diminishing of peoples and cultures, aka genocide, guides the selection of parts of the volume under review that will receive special attention here. That it is an attempt to understand the failure of negotiations between the Sudanese government and the opposing "movements" rather than the entire course of the genocidal conflict makes this work command attention. When a general history of Sudan is written in years to come, this failure may come to be viewed as an especially tragic defining episode in a period of time when the destruction of the Darfuri people and their culture might have been stopped.

The first item presented in the attempt to explain the failure of peace is de Waal's analysis of the nature of the Sudanese regime in Khartoum. In an essay introducing the volume, "Sudan: The Turbulent State," he describes a crucially important technique whereby the current National Congress Party regime headed by General Omar al-Bashir maintains its power. Although many other empires have used the principle of "divide and rule" to maintain the dominance of the central authority, few have ever come close to the skill with which the regime that came to power in 1989 has combined the use of land and air units against armed opponents, land and air units against civilians, and the enlistment of tribally based militias (the core of the Janjaweed formations) to create a state of continuing chaos and uncertainty on its periphery in Darfur, just as it did in the southern provinces and the Nuba Mountains in its first decade in power.

It is this set of armed actions that de Waal offers as the principal element of the turbulence-creation that serves to perpetuate the power of what he labels the "hyper-dominant," predatory regime in Khartoum. Such is the nature of the government in the Sudanese capital, with its offices and the subordinate institutions and ideologically and organizationally connected individuals occupying them. This set of offices was also the structure that John Garang wished to use as the base for a unified, secular, democratic, and decentralized country. As the al-Bashir regime's triumph over Garang's vision of a new Sudan suggests, Sudan is probably best characterized not as a nation-state in the manner of Italy, Argentina, or Malawi, but as an empire-state, ruling over its internal colonies (in the south, the east, the Nuba Mountains, and Darfur), with an especially effective combination of violence, manipulation, and the cooptation of possible opponents.

As presented in the volume's opening essay, de Waal's list of devices used to stir the periphery's political brew into a chaotic, deadly pottage appears incomplete. Else-



where in the work, however, and in other writings about Sudan, one may find ample additional evidence revealing the government of Sudan's (GoS) catalogue of the weapons of disorder: selective neglect in delivering to the region vital services and equipment; comprehensive administrative warfare entailing such techniques as limitation of access to the region by journalists and officials, permit proliferation, and the routine imposition of deliberately extended delay; use of terror and torture in the "ghost houses" of the Khartoum area; manipulation of aid organizations into near-total dependence on Khartoum's transportation facilities as well as collusion in the limitation of investigators' access to camp residents; encapsulation and cat-and-mouse censorship of the opposition press; energetic, opportunity-sensitive international media and diplomatic operations; and superbly calibrated, scruple-free, and impressively deceptive international and intranational negotiations.

Rather than cataloguing such tactics, however, de Waal's opening essay continues with a description of what he calls "the second most persistent fact in Sudanese political history . . . the inability of any one elite faction to establish unchallenged political dominance over the state" (4). In his view, the special resources of Khartoum enable it, alone of all Sudan's cities, to support multiple elite groups. None has established "unchallenged political dominance" over the other, producing a situation of chronic instability. The 1989 military coup that brought al-Bashir and his fellow Islamist revolutionaries to power merely masked the "multiple competing power centers in Khartoum and the frequent reconfigurations within the ruling group" (5). This fragmentation, de Waal argues, prevents the pursuit of any long-term political strategy, forcing the regime to resort to an ad hoc style, with short-term crisis management in all areas of operation, including both counterinsurgency, administrative reform, and foreign relations. The resulting instability has been "projected into the provinces," making it impossible to govern them. Thus the chaos that prevents opponents of the regime from organizing themselves either to defeat the regime or to make a successful common plan for a negotiated settlement results both from the conscious creation of disorder the GoS has enlisted in the cause of rule and from the inexorable transmission of practices of near-term-focused and regulation-undermining tactical decision-making from the empire to its areas of colonial contestation.

Most grievous, however, is the injury done by this Khartoum-spawned instability and fragmentation to the possibility that the radical diminishing of Darfur and Darfuris will come to an end and that the victims' will ever have a chance to reconstruct their lives in relatively secure circumstances and to receive compensation for their losses. De Waal's formulation of this process is that the GoS's internal instability and churning factional struggles produce a situation where "it is almost impossible to make peace" (23). At the same time, the delivery of any sort of justice based upon the trial of individuals will make no contribution to a solution. Structural factors, not identifiable individuals, drive events: "literally, nobody is in control" (23).

At times, however, this argument seems to conflate the constant sectarian struggles within the Khartoum area political class as a whole with factional disputes within the ruling NCP government descended from the Revolutionary Command Council, which was set up after the coup of 1989. As de Waal tells us, the GoS itself, whatever its internal rivalries, has been able to maintain long-term consistency and coherence in the policies producing domination of the periphery. It is thus unclear why figures such as al-Bashir, Nafi Ali Nafie, Sala Abdalla Gosh, and Ali Osman Taha, powerful managers of GoS policies since well before the current crisis in Darfur, could not arrange a settlement if their fundamental goals were thus secured.

If the failure of the long-running attempt at a negotiated peace at Abuja can be attributed to the internal instability of the GoS, can the structural weaknesses of the regime's opponents, the "movements" (as they are referred to in official accounts) be said to have rendered the collapse overdetermined? Accounts of the fragmentation of the rebel groups, shown by the activist experts of the Enough Project to be substantially exaggerated, continue to command first place in the situation reports of diplomats and international officials, despite current efforts of the government of South Sudan (GOSS) to unite the groups. This fragmentation can be said to be in large measure the result of the GoS's deliberate creation of chaos. It regularly attempts to transform negotiations into meetings where individual leaders bargain individually for personal goals (a process well described by de Waal) and it bombs coordination and unification meetings of leaders of different rebel groups whenever it can locate them. As the volume's contribution on Islamism by Ahmed Kamal el-Din indicates, however, ideological divisions may be just as important as such structural explanations. The article on the armed movements by Julie Flint makes clear, moreover, that conflicting tribal loyalties have played a role in rebel divisions, undermining at key points the cooperation between JEM and SLA and the cross-tribal composition of leadership groups.

Whatever the structural instabilities and internal conflicts burdening the two sides at Abuja, however, the essays in *War in Darfur and the Search for Peace* by Dawit Toga, Laurie Nathan, and de Waal himself show that their negotiating positions remained strikingly consistent. At certain brief moments both Mahzoub al Khalifa, the head of the GoS team, and Abdel Wahid al Nur, leader of the largest rebel group, appeared to compromise on a point or two, but such momentary lapses can be found in most extended negotiations. Demands on crucially important issues otherwise changed little from statements about key objectives made by both JEM and SLA in the early rounds:

1. The reunification of the Darfur region, split into three provinces by Khartoum in a transparent effort to render the population more easily dominated from the center.
2. Autonomy for the unified region, with the implication that Sudan would become a federal state.
3. Justice rendered to the perpetrators.
4. Compensation to victims. (Granting compensation, as opposed to reconstruction grants, would have implied that the GoS had a measure of responsibility for the destruction, something it did not want to admit openly, despite the tacit admission that it had control over the Janjaweed contained in its agreement to arrange for their appearance at disarmament areas and to cooperate in other ways.)
5. Security. This demand entailed the creation of a credible mechanism that would guarantee the enforcement of any agreed arrangements to control and limit the activities of armed groups on either side. As stated above, for example, in the final draft of the Darfur Peace Agreement, the government undertook to assemble the Janjaweed militias at designated control areas, where they would be disarmed, by the second week of July 2006. The document specified no measures to be taken, however, if this deadline were not met, which, to no one's surprise, it was not. The government made little effort to disguise its unqualified opposition to these demands.

Some other issues may have afforded space for negotiation and compromise. Power-sharing, in the form of the allocation to the movements of high offices in the Government of National Unity, a structure some considered a kind of administrative Potemkin village since no real decision-making power ever left the inner circles of the National Congress Party, was also one of the rebels' *desiderata*. A precedent for such an arrangement appeared in the Comprehensive Peace Agreement, signed in January 2005 by the GoS and the Sudan Peoples Liberation Movement. It promised the south regional self-administration in the form of a government of South Sudan with a capital city at Juba and a referendum on separation from the rest of the country to be held in 2011. There were reasons why Khartoum made this particular concession, however, which did not apply to Darfur. In a generation of constant war with Khartoum, the south, with diplomatic and material support from Western countries, had developed a formidable guarantor of its own security, the Sudan People's Liberation Army, a disciplined, professional, reasonably well equipped army that had fought the north and its militia allies to a standstill. Nor did the CPA give a welcome to some of the Darfur rebels' other goals. The document contained no mention of the justice issue or the payment of individual compensation, a strong indication that no clauses addressing these demands would appear in the Darfur Peace Agreement.

The clearest indication that the GoS was foreign to the practice of negotiating in good faith was probably its long record of deceptive and devious diplomatic tactics ranging from bribery to document-rigging to carefully timed rejection of previously signed agreements, evidence for all of which can be found in the volume under review and in many other places. de Waal, moreover, limns the near-impossibility of making peace when he points to the GoS's governing structure at the roots of this devious diplomacy, stressing its instability, Darwinian factional behavior, and general volatility.

The most puzzling questions raised by *War in Darfur and the Search for Peace*, then, may be why the Abuja talks were held at all, why some people took them seriously, and why the editor of the volume spent so much time and effort as a mediator/advisor, trying to bring them to a successful conclusion. Perhaps the international mediators were willing to take up their Sisyphean task because they were convinced that the rebels' preferred solution, a robust intervention by NATO or some similar coalition, had no prospect of realization.

In any case, the result was that the peace talks at the Nigerian capital tended to dominate the agenda of would-be peacemakers and conflict resolution experts. Abuja became a sinkhole into which stumbled the hopes of those who accepted the premise that only a UN-backed comprehensive peace agreement between armed rebel groups and the Sudanese government could end the destruction of peoples and cultures. Alternative solutions based on different premises were pushed to the sidelines. The United Nations thus retained its position as the Great Alibi of the Great Powers, its egregiously understaffed and underfinanced deployments somehow providing the larger industrialized nations with an excuse not to take political or military risks themselves: blue helmets were already at the scene. The UN's subcontractor, the African Union, eager to establish its legitimacy and its distance from its discredited predecessor, the Organization of African Unity, let ambition overcome caution in the name of a repeatedly proclaimed political maturity: "African solutions for African problems."

*War in Darfur and the Search for Peace* shows how tragic was this narrowing of the field of action options. The structure of the negotiations pitted the young leaders of the rebel movements against the representatives of the GoS, led by the highly experienced Dr. Majzoub al-Khalifa. Most important among the many Darfuri groups

absent from the bargaining sessions were the Arab populations of Darfur themselves, neither the Janjaweed militias, recruited in substantial numbers from the landless Arab camel herders of the Abbala Rizeigat, nor the more numerous, cattle-herding Baggara Rizeigat from southern Darfur, most (but not all) of whom stayed neutral in the conflict between GoS and the rebels. Yet whatever other changes in the power relations and alleviation of grievances may be needed to accomplish it, any reversal of the radical diminishing of peoples and cultures that has occurred in Darfur depends on some kind of restoration of the pre-2002 relations among the region's Arab and non-Arab groups.

During four months in 2006 following the end of the Abuja negotiations in May, Abdul-Jabbar Fadul, a Darfuri professor at the University of El Fashir, and Victor Tanner, a researcher at Johns Hopkins University, conducted interviews with 120 inhabitants of the region "from many walks of life, including local inhabitants, displaced people, traditional leaders, and educated professionals" (284). In their chapter, "Darfur after Abuja: A View from the Ground," they note that among both Arabs and non-Arabs, attitudes had changed significantly since the two researchers conducted their first surveys in 2004. Fadul and Tanner encountered a judgement that the "manifest lack of goodwill on the part of the government" and the failure of two of the three rebel factions to sign the DPA left the region expecting a future marked by continued conflict and insecurity. Nor did the interviewees consider any longer that negotiations with the government could bring an end to the region's suffering. The DPA's failure and the weeks of violence following the disappointing signing ceremony had convinced them that there could be no peace "unless it was forced on the government militarily" (287).

This hardening of attitudes toward the government was not surprising. What is of equal or greater significance is the fact that all sides, Arab and non-Arab, had come to recognize the Sudanese state as principal perpetrator. Among the Fur and Masalit victims interviewed, bitterness against the Janjaweed militias ran deep, but the final responsibility for the damage was now laid at the door of Khartoum. A Fur *omda* told Fadul and Turner that "it was not a tribe fighting us, it was the National Islamic Front government." They had "fanned the flames, using the Arabs against the Africans." A displaced victim in south Darfur told them, "Even if the Arabs did take part, they are just poor people like us. The government is behind it." The investigators found that reconciliation had become a possibility. The non-Arab peoples of the region had suffered from the raids in which their Abbala Arab neighbors participated, but "they knew them, and they knew they would have to live with them in the future" (294).

On the side of the perpetrators, the results of Fadul and Tanner's 2006 survey pointed in the same direction. Arab leaders assessed the situation using language "far more conciliatory" than they had used in 2004. If they admitted that some of their tribesmen had participated in the attacks, the scale of which they no longer minimized, they pointed out at the same time that these men had done so as individuals, not as representatives of the tribe. The investigators' striking account of the remarks of an Arab *nazir* from the Kebkabiya area, the site of heavy destruction, compels the reader immediately to mark the page. This high-ranking traditional leader believed that the displaced had a right to return to their land and to demand compensation from the government for their losses. He was convinced that had there been "better coordination between the tribes," the rebellion could have united all Darfuris, Arabs and non-Arabs, in making the justified claims that the rebels made. In the case of the Tama, a non-Arab tribe who had allied with those Arabs carrying out attacks

on villages, an *omda* who had formerly taken a bellicose stance now showed his visitors a directive to his local leaders instructing them to forbid local Tama from cultivating the land of displaced farmers unless they could obtain the farmers' explicit permission.

Their research indicated to Fadul and Tanner the possible re-emergence of the "historic Darfur consensus," a "central majority bloc" that brings together the main ethnic groups of the region, both Arab and non-Arab, in a loyalty to the region that has been "the historic bedrock of Darfur society" and the foundation of its stability. They found that, in contrast to the highly contested "Sudanese consensus," a concept serving more as the focus of certain Sudanese intellectuals' hopes than as a operational social reality, the Darfur consensus was a functioning traditional political order that made Darfur viable, first as a Fur-dominated yet multi-ethnic sultanate, then as a region that, "while prone to local conflict over resources, remained quite stable until the late 1980s." For most of the Darfuris to whom the two talked, the conflict there clearly constituted an assault on this Darfur consensus.

Fadul and Tanner thus discovered a space of opportunity in the Darfuris' mental terrain, a chance for Darfur's inhabitants to come together themselves to end the destruction and displacement. The conceptual map of Sudan's history, as well as the organization of remedial action, could shift from its exclusive concentration upon the Nilo-centric north-south axis to the east-west axis. Alex de Waal's writing has been asking for this change for many years. The survival of the memory of the Darfur consensus prompted recognition that the Darfur region had a claim to integrity and cultural autonomy that was rooted in history and required consideration in the present's policy arguments.

The regime controlling the center of the Sudanese empire-state has long worked to break up that consensus, of course, by enlisting northern Rizeigat groups, and whatever other tribes it finds willing, in its campaigns of destruction directed at non-Arab groups. In a development adumbrated in *War in Darfur*, however, the men who joined the Janjaweed have become increasingly alienated from Khartoum. Julie Flint has written elsewhere about a "sea change" in the configuration of political alliances in Darfur.<sup>1</sup> Arabs, unpaid, betrayed in battle, and realizing they have been manipulated, have formed their own groups to combat GoS forces, and have even entered into alliances with non-Arab armed units.

To evaluate fully the chances that a moment for reconciliation and self-determination had arrived by the summer of 2006, however, would require answers to questions to which *War in Darfur* gives incomplete and analytically unsatisfactory answers. Chief among these is the importance, trajectory, and endurance of Arab supremacism as a theme motivating the perpetrators' attacks and expulsions. The volume's article by Ali Haggag locates one source of what Julie Flint calls this "openly racist" ideology in the Arab Legions promoted by Libya in the 1980s and 1990s. Haggag then describes the development of a semi-secret group who worked out the details of an overall strategy and action program to "change the demography of Darfur and empty it of African tribes":<sup>2</sup> the Arab Gathering. One of the functions of this latter group was to motivate and guide the Janjaweed, the militias recruited from six categories of armed Arab groups in Darfur and their tribal cousins among Chadian immigrants. According to Haggag, because the militias adhere to this ideology of Arab supremacy and are willing to commit murders and carry out wide-scale destruction in its name, they earn the support of the government in Khartoum. Many observers have concluded that government and militias are thus collaborating in genocide as defined by the UN Convention on the Prevention and Punishment of the Crime of Genocide.

The timing, intensity, and specific channels of communication whereby the NIF/NCP-dominated government carried out this support, however, remain unspecified. Nor is it clear that it was the Arab Gathering's eliminationist version of Arab supremacy that inspired the ethnically targeted initiatives from the GoS that shaped the events in Darfur. Further information needed to link together the racist ideology and the mechanics of enacting the genocidal project, or to distinguish between genocidal projects, which may have enlisted only a segment of the NCP elite, and "counterinsurgency on the cheap," which probably enlisted all of them, must be gathered from sources outside *War in Darfur and the Search for Peace*. For example, in *Darfur: A New History of a Long War*, de Waal and his co-author Julie Flint point out in their account of the Arab Gathering that the "crux of the ideology" of this group, which may "never have existed as a coherent organization," was a blend of Arab supremacy and Islamic extremism holding that only those who trace their lineage to the Prophet Mohammed are the true custodians of Islam and therefore entitled to rule Muslim lands. The "only true Arabs" are the Juhayna, the descendants of Mohammed's own Qoreishi clan who crossed to Darfur and Kordofan in the Middle Ages. In this view, Sudan's riverine elite were "half-caste" Nubian-Egyptians.<sup>3</sup> If this riverine elite, who compose a large majority of the current Sudanese NCP government, were angered by this attack on their legitimacy, it is not clear how they acted upon this anger. Abdalla Ali Masar, one of the first to articulate an extreme version of the Arab Gathering's ideology, later became an advisor to President al-Bashir for Darfur affairs.<sup>4</sup>

Other aspects of the GoS-Arab Gathering nexus remain unclear as well. A November 2007 International Crisis Group (ICG) report, while giving many confirming details about the "sea change" in alignments and alliances in Darfur, affirms that certain high-ranking generals of the regular Sudanese Armed Forces (SAF) were sympathetic to the Arab Gathering ideology. At the same time, however, it points out that at the time of the SAF operations in Darfur in the fall of 2007 the Arab Gathering was considered to have ceased to exercise adequate control of fighting among Arabs themselves.<sup>5</sup>

*War in Darfur* also fails to examine fully the relationship between the "war in Darfur" and those Arabization policies of the GoS that do not involve violence, such as the favored treatment of Arab immigrants from Niger, Mali, Nigeria, Egypt, and other African countries (instant citizenship and voting rights, preference in employment, grants of land), imposition of the Arabic language, and discrimination in government positions against those who cannot prove Arab blood.

In short, the reports and analytic essays in the volume under review fail to give the African Union, the United Nations, other mediators, or unofficial readers a full understanding of the objectives of the parties to the conflict. Can one argue that whether or not the GoS's goal was to put down an insurgency with a minimal use of resources or to carry out some kind of radical diminishing of targeted, non-Arab peoples, through mass killings and expulsion—that is, a project to which many would apply the term genocide, or some *combination* of these two goals—should make no difference in the way one handles the attempt to mediate conflicts between the two sides? Is it not important to equip peacemakers with a detailed evaluation of the importance and negotiability the rebel movements attribute to various stated demands such as a unified region, the identity and credibility of the bodies charged with enforcing security arrangements, compensation for the victims, the delivery of justice to the perpetrators, or the attribution of high offices in a "National Unity" government in which office-holders not from the NCP would actually have power? The sad but

enlightening history of federal arrangements in the Sudan—vital information, it would seem, to anyone trying to reach a convincing settlement at Abuja—receives little attention in the volume, yet many analysts argue that it will be only the arrival of a true federalism, backed by regional institutions more resistant to subversion than those in the north–south Comprehensive Peace Agreement, that brings an end to the wars and atrocities in the Sudanese empire-state.

The limitations of *War in Darfur and the Search for Peace*, which nevertheless remains the most valuable single volume for anyone seeking to understand the Darfur genocide in its international and local political and social context, point the reader to a crucially important obstacle to the prevention and elimination of atrocity crimes: the continual and pervasive restriction of the resources allocated to the gathering and analysis of information pertinent to the planning and execution of the full range of possible actions which could stop the destruction and restore the culture of the victim populations.

The volume contains the papers sponsored by the Conflict Prevention and Peace Forum, established in 2000 as cooperative arrangement between the UN and the Social Science Research Council, where the volume's editor is a program director. The latter institution, an American coordinating and grant-making body, provides the UN with a systematic channel to outside experts in order to deepen the analysis upon which the UN bases its work on conflict. Justice Africa, a research and advocacy organization based in London and founded by Alex de Waal and others in 1999, also commissioned certain of the papers. The first set of papers were delivered to the African Union, presumably passed along by the UN, in "early 2005" in order to provide "background analysis of Darfur for the African Union mediation." It is not specified whether the volume includes all the papers submitted at that time.

The volume does, however, include a list of subjects that constitute "gaps" that could not be filled because of "constraints of space and time": sexual violence during the conflict, the government's conduct of the war to date, attempts at local conflict resolution, the impact of the war on livelihoods, the emergence of a war economy, and the humanitarian crisis and assistance efforts. "These must wait for another occasion" (xiv). One may presume, therefore, that on such critical subjects the AU did not receive, and probably did not request, any "background analysis" from the CPPF or Justice Africa. To the list of subjects given in de Waal's preface that would have been addressed but for the "constraints of space and time" one could add many more of equal or greater importance: a thorough survey of the political attitudes of the victim populations, including support for individual leaders (e.g., is the volatile Abdel Wahid still "our guy" to the majority of camp residents?); a comprehensive survey of recent developments in the technology of aerial surveillance, interdiction, and neutralization; and a complete investigation of the international sources of combatants' logistical support and an analysis of such supporting governments' vulnerability to various kinds of pressure.

In dealing with atrocity crimes, moreover, one must think big and plan big. It is just possible, for example, that Fadul and Tanner's remarkable survey of changes in Darfuri attitudes after July 2006, which discovered the Darfuris' conviction that "peace depended on one of two things—a non-consensual deployment of Western troops or a rebel military victory, or both" (287)—would have prompted urgent and effective action if it had been stated with the authority of a thousand systematically randomized interviews, rather than 120 rather aleatory ones. In short, neither genocide nor counterinsurgency on the cheap can be countered by research and analysis on the cheap.

## Notes

1. See Julie Flint,, “A Seismic Political Shift is Taking Place in Darfur,” *Daily Star* (Beirut), 31 December 2007.
2. Quoted in Alex de Waal and Julie Flint, *Darfur: A New History of a Long War* (London: Zed Books, 2008), 37.
3. *Ibid.*, 51.
4. *Ibid.*, 50.
5. International Crisis Group, *Darfur’s New Security Reality*, Africa Report No. 134 (Nairobi: International Crisis Group, 2007), 4.



---

# Book Review

Samuel Totten and Eric Markusen, eds., *Genocide in Darfur: Investigating the Atrocities in the Sudan*. New York: Routledge, 2006. Pp. 334, paper. \$37.95 US.

Reviewed by Justyna Klaczany, Jagiellonian University, Cracow, Poland; Silesian University, Katowice, Poland

---

Edited by the two prominent genocide scholars Samuel Totten and Eric Markusen, *Genocide in Darfur: Investigating the Atrocities in the Sudan* is an outstanding collection of essays that describes in great detail the genesis, design, implementation, results, and ramifications of the Darfur Atrocities Documentation Project (ADP). What makes this work significant is the fact that the essays are written not only by many noted scholars, US government and non-governmental organization officials, but also by the ADP designers and investigators. The perspectives of the latter is extremely valuable, since they were the people who conducted the interviews with the Darfur refugees in the internally displaced camps (IDP) in Chad and who listened to the victims' first-hand accounts of the horrific experiences they suffered at the hands of the Government of Sudan (GoS) troops and the Janjaweed (Arab militia).

The book consists of fourteen chapters grouped into five parts: (1) "The Background on Darfur," (2) "The Investigation," (3) "The Genocide Determination," (4) "The Significance of the Darfur Atrocities Documentation Project: A Precedent for the Future? The Perspective of 'Outsiders,'" and (5) "Analysis of the Rationale and Reasoning Behind the U.S. ADP and Genocide Determination." In addition, the editors have included a very useful chronology of the Darfur crisis and five noteworthy appendices: "The Darfur Refugee Questionnaire," which is very informative, especially for those interested in the research tools used in the project; the summary of the ADP final report; US Secretary of State Colin L. Powell's testimony before the Senate Foreign Relations Committee, in which he announced that "genocide has occurred in Darfur and may still be occurring"; the United Nations Convention on the Prevention and Punishment of the Crime of Genocide; and a list of the personnel involved in the ADP.

The book begins with a historical overview of Darfur that begins with the establishment of the Fur sultanate in 1650 and concludes in 2004 when the efforts of the international community to address the "worst humanitarian crisis" started. Robert O. Collins, a noted expert on the history of Sudan and the author of many widely acclaimed books including *Africa's Thirty Years War: Chad, Libya and the Sudan, 1963–1993*, focuses on the complex root causes of the conflict such as marginalization of the region, the tribes' struggles for resources, and the ethnic tensions between different tribes exacerbated by the "cynical and dysfunctional Islamist government of the Sudan." Although this chapter demands a lot of concentration on the part of the reader as the text is full of historical data, it enables non-experts to understand the complexity of the crisis.

Part 1 also includes a chapter by Andrew S. Natsios, who, at the time of the investigation, was the chief administrator of the US Agency for International Development

(USAID). After briefly presenting the reasons for American involvement in the Sudan, the context of the crisis in Darfur and the atrocities committed by the Janjaweed and GoS military, he focuses on the actions taken by USAID to address the crisis, which included providing humanitarian aid, conducting research and providing data such as satellite imagery of the situation in Darfur to high level members of the US government and to the members of the UN Security Council. Finally, Natsios explains the genesis and significance of the ADP.

Part 2 is entirely devoted to a description of the Darfur ADP. Each of its chapters focuses on a different aspect of the investigation. In chapter 3, Nina Bang-Jensen and Stefanie Frease, leaders of the Coalition of International Justice, the latter of which was selected by the State Department to plan and implement the ADP, describe the stages of the project from its creation after the meeting of NGOs at the US State Department in Washington in late June 2004, through assembling the team of investigators, dispatching the assessment team and the field investigators to Chad, to their safe return home at the end of August. They make the reader aware of the fact that the ADP was a logistical challenge, as well as a dangerous enterprise fraught with innumerable difficulties. In conclusion, they state, "For those who heard firsthand from over twelve hundred refugees about their similarly harrowing accounts of attacks, murder, rape, racial epithets, and destruction of their way of life, it was gratifying to know their voices had been heard, at least by some" (57).

In turn, Jonathan P. Howard, a research analyst with the US State Department, provides an in-depth report of the development of the research methodology. The importance of this research and its purpose forced the methodologists to design it in such a way that it would ultimately provide statistically significant and reliable data obtained from a representative sample. Although the detailed description of the questionnaire design, data entry, and analysis may not be interesting for non-experts, it is worthwhile reading for those who have any doubts concerning the validity and reliability of the project. The author presents, in a very clear way, the quantitative findings that shed light on the scale and nature of human suffering in Darfur.

The chapter written by Helge Niska, an expert on community interpreting services and interpreter training, provides an insight into the essential role of interpreters, a role which is unfortunately very often underestimated. He addresses a host of issues such as the recruitment, testing, and training of the interpreters. This chapter is a very important contribution to the volume because Niska points out the essential role interpreters have in international research and that the lack of proper training can lead to serious distortions in the results.

In contrast to the earlier chapters in this part, which to a large extent deal with technical details of the preparation of the ADP, Samuel Totten and Eric Markusen's chapter provides a detailed account of the interviewers' work on the ground. It includes detailed and moving reflections and stories by members of the ADP team. As far as this reviewer is concerned, this is one of the most important essays in the entire volume. It is here that the reader learns about the horrific experiences of the victims. Unlike other chapters, in which the ADP findings are summarized by means of diagrams and percentages, this chapter, through the reflections of different investigators, presents stories of individual human beings who have a name and who experienced enormous suffering, which is all but unimaginable to most people in the Western world.

Tellingly, the chapter shows that what was most difficult for the investigators were not the harsh conditions on the ground in Chad and logistical challenges, but conducting the interviews. As Markusen puts it: "For me personally, the most heart-

wrenching aspect of this mission was asking the respondents for details of their murdered relatives—spouses, children, parents, cousins, aunts, uncles. Many lost four or five or more relatives, and recording names, ages, gender, relationship, and cause of death left me emotionally exhausted” (90).

Notably, this chapter concludes with the investigators’ bitter comments on the lack of action from the international community. Debbie Bodkin, a Canadian police officer and one of the ADP investigators, acknowledges, “My heart breaks knowing that even though our work was successful in many ways, the horrors are still continuing now as I write this” (107). Samuel Totten adds, “If the international community continues to waver and equivocate, there is no doubt in my mind that ten years from now the international community will apologize to the victims of Darfur just as it did recently to the Tutsis on the tenth anniversary of the 1994 Rwandan genocide. But such apologies are as hollow as they get when something could have and should have been done to save the people in the first place” (107). The strongest statement on the reasons for inaction comes from Vanessa Allyn, who asserts:

I also feel that the reliance on the AU [African Union] troops as some sort of piecemeal solution is an excuse to do less . . . It seems to come down to the same old racist/colonialist international attitude towards the “dark” continent: “It is an African problem, let the Africans solve it, and if they don’t solve it, the people who are dying are just Africans anyway. Let them go on slaughtering each other until they learn their lesson or all die, but we aren’t going to waste our precious western resources or lives on something like hopeless, chaotic Africa.” (106)

In Chapter 7, which opens the third part of the book, Stephen A. Kostas discusses aspects of the determination of genocide. He does so based on interviews that he conducted together with Eric Markusen, Pierre-Richard Prosper (former US Ambassador-at-Large for War-Crimes), and Lorne Craner (former Assistant Secretary for the State Department’s Bureau of Democracy, Human Rights and Labor). Kostas explains the US State Department’s motives for the creation of the ADP and the subsequent genocide determination. The text is very engaging, especially when Kostas reports on the analysis of the data obtained by the ADP. The author describes how the State Department concluded that genocidal intent, which is the most debatable issue, could be inferred from the evidence. Although Kostas provides the reader with an in-depth analysis of how the determination of genocide is made, one question remains: Why was US government’s action reduced only to calling on the UN under Article VIII?

This vacuum is partly filled by Jerry Fowler, who elaborates on the legal definition of genocide. In order to answer this question he zeroes in on two reasons. First, he sees the problem in the UN Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) itself, when he rightly comments: “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 underway” (127). This is accomplished by a thorough analysis of the conclusions reached by the US government and the UN Commission of Inquiry (COI). In doing so, Fowler presents convincing arguments when he criticizes the COI’s final report.

The second reason for inaction was the lack of political will. Fowler gets to the core of this problem when he concludes that

the prevention and suppression of genocide and other mass atrocities will never be accomplished by the international community or 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 is there hope for ending the heartbreaking irony of a universally condemned crime that is allowed to transpire in broad daylight. (138)

Ultimately, for those interested in the Darfur genocide, Fowler's powerful and passionately critical analysis is a must.

Part 3 concludes with a chapter entitled "Prosecuting Gender Crimes Committed in Darfur: Holding Leaders Accountable for Sexual Violence" by Kelly Dawn Askin, an expert on international criminal law, international humanitarian law, and gender justice. The text is not an easy read and that is for two basic reasons. First, the author, drawing from the data obtained by the ADP, describes in minute detail the sexual violence in Darfur. Reading about such horrific crimes is simply heartbreaking. Second, the section of this chapter, in which the questions of responsibility and accountability of the perpetrators are analyzed on the basis of examples from the ICTR and ICTY judgements, is very demanding for non-experts because of the complex legal terms Askin uses. Nevertheless, this chapter is well documented and surely contributes to the better understanding of the complex issues related to prosecuting not only the physical perpetrators of sexual violence but also the leaders who have a duty to protect the civilian population from such crimes.

Part 4 consists of short but very thought-provoking chapters that are devoted to the analysis of the significance of the ADP and the evaluation of the international community's actions—and especially those of the United States—to end the crisis. Taylor B. Seybolt stresses that the ADP is a precedent for the future as it proved that it is possible to identify a genocide in time to stop it, but he criticizes the US government for inaction and claims: "The Bush administration's declaration of genocide has proved to be a substitute for action, not a call to action." Continuing, he asserts: "Sadly, the lack of action should not surprise us. Governments are most likely to act when they perceive threats to their primary interests or an opportunity to promote their primary interests. When secondary or tertiary interests are at stake, we can expect to see only weak responses, especially when taking action involves risks" (168). Ultimately, Seybolt draws a pessimistic, but, unfortunately, correct conclusion: "The most troubling aspect of the rhetoric in Washington is that governments with the power to act now understand that it is acceptable to allow mass killing even when they cannot deny knowledge of it" (168–169).

In his essay entitled "From Rwanda to Darfur: Lessons Learned?" Gerald Caplan is even more critical than Seybolt. The value of this chapter lies not only in what is said but also in how it is said. Caplan uses very strong language and the text is filled with trenchant comments. He points to three lessons that emerged from the international community's failure in Rwanda. First, the international community will only take serious and effective action when its political interests are involved. Second, any time "another Rwanda" appears on the horizon, if it garners enough attention then the international community would be inclined to act for it could not plead ignorance of the event. Third, "[US President Bill] Clinton's position that there was no full-blown genocide in Rwanda unwittingly provided the glimmer of hope [that] if Rwanda was 'not quite' a genocide, and therefore intervention was not obligatory, it surely followed logically that if a genocide were declared in the future" (175), the international community would commit to intervening in a timely and effective manner. Caplan argues that the last two conditions were fulfilled in Darfur, and then bitterly concludes: "From the point of view of the hopes raised by two of the optimistic lessons from Rwanda, the response of the 'international community' to the crisis in Darfur

can only be considered a giant, tragic set-back. It is not too much to say that Darfur shows that only the first despairing lesson—the bottomless cynicism and self-interest of the major powers—remains valid, while the hopes have been largely destroyed” (176). To continue to summarize Caplan’s chapter will only “kill the spirit” of his text. Suffice it to say that it is imperative to read this essay.

Next, Gregory H. Stanton provides a legal analysis of the concept of genocide and elaborates on the reasons why this term applies to the crimes committed in Darfur. He argues that they are genocide as defined by the UN Genocide Convention because “[t]he atrocities are intentional, evidenced by the systematic nature of their destruction . . . , the crimes are directed against groups protected by Genocide Convention . . . , the crimes include all the acts of genocide enumerated in the Genocide Convention . . .” (183).

Stanton concludes that the reluctance to apply the appellation of genocide to Darfur has its source in the misconception that the Genocide Convention contains a legal obligation to act, that only destruction in whole constitutes genocide, and that motive and intent are the same thing. In doing so, Stanton provides clear and logical arguments to support his interpretation.

In contrast, there are and will be other legal experts who will argue that atrocities in Darfur are not genocide. Scott Straus, in the closing essay of part 4, who supports the view presented by Jerry Fowler, underscores that the main cause of these endless debates is the Genocide Convention itself. He stresses that disambiguating the concept is a prerequisite for effective genocide prevention. In his conclusion, he enumerates the same reasons for the international community’s inaction in Darfur as those expressed by most of the contributors in this volume. However, he adds that the most important factor is the politics within the Security Council, whose two permanent members—Russia and China—have blocked any forceful action.

In the last essay in this volume, Samuel Totten evaluates the ADP, confronts and successfully refutes criticism of this project made by other scholars, such as Alex de Waal and Howard Adelman, and assesses the US government’s policy on Darfur. Totten, on the one hand, effectively recapitulates what had been said, and, on the other hand, complements the whole work by explaining the reasons for such US policy on Darfur and by providing an objective critique of this policy. In doing so, he presents not only strengths but also certain weaknesses of the ADP. In confronting criticism, he uses very convincing arguments and poses thought-provoking questions. Totten is successful in showing the positive consequences of ADP and the genocide determination, but, at the same time, on numerous occasions, he expresses strong criticism concerning the lack of meaningful action on the part of the US government, which is reflected in the following statement: “The point is, though, there is plenty that the United States could have done—and still can and should do—but it hasn’t. And that is nothing short of shameful” (220).

Throughout the book, various authors stress the importance of the ADP and how the genocide determination constituted “the first official investigation by a sovereign nation of an ongoing case of mass violence for the express purpose of determining whether or not the violence amounted to genocide . . . , the first time that one government formally accused another government of ongoing genocide . . . , and the first time that Chapter VIII of the UN Convention on the Prevention and Punishment of the Crime of Genocide was invoked calling on the Security Council to take action” (xiv). Because of these reasons, as well as others cited in this review, *Genocide in Darfur* is an extremely important contribution to the literature on Darfur and especially on genocide, particularly because it provides an in-depth analysis of these important

events and issues. What is more, because these events and issues are analyzed from different perspectives, readers are provided with a lot of food for thought. All contributors convey their ideas in a very logical and clear way, so even a non-expert can gain insight into the complexity of the issue of genocide in international relations.

Ultimately, each author seems to agree with the statement made by Jan Pfundheller, one of the ADP investigators: "I heard it [the account of the horrors] from the victims themselves. And having heard it, knowing in my heart that I can and will stand up and say 'this happened' to whoever will listen, to whoever cares, and to those who do not. To give a louder voice to the victims and their horrific truths" (106).