

ON OUR WATCH: THE GENOCIDE CONVENTION AND THE DEADLY, ONGOING CASE OF DARFUR AND SUDAN

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From the Convention on the Prevention of Genocide (Genocide Convention)¹ and the Universal Declaration of Human Rights² in 1948, to the Responsibility to Protect in 2001, the modern human rights revolution has produced an extraordinary range of international norms that articulate the rights of human beings within and across state boundaries. “Human rights assert the radical idea that everyone everywhere shares an equal birthright of dignity that should be recognized in law and politics as matters of principle and practice. Modern human rights therefore presuppose the possibility of international law and international organization based on global agreement and consensus.”³ It is in part the very popularity of the human rights discourse, and its purported use as a political frame of reference, that has heightened the visibility of the gap between the “visions seen”⁴ and encapsulated in international norms and the reality of viewing the pervasiveness and range of “suffering of others”⁵ worldwide.

Sixty years after the Genocide Convention was adopted by the U.N. General Assembly on December 9, 1948, the gap between the promise of protecting human beings from criminal acts of targeted

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1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

2. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

3. ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE 15 (2008).

4. For an insightful discussion of the history and ideals of human rights, see PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (rev. ed. 2007).

5. See SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 118 (2003).

destruction and the reality of gross, ongoing human rights violations against specific population groups persists. The destruction in Darfur is a deadly, ongoing example of this.

The case of Darfur, and of Sudan as a whole, reflects the compromises made sixty years ago in the drafting of the Genocide Convention from the narrow definition of groups targeted, to the vagueness of the implementation mechanisms, and to the tension between state sovereignty and international safeguards. In many respects, the Genocide Convention mirrors the promises, dilemmas, and limitations of the international human rights revolution itself.

I. NOT ON MY WATCH

The escalation of violence in February 2003 in the Western Sudan region of Darfur was overshadowed by international and U.S. attention on the wars in Afghanistan and in Iraq, where the United States launched Operation Iraqi Freedom on March 19, 2003.⁶ However, a year later, responses within the United States to violence in Darfur included increased media attention,⁷ growing public awareness, formation of a number of civil society protest movements, and a series of other important initiatives.⁸ But the degree of killing, destruction, and displacement carried out on the ground in Darfur was already enormous, affecting millions of people during the first eighteen months.⁹ Hence, focus on swift and sustained action and incentives to persuade and/or coerce the Government of Sudan to halt the attacks were needed. Instead, as the destruction continued, a significant amount of time and energy was spent on debates over whether or not events in Darfur were “genocide” and if the Genocide Convention applied,¹⁰ on recommendations to the Security Council, and on official and public condemnations—none of which stopped the

6. See Deborah Murphy, *Narrating Darfur: Darfur in the U.S. Press, March-September 2004*, in *WAR IN DARFUR AND THE SEARCH FOR PEACE* 314-15 (Alex de Waal ed. 2007).

7. See *id.* at 314-36 (citing eighty-three editorials and op-eds on genocide in Darfur appearing in the *New York Times*, *Washington Post*, *Wall Street Journal*, and *Washington Times*).

8. See Rebecca Hamilton & Chad Hazlett, “Not on Our Watch”: *The Emergence of the American Movement for Darfur*, in *WAR IN DARFUR AND THE SEARCH FOR PEACE*, *supra* note 6, at 337, 366. It is interesting to note that the anti-Iraq war movement was not able to effectively develop a constituency to anything like the same extent that the various Save Darfur movements did. In reality, many student activists found the Darfur atrocities easier to protest against (a clear case of good versus evil rationale, etc.) than to protest their own government’s policies in Afghanistan, Iraq, Guantanamo, and between the Israelis and Palestinians.

9. See Scott Straus, *Darfur and the Genocide Debate*, *FOREIGN AFF.*, Jan.-Feb. 2005, at 127.

10. See *id.* at 123, 128.

momentum of escalating violence.¹¹

In part, the growing interest about Darfur and the focus and debate on whether or not genocide was taking place were examples of historic compensation or “lessons learned.” In particular, the United States and the United Nations did not want to repeat such past mistakes as: (1) a series of failures to act, especially in the case of Rwanda, where there was repeated denial of the level of atrocities being carried out, and (2) failure to acknowledge earlier genocides and the extent of human rights violations carried out by the Sudanese government against targeted civilian populations. Neither the U.S. State Department nor leadership in the United Nations wanted a repeat of the glaring, highly publicized failures of Rwanda a decade earlier.¹² According to Samantha Power, in 2001, newly elected President George W. Bush was presented with a memo on the failure of the Clinton administration in Rwanda.¹³ Power reports: “Bush wrote in firm letters in the margin of the memo: ‘NOT ON MY WATCH.’ While he was commander in chief, he was saying genocide would not recur.”¹⁴ “NOT ON MY WATCH” came to haunt the Bush administration and became the slogan taken up by activists. The phrase appeared everywhere, from public rallies to the “Not on my Watch, Save Darfur” wristbands sold by Citizens for Global Solutions, to the paperback *Not on our Watch: The Mission to End Genocide in Darfur and Beyond*,¹⁵ co-authored by actor Don Cheadle, who played the lead role as Paul Rusesabagina in the film *Hotel Rwanda*, and John Prendergast, Africa specialist and NGO activist in the International Crisis Group. Advocacy by a number of entertainment figures, such as Mia Farrow and George Clooney, as

11. See *id.* at 128-33.

12. See, e.g., MICHAEL BARNETT, *EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA* (2002); ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2004); SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE (2003). Power’s Pulitzer Prize winning book is a nonfiction best-seller that has had considerable influence on raising awareness of the long history of U.S. foreign policy inaction in the face of genocide. The chapter on Rwanda emphasizes the decision of the Clinton administration not to use the “g-word” in discussing Rwanda and points out that the lack of public outcry or a movement to stop the killings played a role in the government’s inaction. POWER, *supra*, at 358-84. Power’s arguments influenced the founders of the Students Taking Action Now in Darfur (STAND), the Genocide Intervention Network, and other anti-genocide groups. Herb Hirsch’s *ANTI-GENOCIDE: BUILDING AN AMERICAN MOVEMENT TO PREVENT GENOCIDE* (2002) was also an important guide for STAND and other student activists.

13. POWER, *supra* note 12, at 511.

14. *Id.*

15. DON CHEADLE & JOHN PRENDERGAST, *NOT ON OUR WATCH: A MISSION TO END GENOCIDE IN DARFUR AND BEYOND* (2007); see also *Not on Our Watch*, <http://www.notonourwatchbook.com> (last visited Nov. 21, 2008).

well as public events that included rallies and concerts, all added to fundraising and popular support and publicity.

On September 6, 2001, the Bush administration appointed Senator John Danforth to lead peace negotiations as special envoy to Sudan.¹⁶ Within less than a week, however, the bombings of September 11, 2001 and President George W. Bush's focus on the "war on terror" transformed U.S. foreign policy, including policy on the Sudan.¹⁷ Nevertheless, consulting with key European partners, such as the United Kingdom, Norway, and Italy, which had been involved for some time in promoting peace talks, Danforth's missions to Sudan and other diplomatic initiatives helped facilitate a ceasefire and broker a settlement to the decades-long North-South Sudanese war.¹⁸ At the same time, the Bush administration was working with the Khartoum Government to gain intelligence information on Osama bin Laden (who had been based in Sudan for several years in the 1990s), and al-Qaeda and other radical political groups.¹⁹ The Bush appointment of Danforth came as a response to pressure from a number of domestic constituencies, notably Christian groups that had been active since the 1990s in trying to stop the forced conversion of Christian groups to Islam and to bring attention to a range of gross human rights violations being carried out in Sudan.²⁰

II. DEADLY PRECEDENTS

Under the National Islamic Front (NIF) regime, Sudan has been the site of a series of internal wars over power sharing and natural resources in which the Government of Sudan (GOS) waged a series of brutal campaigns against civilian populations that resulted in mass human rights violations and population displacement.²¹ As a result, Sudan has five million internally displaced people (IDP), the largest number of IDPs of any state.²² The attacks against the Nuba illustrate the brutal GOS policies. In July 1995, African Rights, the London-based research NGO, published *Facing Genocide: The Nuba of Sudan*, in which they explained that under the cover of a decades

16. JOK MADUT JOK, SUDAN: RACE, RELIGION AND VIOLENCE 244 (2007).

17. See RUTH IYOB & GILBERT M. KHADIAGALA, SUDAN: THE ELUSIVE QUEST FOR PEACE 121 (2006).

18. See *id.*

19. See *id.*

20. JOK, *supra* note 16, at 23-24.

21. For a detailed overview of these conflicts and the role of race and religion, see *id.*

22. U.N. Env't Programme [UNEP], *Sudan: Post-Conflict Environmental Assessment*, 9 (June 2007). See generally THOMAS G. WEISS & DAVID A. KORN, INTERNAL DISPLACEMENT: CONCEPTUALIZATION AND ITS CONSEQUENCES (Rorden Wilkinson ed., Routledge 2006) (providing statistics and tables on IDPs generally).

long civil war between the North and South, the GOS waged a series of military attacks against “defenceless villages . . . kidnapping and killing unarmed civilians. It is a war against the people. It is genocide.”²³ Two main investigators, one of whom was Alex de Waal,²⁴ visited the region and heard 130 testimonies by victims and witnesses of human rights abuses, as well as reports of African Rights human rights monitors, and reported:

Do the crimes against the Nuba warrant the term “genocide”? They certainly fit the legal definition . . . and if the Sudan Government is able to pursue its programme unhindered for one or two more years, many thousands of Nuba people will have been killed, the majority of women and girls raped, and children separated from their parents and subjected to a forcible change of identity. In addition to the tens of thousands who will have perished, the Nuba people will no longer exist in a recognisable state. They will be politically subjugated and socially dismembered, with their distinctive cultures obliterated.²⁵

Many of the governmental policies against the Nuba and other communities are being repeated over a decade later in Darfur—from launching a scorched earth policy, which included burning and looting food stocks, raiding livestock, and killing community leaders, to abductions, rape, and sending women into forced labor.²⁶ The African Rights report documented how “peace camps are part of a wider strategy of ‘Popular Mobilisation.’”²⁷ The GOS used “bribery and coercion to obtain the support, or at least the acquiescence, of selected Nuba chiefs in their programme.”²⁸ The range of tactics used to attack and dismember the Nuba’s culture and to restructure their society provided a deadly model in many respects for what was

23. AFRICAN RIGHTS, FACING GENOCIDE: THE NUBA OF SUDAN 1 (1995).

24. Alex de Waal is a Sudan specialist and was a founder of the London-based African Rights, and is currently a director of Justice Africa. See, e.g., ALEX DE WAAL, FAMINE THAT KILLS DARFUR, SUDAN (John D. Hardgreaves et al. eds., rev. ed. 2005); JULIE FLINT & ALEX DE WAAL, DARFUR: A SHORT HISTORY OF A LONG WAR (2005). His 2004 article was widely quoted for pointing out the GOS policy of serial killing of civilian groups. See Alex de Waal, *Counter-Insurgency on the Cheap*, LONDON REVIEW OF BOOKS, Aug. 5, 2004, at 25. De Waal has been one of a small number of western-trained African specialists and activists relied upon by the Western media for his expertise. His involvement with the Darfur Peace Agreement negotiations among other issues has led to a number of heated debates. Arguments about causes and solutions to violence and the humanitarian crisis in Darfur and Sudan between and among African and NGO specialists and activists characterize academic and public forums on the subject.

25. AFRICAN RIGHTS, *supra* note 23, at v.

26. *Id.* at 1-3.

27. *Id.* at 3. Forced conversion to Islam was also part of the GOS policy against the Nuba and other non-Muslim communities. *Id.* at 4.

28. *Id.* at 3.

inflicted upon millions in Darfur from 2003 to the present. These atrocities also point to future tactics that may be employed such as famine, the manipulation of aid, and further politicization and disruption of life in IDP camps.

Outside pressure on the GOS to restrain its campaigns against the Nuba, Dinka, and other groups was limited. In 2002, John Ryle, of the Rift Valley Research Institute, pointed out that:

Sudan has one of the worst human rights records in the world. There has been a resurgence of slavery; rebels and government militias routinely burn and loot villages; the government bombs aid centers with impunity. The Geneva Conventions and other international human rights agreements to which the Government of Sudan is signatory are routinely defied—yet there is no human rights monitoring regime supported by a major Western nation or international organization.²⁹

Hence, the international community was sending a signal to the architects and perpetrators of destruction in the Sudan that they could carry out serious human rights violations and get away with it. It must have been quite surprising to President el-Bashir, the NIF government (now called the Government of National Unity (GNU)), and the military that there had been so much publicity and international public outrage for their actions in Darfur. In fact, the ruling elites were just conducting business as usual.

III. FOCUS ON DARFUR AND DEBATING GENOCIDE

While small in number, earlier activism on GOS human rights violations, particularly discrimination and persecution against Christians, “created . . . a pool of experienced and well-connected advocates”; there was also a “contingent of Congressional ‘champions’ for Sudan.”³⁰ The anti-slavery coalition included representatives from synagogues, churches, and the U.S. Holocaust Memorial Museum Committee on Conscience under the leadership of Jerry Fowler.³¹

There was some reporting on the U.S. role in working to help broker a peace agreement (and in the U.S., the press paid little attention to how other countries such as Norway had been working toward a settlement for years).³² Reports featured special envoy to the Sudan, John Danforth, and visits by other U.S. officials, including Secretary of State Colin Powell. The negotiations that

29. John Ryle, *The Burden of History: An Overview*, CRIMES OF WAR PROJECT, Apr. 2002, <http://www.crimesofwar.org/sudan-mag/sudan-overview.html>.

30. Hamilton & Hazlett, *supra* note 8, at 341.

31. *Id.* at 343-44.

32. JAN EGELAND, A BILLION LIVES: AN EYEWITNESS REPORT FROM THE FRONTLINES OF HUMANITY 89 (2008).

began in 2002 resulted in the signing of the Comprehensive Peace Agreement (CPA) three years later, in January 2005, in Naivasha, Kenya, between the GOS and the Sudan People's Liberation Movement (SPLM).³³ After decades of war and atrocities interrupted by periodic peace agreements that were then violated, the signing of the CPA was an enormous breakthrough; an acknowledgement by both the GOS and SPLM that a settlement was preferable to continuation of the conflict. The GOS also hoped for a series of peace dividends, including repairing its reputation, normalization of diplomatic relations, and improving investment and trade. However, the peace dividend was stillborn. Why? Because during the last two years of negotiations, the GOS carried out atrocities against a new group of citizens, this time in the western region: Darfur.³⁴ By January 2005, the shift in media attention to Darfur took attention away from the long-awaited peace settlement and its significance.

The Sudan Liberation Movement/Army's (SLM/A, previously called the Darfur Liberation Movement) attack on government forces and military bases in February 2003 "coincid[ed] with [a] breakthrough in the north-south" negotiations after the signing of the Machakos Protocol.³⁵ Both the Darfuri rebel groups, SLM/A and the Justice and Equality Movement (JEM), realized that they were being excluded from whatever new power-sharing arrangement was being worked out, and saw this as an opportune time to bring attention to their grievances. In fact, it was the vision of a "New Sudan" articulated for decades by SPLA leader John Garang that contributed to the Darfuri rebels' politicalization.³⁶ In radio broadcasts and writings, John Garang encouraged participation and broad support in creating a "New Sudan":

The SPLA/SPLM belongs to all those who work in the factories and earn so little . . . to those forgotten citizens who crowd under very difficult conditions . . . and in all the slums of our cities . . . to those in the North who have been callously displaced from your ancestral homes, to you the Hadendowa and the Ingessana who never know of schools in your villages, to you the Nuba and Baggaras of the Centre, to you the Fur, Zaghawa and Masalit of the West, to you all, the SPLA is yours.³⁷

Garang pointed out how various marginalized regions and groups all shared a need to have their problems addressed if there was to be a viable and more just unitary state:

33. IYOB & KHADIAGALA, *supra* note 17, at 153, 169-70.

34. *Id.* at 184.

35. *Id.* at 151.

36. *See id.* at 55.

37. *Id.* at 56.

Suppose we solve the problem of the South, we will soon have to solve the problem of the Jebels [the Nuba Mountains] because the Nuba can also take arms; after that the problem of the Beja; and so forth. It is a national, not a Southern problem that we must address.³⁸

Early on, the Darfuri rebels issued a political statement calling for “a united democratic Sudan” and against the GOS “policies of using some Arab tribes . . . to achieve its hegemonic devices that are detrimental both to Arabs and non-Arabs.”³⁹ There was, of course, a tragic irony here, since the GOS had enlisted men from Darfur as fighters in earlier campaigns.⁴⁰ John Garang ignored his own warnings and brokered a deal focusing on the enormous and complicated issues of the North-South conflict.⁴¹ The Khartoum government’s masterstroke once again was a piece-by-piece deal with Sudanese opposition groups that forced Garang, other SLA leaders, and international negotiators to focus on one region and ignore (for the time being, some argued) the atrocities being carried out in the West.⁴² However, this proved to be a fatal miscalculation.⁴³ Effective implementation of the CPA has been undermined by events in Darfur. The death of John Garang in an airplane accident in 2005⁴⁴ further reduced the possibility that the vision of a “New Sudan,” which included various regions and groups in power-sharing and governance in a unitary state, would eventually become a reality.⁴⁵ The negotiations for the CPA put a spotlight on Sudan that shifted quickly to the escalating violence and mass displacement in Darfur.⁴⁶ The emergence of new groups mobilizing against the genocide and pressuring the U.S. government to “do something” emphasized the human rights violations going on in Darfur, largely ignoring the CPA and complex Sudanese and regional African context.⁴⁷

What were the new developments and responses to the genocidal atrocities? Bertrand Ramcharan, the acting U.N. High Commissioner for Human Rights, described the atrocities in Darfur on May 8, 2004: “First, there is a reign of terror in this area; second, there is a scorched-earth policy; third, there is repeated war crimes and crimes

38. *Id.*

39. *Id.* at 151.

40. *Id.* at 121-22.

41. *Id.*

42. *Id.*

43. *See id.* at 123.

44. *Id.* at 61.

45. *Id.* at 55-56.

46. *Id.* at 168-69.

47. *See id.* at 121-22.

against humanity; and fourth this is taking place under our eyes.”⁴⁸ Other high ranking U.N. officials such as Jan Egeland, Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator (2003-2006), spoke out on the severity of the humanitarian crisis and accused the GOS of deliberately hindering relief aid.⁴⁹ Evidence of human rights violations carried out against civilians was documented by NGOs such as Human Rights Watch, International Crisis Group, and others, along with specific studies on sexual violence, assault on livelihoods, calls for security and restitution, and related issues.⁵⁰ The U.S. Congress passed a joint resolution in July 2004 calling the atrocities “genocide” and, with reference to the Genocide Convention, urged the “Bush Administration to seriously consider multilateral or even unilateral intervention to prevent genocide should the U.N. Security Council fail to act.”⁵¹ That same month, Juan Mendez was appointed to the newly formed position of Special Adviser on the Prevention of Genocide to the United Nations, and in that capacity, visited Sudan twice.⁵² Following the request of the U.N. Secretary-General, Mendez and the High Commissioner for Human Rights undertook a joint mission to Darfur.⁵³ A series of recommendations were made to “various UN offices with guidance on issues related to the prevention of genocide, such as guidelines on hate speech and public incitement to violence for the Department of Public Information (DPI) and peacekeeping missions.”⁵⁴ The first time, Mendez reported his findings of human rights violations being carried out in Darfur to the Security Council; the second time, he was blocked from doing so.⁵⁵

48. Rene Wadlow, *Justice and Genocide in Sudan*, TOWARD FREEDOM, July 29, 2008, <http://towardfreedom.com/home/content/view/1363/1>.

49. See EGELAND, *supra* note 32, at 77-78 (detailing his visit to a hospital in West Darfur).

50. See DARFUR: GENOCIDE BEFORE OUR EYES 79-82 (Joyce Apsel ed., 3d ed. 2007) (listing NGO websites). See generally PHYSICIANS FOR HUMAN RIGHTS, DARFUR—ASSAULT ON SURVIVAL: A CALL FOR SECURITY, JUSTICE, AND RESTITUTION (2006), <http://physiciansforhumanrights.org/library/documents/reports/darfur-assault-on-survival.pdf> (examining the impact on those living in the region); PHYSICIANS FOR HUMAN RIGHTS, THE USE OF RAPE AS A WEAPON OF WAR IN THE CONFLICT IN DARFUR, SUDAN (2004), <http://physiciansforhumanrights.org/library/documents/reports/the-use-of-rape-as-a-weapon.pdf> (examining the nature and impact of rapes in Darfur).

51. H. R. Con. Res. 467, 108th Cong. (2004).

52. Juan E. Mendez, *The United Nations and the Prevention of Genocide*, in THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS 225, 228 (Ralph Henham & Paul Behrens eds., 2007).

53. *Id.* at 229-30.

54. *Id.* at 230.

55. See Warren Hoge, *Annan Urges Prompt Action on Sudan Draft*, N.Y. TIMES, Sept. 17, 2004, at A6; *Bolton Blocks a Briefing on Sudan*, N.Y. TIMES, Oct. 11, 2005, at A1. The establishment of the Office of Special Advisor on Genocide was part-time and

In 2005, the United Nations Commission of Inquiry (COI), assisted by the Darfur Atrocities Documentation Team (ADT), the Coalition for International Justice, and other NGOs, issued their findings.⁵⁶ While both investigations found gross human rights violations taking place, only the ADT's finding used the term genocide.⁵⁷ The COI declared that there was no finding of genocide, but stated that crimes against humanity and war crimes were being carried out.⁵⁸ These two commissions reflect how individual states and international institutions can quickly initiate and pull together resources to investigate atrocities when they are motivated to do so. The issue then becomes how to take these findings and develop an effective strategy to significantly alter or impact the processes of destruction and devastation. For example, on September 9, 2004, a report entitled *Documenting Atrocities in Darfur* was released to the public after an ADT investigation that included interviews with refugees in Chad.⁵⁹

The ADT findings provided part of the evidence for Secretary of State Colin L. Powell testifying that day to a Hearing of the Senate Foreign Relations Committee, that “[w]e believe the evidence corroborates the specific intent of the perpetrators to destroy a ‘group in whole or in part.’”⁶⁰ However, Powell added: “[S]ome [within the United States] seem to have been awaiting for this determination of genocide to take action. In fact, however, no new action is dictated by this determination.”⁶¹ He referred to Article 8 of the Genocide

was the outcome of the UN's investigation and acknowledgment of its failure in Rwanda and the Balkans. See Mendez, *supra* note 52, at 227-28. Mendez reached out to a range of groups, including genocide scholars, some of whom had lobbied for the position to be established. *Id.* at 229-30. While the position has the potential to be an important one and is now full-time, the tensions between institutional barriers in the Security Council, including individual state power politics, and coming up with new ways to harness effective action to prevent and stop genocide and other mass violence continues. See *Darfur Refugee and Top UN Envoy for Prevention of Genocide Discuss Humanitarian Crisis in Sudan and Role of International Community*, DEMOCRACY NOW!, Apr. 18, 2006, http://www.democracynow.org/2006/4/18/darfur_refugee_and_top_un_envoy.

56. International Commission of Inquiry on Darfur, *Report to the Secretary-General*, S.C. Res. 1564 (Jan. 25, 2005), http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

57. *Id.* ¶ 220.

58. Eric Markusen & Samuel Totten, *Investigating Allegations of Genocide in Darfur: The U.S. Atrocities Documentation Team and the UN Commission of Inquiry*, in *DARFUR: GENOCIDE BEFORE OUR EYES*, *supra* note 50, at 58, 62-63 (quoting and citing International Commission of Inquiry on Darfur, *supra* note 56).

59. U.S. DEP'T OF STATE, *DOCUMENTING ATROCITIES IN DARFUR* (2004), <http://www.state.gov/g/drl/rls/36028.htm>.

60. *Testimony Before the Senate Foreign Relations Committee*, 108th Cong. 3 (2004) (statement of Colin L. Powell, Secretary of State).

61. *Id.*

Convention that contracting parties “may call upon the [United Nations] to take action[s] . . . appropriate for the prevention and suppression of acts of genocide.”⁶² Within two weeks, President George W. Bush, in an address to the U.N. General Assembly, referred to the events as genocide,⁶³ and hence, on his watch, was the first U.S. president to label events as genocide while they were occurring. Initially, the Bush administration, which opposed the International Criminal Court, proposed that a separate tribunal be created for crimes being carried out in Darfur, but this proposal had little support and proved unworkable.⁶⁴ So, the U.S. government switched strategies. Hence, on March 31, 2005, the U.N. Security Council applied Article 8 of the Genocide Convention for the first time and adopted Resolution 1593, which referred the situation in Darfur to the International Criminal Court.⁶⁵ The U.S. government and China abstained from the vote.⁶⁶ In June 2005, ICC Prosecutor Luis Moreno Ocampo opened the ICC investigation into criminal actions in Darfur.⁶⁷ As precedent setting as this referral and the ICC investigation were, what were their impact? Two years after the escalation of violence in western Sudan, and no matter how well-intentioned or precedent setting these investigations and actions were, they do not appear to have significantly impacted the displacement and destruction on the ground.

Responses to the tragedy in Darfur included increased coverage in newspapers, on the internet, and on television by a small group of public voices who continued to shout out against the atrocities and gained a following through their writings and public speaking. For example, Eric Reeves sounded the alert in 2003 about the likelihood of the Khartoum government waging war against its citizens in Darfur.⁶⁸ His prophetic voice and gloomy predictions, found in internet postings on [sudanreeves.org](http://www.sudanreeves.org), newspaper and journal articles, and talks, were an outgrowth of his advocacy efforts to stop

62. *Id.* (quoting Genocide Convention, *supra* note 1, art. VIII).

63. *Remarks to the United Nations General Assembly in New York City*, 40 WEEKLY COMP. PRES. DOC. 2075, 2077 (Sept. 21, 2004).

64. Zachary D. Kaufman, *Sudan, the United States, and the International Criminal Court: A Tense Triumvirate in Transitional Justice for Darfur*, in *THE CRIMINAL LAW OF GENOCIDE*, *supra* note 52, at 49, 50-51.

65. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

66. John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT’L L. 691, 691-93 (2005).

67. Int’l Criminal Court, *Sixth Report of the Prosecutor of the Int’l Criminal Court to the UN Security Council Pursuant to the UNSCR 1593*, ¶ 9 (Dec. 5, 2007) (prepared by Luis Moreno-Ocampo).

68. For a complete archive of Eric Reeves’s internet postings, see Sudan Research, Analysis, and Advocacy, <http://www.sudanreeves.org/page-2.html> (last visited Nov. 21, 2008).

the decades-long atrocities committed by the GOS against its own citizens. Although Reeves had his early critics, many of his analyses turned out to be correct. In 2006, Nicholas Kristof of *The New York Times* received a Pulitzer Prize for his articles on what he quickly moved from describing as ethnic cleansing to genocide in Darfur.⁶⁹ Emily Wax of *The Washington Post*,⁷⁰ Samantha Power,⁷¹ John Prendergast of International Crisis Group,⁷² and Jerry Fowler of the Committee on Conscience of the U.S. Holocaust Memorial Museum,⁷³ were also among those who wrote about the gravity of the situation.

The growth of a large scale civil society movement (particularly in North America) to stop the destruction included different strategies and coalition groups. These groups included some of the same Christian advocacy groups that earlier focused on ending the violence in southern Sudan as well as new student groups,⁷⁴ such as the Genocide Intervention Network (originally called the Genocide Intervention Fund), Student Anti-Genocide Coalition (originally called STAND), and the Save Darfur Coalition. A range of strategies and emphases emerged. Sometimes, groups differed with one another as to where and how the advocacy should proceed, which ranged from lobbying administration officials and Congressional members for specific legislation, to mass rallies, bumper stickers, advertisement campaigns in subways, and Save Darfur t-shirts. Whether or not some or all these factors have resulted in putting any restraints on the level of violence remains difficult to assess.

Advocacy strategies included economic pressure on the GOS through divestment campaigns and on the Chinese government through threats to boycott the Beijing Olympics if China did not put pressure on its Sudanese trading partner.⁷⁵ From USAID and U.N.

69. See The 2006 Pulitzer Prize Winners, <http://www.pulitzer.org/works/2006/Commentary> (last visited Nov. 21, 2008) (listing articles in order of appearance).

70. See, e.g., Emily Wax, Op-Ed., *A Loss of Hope Inside Darfur Refugee Camps: Over Two Years, a Genocide Comes into View*, WASH. POST, Apr. 30, 2006, at A12.

71. See, e.g., Samantha Power, Op-Ed., *Court of First Resort*, N.Y. TIMES, Feb. 10, 2005, at A23.

72. See, e.g., John Prendergast, *So How Come We Haven't Stopped It?*, WASH. POST, Nov. 19, 2006, at B01.

73. See, e.g., Jerry Fowler, *In Sudan, Staring Genocide in the Face*, WASH. POST, June 6, 2004, at B02.

74. Darfur has provided an opportunity for a number of students-turned-Darfur-activists to launch human rights careers and for a number of NGOs to raise funds and raise the profile of their organizations. However, the pressure on NGO specialists to give talks and provide information about Darfur during 2005-2007 reduced attention to and funding in support of other humanitarian crises.

75. Nicholas D. Kristof, Op-Ed., *Boycotting the Beijing Olympics*, N.Y. TIMES, Jan. 31, 2007.

agencies, to Christian Mercy and Médecins Sans Frontières, national and international relief agencies joined the public policy NGOs and various student and other advocacy groups to provide relief for the millions of displaced people, to support and fund the African Union forces on the ground, and to alleviate the crisis. These activities have helped provide needed food, shelter, and other necessities for millions of IDPs. But the response of humanitarian aid organizations have also allowed the Sudanese government to once again carry out atrocities against segments of its population, and let the world community come in after the fact to help feed and house their citizens in the midst of a “humanitarian crisis.” This was precisely what had happened with the millions of displaced persons in southern Sudan where the United Nations, USAID, and various NGOs continue to provide wide-scale relief.

IV. THE PERILS OF “LESSONS LEARNED FROM THE PAST” AND GENOCIDE DEFINITIONALISM

It often appears that selective “lessons learned” from earlier genocides are applied to the next event, even though the next event is within a different historic context and any lessons learned need to be carefully adjusted to the new historic events—fine-tuned so to speak—and their underlying assumptions carefully thought through. Certainly, the popularity of the phrase “never again,” without contextualizing it within “ever again,” points to how old assumptions or popularization remain current long after historic events have undermined their validity or effectiveness. Five years after the conflict escalated to genocide in Darfur, “NOT ON OUR WATCH” continues to be the slogan of choice.

The publicity generated in 2004 and 2005 on whether or not the Darfur atrocities constituted genocide, as well as the time and energy spent on debates and accusations between various state, NGO, and international actors, was generated more by past examples and failures than by concrete reflection on how the civilian destruction could be stopped in Darfur in 2004 and beyond. To this day, a number of important NGOs, including Amnesty International, Human Rights Watch, and the International Crisis Group, have refused to use the term “genocide” to describe atrocities in Darfur.⁷⁶ In contrast to Rwanda, the U.S. government took the lead in labeling

76. See, e.g., Amnesty International USA, Darfur Reports and Background, <http://www.amnestyusa.org/darfur/darfur-facts/page.do?id=1041056> (last visited Oct. 30, 2008) (“conflict”); HUMAN RIGHTS WATCH, DARFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN (2004) (“ethnic cleansing”), <http://hrw.org/reports/2004/sudan0504/sudan0504simple.pdf>; International Crisis Group, Crisis in Darfur, <http://www.crisisgroup.org/home/index.cfm?id=3060> (last visited Oct. 17, 2008) (“conflict”).

the destruction in western Sudan as genocidal. In both cases, for the civilians on the ground, the effect was the same—the perpetrators carried out mass destruction with impunity.

Many genocide scholars and organizations recognized the events as genocide. For example, at its 2005 biennial conference, the International Association of Genocide Scholars passed a resolution of condemnation urging the international community to take immediate action to stop the genocide. Two genocide scholars, the late Eric Markusen and Sam Totten, were members of the Darfur Atrocities Team interviewing Darfuri refugees in Chad.⁷⁷ In 2005, the Institute for the Study of Genocide published a collection of essays entitled *Darfur: Genocide Before Our Eyes*.⁷⁸ Further, recent scholarly literature in the study of genocide and legal rulings of the international tribunals expanded interpretation of what constituted genocide.⁷⁹ New analysis of the connection between genocide and war, which has expanded the notion of intent and the use of rape as a systematic method in genocide (the Akayesu decision), has contributed to reappraisals of the complexity of processes of destruction and how these could be applied to interpreting the Genocide Convention.⁸⁰ In September 2004, the International Law and Policy Group issued *Genocide in Darfur: A Legal Analysis*, which found that “the acts of violence and aggression in Darfur, Sudan meet the legal standard for genocide as set forth in the Genocide Convention.”⁸¹ The brief included reports from NGOs, the United Nations, and U.S. State Department, along with rulings of the International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY) and newspaper reports to conclude that “the nature of the attacks, rapes, killings and property destruction that have been widely reported indicates that there is sufficient evidence to satisfy the legal requirements for determining that genocide is occurring in Darfur, Sudan.”⁸²

The prevailing rationale was that once Darfur was found to be a

77. See Markusen & Totten, *supra* note 58, at 52.

78. See DAFUR: GENOCIDE BEFORE OUR EYES, *supra* note 50.

79. See David Lisson, Note, *Defining “National Group” in the Genocide Convention: A Case Study of Timor-Leste*, 60 STAN. L. REV. 1459 (2008).

80. See PUB. INT’L L. & POL’Y GROUP, GENOCIDE IN DARFUR: A LEGAL ANALYSIS 4-10 (2004), <http://www.publicinternationallaw.org/publications/reports/DarfurGenocide-9-28s.pdf>.

81. *Id.* at 1.

82. *Id.* at 10. But see William A. Schabas, *Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide*, in THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS, *supra* note 52, at 39 (noting that the 2005 report from the International Commission of Inquiry on Darfur found that the atrocities in Darfur should be characterized as crimes against humanity rather than genocide).

case of genocide, the international community would be galvanized to act.⁸³ But how? The focus on calling the violence in Darfur “genocide” and thereby triggering the Genocide Convention was a byproduct of inaction during earlier events, particularly the Rwandan genocide. But, post 9/11 and in the middle of the “war on terror,” with wars in Afghanistan, Iraq, Chechnya, Congo, and elsewhere, who was going to intervene and how? What were the purported lessons learned? The lessons learned were that if the international community had acted to reinforce the U.N. peacekeepers or to capture arsenals of machetes and other weapons, the slaughter of an estimated 800,000 Rwandans might have been thwarted or reduced in number.⁸⁴ However, this was not the situation on the ground in Darfur.⁸⁵

Historically, a number of genocides were stopped after significant destruction of human lives had already been carried out through military defeat such as the case of the Nazi genocides during World War II, and the genocides in Cambodia, Bangladesh, and Rwanda.⁸⁶ President Bush’s leadership on pressuring for a peace accord in the North-South War and condemnation of the atrocities in Darfur stood out early on. But there was no consensus in the Bush administration, Congress, or within the international community on how to proceed.⁸⁷ Neither the United States nor any other western country was gathering a “coalition of the willing” to act, nor were multilateral organizations such as NATO or the European Union willing to take action.⁸⁸ Most African and Arab countries were silent on the matter.⁸⁹ Sudan’s largest trading partner, China, showed no public inclination to intervene in what it characterized as a domestic matter.⁹⁰ In the case of the Sudanese Government: What signal is being sent if you continue to broker a peace accord for power sharing

83. See Murphy, *supra* note 6, at 333-35.

84. See Roméo Dallaire & Kishan Manocha, *The Major Powers and the Genocide in Rwanda*, in *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS*, *supra* note 52, at 61, 61-62.

85. See Murphy, *supra* note 6, at 317-18.

86. See, e.g., The History Place, *Genocide in the 20th Century*, <http://www.historyplace.com/worldhistory/genocide/holocaust.htm> (last visited Nov. 21, 2008); Cambodian Genocide Group, *The Genocide*, <http://www.cambodiangenocide.org/genocide.htm> (last visited Nov. 21, 2008); 1971 Bangladesh Genocide Archive, <http://www.genocidebangladesh.org> (last visited Nov. 21, 2008); INT’L PEACE ACADE., *10 YEARS AFTER GENOCIDE IN RWANDA: BUILDING CONSENSUS FOR THE RESPONSIBILITY TO PROTECT* (2004), http://www.ipacademy.org/pdfs/10_YEARS_AFTER_GENOCIDE.pdf.

87. See Murphy, *supra* note 6, at 326-28.

88. See *id.*

89. *Id.* at 330-31.

90. Scott Straus, *‘Atrocity Statistics’ and Other Lessons from Darfur*, in *GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN* 189, 194 (Samuel Totten & Eric Markusen eds., 2006).

(CPA) with one group of opposition leaders at the same time that the perpetrator government launches a new attack against civilians and rebels in a different part of the country? How does one negotiate with and persuade a government that has carried out atrocities for decades against civilian populations to stop? How can the considerable incentives to continue be reduced? Incentives for the GOS and its accomplices include: weakening and/or eliminating the rebel groups; restructuring Darfuri society and landholding; destroying one population's traditional way of life and livelihood; and creating a vulnerable population of internally displaced persons and refugees.⁹¹ In fact, the genocide is characterized by a successful land grab for perpetrators, various armed factions, and civilian groups.⁹²

Francis Deng, the current Special Advisor of the U.N. Secretary-General on the Prevention of Genocide and who is originally from Sudan, noted:

Considering that most countries were characterized by diversity and gross inequalities in the shaping and sharing of power, national wealth and employment, the potential for identity conflicts that could escalate to genocide was far more widespread than was generally assumed, [and] was not limited to one region or a selected group.⁹³

In fact, such "structures and policies of marginalization, exclusion, discrimination and denial of rights of citizenship and the enjoyment of all human rights" characterize the history of modern Sudan and have been aimed at a growing number of peoples who have come to be identified by the perpetrators as targeted groups.⁹⁴

Darfur is the most recent, *and not necessarily the last*, in a series of ongoing genocidal politics and practices in Sudan that include scorched earth campaigns, targeted killings, and rape. Many features of Darfur follow the patterns of a series of other twentieth-century genocides and mass violence, including state sponsorship; use of proxy groups; the targeting of civilian populations, which takes place under the cover of violent state, regional, and international conflicts; heightened tensions of internally displaced persons caused by a scarcity of resources and environmental degradation; destruction of lives and livelihoods; economic incentives ranging from booty to land; the radicalization of opposition groups who also carry out atrocities;

91. See JOK, *supra* note 16, at 2-5.

92. See *id.* at 7.

93. Human Rights Council, *Human Rights Council Hears Statements by Special Advisor on Prevention of Genocide and Special Rapporteur on Human Rights in Sudan*, Mar. 17, 2008, <http://www.africafiles.org/article.asp?ID=19004> (paraphrasing Mr. Deng).

94. *Id.*

and perpetrator denial.⁹⁵

The patterns of massive and repeated population displacements and genocide by attrition characterize the genocide in Darfur and follow earlier practices against the Nuer, Nuba, Dinka, and other groups. "With over five million internally displaced persons (IDPs) and international refugees, Sudan has the largest population of displaced persons in the world today."⁹⁶ Desertification and regional climate changes contribute to the conflicts.⁹⁷ The severity of violence over decades of civil wars, and now in Darfur, only add to the environmental damage.⁹⁸ Increased pressure from pastoralist groups in Darfur and Kordofan reflect the decline in precipitation regionally and add to tensions and violence.⁹⁹ Around IDP camps such as the large camp El Fasher in Northern Darfur, the area is severely degraded and there is scarcity of firewood and food insecurity.¹⁰⁰ The increase in Northern Darfur's "population growth and related environmental stress have [also] created conditions" that add to conditions of conflict.¹⁰¹

The environmental degradation and resulting violence in Darfur has taken attention away from implementation of the 2005 Comprehensive Peace Agreement.¹⁰² Support and incentives to implement the CPA within the government have been largely eliminated.¹⁰³ Provisions of the agreement such as power sharing and return or resettlement of millions of civilians displaced during the North-South conflicts were difficult to implement and monitor under the best of circumstances.¹⁰⁴ They have been further eroded due to the violence in Darfur.¹⁰⁵ This toxic spillover effect on other areas within Sudan and the exacerbation of tensions with neighboring countries, such as Chad and the Central African Republic, continue due to cross-border raids and the increased numbers of internally displaced persons, and threatens the well-being and security of

95. For further discussion of these factors, see Joyce Apsel, *Teaching About Darfur Through the Perspective of Genocide and Human Rights*, in DARFUR: GENOCIDE BEFORE OUR EYES, *supra* note 50, at 13-16.

96. UNEP, *supra* note 22, at 9.

97. *Id.* at 9-10.

98. *Id.* at 8.

99. *Id.* at 9.

100. *Id.*

101. *Id.* at 8.

102. See *id.* at 6. See generally United Nations Mission in Sudan, *The Comprehensive Peace Agreement Monitor*, <http://www.unmis.org/english/cpaMonitor.htm> (last visited Nov. 21, 2008).

103. U.N. Sec. Council, *Sudan: North-South* (Sep. 5, 2007), <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3272315>.

104. *Id.*

105. See *id.*

civilians throughout the larger region.¹⁰⁶

The internal displacement in Darfur took place at “an unprecedented rate,”¹⁰⁷ inflicting mental and physical harm on people during and after the uprooting. According to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), there are 2.4 million people, or approximately one-third of the population of Darfur, displaced.¹⁰⁸ OCHA describes the situation as the “[w]orld’s largest humanitarian operation.”¹⁰⁹ In 2004, there were 230 relief workers trying to assist 350,000 people; four years later there are over 14,833 aid workers struggling to help “more than 4 million people affected by the conflict.”¹¹⁰

One central feature of the Darfur genocide is the IDP crisis and the degree to which these populations continue to be at serious risk from a pattern of repeated population displacements and attacks. From January through March 2008, “nearly 80,000 more innocent civilians [were] forced to abandon their homes to seek refuge.”¹¹¹ The displacement is “primarily due to aerial bombardment, clashes between Government and rebel forces, militia attacks, Sudan Liberation Army signatories attacks and inter-tribal fighting. Sexual and physical assault on civilians continues to be reported on a daily basis.”¹¹² Those forced to flee for the first time sought refuge in internally displaced persons camps, most of which were “already filled beyond capacity.”¹¹³

The key here is that the government and its accomplices target not only armed rebel groups, but civilian groups under the pretext of fighting rebels.¹¹⁴ There has been a “successful” restructuring of the society, eliminating civilian groups often caught in the middle of the conflict, some of whom are sympathetic or provide support for the rebels.¹¹⁵ The hastily concluded and disastrous Darfur Peace Agreement (DPA), signed on May 5, 2006 between representatives of the Sudan Government and one small SLA rebel faction led by Mini

106. *Id.*; see Joyce Apsel, *The Complexity of Destruction in Darfur: Historical Processes and Regional Dynamics*, HUM. RTS. REV., Sept. 6, 2008.

107. UNEP, *supra* note 22, at 9.

108. UN Office for the Coordination of Humanitarian Affairs (OCHA), *Sudan-Darfur: Humanitarian Profile-March 2008*, http://www.humansecuritygateway.info/documents/UNHCR_map_Sudan_Darfur_humanitarianprofileMarch2008.pdf.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Apsel, *supra* note 95, at 14.

115. *See id.* at 14-16.

Minawi, further splintered opposition factions.¹¹⁶ Amidst the chaos and jockeying for power, the GOS, the Janjaweed, opposition groups, and local bands attacked people in IDP camps and elsewhere, as well as humanitarian workers and members of the African Union force.¹¹⁷ Access to displaced persons actually deteriorated with the surge in violence after the DPA was concluded, increasing insecurity on the ground.¹¹⁸ For millions of people whose lives and livelihoods have been uprooted, there is in all likelihood no going back to their former villages.¹¹⁹ Traditional societal and economic relationships have been ruptured, from family structures to landholding.¹²⁰ According to the Sixth Report of the ICC Prosecutor Luis Moreno-Ocampo:

As the campaign of terror of 2003-2004 has achieved its aim and with international presence expanding, there emerges a new phase: a pattern of repeated abuses and targeted attacks directed in particular against the persons displaced.

The Office [ICC Prosecutor] has identified numerous incidents which may constitute crimes within the ICC's jurisdiction: forcible transfer of civilians; murder; intentionally directing attacks against the civilian population; rape or other forms of sexual violence; and intentionally directing attacks against personnel or vehicles involved in humanitarian assistance. These include strong allegations of crimes committed by all parties, including alleged rebel attacks against peacekeepers and humanitarian personnel. Such attacks can constitute war crimes within the ICC's jurisdiction.¹²¹

Displacement of specific population groupings, which has resulted in millions of internally displaced persons and refugees who continue to be targets and at serious risk, attest to the success of the genocidal campaign.

CONCLUSION

This essay began by pointing out the gap between the promise of

116. See Julian Thomas Hottinger, *The Darfur Peace Agreement: Expectations Unfulfilled*, in *PEACE BY PIECE: ADDRESSING SUDAN'S CONFLICT* (Mark Simmons & Peter Dixon eds., 2006), <http://www.c-r.org/our-work/accord/sudan/contents.php>.

117. See Eric Reeves, *Attack on UNAMID Forces in Darfur: The Khartoum Regime Is Responsible* (July 12, 2008), <http://www.sudanreeves.org/Article219.html>.

118. See *id.*

119. See Jennifer Leaning, *The Human Impact of War in Darfur*, in *DARFUR: GENOCIDE BEFORE OUR EYES*, *supra* note 50, at 64.

120. See *id.* at 70-71 (detailing the precarious circumstances of IDPs within Darfur and elsewhere in Sudan); see also *DARFUR—ASSAULT ON SURVIVAL*, *supra* note 50, at 39-45; HELEN YOUNG ET AL., *FEINSTEIN INTERNATIONAL FAMINE CENTER, TUFTS UNIVERSITY, DARFUR—LIVELIHOODS UNDER SIEGE* (2005), <https://wikis.uit.tufts.edu/confluence/display/FIC/Darfur+Livelihoods+Under+Siege>.

121. Int'l Criminal Court, *supra* note 67, ¶¶ 40-41.

human rights norms and institutions and the practical application on the ground. As a new institution, the International Criminal Court is investigating criminal actions against civilians in Sudan, specifically in Darfur, as they are being carried out. The Prosecutor of the ICC has issued a series of reports to the U.N. Security Council pursuant to U.N. Security Council Resolution 1593 in 2005. The Office of the Prosecutor opened its investigation on June 1, 2005, "focusing on some of the most serious crimes which occurred in 2003-2004."¹²² After collecting evidence:

On [April 27, 2007], Pre-Trial Chambers I of the ICC issued warrants of arrest against Ahmad Muhammad Harun, former Minister of State for the Interior and current Minister of State for Humanitarian Affairs of the Sudan and Ali Muhammad Ali Abd Al Rahman, otherwise known as Ali Kushayb—a Janjaweed/militia leader—for war crimes and crimes against humanity.¹²³

What effect have some of the precedent-setting events discussed in this essay, such as the U.N. Security Council referral to the ICC and the triggering of Article 8 of the Genocide Convention or the ICC issuance of warrants against leaders of the crimes carried out against civilians in Darfur, had on the Government of Sudan? On the accused? On the human beings targeted on the ground? The answers to these questions are most disturbing.

The ICC Office of the Prosecutor in its Sixth Report to the U.N. reports that the GOS "has taken no steps to arrest and surrender Ahmad Harun and Ali Kushayb."¹²⁴ Ali Kushayb, who previously was said to be under investigation and arrest, was released because, according to GOS officials, there was a "lack of evidence."¹²⁵ Ahmad Harun, former Minister of State for the Interior and current Minister of State for Humanitarian Affairs of the Sudan, continues to have "a high profile in the Sudanese media and in public life, participating in more than 17 high level official events organized by his Ministry, the GOS or the ruling National Congress Party."¹²⁶ These included a number of meetings on resettlement plans on Darfur and "attending security forces' functions."¹²⁷ In July 2008, ICC prosecutor Luis Moreno-Ocampo requested an arrest warrant based on his investigations in Darfur charging President Omar al-Bashir of Sudan with crimes against humanity, war crimes, and genocide.¹²⁸ The

122. *Id.* ¶ 9.

123. *Id.* ¶ 2.

124. *Id.* ¶ 4.

125. *Id.* ¶ 13.

126. *Id.* ¶ 24.

127. *Id.*

128. Situation in Darfur, the Sudan, Case No. ICC-02/05, Summary of Prosecutor's Application Under Article 58, ¶ 1 (July 14, 2008), <http://www.icc->

impact of this request for charges to be brought against the President of Sudan remains unclear such as whether it will exert pressure to curtail violence or result in its escalation long term.¹²⁹ Will there be repercussions undermining the work of humanitarian actors or the United Nations African Union Mission forces (UNAMID) as peacekeeping monitors? Will this have an impact on security and the lives of people on the ground? The possibility of President al-Bashir's indictment is a focus of media attention and helps keep Darfur and Sudan in the public spotlight. But, such a focus on one or a small number of leaders has its own dangers, including reinforcing "evil men in history theories" and oversimplifying the range of actors involved and complexity of destruction processes. The promise of justice and its effectiveness as a deterrent has so far been trumped by state sovereignty and non-compliance. Keeping the role of courts and tribunals in perspective as part of the larger process of deterring or addressing atrocities is crucial. "Courts and tribunals are not ends in themselves. Rather, they are elements of a much broader project."¹³⁰

The tragic case of Darfur continues and will undoubtedly provide important (if at points outdated) models for how to address the next events that escalate to genocide or crimes against humanity. Perhaps less time will be spent determining whether or not the event is genocide so that realistic strategies for intervention or pressure on the perpetrator government will emerge more quickly. As this Article has pointed out, there have been a series of precedents set in response to the violence perpetrated against civilians in Darfur since 2003. These include: investigations of the human rights violations initiated by the U.S. State Department and the United Nations; speaking out against the violations by President George W. Bush and Secretary of State Powell, who invoked the Genocide Convention; the U.N. Security Council reference to Article 8 and referral to the ICC; and the ongoing ICC investigation of the crimes, as well as the Office of the Prosecutor's issuance of arrest warrants for two high-level criminal suspects and the July 2008 request for an arrest warrant for Sudanese President al-Bashir. An entire generation of young people and other citizens, in the United States and Canada especially, have participated in a large civil society movement to publicize the atrocities and put pressure on their government and the international community to do something. However, these activists will have to absorb difficult lessons learned from the genocide

cpi.int/library/cases/ICC-02-05-152-ENG.pdf.

129. *See id.*

130. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 209 (2007).

continuing very much *before their eyes* and *on their watch* despite lobbying, protests, and other actions. Some of these people will continue to work in human rights advocacy and will be part of a new generation of human rights activists and political leaders. All of this is to the good, but has had little direct impact on the Government of Sudan to stop the destruction, disarm the Janjaweed, or take other actions to provide security or to help the millions of displaced persons return to their villages.

Scarcity of resources, lack of security, and targeting of displaced populations who are dependent on outside aid for food, water, and medical aid describe the conditions in 2008, and as a result, millions of human beings remain at serious risk of death from attacks, malnutrition, and disease. If the destruction and displacement was initially carried out at a rapid rate, the present stage is a painful one carried out over years through deprivation and death by attrition.

In conclusion, the prospects for the IDP population remain difficult as they adjust to the new demographic restructuring, including landholding, power, and political changes on the ground over the past five years. Resolution of the conflicts in Darfur and in Sudan has become more complex and challenging. The ongoing fracturing of Darfuri society and its leadership does not bode well for the future. This is not surprising, as it follows the Government of Sudan's tactics of divide and rule and of mass human rights violations carried out against its own citizens for decades. How does one stop a genocidal regime? On this sixtieth anniversary of the 1948 Genocide Convention, for the people in Darfur and other targeted Sudanese, the Genocide Convention does not appear to provide the prospect of an answer.