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DARFUR AND THE RHETORIC OF GENOCIDE

BETH VAN SCHAACK*

I. INTRODUCTION

The ancient concept of humanitarian intervention¹ has become the subject of renewed debate and discussion at the inter-governmental level,² within the non-governmental sector,³ and in the academy.⁴ This

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1. Grotius argued in 1625 that “ ‘war for the subjects of another [is] just, for the purpose of defending them from injuries inflicted by their ruler’ . . . if [the] ‘tyrant . . . practices atrocities toward his subjects which no just man can approve.’ ” Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 *Cardozo J. Intl. & Comp. L.* 1, 2-3 (1995) (quoting Grotius, *Vindiciae Contra Tyrannos* (1625)).

2. See generally United Nations, Rpt. of Sec. General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Knowledge* (2004) (available at <<http://www.un.org/secureworld/>> (accessed Mar. 28, 2005)) [hereinafter *High Level Panel*]. The panel was an initiative of Secretary-General Kofi Annan to reconsider the role of the United Nations (U.N.) in light of new threats posed by terrorism, poverty, and war and violence within states, and changing conceptions of sovereignty, collective security, and the use of force. *Id.* In response to a plea by Secretary-General Kofi Annan following the North Atlantic Treaty Organization (NATO) operation in Kosovo to craft consensus principles governing humanitarian intervention, the International Commission on Intervention and State Sovereignty prepared a report on “The Responsibility to Protect” to promote a global debate on the relationship between intervention and state sovereignty. Intl. Comm. on Intervention & St. Sovereignty, *The Responsibility to Protect* ¶¶ 1.6-1.7 (Dec. 2001) (available at <<http://www.iciss.ca/pdf/Commission-Report.pdf>> (accessed Mar. 28, 2005)). The report purposefully eschews the term “humanitarian intervention” in favor of the concept of the “responsibility to protect” in order to emphasize the protective function of any intervention. *Id.* at ¶¶ 1.39-1.41. This paper employs the former terminology, but notes the movement in the lexicon toward the latter. See *High Level Panel, supra*,

concept can be defined as the intervention into the territorial state by another state or a collective of states, with or without authorization from the United Nations Security Council, for the promotion or protection of basic human rights where the territorial state is perpetuating abuses or is unable or unwilling to provide the necessary protection to its inhabitants.⁵ The concept of humanitarian intervention is implicated in such disparate events as the United Nations's (U.N.) involvement in Somalia in 1992, the North Atlantic Treaty Organization's (NATO) deployment in response to abuses in Kosovo in 1999, and the United States's invasion of Iraq in 2003. In a major new initiative, the U.N. recognized:

[T]he emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved themselves powerless or unwilling to prevent.⁶

Although intrigued by the concept in theory, interested parties are grappling with the specifics of identifying substantive criteria justifying intervention, mechanisms for doing so within and without the U.N. institutional framework, operational considerations, and means to protect against abuses of the doctrine.

The crisis in Darfur, Sudan has provided an immediate test of the international community's commitment to humanitarian intervention and its resolve to avoid the debacle of Rwanda, where the world stood largely silent while entire communities were exterminated with rudimentary farm tools.⁷ And yet, the international discourse

at ¶201 (stating "[t]here is a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe." (emphasis in original)).

3. See generally e.g. Ken Roth, *World Report 2004, War in Iraq: Not a Humanitarian Intervention*, Human Rights Watch (Jan. 2004) <http://hrw.org/wr2k4/3.htm#_Toc58744952> (accessed Mar. 28, 2005).

4. See generally e.g. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (U. of Pa. Press 1996).

5. See Halberstam, *supra* n. 1, at 2.

6. *High Level Panel*, *supra* n. 2, at ¶ 203.

7. Indeed, the emergence of Darfur on the international agenda coincided with the 10th anniversary of the genocide in Rwanda.

concerning the humanitarian crisis in Darfur has conflated two distinct inquiries: The legal definition of genocide as it applies to the unique circumstances of Darfur and the propriety of humanitarian intervention, which remains mired in international politics. This conflation can be traced to a number of factors, including a misunderstanding of the obligations imposed by the *Genocide Convention*, the temptation to employ semantic hyperbole to provoke an international response, a persistent unwillingness to risk blood and treasure in defense of humanity, and the manipulation of a plausible delay tactic. Irrespective of the source of this conflation, the question of whether or not the violence in Darfur constitutes genocide is irrelevant outside the context of an international criminal tribunal with jurisdiction over events in Darfur.⁸ At the point in time at which state responsibility is at issue and economic, political, and military solutions to mass violence are being contemplated—be it on multilateral, regional, or even unilateral grounds—debating legal semantics about whether violence rises to the level of genocide simply has no place. Indeed, the methodology necessary to determine the commission of genocide is inapt—and the surrounding discourse discordant—when people are being systematically killed and expelled from their homes through violence on a mass scale. What matters is that the level of violence and the risk to humanity has reached a certain threshold. If international law creates a right—or even a duty—to intervene in countries where massive rights violations are occurring, such a right or a duty has long since been triggered in Darfur.

This paper seeks to disentangle the discourse on genocide and humanitarian intervention by arguing that any right or duty of states to engage in humanitarian intervention should be untethered from specific findings of genocide under international criminal law (ICL). It proceeds in three parts. First, by way of background, it situates the conflict in Darfur in the context of the Sudanese civil war that has raged on and off since Sudan achieved its independence in 1956. Second, it sets out the elements of the crime of genocide and identifies several problems of proof posed by this definition and the nature of

8. As this article went to press, the Security Council decided to refer the situation in Darfur, ongoing since July 1, 2002, to the Prosecutor of the International Criminal Court (ICC) under Article 13(b) of the *Rome Statute of the International Criminal Court*. U.N. Sec. Council. Res. 1593 (2005) (available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement>> (accessed Apr. 8, 2005)).

mass violence in general that led to the finding by a U.N. International Commission of Inquiry (Commission) that the government of Sudan is not committing genocide in Darfur. This paper not reach its own conclusion about whether genocide is or is not occurring in Darfur, but it does evaluate the Commission's reasoning within the ICL jurisprudence in an effort to demonstrate the complexity and subtlety of such an inquiry. Finally, it argues that there is a basic incongruity in undertaking a genocide analysis, which requires detailed considerations of identity and intent, while abuses are ongoing and some form of intervention or state sanction is being contemplated. The nuances inherent to the definition of genocide under ICL provide an inapt metric for determining state responsibility and designing an appropriate preventative response.

II. DARFUR

A. *THE SUDANESE CIVIL WAR*

Sudan has been plagued by conflict for the majority of its fifty-year existence. The primary civil war has been one between the Northern government and rebels in the South, calling themselves the Sudanese People's Liberation Army (SPLA), led by John Garang, who seek greater autonomy and wealth sharing for the people of the oil-rich southern regions. This conflict in which soldiers and militia from the Muslim North are fighting Christian and Animist rebels of the South is occurring across a religious and ethnic divide that bisects much of the African continent.⁹

Just as peace negotiations were proceeding between the North and South in Naivasha, Kenya in 2002 under the auspices of the Inter-Governmental Authority on Development (IGAD),¹⁰ a new conflict flared up in the Western region of Darfur. In February 2003, loosely federated rebel groups, calling themselves the Sudan Liberation

9. For a discussion of this conflict, *see generally Sudan Civil War* <<http://www.globalsecurity.org/military/world/war/sudan.htm>> (accessed Mar. 16, 2005).

10. The Intergovernmental Authority on Development (IGAD) is an East African intergovernmental body composed of Uganda, Kenya, Somalia, Djibouti, Eritrea, Ethiopia, and Sudan that was originally created to address issues of drought and development in the region. *See generally Intergovernmental Authority on Development* <<http://www.igad.org/>> (accessed Mar. 16, 2005).

Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), declared open rebellion against the government because they were excluded from the power- and wealth-sharing agreements emerging from the North-South negotiations. The government responded with a counter-insurgency campaign directed primarily at civilian targets.¹¹ This coincided with the emergence on the international scene of the so-called *janjawid*—roving militia with deniable ties to the central authorities.¹² The N'Djamena Humanitarian Ceasefire Agreement of April 8, 2004¹³ between the government and the SLM/A and JEM has been short lived.¹⁴

The violence and destruction of everyday life that has been unleashed in Darfur staggers the mind. Of a total population of six million in a region the size of France, more than 1.5 million are internally displaced and another 200,000 have been rendered refugees in Chad.¹⁵ NGOs report deaths exceeding 70,000¹⁶ and many thousands more expected due to adverse conditions of life, malnutrition, famine, and disease.¹⁷ Government and *janjawid* attacks

11. Amnesty International USA, *Sudan: Human Rights Concerns* <<http://amnestyusa.org/countries/sudan/background.html>> (accessed Mar. 29, 2005) [hereinafter *Amnesty International USA*].

12. The term *janjawid*, also spelled *jingawit* or *jangaweed*, may be loosely translated as “armed men on horseback” or “evil horsemen,” and is a traditional Darfuran term. *Factbits* <<http://factbits.com/topics/Janjaweed>> (accessed Mar. 16, 2005).

13. *N'Djamena Humanitarian Ceasefire Agreement* (Apr. 8, 2004) (available at <http://www.darfurinformation.com/cf_ceasefire_agreement.shtml> (accessed Mar. 16, 2005)).

14. The rebels and the government of Sudan first reached a ceasefire in September 2003, mediated by the government of Chad. When this agreement failed to hold, the United States brokered the N'Djamena Humanitarian Ceasefire Agreement in April 2004 between the government of Sudan and the two main rebel groups in Darfur. The African Union (A.U.) is charged with monitoring the ceasefire.

15. U.N., Intl. Commn. of Inquiry on Darfur, *Report to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564* ¶ 186 (Jan. 25, 2005) (available at <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf> (accessed Mar. 29, 2005)) [hereinafter *Darfur Report*]; *Amnesty International USA, supra* n. 11, at [¶ 1].

16. BBC News, *UN's Darfur Death Estimate Soars* [¶ 2] (Mar. 14, 2005) <<http://news.bbc.co.uk/go/pr/ft/-/2/hi/africa/4349063.stm>> (accessed Mar. 30, 2005) (reporting 200,000 deaths); The Save Darfur Coalition, *Violence and Suffering in Sudan's Darfur Region* [¶ 3] <<http://savedarfur.org/>> (accessed Mar. 13, 2005).

17. *Id.* The U.S. Agency for International Development predicted in April 2003 that 320,000 or more people would be dead by the end of the year. The current

have destroyed hundreds of villages and many head of livestock, the main source of accumulated wealth in the region.¹⁸ The mass rape of women and girls is once again a weapon of war.¹⁹

B. THE UNITED NATIONS IN DARFUR

The U.N. Security Council first took the situation in Darfur under advisement in conjunction with the emerging peace process in southern Sudan.²⁰ In June 2004, the Security Council established the U.N. Advance Mission in Sudan (UNAMIS) with Resolution 1547.²¹ This

estimate, based on the conditions prevalent in the Internally Displaced Persons (IDPs) camps, is approximately 10,000 deaths per month that the strife continues. U.S. Dept. of St., Bureau of Democracy, Human Rights, and Lab. & Bureau of Intelligence and Research, *Documenting Atrocities in Darfur*, St. Publication 11182 (Sept. 2004) (available at <<http://www.state.gov/g/drl/rls/36028.htm>> (accessed Mar. 29, 2005)) [hereinafter *Documenting Atrocities*]; U.S. Agency for Intl. Dev., *U.S. Pledges Additional \$188 Million for Darfur Crisis: Brings Total U.S. Contribution to Nearly \$300 Million* [¶ 2] (available at <<http://www.usaid.gov/press/releases/2004/pr040603.html>> (accessed Mar. 30, 2005)). According to a report published in the *Journal of the American Medical Association*, and based on a survey of three IDP camps, the death rate, expressed as daily deaths per 10,000 of the population, is 2.5. Francesco Grandesso et al., *Mortality and Malnutrition Among Populations Living in South Darfur, Sudan*, 293 *J. Am. Med. Assn.* 1490-94 (Sept. 2004) (available at <http://jama.ama-assn.org/cgi/content/abstract/293/12/1490?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=darfur&searchid=111587982905_1408&stored_search=&FIRSTINDEX=0&journalcode=jama> (accessed Apr. 11, 2005)).

18. Andrew S. Natsios, U.S. Agency for Intl. Dev. Adminstr., Special Briefing, *U.S. Dept. of St. On-the-Record-Briefing on Sudan* (D.C., Sept. 29, 2004) (available at <<http://www.state.gov/p/af/rls/spbr/36615.htm>> (accessed Mar. 30, 2005)) (regarding the situation in Darfur).

19. Nima Elbagir, *Raped Darfur Women Wrestle with Fate of Babies*, *Sudan Tribune* (Feb. 20, 2005) (available at <http://www.sudantribune.com/article.php3?id_article=8120> (accessed Mar. 20, 2005)); Lydia Polgreen, *Darfur's Babies of Rape Are on Trial from Birth*, *N.Y. Times* A1 (Feb. 11, 2005).

20. Two 2004 Security Council presidential statements expressed concern about the humanitarian crisis in Darfur. Gunter Pleuger, U.N. Sec. Council President, *Press Statement on Darfur, Sudan* (Feb. 4, 2004) (available at <<http://www.un.org/News/Press/docs/2004/sc8050.doc.htm>> (accessed Mar. 28, 2005)); Gunter Pleuger, U.N. Sec. Council President, *Statement by the President of the Security Council* (May 26, 2004) (available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N04/364/95/PDF/N0436495.pdf?OpenElement>> (accessed Mar. 30, 2005)).

21. U.N. Sec. Council Res. 1547 (June 11, 2004) (available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N04/386/26/PDF/N0438626.pdf?OpenElement>> (accessed Mar. 30, 2005)).

resolution adopted Secretary-General Kofi Annan's proposal for an advance team in Sudan to prepare for further peacekeeping in the region to support the implementation of the Comprehensive Peace Agreement between the government and the SPLA geared toward ending the southern civil war. The resolution also called upon the parties to bring an immediate halt to the fighting in the Darfur region.²² In a July 2004 Joint Communiqué between the U.N. and Sudan, the government of Sudan agreed to sixteen specific measures to resolve the crisis, including the disarmament of the *janjawid* and the admission of human rights monitors in Darfur.²³ The U.N. in turn pledged to assist the deployment of African Union (A.U.) ceasefire monitors and continue to provide humanitarian assistance.²⁴

Sudan reappeared on the Security Council's agenda a month later in Resolution 1556, wherein the Council, determining that the situation in Sudan constituted a "threat to international peace and security and to stability in the region"²⁵ under Article 39 of the U.N. Charter,²⁶ advocated the disarmament of the *janjawid*, established an arms embargo against non-governmental entities and individuals (but not the

22. See generally *id.*

23. U.N., Joint Communiqué between the Government of Sudan and the United Nations on the Occasion of the Visit of U.N. Sec. General to Sudan S/2004/635, annex (July 3, 2004) (available at <<http://www.reliefweb.int/rw/rwb.nsf/db900SID/MHII-62L5PR?OpenDocument>> (accessed Mar. 30, 2005)).

24. Per a report of the Cease Fire Commission, the A.U. peacekeeping force deployed in Darfur consists of 1,059 personnel: 244 military observers, 789 protection force personnel, 11 cease fire commission members, 9 foreign contractors, and 6 civilian policemen. A.U., Joint Commn., *Report of the Cease Fire Commission* ¶ 11 (Jan. 3, 2005) (available at <<http://www.africa-union.org/DARFUR/Reports%20of%20the%20cfc/Report%20of%20CFC%20Joint%20Com%20meeting%20Ndjamena%20Tchad%2003jan05.pdf>> (accessed Mar. 30, 2005)). In practice, the A.U.'s mission in Sudan has a very limited mandate: to document and report atrocities and violations of the ceasefire. *Id.* at ¶ 13.

25. U.N. Sec. Council Res. 1556 (July 30, 2004) (available at <http://daccessdds.un.org/doc/UNCD/DOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement> (accessed Mar. 29, 2005)). The resolution passed unanimously, although China and Pakistan abstained, arguing that the government of Sudan needed more time to live up to its obligations. U.N. Sec. Council 5015th Meeting Minutes, *Report of the Secretary-General on the Sudan* (July 30, 2004) (available at <<http://daccessdds.un.org/doc/UNDOC/PRO/N04/445/15/PDF/N0444515.pdf?OpenElement>> (accessed Mar. 30, 2005)).

26. *U.N. Charter*, ch. 7, art. 39 (available at <<http://www.un.org/aboutun/charter/chapter7.htm>> (accessed Mar. 30, 2005)).

government), and urged the parties to consider a political settlement. It also threatened to consider further actions, including non-military measures or sanctions established under Article 41 of the *U.N. Charter*.²⁷ Finally, the Security Council launched a reporting process whereby the Secretary-General is to submit reports on the progress of the government of Sudan in disarmament, accountability, and ceasing violations. These reports, dutifully submitted to date, are striking in their accounts of the lack of progress in Darfur with respect to curbing the violence or establishing any form of accountability for abuses.²⁸

By Resolution 1564,²⁹ the Security Council directed the Secretary-General to form a Commission of Inquiry³⁰ to:

27. U.N. Sec. Res. 1556; see *U.N. Charter*, *supra* n. 26, at ch. 7 art. 41.

28. See e.g. U.N., *Report of the Secretary-General on the Sudan pursuant paragraphs 6, 13 and 16 of Sec. Council Resolution 1556 (2004), paragraph 15 of Sec. Council Resolution 1564 (2004) and paragraph 17 of Sec. Council Resolution 1574 ¶¶ 2-3, 5-8, 11-13, 18 (Jan. 7, 2005)* (available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/201/40/PDF/N0520140.psf?OpenElement>> (accessed Apr. 11, 2005)).

29. U.N. Sec. Council Res. 1564 (Sept. 18, 2004) (available at <<http://daccessdds.un.org/doc/UNDOC/GEN/NO4/515/47/PDF/NO451547/pdf?OpenElement>> (accessed Mar. 30, 2005)).

30. *Id.* at ¶ 12. The Sudan Commission of Inquiry has several historical antecedents. Following both world wars, members of the victorious nations established investigative commissions to collect evidence of violations of international law, primarily of the 1907 *Hague Convention on the Regulation of the Laws and Customs of War on Land* and other “laws of humanity.” M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1993)*, 88 *Am. J. Intl. L.* 784, 785 (1994). As the political will for prosecutions dissipated following World War I, the findings of the 1919 Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties for Violations of the Laws and Customs of War were consigned to the historical record, rather than embodied in indictments. *Id.* at 787. The 1943 U.N. War Crimes Commission made more of a contribution to justice in the post-World War II period by compiling dossiers on particular perpetrators and recommending national prosecutions within the zones of occupation of the victorious Allies pursuant to Control Council Law No. 10. *Id.* at 788. Here the term “United Nations” referred to the Allies rather than the U.N. Organization, which was formed in 1945. *Id.* at 787. However, most prosecutions, including before the International Military Tribunal established in Nuremberg, involved independent investigations rather than reliance upon the findings of the Commission. *Id.* at 788. This precedent was revived by Security Council Resolution 780, which established a Commission of Experts to document international crimes being committed in the internecine war of the former Yugoslavia. U.N. Sec. Council Res. 780 (Oct. 6, 1992) (available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N92/484/40/IMG/N9248440.pdf?OpenElement>>

[I]nvestigate 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, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.³¹

During November 2004 and January 2005, the Commission sent investigative teams to Sudan to hold meetings with “representatives of the Government, the Governors of the Darfur States and other senior officials in the capital and at provincial and local levels, members of the armed forces and police, leaders of rebel forces, tribal leaders, internally displaced persons, victims and witnesses of violations, NGOs and United Nations representatives.”³² On January 25, 2005, it issued its Report to the Secretary-General who later released it to the Security Council and the public.³³ The Report reaches the conclusion—surprising to many—that the events in Darfur do not constitute genocide, although it determined that the government of Sudan was responsible for crimes against humanity and war crimes on a mass scale.³⁴

The Commission’s conclusion on the genocide question is not undisputed. Prior to the release of its report, the United States Congress, in an unprecedented action, issued a joint resolution classifying the violence in Darfur as “genocide” and urging the

(accessed Mar. 30, 2005)). Its findings laid the groundwork for the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the first international criminal tribunal since the Nuremberg/Tokyo tribunals, and its raw data were transferred to the tribunal’s Office of the Prosecutor. U.N. Sec. Council Res. 808 (Feb. 22, 1993) (available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N93/098/21/IMG/N9309821.pdf?OpenElement>> (accessed Mar. 30, 2005)) (deciding that “an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”); *see generally* Bassiouni, *supra* at 790. A similar commission preceded the establishment of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States (ICTR). *Id.* at 804.

31. U.N. Sec. Res. 1564 at ¶ 12.

32. *Darfur Report*, *supra* n. 15, at Exec. Summary [¶ 4].

33. *Id.* at Exec. Summary [¶ 5].

34. *Id.* at ¶¶ 518-519 (concluding that the government of Sudan had not pursued a policy of genocide).

international community to respond through humanitarian intervention.³⁵ The resolution also called upon the international community to join the United States in identifying the events in Darfur as genocide.³⁶ In September 2004, then-Secretary of State Colin Powell followed suit in an address to the Senate Foreign Relations Committee that was based upon a Department of State investigation in Darfur.³⁷ In a September address to the General Assembly, President Bush also called the atrocities in Darfur “genocide.”³⁸ Even with the release of the Commission’s report, many in the United States have stood by President Bush’s original denunciation.³⁹

In contrast, the European Union (E.U.) and A.U. have been more circumspect. The E.U.’s fact-finding mission documented the widespread killing of civilians and burning of villages, but its report purposefully did not employ the term “genocide.”⁴⁰ Likewise, the

35. H.R. Con. Res. 467, 108th Cong. (Sept. 7, 2004). The resolution was unanimous with 12 members not voting. It declared the atrocities in Darfur to be genocide, deplored the failure of the U.N. Human Rights Commission to take appropriate action, and called upon the U.N. to assert leadership by calling “the atrocities being committed in Darfur by their rightful name: ‘genocide.’” *Id.* at § 6. It also called upon the member states, especially those from the A.U., the Arab League, and the Organization of the Islamic Conference, to undertake measures to prevent genocide. *Id.* at § 5. The resolution also urged the Administration to call events in Darfur “genocide” and to consider humanitarian intervention (multilateral or even unilateral) should the U.N. Security Council fail to act. *Id.* at § 1. It also called for targeted sanctions against Sudanese interests and specific individuals responsible for the atrocities. *Id.* § 11.

36. *Id.* at § 5.

37. Secretary of State Colin Powell visited Darfur in June 2004. A Department of State “Atrocities Documentation Team” then undertook an investigation in Darfur from July through September 2004. *See generally Documenting Atrocities, supra* n. 17. This report represents the synthesis of over 1,000 interviews with displaced Darfurians that were conducted in refugee camps in Eastern Chad. *Id.*

38. George W. Bush, U.S. President, *President’s Statement on Violence in Darfur, Sudan* (Sept. 9, 2004) (available at <<http://www.whitehouse.gov/news/releases/2004/09/20040909-10.html>> (accessed Mar. 29, 2005)).

39. *See e.g.* U.S. Newswire, *Hyde Questions Findings of U.N. Commission of Inquiry on Darfur* (Feb. 1, 2005).

40. Council of the European Union, *Outcome of Proceedings: Sudan/Darfur*, 13303/1/04 Rev 1 (Oct. 13, 2004). *See Reuters, Europe Sees No Genocide in Sudan Region* (Aug. 10, 2004) <<http://query.nytimes.com/gst/abstract.html?res=F50813F63A580C738DDDA10894DC404482&incamp=archive:search>> (accessed Mar. 29, 2005).

A.U. has refrained from characterizing the events as genocide.⁴¹ The European Parliament passed a resolution urging Sudan to arrest individuals accused of acts that are “tantamount to genocide.”⁴² In addition, reports on Darfur by intergovernmental, non-governmental and journalistic sources have proliferated. Some embrace the genocide determination,⁴³ while others dodge it.⁴⁴ The unique elements of

41. A.U., Peace and Sec. Council, *Communiqué of the Seventeenth Meeting of the Peace and Security Council* ¶ 19 (Oct. 20, 2004) (available at <http://www.africa-union.org/News_Events/Communiqu%E9s/Communiqu%E9%20_Eng%2020%20oct%202004.pdf> (accessed Mar. 29, 2005)) (reiterating its concern over the state of affairs in Darfur and urging the government of Sudan to bring the perpetrators of human rights violations to justice).

42. European Parliament, Res. on the Humanitarian Situation in Sudan B5-0065/2004 (Sept. 16, 2004) (available at <http://europa.eu.un.org/articles/et/article_3810_et.htm> (accessed Mar. 29, 2005)).

43. For the first time in its history, the U.S. Holocaust Memorial Museum declared a “genocide emergency” in Darfur, indicating that genocide is imminent or ongoing there. See Jerry Fowler, Panel Discussion Remarks, *Western Sudan in Flames: Briefing on the Darfur Emergency* [¶ 3] (U.S. Holocaust Meml. Museum, D.C, Feb. 20, 2004) (available at <<http://www.ushmm.org/>> (accessed Mar. 18, 2005)). See also Physicians for Human Rights, *PHR Calls for Intervention to Save Lives in Sudan: Field Team Compiles Indicators of Genocide* (June 23, 2004) (available at <http://www.phrusa.org/research/sudan/pdf/sudan_genocide_report.pdf> (accessed Mar. 29, 2005)); *Darfur: A Genocide We Can Stop* <<http://www.darfurgenocide.org/>> (accessed Mar. 30, 2005); Online Newshour, *Darfur Report* (Feb. 2, 2005) <http://www.pbs.org/newshour/bb/africa/jan-june05/sudan_2-02.html> (accessed Mar. 29, 2005) (recounting statement by Salih Booker, Executive Director of Africa Action: “Where we disagree [with the Commission’s report] is that this is a genocide and it has been going on for two years now. We’re just dismayed that this commission could not discover the government’s intent. It’s clear. . .”).

44. For example, in March 2004, the U.N. Resident Humanitarian Coordinator noted that the brunt of the war was being felt by civilians and was ethnically directed. “The violence in [Darfur] ‘appears to be particularly directed at a specific group based on their ethnic identity and appears to be systemized.’” Islam Online, *U.S. Congress Says Attacks in Darfur “Genocide”* (July 23, 2004) <<http://www.islamonline.net/English/News/2004-07/23/article06.shtml>> (accessed Mar. 29, 2005) (quoting the U.N. Humanitarian Coordinator). In May 2004, the U.N. High Commission for Human Rights released its report identifying massive rights violations in Darfur, including war crimes and crimes against humanity. *Violations in Darfur, Sudan May Constitute War Crimes, Crimes Against Humanity, U.N. Human Rights Office Report Says* (July 5, 2004) <<http://www.un.org/News/Press/docs/2004/afr921.doc.htm>> (accessed Mar. 20, 2005). See also Human Rights Watch, *Targeting the Fur: Mass Killings in Darfur, A Human Rights Watch Briefing Paper 1* (Jan. 21, 2005) (available at <<http://www.hrw.org/backgrounder/afnca/darfur0105/darfur0105.pdf>> (accessed Mar. 30, 2005)).

genocide, which elude cursory application, facilitate this debate, rhetoric and equivocation.

C. GENOCIDE IN DARFUR?

The term “genocide” was first coined by Raphael Lemkin, a Polish jurist who was instrumental in establishing genocide as an international crime.⁴⁵ Lemkin finally saw his efforts come to fruition in 1948 with the adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide*⁴⁶ by the General Assembly.⁴⁷ The *Genocide Convention* has penal and, to a lesser extent, political components. It envisions genocide as an international crime, which treaty parties are obliged to punish, but also creates mechanisms to enable preventative and reactive interstate responses. While the conclusion of a comprehensive treaty on genocide was a major achievement of the post-WWII period, until recently it has operated more as a retrospective condemnation of the Nazi enterprise than a criminal code for prospective enforcement or prevention. Sudan is not a party to the *Genocide Convention*,⁴⁸ but the International Court of Justice has ruled that many of the *Convention’s* provisions, including the basic prohibition against genocide, constitute customary law, binding on all states regardless of ratification.⁴⁹

As an international crime, genocide contains three elements that together distinguish it from other forms of crimes against humanity, war crimes, persecution, mass killing, common murder, or mayhem.⁵⁰

45. See Raphael Lemkin, *Genocide as a Crime under International Law*, 41 Am. J. Intl. L. 145, 145-47 (1947). The term comes from the Greek word *genos* (for race) and the Latin suffix *cide* or *caedere* (to kill). *Id.* at 147. See generally William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge U. Press 2000) (discussing the history and application of the *Genocide Convention*).

46. *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277 (Jan. 12, 1951) (available at <<http://www.umn.edu/humanrts/instreet/x1cppcg.htm>> (accessed Mar. 29, 2005)) [hereinafter *Genocide Convention*].

47. U.N. Gen. Assembly Res. 260(III)(A) (Dec. 9, 1948).

48. See U.N. Treaty Collection, *Convention on the Prevention and Punishment of the Crime of Genocide* (Oct. 9, 2001) (available at <<http://www.unhcr.ch/html/menu3/b/treaty1gen.htm>> (accessed Apr. 16, 2005)) (providing a list of current participating countries as of Oct. 9, 2001).

49. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 Intl. Ct. J. 15, 23 (Intl. Ct. of J. May 28, 1951).

50. Article 2 of the *Genocide Convention* reads in full:

First, genocide involves the targeting of members of particular protected groups: racial, religious, ethnic, or national groups.⁵¹ Early and interim definitions of the crime of genocide advanced broad protections for racial, religious, political, linguistic, social, and other groups. During the drafting of the treaty, however, significant opposition arose to the inclusion of political, economic or social groups, in part on the grounds that delegates considered such groups to be too “mutable” to merit protection under the genocide prohibition and in part because delegates feared the creation of a crime of “political genocide” that might be applicable to internal conflicts. As a result, the final *Convention* protects only the four groups listed.⁵²

The second element of genocide, the *actus reus* or criminal act, consists of killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.⁵³ Third, the *mens rea* or criminal intent element of genocide is the specific intent to destroy the protected group in whole or in part.⁵⁴

In the present *Convention*, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical [sic], racial or religious group, as such:

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

Genocide Convention, *supra* n. 46, at art. 2.

51. The crime of persecution, a crime against humanity, also involves the targeting of identifiable groups, but does not require a showing of specific intent to destroy protected groups. See *Rome Statute of the International Criminal Court*, art. 7, U.N. Doc. A/CONF.183/9 (July 17, 1998) (defining crimes against humanity) [hereinafter *Rome Statute*].

52. See generally Beth Van Schaack, *The Crime Of Political Genocide: Repairing The Genocide Convention's Blind Spot*, 106 Yale L.J. 2259, 2260-61 (1997) (discussing drafting history).

53. *Genocide Convention*, *supra* n. 46, at art. 2.

54. *Id.*

The definition of genocide under international law has remained constant since its inception, despite calls and opportunities to amend the definition or recognize a more expansive crime that would reach violence against political groups⁵⁵ or relax the intent requirement to cover acts undertaken with knowledge that the destruction of the group would result.⁵⁶ The high threshold level of specificity has been maintained to recognize a conceptual distinction between acts taken to destroy a particular type of human group and other acts of violence that may not be directed at humanity as a whole. It also avoids a collapse of the concept of genocide into crimes against humanity.

These elements, unique as they are, present several problems of proof that have complicated the categorization of the violence in Darfur and led to the Commission's conclusion that the government of Sudan is not committing genocide. In supporting its conclusion, the Commission in some respects drew on the ICL jurisprudence of the international tribunals, for example in its expansive treatment of the concept of "ethnicity" and the groups protected by the *Convention*. In other respects, the Commission overlooked this body of legal precedent and reasoning, for example in its more rigid conception of genocidal *mens rea*.⁵⁷ Regardless of the Commission's fealty to ICL precepts

55. See e.g. Van Schaack, *supra* n. 52, at 2260-61 (arguing for the recognition of political genocide under customary international law). Some national legislation has in fact expanded the groups protected by the genocide prohibition. See Schabas, *supra* n. 45, at 350-51 (cataloging state statutes).

56. See *The Prosecutor v. Jelisić*, Trial Judgement, IT-95-10-T ¶¶ 85-86 (Int'l. Crim. Trib. for Former Yugoslavia Dec. 14, 1999) (available at <<http://www.un.org/icty/jelisić/trialC1/judgement/jel-tj991214e.pdf>> (accessed Mar. 28, 2005)) (rejecting prosecution's argument that genocide exists where a defendant knew that his acts would inevitably, or probably, result in the destruction of the group in question); see also Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 Colum. L. Rev. 2259, 2282-83 (1999). This relaxation has occurred with respect to the standards applied to prosecute complicity to commit genocide, where it need only be shown that the defendant knew that the primary perpetrator possessed genocidal intent.

57. In discussing the results of the Commission and its analysis as against existing genocide jurisprudence, the intent is not to hold the Commission to the same level of rigor and detail expected of a criminal tribunal considering the guilt of particular individuals. Obviously, the Commission's mandate and terms of operation were limited, and it was working under intractable geographical, logistical, and political obstacles. The goal instead is to provide a point of comparison to demonstrate that the subtleties of a genocide inquiry render it ill-suited to serve as the basis for decisions on humanitarian intervention that must be made rapidly with incomplete facts and limited access to the region in question.

and precedent, the Commission's analysis and conclusions reveal a more basic incompatibility of undertaking a genocide analysis while such abuses are ongoing and intervention, rather than adjudication, is being contemplated.

1. *Genocidal Acts in Darfur*

The Commission easily found that acts that constitute the crime of genocide are occurring in Darfur. Individuals have been massacred, villages and livelihoods have been wiped out, and civilian populations have been abused and expelled from their homes.⁵⁸ Even children are not spared.⁵⁹ Indeed, all accounts from Darfur are in accord with respect to the high levels of violence against the civilian population in Darfur since the conflict began there in 2003.⁶⁰

2. *Targetted Protected Groups*

Defining the victim group in Darfur within the genocide paradigm proved more problematic for the Commission as is often the case where groups manifest multiple identities along racial, political, ethnic, social, linguistic, and economic dimensions. And yet, the Commission—notwithstanding its short stay in Sudan—was able to capture some of the complexities of identity in Darfur. In particular, the Commission's analysis demonstrates that the concept of ethnicity—being ahistorical, expansive, and subjective—can operate as a repository for groups expressly, or by implication, excluded from the terms of the genocide prohibition by the *Convention's* drafters. These results, which often seem to shoehorn contemporary inter-group disputes into the genocide paradigm, go beyond the four corners of the *Convention* and reflect varying degrees of fealty to the terms of the *Convention* and the intentions of its drafters.

58. *Darfur Report*, *supra* n. 15, at ¶ 507.

59. See Nicholas D. Kristof, *The Secret Genocide Archive*, N.Y. Times A31 (Feb. 23, 2005) (recounting examples of children being targeted).

60. See Intl. Crisis Group, *Crisis in Darfur* [¶ 1] <<http://www.crisisgroup.org/home/index.cfm?id=3060&l=1>> (accessed Mar. 30, 2005); U.S. Agency for Intl. Dev., *Darfur Humanitarian Emergency* [¶ 1] <http://www.usaid.gov/locations/sub-saharan_africa/sudan/> (accessed Mar. 30, 2005); see generally U.N. Sys. in Sudan, Sudan Info. Gateway, *Sudan Situation Reports* <<http://www.unsudanig.org/emergencies/darfur/sitreps/index.jsp>> (accessed Mar. 30, 2005).

The conflict in Darfur can be, and has been, superficially framed in genocidal terms. According to this view, “Arab” nomadic herders are persecuting “Black African” sedentary farmers and the government is intent to achieve the “Arabization” of Western Sudan. This would imply genocide against an “ethnic” group, or perhaps even a “racial” group, as required by the *Convention*. This simplistic account, however, belies a more complex ethnographic relationship between victim and perpetrator groups.⁶¹

In contrast to the North-South dispute, the conflict in Darfur is between groups who primarily follow Islam and speak Arabic, but who belong to different “tribes” that may speak different or related African mother tongues. In particular, the casualties are felt most by people belonging to the Fur, Zaghawa, Massalit, Jebel, and Aranga tribes. So, there is no religious dimension to the Darfur conflict and only a slight linguistic one. In addition, the Commission noted that some “Arab” Darfurians have joined the rebel groups active in Darfur and some “Black African” groups were supporting the government of Sudan, so that even these labels do not fully explain the direction the violence is taking.⁶²

Although victims and perpetrators may belong to different Sudanese “tribes,” within the sense of groups that share a particular kinship and control of territory, the Commission noted that “tribes” per se are not protected groups unless they also fit within one of the four categories identified in the *Genocide Convention*.⁶³ Most importantly, there is little “objective” or physical distinction between people who might be assumed to belong to one Sudanese tribe or another other than differences in lifestyle and livelihoods—distinctions that the Commission determined were not alone sufficient to render the groups different “ethnic groups” within the meaning of the *Genocide Convention*.⁶⁴ Accordingly, the Commission concluded that the victim

61. See generally Alex de Waal, *Who are the Darfurians? Arab and African Identities, Violence and External Engagement* <http://www.justiceafrica.org/the_darfurians.htm> (accessed Mar. 30, 2005).

62. *Darfur Report*, *supra* n. 15, at ¶ 508-12.

63. *Id.* at ¶ 497; but see Schabas, *supra* n. 45, at 151 (arguing that tribal groups should fall within the definition).

64. *Darfur Report*, *supra* n. 15, at ¶¶ 494-499.

groups “do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong.”⁶⁵

Nonetheless, the Commission noted that whether or not there is an “objective” distinction between victim and perpetrator groups in Darfur is increasingly irrelevant from the perspective of ICL.⁶⁶ Indeed, the International Criminal Tribunal for Rwanda (ICTR) in its expansive genocide jurisprudence has determined that social constructs—in the form of traditions of self-identification, subjective views on whether victims constitute a protected group, the way in which social institutions and conventions classified individuals, and lineage or descent rules—are sufficient to support a finding that a group constitutes a protected group under the *Genocide Convention*, even where there may be no objectively identifiable difference between embattled groups.⁶⁷

The case against Jean-Paul Akayesu before the ICTR—the first international prosecution on the merits of an individual charged with genocide—is instructive.⁶⁸ Akayesu, the bourgmestre of Taba commune, was originally indicted on February 13, 1996 for acts of killing, torture and various forms of cruel treatment amounting to

65. *Id.* at ¶ 508.

66. See Guglielmo Verdirame, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals*, 49 Intl. & Comp. L.Q. 578, 589 (2000) (noting a “progressive shift from the objective position to one which is predominantly based on subjective criteria of membership, i.e. identification by others or self-identification”).

67. *Id.* at 592 (noting that the tribunals are “beginning to acknowledge that collective identities, and in particular ethnicity, are by their very nature social constructs, ‘imagined’ identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomenon or physical facts”) (citations removed, emphasis in original).

68. See *The Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T (Intl. Crim. Trib. for Rwanda Sept. 2, 1998) (available at <<http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (accessed Mar. 30, 2005)). Two days after the *Akayesu* decision was issued, the Rwanda Tribunal issued its judgement and sentence in the case against Jean Kambanda, the Prime Minister of the Interim Government of Rwanda and *ex officio* head of the Council of Ministers. *The Prosecutor v. Kambanda*, Trial Judgement and Sentence, ICTR-97-23-S (Intl. Crim. Trib. for Rwanda Sept. 4, 1998) (available at <<http://www.ictr.org/ENGLISH/cases/Kambanda/judgement/kambanda.html>> (accessed Mar. 30, 2005)). Kambanda pled guilty during his initial appearance to the charges of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity. *Id.* at ¶ 3.

genocide,⁶⁹ crimes against humanity,⁷⁰ and violations of Article 3 common to the *Geneva Conventions*.⁷¹ In adjudicating the genocide counts, the Tribunal had to determine whether Hutu and Tutsi groups within Rwanda constitute different “ethnic groups” within the meaning of the genocide prohibition.⁷²

69. See U.N., *The Statute of the International Tribunal*, U.N. Doc. S/Res/955 annex, art. 2 (Nov. 8, 1994) (reprinted at 33 I.L.M. 1598 (1994)) [hereinafter *ICTR Statute*] (giving International Criminal Tribunal of Rwanda (ICTR) power to prosecute persons committing genocide and reproducing definition of genocide from the Articles II and III of the *Genocide Convention*).

70. The *ICTR Statute* defines crimes against humanity at Article 3 as:

[T]he following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; [and,] (i) Other inhumane acts.

Id. at art. 3.

71. The war crimes provisions of Article 4 of the *ICTR Statute* encompass:

[S]erious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised [sic] as indispensable by civilised [sic] peoples; (h) Threats to commit any of the foregoing acts.

Id. at art. 4.

72. The *travaux préparatoires* of the *Genocide Convention* do not provide a precise definition of “ethnic group.” The Swedish delegate originally proposed the inclusion of “ethnic groups” within the ambit of the *Convention* on the theory that it would be useful to “extend protection to doubtful cases” such as where a group is “defined by the whole of its traditions and its cultural heritage” as opposed to its race. U.N. GAOR 6th Comm., 3d Sess., 73rd mtg., at 98 (1948); *Id.*, 75th mtg., at 115. Certain delegates supported the Swedish amendment as they foresaw potential problems with the indeterminacy of the term “race.” See *e.g. id.* at 116 (arguing that the “intermingling between races in certain regions had made the problem of race so complicated that it might be impossible, in certain cases, to consider a given group as a racial group,

The Rwanda tribunal was faced with a difficult question here. According to some anthropologists and historians familiar with the area, the people of Rwanda may in fact have descended from three distinct genetic populations: One subset of the population resembled the Bantu people of the region, another group resembled the Cushitic people of the Horn of Africa, and a third is related to local “pigmy” populations.⁷³ Over time, however, these groups intermixed and developed a common language and culture. In fact, prior to the colonial era, there is little trace of violence between different groups within Rwanda.⁷⁴

According to one observer, the distinctions between the groups are essentially meaningless and have been “widely exaggerated” as “it is rarely possible to tell whether an *individual* is a Twa, Hutu, or Tutsi (the three main groups in Rwanda) from his or her height. Speaking the same language, sharing the same culture and religion, living in the same places, they are in no sense ‘tribes,’ nor even distinct ‘ethnic groups.’”⁷⁵

although it could not be denied classification as an ethnical group”) (statement of Haitian delegate). In contrast, others argued that the terms “ethnic” and “racial” were identical such that the inclusion of the former was redundant. *See e.g. id.* at 115-16 (statements of Egyptian, Uruguayan, and Belgian delegates). Interestingly, it was noted by one proponent of the inclusion of political groups that it was not necessary to include reference to “ethnic groups” as such groups “would be protected as political groups.” *Id.* at 115 (statement of Egyptian delegate). The Swedish proposal was adopted without further clarification of the scope of the term. *Id.* at 116. A Special Rapporteur in 1978 summarized contemporaneous academic debates over this terminology, but did not substantially clarify the meaning of “ethnic group” within the *Convention*. Study Prepared by Mr. Nicodeme Ruhashyankiko, Special Rapporteur, *Study on the Question of the Prevention and Punishment of the Crime of Genocide*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 31st Sess., E/CN.4/Su.2/416 at 18-20 (July 4, 1978). Similarly, the 1985 Rapporteur noted that no precise definition exists for the groups protected but did not elaborate further. Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. Whitaker, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 38th Sess. U.N. Doc. E/CN.4/Sub.2/1985/6 at 16 (July 2, 1985).

73. Gérard Prunier, *The Rwandan Crisis: History of a Genocide* 5-9, 16-17 (C. Hurst & Co. 1995).

74. *Id.* at 39.

75. Alex de Waal, *Genocide in Rwanda*, 10 *Anthropology Today* 1, 1-2 (June 1994) (emphasis in original).

Given the difficulty of classifying Rwanda's population, commentators have accordingly decried the media's tendency to describe the killing in Rwanda as an expression of "age old tribal animosities."⁷⁶ Rather, it has been argued, the three main groups in Rwanda are actually "three different strata of the same group, differentiated by occupational and political status," with some analogy to the Indian caste system.⁷⁷ By these accounts, the system for distinguishing between the different groups was originally based on an individual's wealth: "[T]hose with ten or more cows were classified as Tutsi, those with less as Hutu."⁷⁸ Accordingly, the acquisition of wealth could transform an individual considered to be a Hutu into a Tutsi, and vice versa.⁷⁹

During the early colonial era, the theoretical basis of the distinction between these groups shifted from class to race or ethnicity. This is largely a result of apparently racist colonial assumptions about the inability of native "Africans" to have erected the highly organized and sophisticated political system present in Rwanda.⁸⁰ The Tutsi who were associated with this system were presumed to have imported it to the Great Lakes region from the Horn of Africa. Colonial administrators thus sought to partner with Tutsi individuals, whom they considered to be a superior "race," in the administration of the state.⁸¹ In order to facilitate the identification of individuals worthy of this benefice, the native population was assigned an ethnicity that henceforth appeared on a state-issued identity card.⁸² Thus, the description of these groups as different "tribes" or ethnic groups represents a largely fallacious vestige of the colonial era solidified in the contemporary society of the Great Lakes region by the identity card and related bureaucratic structures. As a result, the only way to determine an individual's group membership was either by his or her identity card, which specified the group to which the individual "belonged," or by individual self-identification.

76. *Id.* at 1.

77. *Id.*

78. *Id.* at 2.

79. Prunier, *supra* n. 73, at 13-14; Verdirame, *supra* n. 66, at 589 n. 51 (noting that someone of Hutu lineage could "become" Tutsi through the acquisition of cattle).

80. Prunier, *supra* n. 73, at 10-12.

81. *Id.* at 26-29, 36-39.

82. This favoritism in many ways undergirds the post-colonial animosity between the two groups. *Id.* at 29, 39.

The ICTR acknowledged this conundrum at the outset in noting that, “[T]he Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population.”⁸³ The tribunal conceded that the term “ethnic group is, in general, used to refer to a group whose members speak the same language and/or have the same culture. Therefore, one can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture.”⁸⁴ The tribunal concluded nonetheless that within the Rwandan context, the two groups should be considered separate ethnic groups. “[I]n the context of the period in question, they were, in consonance with a distinction made by the colonizers, considered both by the authorities and themselves as belonging to two distinct ethnic groups; as such, their identity cards mentioned each holder’s ethnic group.”⁸⁵

The tribunal identified “a number of objective indicators of the group as a group with a distinct identity.”⁸⁶ Interestingly, the majority of these “objective indicators” stem from the colonial experience within Rwanda and not from any linguistic, cultural or biological characteristic. In addition to the mandatory identity card, the Civil Code of 1988 provided that all persons were to be identified by sex and ethnic group.⁸⁷ The tribunal also noted that the customary descent rules in Rwanda:

[G]overning the determination of ethnic group, which followed patrilineal lines of heredity. The identification of persons as belonging to the group of Hutu or Tutsi (or Twa) had thus become embedded in Rwandan culture. The Rwandan witnesses who

83. *The Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T ¶ 170 (Int'l. Crim. Trib. for Rwanda Sept. 2, 1998) (available at <<http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (accessed Mar. 30, 2005)).

84. *Id.* at n. 56; see Stephan Glaser, *Droit International Pénal Conventionnel* 111-112 (1970) (noting that “[t]he concept of ‘ethnic’ has a wider meaning [than race]; it designates a community of persons linked by the same customs, the same language and the same race (from the Greek *ethnos* = people)” (emphasis in original)).

85. *Akayesu*, ICTR-96-4-T at n. 56. According to an expert witness testifying before the Chamber, this reality “‘was shaped by the colonial experience which imposed a categorization [sic] which was probably more fixed, and not completely appropriate to the scene. . . . The categorization [sic] imposed at that time is what people of the current generation have grown up with.’” *Id.* at ¶ 172 (quoting testimony of Alison DesForges).

86. *Id.* at ¶ 170.

87. *Id.*

testified before the Chamber identified themselves by ethnic group, and generally knew the ethnic group to which their friends and neighbours [sic] belonged.⁸⁸

Finally, the Tribunal found dispositive that “the Tutsi were conceived of as an ethnic group by those who targeted them for killing.”⁸⁹ The Prosecution’s expert witness, Alison DesForges of Human Rights Watch, had similarly testified that it was sufficient for the purposes of the genocide prohibition that the notion of ethnicity exist in the eyes of the beholders. She testified that:

“The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. . . . [T]he definition of the group to which one feels allied may change over time. But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time. The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups. In addition reality is an interplay between the actual conditions and peoples’ subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience [in that] the Belgians did impose this classification in the early 1930’s when they required the population to be registered according to ethnic group. The categorisation [sic] imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued after independence . . . to such an extent that this division into three ethnic groups became an absolute reality.”⁹⁰

In other words, according to this theory, ethnic identity, as it exists in the minds of a particular population, is clearly subjective and fluid. It can be created and imposed by institutions. It was enough, in this instance, that the victims and perpetrators considered themselves to be of different ethnicities even though there is no “objective” biological, cultural, or linguistic distinction between the two groups other than their ascribed identities as evidenced by the designation on

88. *Id.* at ¶ 171.

89. *Id.*

90. *Id.* at ¶ 172 (quoting Alison DesForge’s testimony).

their identity cards and the population's subjective perception of group membership.⁹¹ In this way, the Tribunal was willing to accept the social construction of ethnicity in Rwanda and treat acts taken with the intent to destroy the Tutsi group as genocide.⁹²

Drawing upon this jurisprudence, the Sudan Commission noted that "tribes in Darfur who support rebels have increasingly come to be identified as 'African' and those supporting the government as the 'Arabs' "93 even though these labels do not reflect any differences in identity recognizable by contemporary, or even historical, notions of ethnicity.⁹⁴ The Commission specifically noted the role of the media in further ethnicizing the situation by employing this ethnic

91. One Trial Chamber of the ICTY has noted a distinction between a theory of positive versus negative group membership and determined that either may give rise to a finding of group identity. See *The Prosecutor v. Jelusic*, Trial Judgement, IT-95-10-T ¶ 71 (Intl. Crim. Trib. for Former Yugoslavia Dec. 14, 1999) (available at <<http://www.un.org/icty/jelusic/trialC1/judgement/jel-tj991214e.pdf>> (accessed Mar. 28, 2005)); but see *The Prosecutor v. Stakic*, Trial Judgement, IT-97-24-T ¶ 512 (Intl. Crim. Trib. for Former Yugoslavia July 31, 2003) (available at <<http://www.un.org/icty/stakic/trialC/judgement/stak-tj030731e.pdf>> (accessed Mar. 28, 2005)) (rejecting the negative approach of identifying all victims as "non-Serbs"). Under the positive theory, individuals may be considered members of a protected group if they are perceived as being part of a group distinguished by certain national, ethnic, racial, or religious characteristics. *Jelusic*, IT-95-10-T at ¶ 71. Under the negative theory, individuals may be considered members of a protected group simply by virtue of being perceived as non-members of the perpetrator group. *Id.*

92. See *The Prosecutor v. Rutaganda*, Trial Judgement, ICTR-96-3-T ¶ 56 (Intl. Crim. Trib. for Rwanda Dec. 6, 1999) (available at <<http://www.ictcr.org/ENGLISH/cases/Rutaganda/judgement/>> (accessed Apr. 4, 2005)).

Each of these concepts [i.e., national, ethnic, racial, and religious groups] must be assessed in the light of a particular, political, social and cultural context. . . . [F]or the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept.

Id.

93. *Darfur Report*, *supra* n. 15, at ¶ 510.

94. In addition, while "Arab" may be a label that is employed in Darfur for self-identification and other-identification, "Black African" may not be. Michael Kevane, *The Catastrophe In Darfur Six Months After It Should Have Ended* <<http://lsb.scu.edu/~mkevane/darfur.html>> (accessed Apr. 2, 2005); see generally Amnesty International USA, *supra* n. 11. "Rivals began identifying themselves as 'Arabs' and 'non-Arabs' for the first time during the 1987-1989 Fur-Arab conflict, when nomads of Arab origin and Fur clashed over grazing lands and water resources." *Id.*

shorthand.⁹⁵ In addition, it described the racial epithets that often accompanied the violence in Darfur, suggesting that perpetrator groups viewed their victims as belonging to alien racial or ethnic groups.⁹⁶ Thus, by the Commission's account, the entrenchment of self- and other-perceptions of identity along ascribed ethnic lines has led to a "consolidation of the contrast" between the groups sufficient to satisfy the requirements of the genocide prohibition.⁹⁷

The reasoning of the ICTR and the Sudan Commission reveals that the term "ethnic group" is not susceptible to easy definition. A number of disciplines lay claim to the term, including sociology, anthropology, political science, psychology, and social geography. In many ways, the definition of ethnicity is even more elusive than that of race, and it has been noted that "[o]ne senses a term still on the move."⁹⁸ Likewise, confusion persists concerning the difference between race and ethnicity: Some theorists continue to consider the two to be entirely distinct phenomena—one biological and one cultural—whereas others argue that the notion of ethnicity subsumes race. Moreover, like race, the discourse on ethnicity has "escaped from the academy and into the field,"⁹⁹ such that there is "a partial overlap between analytical sociological terms which are intended to be universally applicable and everyday folk terms which are bounded by their cultural and historical context."¹⁰⁰

As was noted by the Prosecution's expert witness before the ICTR,¹⁰¹ most contemporary definitions of ethnicity include an element of subjective perception, both on the part of individual

95. *Darfur Report*, *supra* n. 15, at ¶¶ 98, 510.

96. *Id.* at ¶ 511. Similarly, the U.S. government's Atrocities Investigation Team conducted a survey of every 10th household in several refugee camps, which amounted to about 1,000 interviews, and determined that 33% of victims heard racial epithets, such as "the Fur are slaves, we kill them" by perpetrators. *Documenting Atrocities*, *supra* n. 17, at [¶¶ 13-17], but see *The Prosecutor v. Radoslav Brdjanin*, Trial Judgement, IT-99-36-T ¶ 987 (Int'l. Crim. Trib. for Former Yugoslavia Sept. 1, 2004) (available at < <http://www.un.org/icty/brdjanin/trialc/judgement/index.htm> > (accessed Apr. 12, 2005)) (downplaying probity of utterances for determining genocidal intent).

97. *Darfur Report*, *supra* n. 15, at ¶¶ 60, 510.

98. Nathan Glazer & Daniel P. Moynihan, *Introduction in Ethnicity Theory and Experience* 1 (Nathan Glazer & Daniel P. Moynihan, eds., Harvard U. Press 1975).

99. Marcus Banks, *Ethnicity: Anthropological Constructions* 189 (Routledge 1996).

100. *Id.* at 53.

101. See text accompanying *supra* nn. 85-90.

members of a group and outside observers, so that ethnicity may best be understood as “ ‘a social identity characterized by fictive kinship.’ ”¹⁰² In other words, ethnic groups are composed of “those who conceive of themselves as being alike by virtue of their common ancestry, real or fictitious, and who are so regarded by others.”¹⁰³ Ethnic groups patrol their boundaries vis-à-vis other groups,¹⁰⁴ and may be distinguishable from other groups according to a variety of factors, including their race, language, beliefs, knowledge, traditions, economic endeavors, social structure, customs of communication, and material possessions.¹⁰⁵ Further, the composition of an ethnic group is not enduring or fixed; rather, individuals may transfer their allegiances between groups for instrumental (i.e., political or economic) reasons.¹⁰⁶ In this way, “Ethnic identity is one of the many identities available to people. It is developed, displayed, manipulated, or ignored in accordance with the demands of particular situations.”¹⁰⁷ Although individuals may self-identify as members of a particular ethnic group, dominant groups may also assume the privilege of assigning ethnic identities. As such, ethnic labels may be applied pejoratively to those groups that are denied a central role in a particular system by a “ruling elite, who refuse to acknowledge their own ethnicity.”¹⁰⁸

Thus, in Sudan, the Commission was content to conclude that the victim groups there constitute “protected groups” because the labels used—by members, non-members, and outsiders—to describe them and to distinguish them from the perpetrator group sound in ethnicity. And yet, the Commission avoided the question of whether people actually perceive the various groups as being different “ethnic” groups within the meaning of the *Genocide Convention*, or as that concept is

102. Banks, *supra* n. 99, at 4 (quoting Kevin Yelvington, *Ethnicity as Practice: A Comment on Bentley*, 33 *Comp. Stud. in Socy. and History* 168 (1991)).

103. Kurt Glaser & Stefan Possony, *Victims of Politics: The State of Human Rights* 69 (Columbia U. Press 1979).

104. Banks, *supra* n. 99, at 27 (citing Max Gluckman, *Analysis of a Social Situation in Modern Zululand* 12 (Manchester U. Press 1958)).

105. *Id.* at 28 (citing Gluckman, *supra* n. 104, at 13).

106. Banks, *supra* n. 99, at 31.

107. Anya Peterson Royce, *Ethnic Identity: Strategies of Diversity* 1 (Ind. U. Press 1982).

108. Banks, *supra* n. 99, at 45 (citing Brackette F. Williams, *A Class Act*, in 18 *Annual Review of Anthropology* 426 (Bernard Siegel, Alan Beals and Stephen Tyler eds., Ann. Rev. 1989)).

understood locally, or whether the terms are just an easy shorthand to mark a dispute that is primarily political, territorial, or economic. Moreover, the Commission was forced to acknowledge the “political polarization” around the rebel opposition to the government of Sudan,¹⁰⁹ implying that the genocide prohibition is applicable so long as victim groups can be characterized as ethnic groups, even though they may also be—perhaps more realistically—characterized as different social, economic, or political groups.

In this way, the Commission continued the trend in ICL toward relaxing the boundaries around the *Convention's* protected groups. Although the Commission's findings on the existence of protected groups in Darfur are in no way preclusive, they do provide the International Criminal Court with a preliminary theoretical approach to adjudicating this threshold element of genocide in connection with the violence in Darfur. This, in turn, may lead to a finding that individual members of the Sudanese government and *janjawid* committed genocide, assuming they possessed the requisite *mens rea*. At the same time, this conclusion is certainly open to challenge by defendants in an adversarial setting and in connection with individual criminal prosecutions.

D. MENS REA: *THE INTENT TO DESTROY THE GROUP*

Problems of proof surrounding the *mens rea* element of genocide precluded a finding of genocide in Darfur. Determining whether individuals are acting with genocidal intent—the intent to destroy a protected group in whole or in part—does not lend itself to easy determination. Criminal intent is an inherently individualistic inquiry, so determining governmental responsibility for genocide raises particular questions about whose intent matters: The intent of members of the central authorities who may be designing a genocidal policy, or that of the “foot soldiers” responsible for implementing it?¹¹⁰ Absent a

109. *Darfur Report*, *supra* n. 15, at ¶ 510.

110. In ruling on the criminal liability of particular individuals indicted for genocide, the tribunals have proceeded in two steps. First, they have undertaken a threshold inquiry of whether genocide writ large occurred in the region in which the individual was operating. Then, the tribunals consider whether the particular defendant possessed genocidal intent. See e.g. *The Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T ¶¶ 112-129, 726-734 (Int'l. Crim. Trib. for Rwanda Sept. 2, 1998) (available at <<http://www.ictt.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (accessed Mar. 30, 2005)) (concluding that genocide occurred in Rwanda and determining that

confession of intent¹¹¹ or a revealed genocidal policy,¹¹² the intent to destroy a group—either as a matter of individual *mens rea* or a governmental plan—must usually be inferred. The international criminal tribunals for the former Yugoslavia and Rwanda have developed a set of criteria for this purpose, but particular inquiries always turn on their own facts. For example, the tribunals have looked to statements or propaganda condemning the group, acts of violence against cultural symbols associated with the group, other policies of discrimination against members of the group, racial or other epithets used in connection with violence, the sheer number of victims, whether children are included within the victims, patterns and systematicity of violence, the brutality or gratuity of the violence employed, etc., to

the accused acted with genocidal intent). If so, the defendant may be convicted as a perpetrator (i.e., one who commits genocidal acts with genocidal intent) or an aider and abettor (i.e., one who assists genocidal acts with genocidal intent). If not, the defendant may still be convicted as an accomplice, so long as he knew that the primary perpetrator possessed genocidal intent and knew that his own actions would assist the commission of genocide. See *The Prosecutor v. Krstic*, Appeals Judgement, IT-98-33-A ¶ 142 (Int'l. Crim. Trib. for Former Yugoslavia Apr. 19, 2004) (available at <<http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>> (accessed Mar. 28, 2005)); *Akayesu*, ICTR-96-4-T at ¶¶ 546-548, 726. This distinction made by the tribunals between aiders and abettors, on the one hand, and accomplices, on the other, is relevant only to genocide prosecutions. *The Prosecutor v. Krstic*, Trial Judgement, IT-98-33-T ¶ 643 (Int'l. Crim. Trib. for Former Yugoslavia Aug. 2, 2001) (available at <<http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>> (accessed Mar. 28, 2005)). It stems from the odd fact that Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute list “aiding and abetting” as a general form of liability while the genocide articles (ICTY Statute at 4 and ICTR Statute at Article 2) reference complicity in genocide as a substantive crime. The tribunals have rejected plausible suggestions that this apparent redundancy is the result of an editing error due to the insertion of Article III of the *Genocide Convention* into the tribunals’ statutes without reconciling this provision with Article 7(1) and instead have attempted to craft a distinction between these forms of complicity. *Krstic*, IT-98-33-T at ¶¶ 639-43.

111. Indeed, Goran Jelusic was acquitted by an ICTY Trial Chamber, even where he had apparently confessed to acting with the intent to destroy a protected group. *The Prosecutor v. Jelusic*, Trial Judgement, IT-95-10-T ¶ 71 (Int'l. Crim. Trib. for Former Yugoslavia Dec. 14, 1999) (available at <<http://www.un.org/icty/jelusic/trialC1/judgement/jel-tj991214e.pdf>> (accessed Mar. 28, 2005)).

112. Interestingly, as this article is going to publication, evidence of a possible governmental policy of genocide had just come to light. An op-ed in the *NY Times* reported the discovery of a document by the A.U. urging *janjawid* members to “change the demography of Darfur and make it void of African tribes” through “killing, burning villages and farms, terrorizing people, [and] confiscating property. . . .” Kristof, *supra* n. 59, at A19 (quoting the document).

determine whether genocide has occurred or whether a particular person was acting with genocidal intent.¹¹³

Evidence of genocidal intent can be obscured where alternative intents or purposes can be identified, hypothesized, or claimed. For example, where violence is occurring within the context of a civil war or a counter-insurgency movement with ethnic dimensions, attacks on a particular group can be framed as part of an armed conflict reflecting political or other discord in an effort to deflect attention from a genocidal policy. In addition, a perpetrator's motive, which is usually irrelevant to criminal liability, is often confused with a specific intent to bring about a prohibited result.¹¹⁴

For example, the term "genocide" was not universally applied with respect to the internecine war in the former Yugoslavia, notwithstanding that the conflict there was characterized by massive rights violations against Bosnian Muslims, clearly singled out on the basis of their ethnic and religious identity. Instead, the term "ethnic cleansing" was coined to describe acts of violence incidental to efforts to obtain territory from one ethnic group by another ethnic group.¹¹⁵ The theory was that the perpetrator group did not want to *destroy* the victim group, in whole or in part, it just wanted to obtain the group's territory and thus used persecutory violence to effectuate this outcome. Indeed, the ICTY has determined that genocide, as a matter of state policy, did not occur universally throughout the various republics of the former Yugoslavia.¹¹⁶ At the same time, it has convicted particular

113. See e.g. *The Prosecutor v. Kayishema*, Trial Judgement, ICTR-95-1-T ¶ 93 (Intl. Crim. Trib. for Rwanda May, 21 1999) (available at <<http://www.ictr.org/ENGLISH/cases/KayRuz/judgement>> (accessed Mar. 29, 2005)); *Akayesu*, ICTR-96-4-T at ¶ 728; *Jeliscic*, IT-95-10-T at ¶¶ 75-77, 82.

114. See Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnatl. L. 787, 838 n. 245 (1999) (discussing definitional imprecision between motive and specific intent); *Jeliscic*, IT-95-10-A at ¶ 49

115. Notwithstanding this wordplay, the General Assembly passed a resolution finding ethnic cleansing to be a form of genocide. See U.N., *The Situation in Bosnia and Herzegovina*, Gen. Assembly Res. A/RES/47/121 (Dec. 18, 1992).

116. See e.g. *Jeliscic*, IT-95-10-T at ¶¶ 66, 98-99 (concluding that genocide did not occur in Brcko, but proceeding with genocide prosecution of Jeliscic on the grounds that he could have been on a "one-man genocide mission"). This approach is in contrast to that taken by the ICTR, most of whose opinions contain a section concluding that all of Rwanda was beset by genocide in the relevant time period.

individuals of genocide based on findings that the defendants acted with genocidal intent¹¹⁷ and determined that certain massacres, notably at Srebrenica,¹¹⁸ constituted acts of genocide. Likewise, in Darfur, competing narratives abound. It could be that the violence is motivated by ethnic animus between groups that has culminated in, or has been incited by, a policy of genocide. Alternatively, it could be that superficial differences are being exploited for political purposes by a government intent on preserving power and control over an increasingly fragile federation in the face of rebel groups intent on secession or at least the arrogation of power and autonomy.

In any case, the Commission of Inquiry was not able to infer genocidal intent from the patterns of violence in Darfur. Although the Commission did note that the scale of the atrocities, the systematic nature of the attacks, and the reports of racially-motivated statements “could be indicative of genocidal intent,”¹¹⁹ it still concluded that there was insufficient evidence of a state policy to commit genocide.¹²⁰ In particular, the Commission noted that not all individuals in attacked regions were killed, even though the perpetrators had the clear opportunity to eliminate everyone. Instead, the Commission noted that young men, presumably feared to be rebels or potential rebels, were specifically targeted for execution, whereas other individuals were only abused and expelled from their homes.¹²¹ In addition, it noted that random victims were executed while other community members were allowed to flee or were collected in internally-displaced camps. And, it recounted instances when people who resisted attempts to deprive them of their property were killed, whereas those who surrendered property were spared.¹²²

117. See e.g. *The Prosecutor v. Krstic*, Trial Judgement, IT-98-33-T ¶ 643 (Int'l. Crim. Trib. for Former Yugoslavia Aug. 2, 2001) (available at <<http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>> (accessed Mar. 28, 2005)).

118. See *id.* at ¶ 634; but see *The Prosecutor v. Sikirica*, Trial Judgement, IT-95-8-T ¶¶ 72-75 (Int'l. Crim. Trib. for Former Yugoslavia Sept. 3, 2001) (available at <<http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>> (accessed Mar. 28, 2005)) (declining to infer the intent to commit genocide at concentration camp where only 2% of local population was detained on grounds that the number of people abused did not constitute a “substantial” part of the group).

119. *Darfur Report*, *supra* n. 15, at ¶ 513.

120. *Id.* at ¶¶ 513-515.

121. *Id.* at ¶¶ 513-515.

122. *Id.* at ¶ 517.

To the Commission, this pattern of violence suggested that perpetrators were implementing a violent counter-insurgency program by eliminating young men who might be members in the rebel movement and other individuals who would resist the government's efforts to cleanse the territory of supportive populations. Thus, the Commission concluded that the violence did not reveal a governmental policy embodying the intent to destroy the targeted groups, in whole or in part.¹²³ The Commission purposefully reserved, however, the question of whether particular individuals were acting with genocidal intent¹²⁴ and submitted a list of names to the Secretary-General for eventual transmission to a competent tribunal.¹²⁵

Although there is some superficial logic to the Commission's approach, it overlooks several important aspects of a genocide inquiry and, in particular, reads several sub-elements out of the genocide definition. First, the ICTY Appeals Chamber rejected the reasoning adopted by the Commission on forwent opportunities. In the case against Goran Jelusic, who called himself the "Serb Adolf,"¹²⁶ the Trial Chamber had concluded that because Jelusic did not kill every Bosnian Muslim who passed through the concentration camp he was putatively in charge of, and in fact on occasion issued *laissez-passés* and appeared to choose his victims at random, he lacked an "affirmed resolve" to destroy the Bosnian Muslim group necessary for a conviction of genocide.¹²⁷ The Appeals Chamber overturned the acquittal on the grounds that Jelusic's apparently erratic actions did not negate other evidence of his announced genocidal intent.¹²⁸ In particular, it

123. *Id.* at ¶ 518.

124. *Id.* at ¶ 520. The Report noted: "One should not rule out the possibility that in some instances, *single individuals*, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group." *Id.* (emphasis in original).

125. *Id.* at ¶ 644. The dossier of implicated individuals compiled by the Commission has since been forwarded to the ICC Prosecutor. See Warren Hoge, *International War-Crimes Prosecutor Gets List of 51 Sudan Suspects*, N.Y. Times A6 (Apr. 6, 2005).

126. See *The Prosecutor v. Jelusic*, Trial Judgement, IT-95-10-T ¶ 3 (Intl. Crim. Trib. for Former Yugoslavia Dec. 14, 1999) (available at <<http://www.un.org/icty/jelusic/trialC1/judgement/jel-tj991214e.pdf>> (accessed Mar. 28, 2005)).

127. *Id.* at ¶¶ 106-07.

128. *The Prosecutor v. Jelusic*, Appeals Judgement, IT-95-10-A ¶ 71 (Intl. Crim. Trib. for Former Yugoslavia July 5, 2001) (available at <<http://www.un.org/icty/jelusic/appeal/judgement/jel-aj010705.pdf>> (accessed Mar. 28, 2005)). The Appeals Chamber

determined that the better conclusion was that these random acts of mercy were “aberrations in an otherwise relentless campaign against the protected group.”¹²⁹ Thus, if there are other indices of genocide, the fact that not every potential victim was killed or abused should not be a bar to a finding of genocide. Any policy is necessarily executed by individuals who may retain considerable discretion in choosing the means of implementation. As a result, particular occurrences in isolation might suggest one policy, but quite another when events are viewed as a whole.

Second, the Commission suggests that some numerical threshold must be reached before a finding of genocide is possible. The tribunals have confirmed that the crime of genocide does not require a showing of the actual extermination of a group in its entirety¹³⁰ or that a particular numeric threshold is reached.¹³¹ So long as acts are committed with the specific intent to destroy, in whole or in part, a protected group, genocide has occurred. It is proof of acts taken with this “surplus of intent” that characterizes the crime of genocide.¹³² In addition, the *Convention* criminalizes attempt, conspiracy, and incitement to commit genocide, which implicates international law prior to the actual commission of genocide.

Third, by focusing only on how many individuals were killed, as opposed to the number of persons subjected to other genocidal acts enumerated in the *Convention*, the Report does not fully appreciate the range of genocidal acts encompassed by the *Convention* and thus disregards the notion of non-killing genocide. The *Genocide Convention* purposefully reaches acts that fall short of murder but that will lead to the destruction of a group, reflecting the concentration camp “death through work” phenomenon of World War II. The international tribunals have recognized the concept of genocide by

refused to order a retrial because Jelisc had already pleaded guilty to the same acts characterized as crimes against humanity and had been sentenced to 40 years. *Id.*

129. *Id.*

130. *E.g. The Prosecutor v. Stakic*, Trial Judgement, IT-97-24-T ¶ 522 (Intl. Crim. Trib. for Former Yugoslavia July 31, 2003) (available at <<http://www.un.org/icty/stakic/trialc/judgement/stak-tj030731e.pdf>> (accessed Mar. 28, 2005)).

131. *E.g. The Prosecutor v. Semanza*, Trial Judgement, ICTR-97-20-T ¶ 316 (Intl. Crim. Trib. for Rwanda May 15, 2003) (available at <<http://www.ict.r.org/ENGLISH/cases/Semanza/judgement/>> (accessed Apr. 4, 2005)).

132. *Stakic*, IT-97-24-T at ¶¶ 520-22. It is the genocidal *dolus specialis* that predominantly constitutes the crime. *Id.*

“slow death,”¹³³ where conditions of life are inflicted upon a protected group that may not lead to the immediate death of members of the group, but will eventually lead to that result if implemented over a long period of time.¹³⁴ Accordingly, the tribunals have emphasized the importance of examining the cluster of abuses suffered by members of the group and the collective impact of those actions on the survival of the group.¹³⁵ This broader conception of genocide reflects the fact that eliminating the members of an entire race or religion, or a substantial part thereof, through outright extermination is difficult work. If that is the goal, it may be much easier to deprive people of their livelihoods, homes, medical care, humanitarian assistance, et cetera and let nature take its course.¹³⁶ Implementing such a policy in Sudan would enable the government to blame any subsequent deaths on the harsh Sudanese conditions or external factors such as famine and deflect attention away from a program of extermination. In addition, the ICTY has noted that

133. See e.g. *The Prosecutor v. Kayishema*, Trial Judgement, ICTR-95-1-T ¶ 116 (Int'l. Crim. Trib. for Rwanda May, 21 1999) (available at <<http://www.ictr.org/ENGLISH/cases/KayRuz/judgement>> (accessed Mar. 29, 2005)).

134. See *The Prosecutor v. Rutaganda*, Trial Judgement, ICTR-96-3-T ¶ 52 (Int'l. Crim. Trib. for Rwanda Dec. 6, 1999) (available at <<http://www.ictr.org/ENGLISH/cases/Rutaganda/judgement/>> (accessed Apr. 4, 2005)); *Kayishema*, ICTR-95-1-T at ¶ 548 (requiring the imposition of harsh conditions of life over an extended period of time to infer the intention to destroy the group). The “conditions of life” are to be construed:

[A]s methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group,” but which are, ultimately, aimed at their physical destruction. The Chamber holds that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard.

Rutaganda, ICTR-96-3-T ¶ 52 (citations omitted).

135. See generally Natsios, *supra* n. 18 (arguing that what matters is whether the group being subjected to abuse that would lead to its destruction in whole or in part).

136. See *The Prosecutor v. Krstic*, Appeals Judgement, IT-98-33-A ¶ 31 (Int'l. Crim. Trib. for Former Yugoslavia Apr. 19, 2004) (available at <<http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>> (accessed Mar. 28, 2005)) (noting that death by extermination is difficult to do and risks greater international censure than more deniable forms of elimination).

inefficiency is no defense to genocide where *mens rea* has been established.¹³⁷

Fourth, the Commission's reasoning also overlooks the import of the term "in part" in the genocide definition. Although it noted that young men have been particularly targeted for abuse, it attributed this to the government's counter-insurgency program. This conclusion did not give sufficient weight to the understanding that eliminating a significant demographic portion of a protected group—such as its leadership—can constitute genocide.¹³⁸ In other words, it may be genocide where the part of the group that is targeted is "emblematic . . . or essential to [the group's] survival."¹³⁹ The relevant inquiry is the fate of the rest of the group in light of the extermination of the particular "part" of the group.¹⁴⁰

The Commission's reasoning in this regard was rejected by the Appeals Chamber in the case against General Radislav Krstic, indicted for genocide for his involvement in the 1995 massacre at Srebrenica, when this U.N. "safe area" in Eastern Bosnia was overrun by Bosnian Serb troops who massacred some 8,000 civilians, including virtually the entire male population. In determining whether the massacre constituted genocide, the Tribunal rejected arguments that the extermination of the men reflected nothing more than an effort to eliminate a military threat.¹⁴¹ Rather, it concluded that the massacre

137. In *Krstic*, the tribunal noted that genocidal intent:

[M]ust be supported by the factual matrix[;] the offense of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.

Id. at ¶ 32.

138. *Kayishema*, ICTR-95-1-T at ¶ 96 (citing B. Whitacker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/1985/6 §29 (noting that "in part" includes within a "reasonably significant number" or "[a] significant section of a group such as its leadership")).

139. *Krstic*, IT-98-33-A at ¶ 12.

140. See *The Prosecutor v. Jelusic*, Trial Judgement, IT-95-10-T ¶¶ 81-82 (Intl. Crim. Trib. for Former Yugoslavia Dec. 14, 1999) (available at <<http://www.un.org/icty/jelusic/trialC1/judgement/jel-tj991214e.pdf>> (accessed Mar. 28, 2005)).

141. *The Prosecutor v. Krstic*, Trial Judgement, IT-98-33-T ¶ 634 (Intl. Crim. Trib. for Former Yugoslavia Aug. 2, 2001) (available at <<http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>>).

itself was an act of genocide.¹⁴² Nonetheless, it acquitted the defendant on the straight genocide counts on the grounds that nothing about his conduct with respect to the massacre indicated that he shared the intent to eliminate the Bosnian Muslim group,¹⁴³ although he was ultimately convicted of complicity in genocide.¹⁴⁴ Similarly, the elimination of young men in Darfur, who may be the economic or social backbone of their community, will inevitably weaken the group and render it more vulnerable to additional attacks and the privations of refugee life. The Commission was thus too quick to focus on quantitative aspects of the abuse at the expense of qualitative ones.

Fifth, the Commission's Report also undermines the role that rape plays in genocide. The ICTR first recognized that rape, as a form of "serious bodily and mental harm," satisfies the *actus reus* element of genocide.¹⁴⁵ It may also constitute a measure to prevent births within a group or transfer children in patrilineal societies where rape is employed in an effort to impregnate the victim with a child who will not belong to the mother's group.¹⁴⁶ In this way, rape can be used to transmit a new identity to offspring and alter the ethnographic makeup of a community.¹⁴⁷ Similarly, rape may be a measure to prevent births where rape works to ostracize women from their communities.¹⁴⁸ Rape may also cause psychic damage that is cognizable as genocide.¹⁴⁹

In Sudan, rules of descent trace identity through patrilineal lines.¹⁵⁰ As a result, children born of rape by *janjawid* members are labeled as "*janjawid*," and there are indications that such children might be rejected by their mothers and communities as a result.¹⁵¹ Indeed, some reports have indicated that perpetrators stated their

(accessed Mar. 28, 2005)).

142. *Krstic*, IT-98-33-A at ¶ 37.

143. *Id.* at ¶¶ 31-33.

144. *Id.* at ¶ 143.

145. *The Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T ¶¶ 706-707, 731-733 (Int'l. Crim. Trib. for Rwanda Sept. 2, 1998) (available at <<http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (accessed Mar. 30, 2005)).

146. *Id.* at ¶ 507.

147. de Waal, *supra* n. 75, at 1-2 (noting use of mass rape in Darfur for identity destruction or transformation).

148. *Akayesu*, ICTR-96-4-T at ¶ 508.

149. *Id.*

150. Polgreen, *supra* n. 19, at A1.

151. *Id.*; Elbagir, *supra* n. 19, at [¶¶ 3-4].

intention to create more lighter-skinned or “Arab” babies, suggests an intent to commit genocide given these rules of descent.¹⁵²

III. THE RELEVANCE OF A FINDING OF “GENOCIDE” FOR HUMANITARIAN INTERVENTION OR STATE SANCTION

Whether or not genocide is in fact occurring in Sudan, the Commission’s Report marks the culmination of the international community’s fixation on analyzing the conflict in Darfur against the genocide paradigm. It reveals the legal precision inherent to a genocide determination and concomitant problems of proof that emerge in undertaking a surface analysis to the question. Precisely because the genocide determination—requiring intricate considerations of cultural context, identity, and intent—is not susceptible to easy determination, it is ill-suited to serve as the basis for a decision to intervene in ongoing abuses.

To be sure, a finding that genocide has been committed provides an identifiable “bright line” for decision-making regarding humanitarian intervention. If genocide is indeed the “crime of crimes,” its commission may arguably provide an appropriate benchmark for engaging in the perilous act of intervening in the internal affairs of a sovereign state. Such a definitive threshold may more clearly protect against interventions motivated by politics, economics, or other impermissible grounds rather than humanitarianism.¹⁵³ Advocates may also believe that labeling events as “genocide” will galvanize

152. Samantha Power, *It Is Not Enough to Call It Genocide*, Time Magazine 63 (Oct. 4, 2004) (available at <<http://www.time.com/time/covers/1101041004/essay.html>> (accessed Mar. 29, 2005)) (noting that the government of Sudan is permitting widespread gang rape to “make what they say will be lighter-skinned babies and ensure that the non-Arab tribes will be too degraded to return to their homes”).

153. *But see* Ryan Goodman, *Humanitarian Intervention and Pretexts for War* (unpublished manuscript on file with the author) (arguing on the basis of empirical studies that states will not use humanitarian intervention as a pretext for war).

political will in the face of apathy;¹⁵⁴ however, even with a confirmed genocide, the political will to intervene may be lacking.¹⁵⁵

The inquiry involved in determining the existence of genocide, however, is too technical and nuanced to serve as the basis for decisions on whether and how to intervene. Indeed, much of the analysis required seems incongruous in the face of ongoing violations. Parsing out whether or not victims belong to a protected group, for example, or whether victims are being abused because the perpetrators desire to destroy their group in whole or in part, or simply because the perpetrators want the victims' territory or are engaged in a political struggle over power or resources, should not alter a decision to intervene in situations in which the level of violence is comparable.

Thus, to the extent standards and thresholds for humanitarian intervention are being developed,¹⁵⁶ they must not depend on an advanced finding of genocide.¹⁵⁷ Instead, they must focus on humanitarian considerations and consequences and on the level of violence being employed against the victims. In this regard, to the extent that policymakers eventually decide to tie decisions on intervention to ICL determinations, the notion of crimes against humanity provides a better metric, because the crime requires proof of the existence of a widespread or systematic attack against a civilian population, which ensures a humanitarian context as well as the existence of a certain threshold of violence.¹⁵⁸

154. The *Darfur Report* also provides a cautionary note to champions of humanitarian intervention who would build an advocacy campaign around charges of genocide only to lose steam upon an "official" finding of no genocide. See Ltr. from Eric Reeves, Smith College, to Jemera Rone, Human Rights Watch, *Darfur a Genocide We Can Stop* (July 2, 2004) (available at <<http://www.darfurgenocide.org/Reeves/genocideletter.htm>> (accessed Mar. 28, 2005)) (responding to charge that author "abused" genocide term to provoke action).

155. See generally Samantha Power, *A Problem from Hell: America and the Age of Genocide* 508-510 (Harper Collins 2003).

156. See e.g. *supra* n. 4.

157. The recommendation of the International Commission on Intervention and State Sovereignty is instructive in arguing that the responsibility to protect is invoked in the face of "large-scale loss of life" or ethnic cleansing, with genocidal intent or not, which is the product either of "deliberate state action, or state neglect or inability to act, or a failed state situation." *Responsibility to Protect*, *supra* n. 2, at ¶ 4.19.

158. Van Schaack, *supra* n. 114, at 834-37 (discussing chapeau elements of crimes against humanity).

Although the *Genocide Convention* does contain preventative provisions, it does not mandate anything over and above what customary or conventional law would allow in terms of humanitarian intervention. Many press accounts and commentators assume that the reason parties are unwilling to call episodes of mass killing—such as in the former Yugoslavia, Rwanda, and now Darfur—“genocide” is because the *Genocide Convention* compels states party to act in the face of such a conclusion.¹⁵⁹ In fact, the preventative provisions in the *Convention* are frustratingly indeterminate. Even if read to its outer limit, the *Genocide Convention* does not create a right or a duty to engage in any form of humanitarian intervention over and above what conventional and customary international law may already provide.

The *Convention* is primarily penal in nature: It establishes genocide as an international crime,¹⁶⁰ outlines the elements of genocide,¹⁶¹ and identifies additional forms of liability (conspiracy, incitement, attempt, and complicity).¹⁶² It obliges the state on whose territory genocide is occurring to assert its criminal jurisdiction over perpetrators.¹⁶³ It is also understood that pursuant to customary international law principles of universal jurisdiction, other states may also assert jurisdiction over acts of genocide, but they are not contractually bound to do so.¹⁶⁴ The *Convention* also recognizes international jurisdiction over the crime of genocide, which is reflected in the statutes of the *ad hoc* criminal tribunals and the International Criminal Court.¹⁶⁵ In this way, the *Convention* is primarily concerned

159. See Ian Mather, *No relief for Sudan's agony as UN quibbles over the case for genocide*, *Scotland on Sunday* (Jan. 30, 2005) (discussing “[a] long-awaited report by a UN commission of inquiry to be published on Tuesday will back away from labeling the actions of the Sudanese government genocide. Such a verdict would have forced the UN to intervene”); but see David Bosco, *Crime of Crimes*, *Washington Post* B01 (Mar. 6, 2005) (arguing that genocide is an “unreliable trigger” for intervention) (available at <<http://www.washingtonpost.com/wp-dyn/articles/A9102-2005Mar5.html>>) (accessed April 8, 2005)).

160. *Genocide Convention*, *supra* n. 46, at art. I.

161. *Id.* at art. II.

162. *Id.* at art. III.

163. *Id.* at art. VI.

164. See Van Schaack, *supra* n. 52, at 2277-80.

165. *Genocide Convention*, *supra* n. 46, at art. VI. This provision was drafted on the assumption that a permanent international tribunal would be established contemporaneously with the promulgation of the *Genocide Convention*. However, the Cold War sidetracked this effort, and it was not until 1999 that the envisioned

with enabling prosecutions for genocide after the fact. That said, the penal regime itself has preventative aspects, such as by enabling the prosecution of conspiracy, incitement, and attempt to commit genocide and through general processes of deterrence, analogous to those assumed to be at work in the domestic realm.

Beyond these criminal law processes, the *Convention* also sets forth mechanisms to channel inter-governmental responses to genocide. For example, Article VIII empowers contracting parties to “call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”¹⁶⁶ The United States Congress’s call upon the U.N. to determine whether the actions of the government of Sudan constitute acts of genocide reflects this provision at work.¹⁶⁷ This provision may be invoked in a preventive capacity where genocide is threatened and does not require a finding that genocide is occurring or has occurred.

Disputes between the treaty parties relating to the interpretation, application or fulfillment of the *Convention*—including relating to the responsibility of a state for genocide—may be submitted to the International Court of Justice pursuant to Article IX.¹⁶⁸ This provision has been invoked a handful of times, most recently in three applications arising out of the war in the former Yugoslavia.¹⁶⁹ Notwithstanding the *erga omnes* obligations contained in the *Genocide Convention*,¹⁷⁰

international tribunal was finally established pursuant to the *Rome Statute*. See *Rome Statute*, *supra* n. 51, at pt. 1 art. 1.

166. *Genocide Convention*, *supra* n. 46, at art. VIII.

167. See H.R. Con. Res. 467, 108th Cong. (June 24, 2004).

168. *Genocide Convention*, *supra* n. 46, at art. IX.

169. Cases have been filed by Bosnia Herzegovina against Yugoslavia, by Yugoslavia against 10 members of the NATO, and by Croatia against Yugoslavia. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (1993) I.C.J. Reports 16; *Yugoslavia v. United States*, reprinted at 38 I.L.M. 1188 (1999) (dismissing case on jurisdictional grounds). Prior to this conflict, Article IX was invoked for the first time by Pakistan against India in 1973 concerning the threatened prosecution of Pakistani POWs for genocide, but that claim was withdrawn. See *Trial of Prisoners of War (Pakistan v. India)*, I.C.J. Rep. 347 (Dec. 15, 1973).

170. *In re Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 4, 32 (Intl. Cr. of J. Feb. 5, 1970) (noting *erga omnes* status of prohibition against genocide under international law).

this provision has never been invoked by a state not victimized by an apparently genocidal campaign.¹⁷¹

Finally, Article I of the *Convention* announces vaguely that “the Contracting Parties confirm that genocide is a crime under international law which they undertake to prevent and to punish.” This indeterminate duty to prevent could provide the basis for multilateral or unilateral humanitarian intervention, but this provision does not impose a clear enough obligation of affirmative action to create real or enforceable duties in this regard. Indeed, an argument could be made that this provision creates a duty only to prevent acts of genocide taking place within a particular state’s borders.

Beyond these irresolute provisions, the *Convention* creates no additional duties in the face of acts or threats of genocide being committed within the territory of treaty members or of nonmember states. In particular, nowhere does the *Convention* recognize a duty, or even a right, of state acting multilaterally or unilaterally to physically intervene in another states to halt an ongoing genocide. In fact, the anemic provisions just mentioned replaced much stronger draft language that would have obliged the U.N., and in particular the Security Council, to take measures to suppress acts of genocide and bound state parties to support such collective measures. Ultimately, however, these more specific preventative duties were rejected in favor of the more timid language.¹⁷²

Although a genocide inquiry is not relevant in the inter-governmental political sphere where decisions to sanction or intervene are being made, such a determination is acutely relevant in the legal sphere when institutions that can ascribe individual criminal responsibility to particular perpetrators have been activated. In this regard, aided by a resolute recommendation by the Commission in its

171. Verdirame, *supra* n. 66, at 582. “There is to date no example of ‘altruistic’ inter-States litigation brought under the Genocide Convention by a non-directly affected State.” *Id.* In the 1980s, there were efforts to convince states to bring suit under Article IX against Cambodia, but this never came to fruition, because the Khmer Rouge was at that time a government in exile and there was little support in the region for such an action. Peter J. Hammer & Tara Urs, *The Elusive Face Of Cambodian Justice*, in *Awaiting Justice: Essays on Accountability in Cambodia* (Jaya Ramji & Beth Van Schaack, eds. Mellon Press, unpublished manuscript forthcoming 2005) (copy on file with the author).

172. See generally Schabas, *supra* n. 45, at 448-452 (offering a concise account of the drafting history of these provisions).

Report,¹⁷³ the Security Council recently referred the situation of Darfur to the newly established International Criminal Court.¹⁷⁴ To date, several states party to the *Rome Treaty* establishing the International Criminal Court—namely Uganda, the Central African Republic, and the Democratic Republic of Congo—have referred matters within their territories to the International Criminal Court.¹⁷⁵ However, because Sudan has signed but not ratified the *Rome Statute*, and because an *ad hoc* self-referral was implausible with the Sudanese government so deeply implicated in the abuses,¹⁷⁶ a Security Council referral was the only mechanism available to trigger the Court's jurisdiction.¹⁷⁷ The ICC is now in a position to consider all the evidence to determine whether particular individuals might have committed genocide in Darfur.

173. *Darfur Report*, *supra* n. 15, at ¶ 584.

174. *See supra* n. 12. A Security Council referral is one of three "trigger mechanisms" for the Court, along with referrals by State Parties and the Prosecutor acting *proprio motu* with authority from a Pre-Trial Chamber. *Rome Statute*, *supra* n. 51, at pt. 3, art. 13. The Security Council can refer any matter to the Court, notwithstanding the ratification of the *Rome Statute* by implicated states.

175. *See* International Criminal Court, Press and Media <<http://www.icc-cpi.int/home.html&l=en>> (accessed April 4, 2005).

176. States that are not party to the ICC treaty can accept the exercise of jurisdiction by the Court with respect to particular crimes. *Rome Statute*, *supra* n. 51, at pt. 2, art. 12(3).

177. This is the first such referral to the Court by the Security Council. Given the United States' strong stance that events in Darfur constitute genocide and must be the subject of criminal prosecutions, the ICC referral placed the United States in a delicate situation were it to veto a referral of Darfur to the Court simply to avoid "legitimizing" an institution the United States has long opposed. Warren Hoge, *U.N. Finds Crimes, Not Genocide in Darfur*, N.Y. Times A3 (Feb. 1, 2005) (" 'We don't want to be party to legitimizing the I.C.C.' ") (quoting Pierre Prosper, U.S. Ambassador At Large for War Crimes)). As a counter proposal, the United States had advocated the creation of a new *ad hoc* tribunal to be located at the site of the ICTR and run by the A.U. *See* BBC News, *Sudan Atrocities Strain U.S. Relations* (Feb. 1, 2005). Interestingly, Professor Jack Goldsmith, formerly with the Office of Legal Advisor, and David Scheffer, former Ambassador at Large for War Crimes, have argued in recent op-eds that a Security Council referral is entirely consistent with United States policy toward the ICC, because such a referral emphasizes the primacy of the Security Council in triggering the Court's jurisdiction, which was the United States's position all along as the Court was being designed. *See* Jack Goldsmith, *Support War Crimes Trials for Darfur*, Washington Post A15 (Jan. 24, 2005); David Scheffer, *How to Bring Atrocity Criminals to Justice*, Financial Times (London, England, February 2, 2005) (available at <<http://www.genocidewatch.org/SUDANHowtoBringAtrocityCriminalstoJustice2Feb2005.htm>> (accessed Apr. 11, 2005)).

IV. CONCLUSION

Focusing the international assessment of this conflict on the genocide question has obscured and distorted the issues of real importance and provided a delay tactic for states reluctant to intervene to protect civilian populations from mass state-sponsored violence. Indeed, the Commission took three months to conduct its investigation. During this time, thousands more people were killed and violently displaced. The people of Darfur may take some solace in learning that the United States Congress and Executive branch consider that their suffering amounts to genocide. Conversely, they may agree with the U.N. Commission's conclusions that the violence in Darfur is not an effort to destroy particular groups, but to acquire territory through violent means as part of a political struggle over control of the country and its resources. Regardless, they would no doubt much prefer the international community to act to prevent further violations than launch another investigative mission to determine whether the elements of genocide have been met. While the International Criminal Court referral is a welcome development, it is not a substitute for immediate and effective preventative action in Darfur.¹⁷⁸

In short, to the extent that there is a legal right or duty—or indeed just a moral obligation—of the international community to intervene, this right or obligation exists in the face of mass violence reaching the levels that we see in Darfur, be it in the form of genocide, war crimes, or crimes against humanity. When civilians are the deliberate objects of attack, when entire villages and livelihoods are destroyed, when women and girls are mass raped, the possibility of humanitarian intervention is implicated, regardless of the identity of the victims or the specific intent of the perpetrators to destroy the victim group.

178. See David L. Bosco, *Full Court Press*, Foreign Policy (February 2005) (available at <<http://www.foreignpolicy.com/story/files/story2777.php>> (accessed March 8, 2005)) (arguing that calls for “judicial intervention” have eclipsed those for immediate military action).

NOTES AND COMMENTS

