

# **GENOCIDE IN SUDAN: THE ROLE OF OIL EXPLORATION AND THE ENTITLEMENT OF THE VICTIMS TO REPARATIONS**

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## **I. INTRODUCTION**

Just as war can be a form of politics carried on by other means, so can genocide represent economic policy carried out by means of mass murder.<sup>1</sup> Genocide is often the outcome of acts designed to enrich a dominant racial, ethnic, religious, or political group at the expense of smaller, weaker, or supposedly “inferior” groups that possess valuable lands, monies, labor, or other resources.

This Article describes the role played by multinational oil corporations in the failure of the international community to prevent repeated campaigns of genocide and ethnic cleansing against the non-Arab populations of Sudan. Although the depopulation of large numbers of indigenous Africans by Arab and Turkish conquerors goes back many centuries,<sup>2</sup> the displacement of non-Arab populations

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1. See CARL VON CLAUSEWITZ, ON WAR 82-83 (1993).

2. The term “indigenous” in this context refers to the fact that the peoples of the African states and tribes prior to Arab conquests “lived on their land before settlers moved in as a result of conquest, occupation, colonization, etc.,” endangering the “livelihoods and very existence” of the African peoples. U.N. Econ. & Soc. Council, Comm. on Human Rights, Sub-Comm. on the Promotion & Protection of Human Rights, Working Group on Indigenous

accelerated with the discovery of oil in Sudan and lucrative contracts between the regime of Omar Hassan al-Bashir and international oil interests including the China National Petroleum Company (CNPC), Petronas, and Talisman Energy. Oil revenues have helped finance the acquisition of sophisticated military equipment by a regime that has exterminated approximately two and a half million indigenous Africans and devastated hundreds, perhaps thousands, of African towns and villages. With several powerful United Nations (U.N.) members having an interest in the continued flow of oil out of Sudan and weapons back in, the U.N. Security Council and other global bodies have failed to recognize or condemn the genocide in southern and central Sudan, which has spread since 2003 to Darfur and eastern Chad.<sup>3</sup>

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Populations, *Working Paper on Globalization and the Economic, Social & Cultural Rights of Indigenous Populations*, ¶ 2, U.N. Doc., E/CN.4/Sub.2/AC.4/2003/14 (June 15, 2003) (prepared by El Hadju Guissé), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.AC.4.2003.14.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.AC.4.2003.14.En?OpenDocument).

3. See, e.g., Jane Macartney, *China Lashes Out Against Darfur Critics in Olympics Row*, THE TIMES (U.K.), Feb. 14, 2008, <http://www.timesonline.co.uk/tol/news/world/asia/article3367440.ece> (“China . . . buys some 40 per cent of [Sudan’s] oil exports while selling it weapons and defending Khartoum in the UN Security Council.”); Ling Zhu, China, *Sudan Vow to Boost Military Exchanges*, XINHUA, Apr. 2, 2007, [http://news.xinhuanet.com/english/2007-04/02/content\\_5926215.htm](http://news.xinhuanet.com/english/2007-04/02/content_5926215.htm) (reporting “smooth[]” military cooperation between Sudan and China); *U.N. Approves Darfur Peacekeeping Force*, CNN.COM, Aug. 31, 2006, <http://edition.cnn.com/2006/WORLD/africa/08/31/un.sudanvote/index.html> (China, Russia, and Qatar abstained on U.N. Security Council resolution dispatching peacekeepers to Darfur); Colum Lynch, *Sanctions Against Sudanese Officials Sought Over Darfur*, WASH. POST, Feb. 23, 2006, at A20 (China, Russia, and Qatar opposed limited U.N. Security Council sanctions on Sudanese government officials); Nabi Abdullaev, *U.N. Data on Russian Arms Exports Paints Incomplete Picture*, DEFENSE NEWS, June 26, 2006, at 32 (Russia sold six military aircraft to Sudan in 2004); Nick Wadhams, *France Delays Vote on U.N. Resolution*, ASSOCIATED PRESS, Mar. 24, 2005, <http://www.highbeam.com/doc/1P1-106723878.html> (United States threatened to veto U.N. Security Council resolution calling for prosecution by the International Criminal Court of crimes committed in Darfur); *Sudan Faces Threat of Sanctions*, CNN.COM, Sept. 18, 2004, <http://www.cnn.com/2004/WORLD/africa/09/18/sudan.un.sanction/index.html>

The international community has justified its refusal to act effectively against genocide in Sudan by distorting international law, most notably in the Report of the International Commission of Inquiry on Darfur submitted to the U.N. Secretary-General in early 2005.<sup>4</sup> The report concluded, contrary to the weight of precedent, that genocide had not occurred in Darfur because although the government and allied militias had systematically killed thousands of people, committed widespread rape, and burned hundreds or thousands of villages, it had not “exterminat[ed] the whole population that had not fled.”<sup>5</sup> This Article demonstrates the errors in that approach, and argues that the situation in Sudan constitutes genocide in that the Sudanese military

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(China, Russia, Algeria, and Pakistan abstained from U.N. Security Council resolution threatening sanctions on Sudan for creating worst humanitarian disaster in the world); Agence France-Presse, *UN Warns Sudan to End Darfur Atrocities*, ABCNEWSONLINE (AUSTRALIAN BROADCASTING CORPORATION), July 31, 2004, <http://www.abc.net.au/news/newsitems/200407/s1165951.htm> (“Seven countries on the council, including China and Russia, two of the five permanent members that can veto any resolution, had opposed the explicit use of a sanctions threat.”).

4. REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL ¶ 432 (2005), *available at* [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) [hereinafter ICID Report].

5. *Id.* ¶¶ 513-15. *Compare also id.*, at Executive Summary at 4 (“[T]he Government of the Sudan has not pursued a policy of genocide.”), *with id.* ¶ 220 (“The Government armed forces, the PDF, the National Security and Intelligence Service, the Police and the *Janjaweed* have, since the beginning of the war, allegedly killed more than 70,000 persons, burned more than 3200 villages and displaced more than 2 million persons.”); *id.* ¶ 236 n.117 (“Most sources assess that 600 villages and hamlets [in Darfur] have been completely destroyed . . . .”); *id.* ¶ 278 (“The Commission received many reports of random and/or targeted killing of children, sometimes in horrific circumstances such as by burning or mutilation.”); *id.* ¶ 279 (“In short, the Commission has collected very substantial material and testimony which tend to confirm, in the context of attacks on villages, the killing of thousands of civilians.”); *id.* ¶ 303 (detailing reports of collaboration between Sudanese government and “the *Janjaweed* [who] burnt and pillaged and committed other atrocities against the population. Many villages are said to have been attacked more than once, until they were completely destroyed.”); *id.* ¶ 634 (“[R]ape or other forms of sexual violence committed by the *Janjaweed* and Government soldiers in Darfur was widespread and systematic . . . .”).

and allied militia have killed and wounded many members of identifiable non-Arab groups, by means of repeated and large-scale destructive and discriminatory acts. Such acts satisfy the legal standard for genocide as set forth in the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>6</sup> as construed by the decisions of international criminal tribunals, and in the writings of its primary conceptual architect, Holocaust survivor Raphael Lemkin.<sup>7</sup>

The allies and trading partners of the Sudanese regime, who profit from energy and arms deals with the government, have a powerful economic incentive not to permit effective humanitarian intervention on behalf of genocide victims in southern or western Sudan. The proceeds of oil sales permit the Sudanese government to purchase, from the international arms industry, technologies designed to end life on a mass scale.<sup>8</sup> Multinational corporations therefore play a role in arming a genocidal regime and perpetuating an apathetic international response. Hoping to turn this dynamic to their advantage, non-Arab Sudanese leaders and international human rights groups point to Sudan's oil revenues as a potential source of leverage over a regime that disregards all considerations of international law.

This Article argues that the international community should redouble its efforts to ensure that groups subjected to genocide in Sudan over the past forty years obtain compensation for their human and material losses, and enjoy their fair share of the country's oil revenues. The levying of reparations obligations on genocidal governments promises to transcend some of the difficulties that genocide scholars have identified as inhibiting the effectiveness of international criminal prosecutions as deterrents to genocidal conduct. Specifically, while criminal prosecutions may only implicate a tiny percentage of a regime's former officials, reparations may be levied on the state that organizes genocide and on corporations that knowingly provide practical assistance to its crimes. Such reparations may be paid

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6. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, approved on Dec. 9, 1948, 78 U.N.T.S. 277, *approved for signature* Dec. 9, 1948 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. The Genocide Convention was codified into U.S. law on Nov. 4, 1988. Pub. L. No. 100-606, 102 Stat. 3045 (current version at 18 U.S.C.A. §§ 1091-93).

7. See *infra* notes 20, 168, & accompanying text.

8. See discussion *infra* Part III.B.

out of oil industry revenues in a manner reminiscent of the U.N. Compensation Commission that was established after the Persian Gulf War, or out of the assets of complicit corporations that do business in the United States.<sup>9</sup>

Part II of this Article describes the Sudanese government's genocidal responses to ethnic and regional aspirations for self-determination in southern and western Sudan. Part III details the role that oil companies have played in motivating and financing genocide in Sudan. This Part draws upon several reports by Human Rights Watch, as well as evidence obtained in pretrial discovery in the case of *Presbyterian Church of Sudan v. Talisman Energy, Inc. and the Republic of the Sudan*.<sup>10</sup> Part IV argues that, because Sudan is extremely unlikely to satisfy its obligations under international law to compensate the victims of its genocidal campaigns against ethnic and religious minorities, the U.N. Security Council and the U.S. federal courts should act in its place. The Second Circuit's recent opinion in *Khulumani v. Barclay National Bank Ltd.*,<sup>11</sup> provides an appropriate framework for allowing victims of genocide in Sudan to obtain compensation under U.S. law from oil companies that aided and abetted Sudan's massacres of civilians. Such reparations, whether administered by the U.N. or by U.S. federal courts, may help mitigate the losses from the destruction of thousands of Sudanese villages and the murder of hundreds of thousands of Sudanese civilians, and deter Sudan and other states from seizing valuable property by means of widespread massacres.

## II. GENOCIDE IN SUDAN

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9. See generally *infra* notes 298-99, 302, & accompanying text.

10. No. 01 CV 9882 (DLC) (S.D.N.Y. class action complaint filed Nov. 8, 2001, second amended class action complaint filed Aug. 18, 2003), 2003 WL 25461349, available at <http://www.bergermontague.com/pdfs/SecondAmendedClassActionComplaint.pdf>. See Mark Hamblett, *Alien Tort Action Survives Concerns of U.S., Canada*, N.Y.L.J., Sept. 2, 2005, available at <http://www.law.com/jsp/article.jsp?id=1125527682979>.

11. 504 F.3d 254 (2d Cir. 2007) (per curiam) (holding that oil corporations that aid and abet violations of customary international law (CIL) may be sued for damages under U.S. law, provided that they willingly supplied the means for a government to violate CIL norms).

### **A. The Historical Context**

Sudan stretches across a territory nearly as vast as all of Western Europe.<sup>12</sup> As the largest country in Africa by land area, it is made up of a number of formerly independent countries and tribal areas that were eventually incorporated into nine federal states, some nearly as large as France.<sup>13</sup> Among those countries were the independent sultanates of Darfur, the home of the Fur people, and of Sinnar, where the bulk of the Dinka people lived.<sup>14</sup>

Sudan is composed of a number of distinct tribes; long before the recent controversies, observers recognized that many of these tribes were Arab and claimed descent from the person or the tribe of the Prophet Muhammad, while others were indigenous Africans with no Arab heritage.<sup>15</sup> At the time of independence in the late 1950s, about two-thirds of the population of Sudan were indigenous African, while about one-third were Arab.<sup>16</sup> By 1990, the Arab population, concentrated in the North, had grown to nearly forty percent of the total population, with indigenous Africans constituting most of the

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12. See Safia Safwat, *Sudan*, in 1 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 237, 237 (Eugene Cotran & Chibli Mallat, eds., 1994).

13. See *id.* at 237; Eric Hooglund, *Government and Politics: Regional and Local Administration*, in SUDAN: A COUNTRY STUDY (Helen Chapin Metz ed., 1991), available at <http://lcweb2.loc.gov/frd/cs/sdtoc.html>.

14. See M.W. DALY, DARFUR'S SORROW: A HISTORY OF DESTRUCTION AND GENOCIDE xix, 2 (2007); STEPHANIE BESWICK, SUDAN'S BLOOD MEMORY: THE LEGACY OF WAR, ETHNICITY AND SLAVERY IN SOUTH SUDAN 17-20 (2004); *Sudan: The Escalating Crisis in Darfur*, U.N. INTEGRATED REGIONAL INFORMATION NETWORK (IRIN), Dec. 31, 2003, available at <http://www.irinnews.org/report.aspx?reportid=47856> [hereinafter *The Escalating Crisis in Darfur*].

15. See, e.g., Sir Charles Wilson, *On the Native Tribes of the Egyptian Sudan*, in REPORT OF THE FIFTY-SIXTH MEETING OF THE BRITISH ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE 833-34 (1887). Arab historians recorded the immigration of Arabs to present-day Sudan and their conquest of the indigenous Nuba and Dinka (whom they called Zing) peoples. See 2 HAROLD ALFRED MACMICHAEL, A HISTORY OF THE ARABS IN THE SUDAN 11-15 (Cambridge Univ. Press 1922).

16. See ABDEL SALAM SIDAHMED & ALSIR SIDAHMED, SUDAN (2005).

remainder.<sup>17</sup> About seventy percent of the population identified themselves as Sunni Muslim, while five percent were Christian and twenty percent practiced indigenous African religions.<sup>18</sup>

## **B. Genocide in Southern Sudan**

The Genocide Convention defines genocide as any of the following acts committed against members of a national, religious, or ethnic group with the intent to destroy that group in whole or in part: killing members of the group, causing serious bodily or mental harm to them, imposing unsustainable conditions of life upon them, preventing births to them, or stealing their children.<sup>19</sup> Prior to the drafting of the Genocide Convention, the Nuremberg tribunal and its adviser Raphael Lemkin coined the term “genocide” to refer to the attempted extermination of national, racial, or religious groups.<sup>20</sup>

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17. *Sudan*, in 5 AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN & AFRICAN AMERICAN EXPERIENCE 82 (2d ed. 1999).

18. *Id.*

19. See Genocide Convention, *supra* note 6, at art. 2, 78 U.N.T.S. at 279-80.

20. See 1 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 10 October 1946, at 43-44 (1947), *quoted in* Elizabeth Borgward, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT’L L. 401, 455 n.250 (2005) (“[The defendants] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.”). See also RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION - CNALYSIS OF GOVERNMENT - VROPOSALS FOR REDRESS* 79 (1943), *available at* <http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm>. Lemkin defines genocide:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups,

Intermittently since the early 1960s, a civil war has raged in Sudan between Arab northerners and indigenous African southerners.<sup>21</sup> Upon independence of Sudan from Britain in the late 1950s, the country was governed and identified as an “Arab state,” with discrimination and “internal colonialism” the fate of the South.<sup>22</sup> The southern Sudanese mounted a secessionist movement supported by Ethiopia, Uganda, Zaïre, and Israel, and charged the government with genocide as a million people died in the war and ensuing famine.<sup>23</sup> In 1972, President Gaafar al-Nimeiry, who came to power in a Soviet-backed coup, defused the southern crisis for a time by granting autonomy to the region.<sup>24</sup> However, he largely abandoned more than 100,000 Darfurians, leaving them to die of famine starting in 1984.<sup>25</sup> President al-Nimeiry lost power in a 1985 coup, following instability precipitated by southern Sudanese opposition to the imposition of Islamic law on Christian areas, and steep hikes in food and fuel prices under an austerity program recommended by the United States and the International Monetary Fund.<sup>26</sup>

Starting in 1983, the Sudan People’s Liberation Army (SPLA), led by John Garang de Mabior, a former Sudanese army colonel of Dinka ancestry, mounted a war of resistance to the Sudanese government’s policies of imposing Islamic law on Christians and second-class citizenship on non-Arabs.<sup>27</sup> In response, the government “mobilized militias” of Arab tribesmen to “massacre[] tens of

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with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups[.]

*Id.*

21. See Alexis Heraclides, *Janus or Sisypheus? The Southern Problem of the Sudan*, 25 J. OF MODERN AFRICAN STUD. 213, 213-15 (1987).

22. See *id.* at 215-17.

23. See *id.* at 213, 221.

24. See Judith Miller, *Fearful City in Southern Sudan Expects Rebel Attack*, N.Y. TIMES, Feb. 1, 1985, at A9; Judith Miller, *15-Year Rule Ends; Overthrow, With Nimeiry Away on Trip, Follows Increasing Unrest*, N.Y. TIMES, Apr. 7, 1985, at A1.

25. See DALY, *supra* note 14, at 3, 227-34.

26. See *id.* at 227; Miller, *15-Year Rule Ends*, *supra* note 24, at A1.

27. See Heraclides, *supra* note 21, at 228-29.



thousands of Dinka villagers [and] create[] a uniquely horrible famine in which camps of displaced people were deliberately starved to death en masse.”<sup>28</sup> The militias massacred 20,000 Dinka people in the province of Bahr el Ghazal, enslaved 50,000 young Dinka girls, and caused the deaths, by starvation or other means, of 40,000 Dinka children fleeing to Ethiopia as refugees.<sup>29</sup> In 1987, Arab mobs slaughtered over a thousand Dinka civilians in a single incident near a railway station.<sup>30</sup> The government also bombed villages that had been “liberated” by the SPLA, using Soviet-designed MiG fighter-bombers.<sup>31</sup> By 1988, Sudan was spending three-quarters of a billion dollars a year on the war, and had lost 300,000 refugees to just one of its neighboring countries, recently famine-stricken Ethiopia.<sup>32</sup> War and famine in Sudan itself placed between five and six million at risk for starvation.<sup>33</sup>

After a coup in 1989, Sudan’s new President, Omar Hassan al-Bashir, suspended the country’s constitution<sup>34</sup> and concentrated “all effective political power . . . in the hands of [the] President.”<sup>35</sup> President al-Bashir allowed the adoption of a new constitution in 1998, which imposed a duty upon every citizen to “defend the country and

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28. Alex de Waal, *Tragedy in Darfur*, BOSTON REVIEW, Oct./Nov. 2004, at 29.5, available at <http://www.bostonreview.net/BR29.5/dewaal.html> [hereinafter *Tragedy in Darfur*].

29. Eric Marsden, *Charities 'Kept Quiet' on Scale of Sudan Famine*, THE TIMES (U.K.), Sept. 4, 1988.

30. DALY, *supra* note 14, at 239; Roger P. Winter, *In Sudan, Both Sides Use Food as a Weapon*, WASH. POST, Nov. 29, 1988, at A25.

31. See *Sudan - Air Forces*, FLIGHT INT’L, Dec. 5, 1990; Julian Ozanne, *The Creeping Paralysis of Sudan*, FIN. TIMES (U.K.), May 8, 1989, at I-21.

32. See Editorial, *Sudan, Drowning in Troubles*, N.Y. TIMES, Aug. 25, 1988, at A26.

33. See *Famine Threatens Huge Areas of Africa*, ST. LOUIS POST-DISPATCH, Dec. 23, 1990, at 5B. See also *News Summary*, N.Y. TIMES, Dec. 19, 1990, at A2.

34. See CIA, *Sudan*, in THE WORLD FACTBOOK (2006), available at <https://www.cia.gov/cia/publications/factbook/print/su.html>.

35. US DEP’T OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE: SUDAN (Nov. 2006), available at <http://www.state.gov/r/pa/ei/bgn/5424.htm>; see also S. Res. 94.IS, 103d Cong.

respond to the Jihad call.”<sup>36</sup> The new constitution also granted authority to the government to raise a “volunteer Popular Defense Force from among the Sudanese people for national defense, . . . or to assist any regular forces.”<sup>37</sup> The government has since deployed the Popular Defense Force (PDF) as a weapon of “holy war.”<sup>38</sup> The PDF and *Murahileen* Arab militias have operated as pro-government forces committing genocide, crimes against humanity, war crimes, and the systematic enslavement and rape of civilians.<sup>39</sup>

While the Sudanese constitution gave lip service to religious freedom,<sup>40</sup> it made Islam “the state religion” and declared “that Islam must inspire the country’s laws, institutions, and policies.”<sup>41</sup> In the decade after the new constitution was adopted, the government banned Christian speech, bulldozed churches, and fired 20,000 non-Muslims

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36. CONST. OF THE REP. OF SUDAN, art. 35(1)(b) (under the title “Public Duties (and their Supervision)”).

37. *Id.* at art. 125.

38. HUMAN RIGHTS WATCH, FAMINE IN SUDAN, 1998: THE HUMAN RIGHTS CAUSES, *The Popular Defense Forces and the University of Bahr El Ghazal* (Feb. 1999), <http://www.hrw.org/reports/1999/sudan/SUDAWEB2-20.htm>.

39. See Prosecutor’s Application under Article 58 (7), Situation in Darfur, the Sudan ICC-02/05-56, at 4-5, ¶ 68 (Feb. 27, 2007), available at [http://www.icc-cpi.int/library/cases/ICC-02-05-56\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf); see also J. MILLARD BURR & ROBERT O. COLLINS, REQUIEM FOR THE SUDAN: WAR, DROUGHT, AND DISASTER RELIEF ON THE NILE 6, 11, 18-19, 29-34, 41, 73-75, 83-90 (1995) (describing actions before the 1998 coup).

40. See CONST. OF THE REP. OF SUDAN, art. 1 (“The State of Sudan is a country of racial and cultural harmony and religious tolerance.”), art. 17 (calling for “respect for the basic rights, freedoms, duties and religious freedom for all people”), art. 21 (“All persons are equal before the law. Sudanese are equal in the rights and duties of public life without discrimination based on race, sex or religion.”), art. 24 (“Everyone has the right to freedom of conscience and religion and the right to manifest and disseminate his religion or belief in teaching, practice or observance. No one shall be coerced to profess a faith in which he does not believe or perform rituals or worship that he does not voluntarily accept.”), art. 27 (“Every sect or group of citizens have the right to keep their particular culture, language or religion . . .”).

41. U.S. DEP’T OF STATE, ANNUAL REPORT ON INT’L RELIGIOUS FREEDOM (1999), available at [http://www.state.gov/www/global/human\\_rights/irf/irf\\_rpt/1999/irf\\_sudan99.html](http://www.state.gov/www/global/human_rights/irf/irf_rpt/1999/irf_sudan99.html) [hereinafter INT’L RELIGIOUS FREEDOM REPORT].

and women from federal jobs.<sup>42</sup> The new constitution purported to guarantee an independent judiciary and parliamentary democracy; however, these provisions were undermined between 1995 and 2005 as the government “manipulated and politicized” the judiciary, and dismissed many independent judges.<sup>43</sup> Officials placed a moratorium on appointing non-Arab judges after 1989, and the judiciary currently regards atrocities by the government and its allied paramilitaries as minor affairs.<sup>44</sup>

In the 1990s, the Nuba people of central Sudan began to suffer the brunt of the government’s war of extermination against indigenous

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42. See *id.*; U.S. Immigration and Naturalization Service (INS), Country Reports: Sudan, Human Rights Conditions (1993), available at <http://www1.umn.edu/humanrts/ins/sudan93.pdf>. [hereinafter INS: Sudan]; U.N. Econ. & Soc. Council, Comm. on Human Rights, *Civil and Political Rights, Including the Question of Freedom of Expression, Addendum: Visit to the Sudan*, ¶¶ 95-102, 136, 151, U.N. Doc. E/CN.4/2000/63/Add.1 (March 3, 2000) (submitted by Abid Hussain), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G00/113/78/PDF/G0011378.pdf?OpenElement>.

43. REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL ¶ 432 (2005), available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) [hereinafter ICID Report].

44. See, e.g., Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES MAGAZINE, Apr. 2, 2006, at 6-42 (noting the lack of jurisdiction of the I.C.C. if the country’s courts are functioning and the fact that this was a case before the I.C.C.); Human Rights Watch, ENTRENCHING IMPUNITY: GOVERNMENT RESPONSIBILITY FOR INTERNATIONAL CRIMES IN DARFUR 55-8 (Dec. 2005), available at <http://hrw.org/reports/2005/darfur1205/darfur1205text.pdf> [hereinafter ENTRENCHING IMPUNITY]. Stating:

The Sudanese government has failed to investigate, let alone prosecute, local, regional, and national officials who planned, coordinated, and implemented ‘ethnic cleansing’ or were otherwise implicated in war crimes and crimes against humanity. . . . Despite numerous, consistent, and credible reports documenting the existence of patterns of rape and sexual violence that may amount to war crimes or crimes against humanity, the Sudanese government consistently refuses to . . . prosecut[e] the perpetrators . . . .

*Id.* at 56, 59-60.

peoples.<sup>45</sup> There were one to two million Nuba people living in Sudan in 1989.<sup>46</sup> The Sudanese government “formally declared a Holy War (Jihad) in the Nuba Mountains” in 1992.<sup>47</sup> It launched a campaign of “wholesale murder, abduction, rape, family separation, forced religious conversion, and the forced relocation of tens of thousands of Nuba” residents, which one non-governmental organization (NGO) summarized as an attempt by “the Khartoum government . . . to extirpate the Nuba peoples themselves.”<sup>48</sup> In order to “Arabize[]” Sudan, the al-Bashir regime pursued “a ten-year campaign of forced Islamization, pillage, rape, and murder against the people of the Nuba mountains in central Sudan, where allies of the regime covet scarce arable land . . . .”<sup>49</sup> Pro-government militias destroyed crops, farmlands, and shops, triggering widespread famine.<sup>50</sup> A Nuba leader working with the SPLA declared that “ethnic cleansing” was replacing the Nuba people with Arabs.

Other indigenous peoples also suffered systematic attacks. The largest of these groups is the Dinka people, with two million members in 1989, more than any other ethnic group in southern Sudan.<sup>51</sup> The Dinka lost hundreds of villages to government attacks between 1994 and 1998.<sup>52</sup> Government trains transported Arab militias such as the *Murahileen* to the Dinka region of Bahr al-Ghazal, through

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45. See ANDREW NATSIOS, REPORT ON SUDAN (May 31, 2002), available at <http://fpc.state.gov/fpc/10631.htm> (referring to the “indigenous Nuba people”); BURR, QUANTIFYING GENOCIDE, *supra* note 39, at 27 (“The Nuba people comprise a substantial part of the indigenous inhabitants of Sudan; they were driven out of their traditional homelands into the mountains by “centuries of attacks by their Arab neighbors.”) (footnote omitted). Some Nuba are Christian, some Muslim, and some practice indigenous African religions. See *id.* at 24.

46. See BURR, QUANTIFYING GENOCIDE, *supra* note 39, at 27.

47. *Id.* at 31.

48. *Id.*

49. Gail M. Gerhart, *Africa*, 76 FOREIGN AFF. 147, 147-48 (May/June 1997). See also, e.g., Jane Perlez, *Sudan Again Bombs Civilians in Rebel Areas*, N.Y. TIMES, Nov. 26, 1990, at A3; James C. McKinley, Jr., *Sudan Hinders U.N. Aid as South Faces Famine*, N.Y. TIMES, Mar. 18, 1998, at A1.

50. BURR, QUANTIFYING GENOCIDE, *supra* note 39, at 29-30 (describing events from 1991).

51. *Id.* at 72.

52. *Id.*

which they rampaged, “looting, pillaging, and raping as they passed through.”<sup>53</sup> The militias “burned many Dinka villages, captured hundreds of women and children as slaves, stole many thousands of heads of cattle, and caused widespread devastation.”<sup>54</sup> Aided by Sudanese military intelligence, they “massacred tens of thousands of Dinka villagers [and] created a uniquely horrible famine in which camps of displaced people were deliberately starved to death en masse.”<sup>55</sup> Human Rights Watch reported that the widespread famine in Bahr al-Ghazal in 1998 threatened one million people, mostly Dinka, with starvation.<sup>56</sup> As many as 100,000 Dinka people died in the 1998 famine alone.<sup>57</sup> The government pursued a “counterinsurgency plan” against both the Dinka and Nuba peoples.<sup>58</sup> These campaigns involved the depopulation of civilian areas of central and southern Sudan as a means of depriving the rebels of a base of support, and transferring wealth to ethnic Arab militias.<sup>59</sup> They also served forcibly to recruit thousands of southern Sudanese children into ethnic Arab militias.<sup>60</sup>

Additionally, attacks by Arab militias claimed “at least two

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53. *Id.* at 75 (citing *By Practical Demonstration, Regime Admits the SPLA is Alive and Well, Sudan*, DEMOCRATIC-GAZETTE (U.K.), Jan. 1995, at 5).

54. *Id.* at 86. See also ICID Report, *supra* note 4, ¶ 56 n.10 (“In March 1987 . . . Murahilin and Arab townspeople killed 1,000 destitute Dinka displaced persons in the largely Arab town of al-Da’ien.”) (quoting ANN MOSELY LESCH, *THE SUDAN: CONTESTED NATIONAL IDENTITIES* (1998)).

55. *Tragedy in Darfur*, *supra* note 28.

56. See generally Human Rights Watch, *Famine in Sudan*, *supra* note 38, available at <http://www.hrw.org/reports/1999/sudan/index.htm#TopOfPage>; See also Washington Office on Africa, *Sudan; Slavery, War and Peace in Sudan*, AFRICA NEWS, Nov. 29, 1999; see Herve Creusvaux, Vincent Brown, Rosamund Lewis, Karine Coudert, & Sophie Baquet, *Research Letter: Famine in Southern Sudan*, 354 LANCET 832 (Sept. 4, 1999); Tony Freemantle, *The Hunger Weapon: Depriving Civilians of Food a Vicious Tool of Modern War*, HOUSTON CHRON., Aug. 29, 1999, at A1; *Sudan; Recurring Famine Blamed on Sudan's Devastating Conflict*, AFR. NEWS, Apr. 9, 1999.

57. See ØYSTEIN H. ROLANDSEN, *GUERRILLA GOVERNMENT: POLITICAL CHANGES IN THE SOUTHERN SUDAN IN THE 1990S* 128 n.21 (2005).

58. See Human Rights Watch, *Famine In Sudan*, *supra* note 38, at <http://www.hrw.org/reports/1999/sudan/index.html/>.

59. *Id.*

60. *Id.*

thousand members of the Masalit tribe.”<sup>61</sup> In the 1990s, the Masalit complained that nomadic Arabs were driving them from their lands.<sup>62</sup>

By 1992, the government and its militia allies had “killed at least 500,000 civilian non-combatants . . . displaced one-third of the south’s civilian population,”<sup>63</sup> and burned down “scores of villages” in the Nuba Mountains.<sup>64</sup> In 1993, the U.S. Committee for Refugees reported that at least 1.3 million southern Sudanese had died since the early 1980s “as a result of war-related causes and government neglect.”<sup>65</sup> The U.S. Committee for Refugees issued a new study in 1998 estimating that about “600,000 additional people have perished in southern and central Sudan since 1993, raising the toll to an astounding 1.9 million deaths.”<sup>66</sup>

In the mid-1990s, the Sudanese government bombed civilians from the air in violation of international humanitarian law<sup>67</sup> and tolerated the abduction and enslavement of ethnic and religious minorities, practices which the U.N. General Assembly in 1995 called upon the government to “cease immediately” as required by international law.<sup>68</sup> Hundreds of thousands of children of ethnic or religious minorities were among those abducted in violation of

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61. Nicholas D. Kristof, *Genocide in Slow Motion*, 53 N.Y. REV. BOOKS (2006); available at <http://www.nybooks.com/articles/18674>.

62. See *The Escalating Crisis in Darfur*, *supra* note 14.

63. INS: Sudan, *supra* note 42.

64. QUANTIFYING GENOCIDE, *supra* note 39, at 28-29.

65. Press Release, U.S. Committee for Refugees, Sudan, Testimony of J. Millard Burr, Consultant, U.S. Committee for Refugees on The Crisis Against Humanity in Sudan (May 27, 1999), available at [http://www.reliefweb.int/rw/rwb.nsf/0/8190a73888f2c452c125677f005602fd?](http://www.reliefweb.int/rw/rwb.nsf/0/8190a73888f2c452c125677f005602fd?OpenDocument) OpenDocument (the organization is now called the “U.S. Committee for Refugees and Immigrants”).

66. *Id.* Accord Scott Strauss, *Darfur and the Genocide Debate*, 84 FOREIGN AFF. 123, 125 (2005) (two million dead in conflict in southern Sudan since 1983).

67. Situation of Human Rights in the Sudan, G.A. Res. 50/197, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/197 (Mar. 11, 1996), available at <http://www.un.org/documents/ga/res/50/ares50-197.htm>.

68. *Id.* (citing to the International Covenants on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Slavery Convention, as amended, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery).

international law from southern Sudan by Sudanese armed forces for military training and religious indoctrination in secret camps.<sup>69</sup> Kidnapped children not sent to the camps were distributed as slaves to Arabs.<sup>70</sup> As the U.N. documented in 1999:

Thousands, perhaps millions of southern children have been the main victims of the brutal war conducted against the civilian population by government and rebel troops alike. Children have died in droves of famine and many are still suffering from malnutrition. In Bahr-el-Ghazal an unknown number of children have been abducted during raids by Murahaleen militia . . . . In the Nuba Mountains, thousands of children are allegedly held in the so-called peace villages, where they are subjected to abuse.<sup>71</sup>

Sudan was one of only about five countries in the world to cause an outflow of at least 500,000 refugees in not only 1992-1997 but also 1997-2001.<sup>72</sup>

The U.S. State Department concluded in 1999 that Sudanese slavery had “a significant religious aspect since the victims are largely

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69. See U.N. Comm. on Human Rights, *Situation of Human Rights in the Sudan*, ¶ 99, U.N. Doc. E/CN.4/1994/48 (Feb. 1, 1994) (prepared by Gáspár Biro).

70. See generally The Secretary-General, *Report of the Secretary-General on the Situation of Human Rights in the Sudan, delivered to the General Assembly*, U.N. Doc. A/50/569 (Oct. 16, 1995) (report of Gáspár Biro, special rapporteur of the Comm. on Human Rights), available at <http://www.un.org/documents/ga/docs/50/plenary/a50-569.htm>. See also *Sudan; Slavery, War and Peace in Sudan*, AFR. NEWS, Nov. 29, 1999.

71. U.N. Econ. & Soc. Council, Comm. on Human Rights, *Situation of Human Rights in Sudan, Addendum*, E/CN.4/1999/38/Add.1, ¶ 98 (May 17, 1999), available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=1460](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=1460).

72. U.N. HIGH COMMISSIONER FOR REFUGEES, STATISTICAL YEARBOOK 2001 158-59 (maps 8-9), available at [http://www.unhcr.org/static/statistical\\_yearbook/2001/maps08.pdf](http://www.unhcr.org/static/statistical_yearbook/2001/maps08.pdf); [http://www.unhcr.org/static/statistical\\_yearbook/2001/maps09.pdf](http://www.unhcr.org/static/statistical_yearbook/2001/maps09.pdf).

Christians and practitioners of traditional indigenous religions.”<sup>73</sup> It also stated in 2000 that slavery in Sudan had “a pronounced racial aspect, as the victims are exclusively black southerners and members of indigenous tribes of the Nuba mountains . . . .”<sup>74</sup> The “government condone[d] slavery, by allowing government troops from the North to buy, sell, and torture rebels. Estimates of those held in captivity range[d] from 14,000 to 100,000 . . . .”<sup>75</sup> In 2000, the Vice President of Sudan renewed the call for a holy war against the people of southern Sudan, and the government carried out this policy with extreme brutality. Its air force bombed many civilian targets, creating a serious international human rights crisis.<sup>76</sup> By one estimate, the government bombed civilian areas 167 times in 2000 alone.<sup>77</sup> Human rights leaders and aid workers reported a government policy of “destroying hospitals, schools, and feeding centers.”<sup>78</sup> In the upper Nile region, “militias supported by military intelligence and aerial bombardment attacked with unrelenting brutality. Scorched earth, massacre, pillage and rape were the norm . . . .”<sup>79</sup> By 2001, the NGO Christian Aid reported that near “the oil fields of Sudan, civilians are being killed and raped, their villages burnt to the ground.”<sup>80</sup> Other NGOs reported that, as of 2002, more than two million people had died in Sudan from the war and related starvation, and another four million were left homeless.<sup>81</sup> In 2002, the Congress and the President of the United States concluded that the actions of the Sudanese government in the south constituted genocide under the Genocide Convention.<sup>82</sup>

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73. U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - ACTI (Feb. 23, 2001), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2000/af/822.htm>.

74. *Id.*

75. *Id.*

76. Ted Dagne, Issue Brief For Congress, *Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and U.S. Policy*, at CRS-12 (Jan. 23, 2003), *available at* <http://fpc.state.gov/documents/organization/17342.pdf>.

77. *Id.*

78. *Id.*

79. Kristof, *supra* note 61.

80. Dagne, *supra* note 76, at CRS-10.

81. *Online News Hour, Glimmer of Peace in Sudan*, PBS, Aug. 28, 2002), *available at* [http://www.pbs.org/newshour/bb/africa/july-dec02/sudan\\_8-28.html](http://www.pbs.org/newshour/bb/africa/july-dec02/sudan_8-28.html) [hereinafter *Glimmer of Peace in Sudan*].

82. Sudan Peace Act, Pub. L. No. 107-245, 2002 H.R. 5531 § 2(10).



### **C. Genocide Spreads to the Darfur Region**

By early 2003, the Sudanese government had agreed to a peace deal with the southern Sudanese rebels.<sup>83</sup> The deal conceded that the southern Sudanese had a right of self-determination, and that the relationship between religion and the state had to change.<sup>84</sup> It was claimed as a victory by U.S. officials, and widely viewed as an outcome of U.S. pressure.<sup>85</sup> Around the same time, the Sudan Liberation Army, which was modeled on the secular, southern SPLA, and likewise emphasized indigenous peoples' right of self-

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83. See Government of the Republic of Sudan and the Sudan People's Liberation Movement/Army, Landmark Sudanese Peace Agreement: Sudan Government Concludes with the SPLM/A "Machakos Protocol" and Issues a Joint Communiqué, RELIEFWEB (July 20, 2002), *available at* <http://www.reliefweb.int/rw/RWB.NSF/db900SID/MHII6227SC?OpenDocument>.

84. *Id.*

85. See, e.g., Jendayi E. Frazer, Assistant Secretary of State for African Affairs, *Consolidating Peace in Sudan* (June 5, 2006), [http://sudan.usembassy.gov/consolidating\\_peace\\_in\\_sudan.html](http://sudan.usembassy.gov/consolidating_peace_in_sudan.html) ("President Bush has made the push for peace throughout Sudan a centerpiece of his Africa agenda . . . . U.S. government commitment and leadership helped to resolve the North-South element of the Sudan conflict . . . ."); Michael E. Ranneberger, Principal Deputy Assistant Secretary of State for African Affairs, *Sudan: Prospects for Peace* (Dec. 9, 2004), <http://www.state.gov/p/af/rls/rm/39751.htm>. Ranneberger stated:

With our strong support, in large measure due to the leadership of former Special Envoy Danforth and our current Senior Representative Charles Snyder, enormous progress has been made toward a north-south accord. He laid the basis for progress through his efforts to broker a ceasefire . . . . The six protocols signed by the Government of Sudan and the Sudan People's Liberation Movement, taken together, constitute resolution of all the major substantive issues. The Machakos Protocol addresses the issue of religion and the state, and the right of the south to a referendum on secession.

*Id.* See also *Sudan Leaders Try to Carve Deal*, BBC NEWS.COM, Dec. 6, 2003, <http://news.bbc.co.uk/2/hi/africa/3296305.stm> (describing "U.S. pressure").

determination within Sudan,<sup>86</sup> began to strike government targets, sacking an air base in April 2003.<sup>87</sup>

President al-Bashir's government retaliated by organizing local militias composed of nomadic Arab tribes into a counterinsurgency army, part of the PDF.<sup>88</sup> The racist agenda of these counterinsurgency forces soon became clear, as victims reported that their attackers repeatedly declared an intention to "exterminate" the "blacks," who were labeled "slaves."<sup>89</sup> The pro-government tribal militias travel on horseback; their civilian victims therefore call them "*Janjaweed*" or devils (*jinn*) on horses (*jawad*).<sup>90</sup> The *Janjaweed* first emerged in the late 1980s in connection with an "Arab Alliance (or Gathering)," which made a "racist" appeal for an Arab tribal "Belt" across Darfur and mounted a "race war" against the Fur.<sup>91</sup> Its campaign of massacres against the Fur and Masalit began in the 1990s and early 2000s, with twenty-three people killed on a single day and

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86. See DALY, *supra* note 14, at 280.

87. See Strauss, *supra* note 66, at 124.

88. See Rubin, *supra* note 44, at 6. See also INTERNATIONAL CRISIS GROUP, DARFUR RISING: SUDAN'S NEW CRISIS, AFRICA REPORT No. 76, at 16 (Mar. 25, 2004), available at <http://www.crisisgroup.org/home/index.cfm?l=1&id=2550>.

89. Eric Reeves, Editorial, *Unnoticed Genocide*, WASH. POST, Feb. 25, 2004, at A25. See also DALY, *supra* note 14, at 3-4, 246-47, 283-85, 296-305; Alex De Waal, *Who Are the Darfurians? Arab and African Identities, Violence and External Engagement*, 104 AFR. AFF. 181, 199 (2006); Edmund Sanders, *Battle For Darfur; Sudan War Spills Into Chad; Despite Peace Efforts in Darfur, a Key Rebel Force is Regrouping Across the Border, Recruiting Among Refugees*, L.A. TIMES, June 19, 2006, at A1; HUMAN RIGHTS WATCH, DARFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN (2004), available at <http://www.hrw.org/reports/2004/sudan0504/> (follow "ABUSES BY THE GOVERNMENT-JANJAWEED IN WEST DARFUR" hyperlink); HUMAN RIGHTS WATCH, DARFUR IN FLAMES: ATROCITIES IN WESTERN SUDAN (Apr. 2004), available at <http://www.hrw.org/reports/2004/sudan0404/3.htm>.

90. Rubin, *supra* note 44, at 6. See also BURR & COLLINS, *supra* note 89, at 286-87, 292-93. An alternative etymology would derive the term "*Janjaweed*" from the words for outlaws or guns (*Jan*) on horses, rather than for the words for a devil or evil spirit (*Jinn*) on horseback. See Human Rights Watch, *Darfur in Flames*, *supra* note 89.

91. See DALY, *supra* note 14, at 243-47, 262-67.

125 on another.<sup>92</sup> Reports from an investigative team sent to Darfur in early 2004 by Physicians for Human Rights, and led by a scholar from the Harvard School of Public Health, described a repeat of the government's counterinsurgency strategy in southern and central Sudan. Specifically, the Sudanese government would bomb or "buzz" a village at about dawn, after which the army and *Janjaweed* militia would enter the village on vehicles or horseback, massacre the men defending the village, rape the women, steal the cattle, burn the homes, and spoil the wells and irrigation works, thus making the village uninhabitable.<sup>93</sup> By mid-2004, over 1.3 million residents of Darfur had been displaced from their homes, and about 50,000 people had died.<sup>94</sup> As of July 2004, the U.S. House of Representatives, the Committee on Conscience of the U.S. Holocaust Memorial Museum, the Congressional Black Caucus, and several African-American civil rights groups had all warned of genocide in Darfur.<sup>95</sup>

#### **D. The Failure of the International Community to Respond to the Genocide in Sudan**

Despite the growing awareness that genocide in southern Sudan and Darfur had claimed over 2 million lives and displaced over 1.3 million Darfur residents and 4 million other Sudanese from their homes, U.N. Secretary-General Kofi Annan stated in July 2004, "I can't at this stage call it genocide."<sup>96</sup> He was not even willing to call

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92. See *id.* at 263, 269; Amnesty International, *Sudan, Darfur: "Too Many People Killed for No Reason,"* AI Index: AFR 54/008/2004 (Feb. 3, 2004), available at <http://web.amnesty.org/library/index/ENGAFR540082004>.

93. Jennifer Leaning, *Diagnosing Genocide – The Case of Darfur*, 351;8 NEW ENG. J. MED. 735, 735-36 (2004).

94. *Id.* at 735; Emily Wax, *Frist Calls Darfur Killing 'Genocide' Senate Leader Tours a Camp in Chad, Cites Sudan's Deadline to Stop Militia*, WASH. POST FOREIGN SERVICE, Aug. 7, 2004, at A14 ("The militia, known as the *Janjaweed*, has committed atrocities across Darfur that have displaced close to 1.5 million darker-skinned African villagers and left as many as 50,000 dead, according to human rights groups and aid workers.").

95. See Strauss, *supra* note 66, at 128.

96. Kofi Annan, U.N. Secretary-General, *Secretary-General's press encounter upon arrival at UNHQ* (June 17, 2004), available at <http://www.un.org/apps/sg/offthecuff.asp?nid=596>.

the situation “ethnic cleansing,” even though he acknowledged “massive violations of international humanitarian law,” and that “quite a lot of . . . killing” was going on.<sup>97</sup> This was nearly a month after the U.N. Security Council had expressed “concern” about “reports of large-scale violations of human rights and of international humanitarian law in Darfur, including indiscriminate attacks on civilians, sexual violence,” and other ethnic-based “acts of violence.”<sup>98</sup>

On September 9, 2004, U.S. Secretary of State Colin Powell testified before the U.S. Senate Foreign Relations Committee that genocide had occurred within the meaning of the Genocide Convention, and that it “may still be occurring.”<sup>99</sup> As evidence, he cited a series of more than 1,000 interviews conducted by a State Department team and “other sources,” which showed that the Sudanese military and *Janjaweed* militia had systematically killed members of non-Arab groups by “burning, shelling or bombing” them; subjected members of these groups to a “consistent and widespread pattern” of rapes and physical assaults; destroyed “villages, foodstuffs, and other means of survival” belonging to these groups; and blocked these groups from receiving humanitarian aid such as food, water, and medicine to such a degree that many deaths resulted.<sup>100</sup>

A little more than a week later, the U.N. Security Council met to discuss Sudan’s refusal to prevent violations of international humanitarian law and other atrocities in Darfur. The Council declined to determine whether genocide had occurred in Sudan, but requested that the Secretary-General “establish an international commission of inquiry” to determine whether “acts of genocide” had occurred, and to identify their perpetrators.<sup>101</sup>

On January 25, 2005, the Commission of Inquiry on Darfur released its report. It found a “pattern of indiscriminate attacks on

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97. *Id.*

98. U.N. SCOR, 59th Sess. 4878th mtg. U.N. Doc. S/PV.4978 (25 May 2004), available at <http://www.un.org/Depts/dhl/resguide/scact2004.htm>.

99. Colin L. Powell, *Written Remarks of Secretary of State to Senate Foreign Relations Committee on The Crisis in Darfur* (Sept. 9, 2004), available at [http://www.whitehouse.gov/interactive/sudan\\_gen.html](http://www.whitehouse.gov/interactive/sudan_gen.html) [hereinafter Colin L. Powell, *Written Remarks on The Crisis in Darfur*].

100. *See id.*

101. *See* S.C. Res. 1564 ¶¶ 7, 12, U.N. Doc S/RES/1564 (Nov. 19, 2004), available at <http://daccess-ods.un.org/TMP/314597.5.html>.

civilians in villages and communities” throughout Darfur beginning in 2001 and 2002 and escalating in 2003 and 2004.<sup>102</sup> These attacks completely destroyed 600 villages and hamlets and partially destroyed 100 more.<sup>103</sup>

The massacres in Darfur are directed by President al-Bashir and the government of Sudan, according to the Commission of Inquiry.<sup>104</sup> *Janjaweed*, the Commission noted, was a term used by victims unaware that their attackers were members of the Sudanese armed forces.<sup>105</sup> To the victims, it is “a derogatory term that . . . clearly refers to ‘militias of Arab tribes on horseback or on camelback.’”<sup>106</sup> But *Janjaweed* militia members typically were either part of the PDF or received “uniforms, weapons, ammunition and payments” from the PDF.<sup>107</sup> The PDF receives its orders from army officers.<sup>108</sup> The headquarters of the *Janjaweed* is also the headquarters of the government’s Border Intelligence Unit, situated in a town that saw enormous traffic in arms and supplies<sup>109</sup> after President al-Bashir declared in 2003 that: “Our priority from now on is to eliminate the rebellion . . . . We will use the army, the police, the mujahedeen [holy warriors], the horsemen to get rid of the rebellion.”<sup>110</sup> Since that declaration, the “Islamic regime in Khartoum” has waged “a campaign of genocide against the ‘infidels’ of Darfur.”<sup>111</sup>

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102. ICID Report, *supra* note 4, at ¶¶ 184, 238. *See also id.* ¶ 186.

103. *See id.* ¶ 236 n.117.

104. *See id.* ¶¶ 106-08, 108 n. 31, 118, 408.

105. *See id.* ¶ 103-05.

106. *Id.* ¶ 511.

107. ICID Report, *supra* note 4, ¶ 109. *See also* Philip Sherwell, *Janjaweed Vow to Fight Any Intervention by 'Infidels'*, THE DAILY TELEGRAPH (U.K.), Aug. 15, 2004, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/08/15/wsud15.xml> (the *Janjaweed* used uniforms of the PDF and the police).

108. *See* ICID Report, *supra* note 4, at ¶ 112.

109. *See* Lydia Polgreen, *Over Tea, Sheik Denies Stirring Darfur's Torment*, N.Y. TIMES, June 12, 2006, at A1.

110. ICID Report, *supra* note 4, ¶ 119 (quoting *Sudanese President Says War Against Outlaws Is Government Priority*, ASSOCIATED PRESS, Dec. 31, 2003).

111. Niall Ferguson, Comment, *Here's a Challenge: Link the Al-Qaeda Bombs to Poverty and Global Warming*, THE DAILY TELEGRAPH (UK), July 10, 2005, available at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/>

The Commission concluded that there was also a pattern of rapes by Sudanese soldiers and *Janjaweed* throughout Darfur, and that the rapes were often multiple, accompanied by other physical violence, and characterized by derogatory racial epithets.<sup>112</sup> The Commission confirmed that the PDF led several “attacks on villages in which civilians were killed and rapes were committed.”<sup>113</sup> Leaders of victims’ groups alleged a mass rape of 120 women in July 2003, and that “the Government and the *Janjaweed* have repeatedly abducted women and children,” the fact that “no Arab woman had been raped and no Arab village had been destroyed was evidence that the Government was specifically targeting African tribes.”<sup>114</sup> Mass rapes and abductions by *Janjaweed* of young girls and older women of the Fur tribe occurred continuously from 2003 to 2004.<sup>115</sup>

Ultimately, the Commission found that genocide had not occurred in Darfur. The Commission was unable to persuade itself of the important element of genocidal intent because, among other reasons, in *some* villages “attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men[.]”<sup>116</sup> It also declined to find genocidal intent because the government forcibly expelled people from their homes but did not prevent humanitarian organizations from delivering food, water, or medicines in all instances.<sup>117</sup> Finally, the Commission concluded that the government’s motivation of “counter-insurgency warfare” meant that no racial or ethnic genocide had taken place.<sup>118</sup>

The Sudanese government immediately “seized on” the Commission’s conclusions “to try to defuse pressure for sanctions and prosecutions against perpetrators of war crimes.”<sup>119</sup> The international press has reported that the Commission’s failure to recognize the

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opinion/2005/07/10/do1003.xml.

112. See ICID Report, *supra* note 4, at ¶ 333.

113. *Id.* ¶ 104.

114. *Id.* ¶ 221.

115. See *id.* ¶¶ 243, 253, 333-55.

116. *Id.* at ¶ 513.

117. See *id.* ¶ 515.

118. See ICID Report, *supra* note 4, ¶ 518. See also *id.* at ¶¶ 3-4, 37, 54.

119. James Bone, *70,000 Dead and 1.6m Homeless, But the UN Says It's Not Genocide*, THE TIMES (U.K.), Feb. 1, 2005, at 29.

genocide in Darfur was “significant because genocide creates a special obligation on governments to act.”<sup>120</sup>

One qualified success of the international community after the issuance of the Commission of Inquiry’s report was the expansion of the African Union Mission in the Sudan (AMIS). This expansion occurred under the auspices of U.N. Security Council Resolution 1556<sup>121</sup> and a series of peacekeeping communiqués issued by the African Union Peace and Security Council (AUPSC).<sup>122</sup> In late 2004, the AUPSC authorized an expansion of AMIS to include over 3,000 military personnel and civilian police.<sup>123</sup> Despite that, AMIS was unable to prevent multiple attacks by Sudanese government forces and *Janjaweed*.<sup>124</sup> Disarmament of the *Janjaweed* did not occur.<sup>125</sup> The African Union expanded its AMIS force to 7,000 personnel by 2006, but tens of thousands more were needed to ensure peace and security in the area.<sup>126</sup> Despite its inadequacies, AMIS may have been a limited success in that its absence might have contributed to even more widespread “mass killings of civilians and . . . serious crimes.”<sup>127</sup>

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120. See, e.g., *id.*

121. S/RES/1556 (2004).

122. Jeremy I. Levitt, *The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan, in THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY: A NEED FOR CHANGE?* 213, 239-45 (N.M. Blokker & N.J. Schrijver eds., 2005).

123. See *id.* at 244.

124. See *id.* at 243-46; Sima Samar, *Report of the Special Rapporteur on the Situation of Human Rights in the Sudan*, U.N. Doc A/61/469, ¶ 49 (delivered to the General Assembly (Sept. 20, 2006) (noting that although AMIS had taken 128 weapons from the Janjaweed, “militia groups continue to operate with impunity throughout Darfur”).

125. See Samar, *supra* note 124, ¶ 49.

126. See Nicholas Leddy, *United Nations Update*, 13 HUM. RTS. BR. 59, 60 (2006) (arguing that many other governments said that at least 20,000 troops are needed).

127. Samar, *supra* note 128. But see Denis Sassou Nguesso, President of the Republic of Congo, AMNESTY INT’L, *Open Letter to the Chair of the Assembly of the African Union Regarding Peacekeeping in Darfur*, AI Index Number: AFR 22/004/2006 (2006), available at <http://web.amnesty.org/library/Index/ENGAFR220042006?open&of=ENG-2AF> (stating that AMIS lacks the equipment, funding, mandate, and Sudanese compliance to prevent “major killings and displacement,” which increased in 2006 despite AMIS deployment to Darfur).

By September 2006, the death toll in Darfur had risen to about 450,000 people, and about 2.5 million people from Darfur had been expelled from their homes and lands.<sup>128</sup> About 3,000 to 4,000 villages had been burned down or otherwise destroyed.<sup>129</sup> A single massacre in September 2006 by Sudanese troops and militia allies killed seventy-two people.<sup>130</sup> The Sudanese government escalated the bombing of villages using Soviet-era aircraft and helicopter gunships.<sup>131</sup> The *Janjaweed*, meanwhile, preyed on civilians expelled to camps for displaced persons, killing the men and raping the women; over 200 women from a single camp were raped by the *Janjaweed* in a little over a month.<sup>132</sup>

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128. See Emily Wax, *A Loss of Hope Inside Darfur Refugee Camps: Over Two Years, a Genocide Comes Into View*, WASH. POST FOREIGN SERVICE, Apr. 30, 2006, at A12; Craig Timberg, *In Darfur, Terror From the Air*, WASH. POST FOREIGN SERVICE, Sept. 9, 2006, at A10; Roger Winter, *Briefing on the Humanitarian Situation in Sudan* (July 29, 2004) (citing 1.2 million displaced persons and 30,000 people killed by July 2004), <http://www.usaid.gov/press/speeches/2004/sp040729.html>; David Nabarro, Representative of the World Health Organization Director-General, *Sudan: Mortality projections for Darfur* (Oct 2004) (citing 70,000 dead and 1.8 million displaced in September 2004), <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/f035e0d2e4a12d1949256f3100030846>; Jeffrey Gettleman, *Toll of Darfur Underreported, Study Declares*, N.Y. TIMES, Sept. 15, 2006, at A8. Several U.S. Senators found in 2004 that “even a best-case scenario will likely result in the death of more than 320,000 people between April 1, 2004 and December 31, 2004.” Comprehensive Peace in Sudan Act, S. 2781, 108th Cong., § 3(13) (as introduced Sept. 9, 2004), available at <http://www.govrecords.org/s-2781-rfh-to-express-the-sense-of-congress-regarding.html>.

129. See Press Release, City of Philadelphia, Philadelphia Divests from Sudan (Sept. 27, 2006), available at [http://www.sudaninvestment.org/docs/Philadelphia\\_press\\_release.pdf](http://www.sudaninvestment.org/docs/Philadelphia_press_release.pdf); see also Lydia Polgreen, *4 Months after DPA, Darfur Heads Toward Military Confrontation*, SUDAN TRIBUNE, Sept. 1, 2006, available at <http://www.sudantribune.com/spip.php?article17368>; John Heffernan & David Tuller, *Crisis in Africa: Ending the Genocide in Darfur*, S.F. CHRON., Feb. 12, 2006, at E7, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/02/12/EDGU9GJ2251.DTL>.

130. See Craig Timberg, *In Darfur's Death Grip*, WASH. POST, Sept. 6, 2006, at A01.

131. See *id.* at A20.

132. See Craig Timberg, *For Darfur Women, Survival Means Leaving Camp, Risking Rape*, WASH. POST FOREIGN SERVICE, Sept. 16, 2006, at A12.



The *Janjaweed* repeatedly invaded neighboring Chad in 2006, expelling 60,000 Chadians from their homes.<sup>133</sup> After a visit to Chad, an envoy described many of Eastern Chad's ethnic African villages as aflame, and called it "an identical situation [to Darfur] with identical atrocities . . . ."<sup>134</sup>

In late February 2007, nearly two years after the Security Council referred the Darfur case to the International Criminal Court (ICC),<sup>135</sup> the Office of the Prosecutor issued a "summons to appear" concerning Darfur, a document resembling and described in the press as an indictment.<sup>136</sup> The summons charged Sudan's Minister of State for the Interior and a member of the PDF with committing war crimes and crimes against humanity, but not genocide.<sup>137</sup> As of this writing, Sudan has consistently refused to surrender the suspects.<sup>138</sup> In late March 2007, President al-Bashir informed Saudi Arabia and other Arab nations that he would allow the U.N. to play a role in providing logistical support to African Union peacekeepers in Darfur.<sup>139</sup>

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133. See Timberg, *Terror in the Air*, *supra* note 128, at A12.

134. Joe DeCapua, *UNICEF Goodwill Ambassador Mia Farrow Calls for Peacekeeping Force in Chad, Darfur and CAR*, VOICE OF AM. NEWS (Feb. 22, 2007), available at <http://www.voanews.com/english/Africa/2007-02-22-voa57.cfm>.

135. See Stephanie Nieuwoudt, *Al-Bashir Calls World's Bluff on Darfur*, INSTITUTE FOR WAR AND PEACE REPORTING, Feb. 16, 2007, available at [http://www.iwpr.net/?p=acr&s=f&o=333337&apc\\_state=henpacr](http://www.iwpr.net/?p=acr&s=f&o=333337&apc_state=henpacr).

136. See Xan Rice, *Sudanese Minister Indicted over Darfur*, THE GUARDIAN (U.K.), Feb. 28, 2007, available at <http://www.guardian.co.uk/sudan/story/0,2022952,00.html>.

137. See Prosecutor's Application under Article 58 (7), Situation in Darfur, the Sudan, Pre-Trial Chamber I, ICC-02/05-56, at 6-23, 31-33 (Feb. 27, 2007), available at [http://www.icc-cpi.int/library/cases/ICC-02-05-56\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf).

138. See *Sudan Has Failed to Cooperate With International Criminal Court, Prosecutor Says*, U.N. NEWS CENTRE (Dec. 5, 2007), <http://www.un.org/apps/news/story.asp?NewsID=24933&Cr=sudan&Cr1> [hereinafter *Sudan Has Failed to Cooperate*].

139. Warren Hoge, *Arabs and U.N. Chief Press Sudan's Leader to End Darfur Crisis*, N.Y. TIMES, Mar. 29, 2007, at A5; Challis McDonough, *Arab Leaders Discuss Regional Peace*, VOICE OF AMERICA NEWS (Mar. 28, 2007), available at <http://www.voanews.com/english/2007-03-28-voa52.cfm>; Andrew Hammond & Sue Fleming, *Sudan Agrees to U.N. force But U.S. Plans New Sanctions*, REUTERS/THE SCOTSMAN (U.K.), Mar. 29, 2007, available at <http://news.scotsman.com/latest.cfm?id=493552007>.

Throughout the rest of 2007, however, his government imposed restrictions on the U.N.'s role that the top U.N. peacekeeping official described as ensuring that the U.N. force "will not make a difference . . . will not have the capability to defend itself, and . . . [will create a] risk of humiliation of the Security Council and the United Nations, and tragic failure for the people of Darfur."<sup>140</sup> As of this writing, about a third of the planned U.N. peacekeeping force had entered Darfur.<sup>141</sup> In the meantime, the Sudan Air Force carried out a massacre of civilians in a village in North Darfur, killing twenty-six, including pregnant women.<sup>142</sup> The Prosecutor of the ICC warned in June and December 2007 that "massive crimes continued, with rampant attacks on individuals for the purpose of destroying communities."<sup>143</sup>

### **E. Correctly Applying the Genocide Convention to the Facts in Darfur**

Since 1948, only a handful of international tribunals have

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140. Warren Hoge, *U.N. Official Criticizes Sudan for Resisting Peace Force in Darfur*, N.Y. TIMES, Nov. 28, 2007, at A9.

141. See Opheera McDoom, *Darfur Rebels Say 15 Die in Army Offensive*, REUTERS (Feb. 20, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/20/AR2008022002622.html>. For an account of the obstacles placed by Sudan on the deployment of this force, see U.N. Secretary-General, *Report on the Deployment of the African Union-United Nations Hybrid Operation in Darfur*, S/2007/759 (Dec. 24, 2007), <http://www.un.org/Docs/sc/sgrep07.htm>.

142. See AMNESTY INT'L, *Sudan: Arms Continuing to Fuel Serious Human Rights Violations in Darfur*, AI Index Number: AFR 54/019/2007 (2007), available at <http://www.amnesty.org/en/library/info/AFR54/019/2007> [hereinafter *Continuing to Fuel Serious Human Rights Violations*].

143. See Press Release, U.N. Security Council *Statement by Madame Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia*, PR/ P.I.S./ 457-e (22 December 1999), <http://www.un.org/icty/pressreal/p457-e.htm> [hereinafter U.N. Security Council, *Press Release*]. See also *Sudan Has Failed to Cooperate*, *supra* note 138 (In Dec. 2007, Chief Prosecutor of ICC reported that continuing attacks on people of Darfur were not "sporadic" but "a calculated, organized campaign by Sudanese officials to attack individuals and further destroy the social fabric of entire communities.").

adjudicated alleged genocides, while a few national courts have struggled with the issue to varying degrees of success.<sup>144</sup> Signatory states continued to prosecute officials for genocide, but these prosecutions were rare (likely under one conviction for every 100,000 victims).<sup>145</sup> One key principle that these prosecutions have established is that killing members of a group in a campaign of ethnic cleansing constitutes genocide, as national courts in Brazil, Croatia, and Germany have determined.<sup>146</sup> Another principle that emerges from the case law is that deporting members of a group en masse so as to threaten their livelihoods is a genocidal act, as courts in Israel, Latvia, and Estonia have concluded.<sup>147</sup> A third principle is that officials may be convicted for genocide committed largely against their own ethnic and national group, as Pol Pot and Ieng Sary of Cambodia were in 1979, as Francisco Macias Nguema of Equatorial Guinea was in 1979, as Nicolae and Elena Ceaucescu of Romania were in 1991, and as Mengistu Haile Mariam of Ethiopia was in 2006.<sup>148</sup> These rulings should put to rest the argument from deniers of genocide in Sudan,

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144. See Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 232 (1995).

145. See JOHN B. QUIGLEY, *THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS*, ch. 6 (2006) (describing litigated cases of genocide in Bolivia, Brazil, Cambodia, Croatia, Equatorial Guinea, Germany, Romania, and other countries).

146. See *id.* at 196.

147. *Id.* at 24-26, 45; Israel (Prosecutor General) v. Eichmann, Jerusalem District Court (12 December 1961), 36 INT'L L. REPORTS 340 (1968); Lauri Mälksoo, *Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law*, 14 LEIDEN J. OF INT'L L. 757, 774-778, 780 (2001).

148. See QUIGLEY, *supra* note 145, at 38; William Schabas, *Cambodia: Was it Really Genocide?*, 23.2 HUMAN RIGHTS Q. 470 (2001); Judgement of the [Cambodian] People's Revolutionary Court, U.N. Doc. A/34/491, 19 August 1979, cited in Provisional Detention Order for Ieng Sary, Extraordinary Chambers in the Courts of Cambodia, 14 November 2007, [http://www.eccc.gov.kh/english/cabinet/indictment/11/Provisional\\_detention\\_order\\_IENG\\_Sary\\_ENG.pdf](http://www.eccc.gov.kh/english/cabinet/indictment/11/Provisional_detention_order_IENG_Sary_ENG.pdf). Ethiopia's former President Mengistu Haile Mariam was tried and convicted in absentia for genocide arising out of the killing of tens of thousands of people from 1974 to 1991, after being deposed by a rebel leader who became Prime Minister in 1991. See *An Archive of Murders Past; Ethiopia*, THE ECONOMIST, Sept. 29, 2007 (President Mengistu was tried in absentia for genocide and sentenced to life in prison but remained a "guest" in Zimbabwe in late 2007).

notably Peter Bechtold, Chairman Emeritus of Near East and North Africa Area Studies at the Foreign Service Institute of the U.S. Department of State, that genocide did not occur in Darfur because Arabs and indigenous Africans are not distinct groups in Sudan.<sup>149</sup>

### **F. Comparing Sudan to Other Cases of Genocide**

It is instructive to compare the scale of genocidal massacres and atrocities in southern Sudan and Darfur to some other often-discussed genocides in history. Such a comparison reveals that the death toll, extent of refugee and internally displaced persons (IDP) flight, and number of destroyed towns and villages in southern Sudan and Darfur approaches or far exceeds the figures for other genocides. Table 1 compares the scale of the massacres and atrocities in Darfur to other genocides,<sup>150</sup> including the Armenian, Assyrian, and Greek

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149. See *Transcript, Youth Forum on Human Rights and the Crisis in Darfur* (2008), [http://www.cspanarchives.org/library/index.php?main\\_page=product\\_video\\_info&products\\_id=203572-1](http://www.cspanarchives.org/library/index.php?main_page=product_video_info&products_id=203572-1).

150. Table 1 does not include other mass killings that may qualify as genocide but that are less often discussed in genocide case law and scholarly writing, including the millions killed during European colonialism and the enslavement of indigenous peoples in Africa, the Americas, and Asia; the millions of Chinese, South Koreans, Vietnamese, Filipinos, Indonesians, and Burmese murdered by the Japanese and their allies during World War II; the millions of Slavic Poles, Russians, and Serbs murdered by the Nazis and their allies during World War I and World War II; the hundreds of thousands of East Timorese, Afghans, Guatemalans, and Iraqis murdered by their governments and/or foreign invaders; and the millions of Congolese murdered by the Rwandans, Ugandans, and their allies during Africa's World War from 1998 until at least 2003. See *infra* note 300 (summarizing casualties of mass murder and destruction of civilian infrastructure by Empire of Japan); GEOFFREY P. MEGARGEE, *WAR OF ANNIHILATION: WAR AND GENOCIDE ON THE EASTERN FRONT, 1941*, at xi, 37-41, 59-62, 89-92, 115-19, 141-42 (2006) (describing Nazi murder of about 30 million Soviet citizens through massacres, deliberate starvation of civilians, etc.); R.A.C. PARKER, *STRUGGLE FOR SURVIVAL: THE HISTORY OF THE SECOND WORLD WAR* 281-87 (1989); 1 U.S. Office of Chief of Counsel for the Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, ch. XIII (1946), [http://www.yale.edu/lawweb/avalon/imt/document/nca\\_vol1/chap\\_13.htm](http://www.yale.edu/lawweb/avalon/imt/document/nca_vol1/chap_13.htm) (Nazi planning documents for occupation of Soviet Union stated that: "Many tens of millions of people in this area will

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become redundant and will either die or have to emigrate to Siberia.” Soviet prosecutor stated: “[T]his document discloses, on its face, a studied plan to murder millions of people through starvation.”); Judgement: Bormann, in Judgment of the International Military Tribunal for the Trial of German Major War Criminals (1947), *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/judborm.htm> (Nazi official convicted of “extermination” in Soviet Union); Judgement: Rosenberg, in Judgment of the International Military Tribunal, *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/judrosen.htm> (Nazi official convicted of atrocities against Soviet and other Slavic peoples); TADEUSZ PIOTROWSKI, POLAND'S HOLOCAUST: ETHNIC STRIFE, COLLABORATION WITH OCCUPYING FORCES AND GENOCIDE IN THE SECOND WORLD WAR 305 (1998) (Germans killed millions of ethnic Poles); JAMES F. BROWN, HOPES AND SHADOWS: EAST EUROPE AFTER COMMUNISM 225 (1994) (Germans killed a third to half of Roma people (“Gypsies”) during the Holocaust); *Report Cites East Timor Suffering*, CNN.COM, Jan 18, 2006, *available at* <http://cnn.com/2006/WORLD/asiapcf/01/18/easttimor.indonesia/index.html?eref=sitesearch> (200,000 East Timorese killed by Indonesian government); Sian Powell, *UN Verdict on East Timor*, THE AUSTRALIAN, Jan. 19, 2006, *available at* [http://www.yale.edu/gsp/east\\_timor/unverdict.html](http://www.yale.edu/gsp/east_timor/unverdict.html) (similar); BENJAMIN A. VALENTINO, FINAL SOLUTIONS: MASS KILLINGS AND GENOCIDE IN THE 20TH CENTURY 220-233 (2004) (over one million Afghans died under Soviet occupation); MOHAMMAD HASSAN KAKAR, AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE, 1979-1982, at 213-52 (1997) (similar); GUATEMALAN COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE (1999), *available at* <http://shr.aaas.org/guatemala/ceh/report/english/conc2.html> (200,000 Guatemalans, principally Mayan in ethnicity, murdered as a result of government policy); *Guatemala 'Genocide' Probe Blames State*, BBC NEWS, Feb. 25, 1999, *available at* <http://news.bbc.co.uk/1/hi/world/americas/286402.stm> (similar); John F. Burns, *In New Hussein Trial, a Grisly Portrait of Mass Killings*, N.Y. TIMES, Dec. 4, 2006, at A15 (180,000 Kurds were killed or disappeared, according to Iraqi prosecutors who filed charges against Saddam Hussein for genocide); MIDDLE EAST WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS 297-98, 312-17, 345 (1993) (similar); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda), Judgment of 3 February 2006, 2006 ICJ LEXIS 1, \*20 (Congo alleged that “by killing, massacring, raping, throat-cutting, and crucifying, Rwanda is guilty of genocide against more than 3,500,000 Congolese, including the victims of the recent massacres in the city of Kisangani”); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ¶¶ 203-19, Judgment of 19 December 2005, 2005 ICJ LEXIS 1 (finding extensive violations of laws of war and of belligerent occupation by Uganda, and ordering payment of reparations to Congo); *Under-Secretary-General*

genocide starting in 1915; the Holocaust of European Jews from 1933 to 1945; and the cases of Bangladesh, Bosnia, Cambodia, Indonesia, Kosovo, and Rwanda.

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*Calls For Greater Security Council Commitment to Ending Conflicts in Democratic Republic of the Congo, Northern Uganda*, US FED NEWS, Sept. 16, 2006 (U.N. Under-Secretary-General for Humanitarian Affairs described Congo as suffering equivalent of “six Rwandan genocides”); James Astill & Isabelle Chevallot, *Conflict in Congo Has Killed 4.7m, Charity Says Starvation and Disease Multiply Toll from Fighting*, THE GUARDIAN (U.K.), Apr. 8, 2003, <http://www.guardian.co.uk/congo/story/0,12292,932034,00.html>.

Table 1:  
Comparison of Sudan to Other Genocides

Case	Death Toll	Refugees/ IDPs	Sources
Jewish Holocaust, 1933-1945	5.1-6.3 million	4.4 million	International Military Tribunal, Nuremberg, Judgement: Kaltenbrunner (Sept. 30-Oct. 1, 1946) <sup>151</sup>
Ottoman Empire, 1914-1923	2 million	1.7 million	U.S. Ambassador to Ottoman Empire Henry I. Morgenthau, speaking to the <i>Los Angeles Times</i> in 1918 <sup>152</sup>
S. Sudan, 1992-2001	2 million	4 million	Sudan Peace Act, Pub. L. No. 107-245, § 2(1) (2002) <sup>153</sup>

151. The International Military Tribunal concluded that six million Jews had been exterminated by the Nazis and their allies. See International Military Tribunal, Nuremberg, Judgment of the International Military Tribunal for the Trial of German Major War Criminals: Kaltenbrunner Judgment (Sept. 30-Oct. 1, 1946), <http://www.yale.edu/lawweb/avalon/imt/proc/judkalt.htm>. More detailed statistical analyses have estimated that between 5.1 and 6.3 million Jews were exterminated. See, e.g., D. D. GUTTENPLAN, THE HOLOCAUST ON TRIAL 115-116 (2001); MICHAEL SHERMER & ALEX GROBMAN, DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT? 174 (2000); David E. Stannard, *The Politics of Holocaust Scholarship: Uniqueness as Denial*, in IS THE HOLOCAUST UNIQUE?: PERSPECTIVES ON COMPARATIVE GENOCIDE 282 (Alan S. Rosenbaum ed., 2000). The figure for Jewish refugees from Nazi-occupied Europe comes from SHERMER & GROBMAN, *supra*, at 174.

152. See *Morgenthau Urges Carving of Turkey*, L.A. TIMES, Dec. 12 1918, at I-1. See also U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Thirty-eighth session, Item 4 of the provisional agenda, U.N. Doc. E/CN.4/Sub.2/1985/6 (2 July 1985), ¶ 24, <http://www.preventgenocide.org/prevent/UNdocs/whitaker/section5.htm#r17>. For the figure on refugees and displaced persons, see ARISTIDE R. ZOLBERG, ASTRI SUHRKE, & SERGIO AGUAYO, ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD 14-16 (1989).

153. See U.S. Committee for Refugees, *supra* note 65. Testimony before the U.S. Congress indicated that more than four million had been displaced from their communities in Sudan. See U.S. Congress, House, Committee on International Relations, Subcommittee on Africa, *America's Sudan Policy: A New Direction?*, at 44 (2001).

Cambodia, 1975-1979	2 million	500,000	U.N. Economic and Social Council, Commission on Human Rights <sup>154</sup>
Bangladesh, 1971	1-3 million	10 million	Government of India, <sup>155</sup> U.S. Consulate (Dacca, Bangladesh) <sup>156</sup>
Rwanda, 1994	800,000 - 1 million	1+ million	The International Criminal Tribunal for Rwanda <sup>157</sup>

154. U.N. Economic and Social Council, *supra* note 71, ¶ 24. *See also* Helen Fein, *Revolutionary and Antirevolutionary Genocides: A Comparison of State Murders in Democratic Kampuchea, 1975 to 1979, and in Indonesia, 1965 to 1966*, in 35 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 796, 810-12 (Oct., 1993). For the figure on refugees and IDPs, *see* MARJOLEINE ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS 138 (1997).

155. *See* GOVERNMENT OF INDIA, MINISTRY OF EXTERNAL AFFAIRS, BANGLA DESH DOCUMENTS (1971). The Indian government's estimate of the death toll was two million. *See* 26 U.N. G.A.O.R., 2003rd Plenary Meeting, 7 Dec. 1971, at 14 ¶ 156; 26 U.S. S.C.O.R., 1608th Meeting, 6 Dec. 1971, at 27 ¶ 262. For various estimates ranging up to three million killed, *see* VALENTINO, *supra* note 150, at 220-23. For the refugee figures, XI FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976: *Southeast Asia Crisis, 1971* 181, available at <http://www.state.gov/documents/organization/45587.pdf> (Editorial note); *id.* at 629 (letter from Indian Prime Minister Indira Gandhi to President Nixon); Anthony Lewis, *The Wringing of Hands*, N.Y. TIMES, Dec. 6, 1971, at 39. Bangladesh was then called East Pakistan.

156. U.S. Consulate (Dacca, Pakistan), *Cable: Selective Genocide*, Mar. 27, 1971, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB1.pdf>; U.S. Consulate (Dacca, Pakistan), *Cable: Dissent from U.S. Policy Toward East Pakistan*, Apr. 6, 1971, "Confidential," <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB8.pdf>.

157. Prosecutor v. Kayishema and Ruzindana, Case No., ICTR-95-1-A, Judgment, ¶ 291 (1999), available at <http://69.94.11.53/ENGLISH/cases/KayRuz/judgement/5.htm>. *See also* U.N. Econ. & Soc. Council, Comm. on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 8, U.N. Doc. E/CN.4/1995/71 (January 17, 1995) (submitted by René Degni-Ségui), available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=520](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=520). For the figures on refugees and IDPs, *see* HOWARD ADELMAN & GOVIND C. RAO, WAR AND PEACE IN ZAIRE-CONGO: ANALYZING AND EVALUATING INTERVENTION, 1996-1997, at 276 n.14 (2004).



Darfur, 2003-?	200,000 -450,000	2.38 million	U.S. Secretary of State; U.S. Government Accountability Office <sup>158</sup>
Indonesia, 1965-1966	100,000 - 1 million	Unknown	FOREIGN RELATIONS OF THE U.S. <sup>159</sup>
Burundi, 1972	100,000 - 300,000	133,000	U.N. Economic and Social Council, Commission on Human Rights <sup>160</sup>
Bosnia, 1992-1996	8,000	2.2 million	The International Criminal Tribunal for the Former Yugoslavia <sup>161</sup>

158. See Colin L. Powell, *Written Remarks on The Crisis in Darfur*, *supra* note 99; U.S. Government Accountability Office, *DARFUR CRISIS: DEATH ESTIMATES DEMONSTRATES SEVERITY OF CRISIS, BUT THEIR ACCURACY AND CREDIBILITY COULD BE ENHANCED* 56-61 (2006), *available at* <http://www.gao.gov/new.items/d0724.pdf>. See also Editorial, *Darfur's Real Death Toll*, WASH. POST, Apr. 24, 2005, at B06. For the figure on refugees and IDPs, see U.N. Mission in Sudan, *Darfur Humanitarian Profile No. 29 - Situation as of 01 Oct 2007*, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KHII-7A48G7?OpenDocument>.

159. XXVI FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968: *Indonesia*; *Malaysia-Singapore*; *Philippines*, 338-340 (editorial note), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB52/exhibit1.pdf>. For figures on death toll, see Robert Cribb, *Genocide in Indonesia, 1965-1966*, 3 J. OF GENOCIDE RES. 219, 219 (2001); Fein, *supra* note 160, at 801-04. For the figure on refugees and IDPs, see Global IDP Project, *Bosnia and Herzegovina: 330,000 People Still Displaced Eight Years After the Peace Agreement* (Jan. 30, 2004), <http://www.notes.reliefweb.int/w/rwb.nsf/vID/228F4E9C0261EC43C1256E2B0053D904?OpenDocument>.

160. U.N. Economic and Social Council, *supra* note 157, ¶ 24. See also C.L. Sulzberger, *To Be Obscurely Massacred*, N.Y. TIMES, July 2, 1972, at E9. For the figures on refugees and IDPs, see IVOR C. JACKSON, *THE REFUGEE CONCEPT IN GROUP SITUATIONS* 166 (1999).

161. See *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Chamber, Judgement (19 April 2004), ¶¶ 25-38, <http://www.un.org/icty/krstic/Appeal/judgement/index.htm>. The figure cited represents the toll in the Srebrenica area alone. The Tribunal has questioned whether the warfare outside of Srebrenica constituted genocide. See William A. Schabas, *Preventing the "Odious Scourge": The United Nations and the Prevention of Genocide*, 14 INT'L J. OF MINORITY RTS. 379 (2007).

Kosovo, 1999	2,100 - 8,000	1 million	The International Criminal Tribunal for the Former Yugoslavia (Spokesperson) <sup>162</sup>
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The Commission of Inquiry on Darfur did not cite to or analyze any of the major cases brought in national courts convicting political officials of genocide after the Genocide Convention became law. This is inexcusable, particularly in light of the Commission's conclusion that "States have shown caution when defining genocidal intent with regard to particular events," a proposition which it supported with a single citation to a memorandum of the Canadian foreign ministry, a political rather than a judicial body, which was analyzing allegations of genocide against Albanian Muslims in Kosovo.<sup>163</sup> The Commission's report was also deficient in omitting to mention that the U.S. President, the U.K. Prime Minister, the Secretary-General of the North Atlantic Treaty Organization, the Prime Minister of Turkey, and other leaders claimed publicly that genocide (or the intent to commit genocide) had taken place in Kosovo, based on the killings of fewer than 10,000 people.<sup>164</sup>

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162. See Weekly Press Briefing, ICTY (Mar. 13, 2002), <http://www.un.org/icty/latest-e/index.htm> (noting 8,000 people had died); Press Release, U.N. Sec., Statement by Madame Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. PR/P.I.S./ 457-e (Dec. 22, 1999), available at <http://www.un.org/icty/pressreal/p457-e.htm>. A spokesman for the ICTY acknowledged that some of the victims whose bodies were exhumed by its investigators may have died in combat as opposed to due to war crimes. See, Weekly Press Briefing, ICTY (Aug. 4, 1999), <http://www.un.org/icty/briefing/PB040899.htm> (noting that it was too early to determine numbers). For the refugee/IDP figure, see *The Kosovo Refugee Crisis: Hearing Before the Subcomm. On Immigration of the S. Comm. on the Judiciary*, 106th Cong., S. Hrg. 106-443, at 10 (1999) (statement of Vjosa Dobruna, Director and Founder, Center for the Protection of Women and Children, Pristina, Kosovo), available at <http://www.loc.gov/law/find/hearings/pdf/00068691710.pdf>.

163. See ICID Report, *supra* note 4, at ¶ 504, n.186.

164. See *Day by Day Guide of the Conflict So Far*, THE TIMES (U.K.), Apr. 3, 1999 (U.S. President Bill Clinton and U.K. Prime Minister Tony Blair); Bob Davis, *Pledging a 'Clinton Doctrine' for Foreign Policy Creates Concerns for Adversaries and Allies Alike*, WALL. ST. J., Aug. 6, 1999, at A12 (Bill Clinton); Tony Blair, *My Pledge to the Refugees*, BBC NEWS, May 14, 1999, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/343739.stm](http://news.bbc.co.uk/1/hi/uk_politics/343739.stm) (Tony Blair);

While ignoring national precedents other than a single memorandum from Canada, the Commission of Inquiry on Darfur cited extensively to the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Established by the Security Council pursuant to its Chapter VII powers under the U.N. Charter,<sup>165</sup> the tribunals have issued important rulings defining the *mens rea* required to find the crime of genocide. The Commission of Inquiry acknowledged many of the tribunals' important clarifications of the Genocide Convention, but failed to apply them to the facts on the ground in Darfur.

First, the Yugoslav and Rwandan tribunals have clarified that the crime of genocide requires neither the complete destruction of a group nor the intent to annihilate a group completely, because an "intention to destroy at least a substantial part of a particular group" suffices for genocidal intent.<sup>166</sup> The Commission of Inquiry should have applied this principle to the situation in Darfur, which it easily could have done by concluding that the Sudanese army and its *Janjaweed* allies had committed genocide by killing a considerable or significant number of individuals of specific non-Arab ethnic or tribal

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Lance Gay, *U.S. Unable to Prove It's Genocide But Hints Milosevic Coming Close*, PLAIN DEALER (Cleveland, Ohio), Apr. 1, 1999, at 8A (NATO Secretary-General Javier Solana); *Turkey Readies to Receive 20,000 Kosovar Refugees*, TURKISH DAILY NEWS, April 6, 1999 (Turkish Prime Minister Bulent Ecevit). Russia, for its part, declared that genocide was being conducted against 200,000 Serbs and other minorities driven out of Kosovo after the victory of the Kosovar Albanian rebels with NATO air support. See *Russian FM Blasts West Over Chechnya, Kosovo*, XINHUA GENERAL NEWS SERVICE, Nov. 30, 1999 (the article also states the reticence of Western nations to officially label the conflict "genocide," however).

165. See Akhavan, *supra* note 144, at 230.

166. Prosecutor v. Milosevic (Kosovo, Croatia, and Bosnia), Case No. IT-02-54-T, Trial Chamber, Judgment, ¶ 128 (June 16, 2004). The Appeals Chamber for Rwanda has concurred in this conclusion. See Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 159 (June 1, 2001), available at <http://69.94.11.53/ENGLISH/cases/KayRuz/appeal/index.htm>; see also Prosecutor v. Krnojelac, Case No.: IT-97-25-A, Appeals Chamber, Judgement (17 Sept. 2003), available at <http://www.un.org/icty/krnjelac/appeal/judgement/krn-aj030917e.htm>.

groups.<sup>167</sup> This would also have been consistent with the designation of the Holocaust as a crime of genocide, despite the fact that fewer than fifty percent of the Jews living in France, Belgium, Denmark, Norway, Italy, Romania, or Bulgaria at the outset of the “Final Solution” actually died in the Holocaust.<sup>168</sup> As Table 2 below illustrates, the Commission of Inquiry could have drawn upon several published sources that demonstrate an intention on the part of Sudanese government and *Janjaweed* leaders to kill large numbers of non-Arabs in the Darfur region and to destroy their livelihoods.

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167. See *Prosecutor v. Kayishema and Ruzindana*, *supra* note 166, ¶¶ 147-49; *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeals Chamber, Judgement, ¶ 82 (July 5, 2001), available at <http://www.un.org/icty/Supplement/supp26-e/jelisc.htm>.

168. See Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. OF INT'L L. 145 (1947) (“[I]n 1945 . . . the German war criminals were indicted, among other things, on the charge of genocide, meaning the extermination of racial, national or religious groups, especially the Jews, Poles, Gypsies, and others . . . . The evidence produced at the Nuremberg trial gave full support to the concept of genocide.”); see also PARKER, *supra* note 156, at 268 (setting forth figures ranging from one percent of Danish Jews to 25 percent of French Jews to 45 percent of Belgian Jews); LEMKIN, *supra* note 20, at 80 n.3 (inventor of term “genocide” used it to describe wars “in which nations and groups of the population were . . . almost completely destroyed”) (emphasis added).

Table 2

Admissions by Sudanese Officials Regarding Genocide in Darfur

Date	Source	Admission
2003	State Minister of the Interior Ahmed Haroun <sup>169</sup>	"Haroun . . . exhorted the Janjaweed and army in a speech to 'kill the Fur' . . . ."
2003	Provincial commissioner for West Darfur <sup>170</sup>	"Zaghawa, Fur and Masalit have become rebels. We will burn everything down and only leave behind the trees. They can destroy all Darfur and even if there is only one soldier left, he will fight against America. This is now <i>jihad</i> ."
2003	President el-Bashir <sup>171</sup>	"Our priority from now on is to eliminate the rebellion . . . . We will use the army, the police, the <i>mujahadeen</i> [holy warriors], the horsemen to get rid of the rebellion."
2004	President al-Bashir <sup>172</sup>	"You are informed that directives have been issued . . . to change the demography of Darfur and empty it of African tribes 'through burning, looting, and killing' of intellectuals and youths who may join the rebels in fighting."
2004	Sheik Musa Hilal, Janjaweed Commander <sup>173</sup>	"What I can say about Darfur, . . . is that the government came to me and to many of the other sheiks and asked for our help in fighting the S.L.A. Of course, we did so gladly . . . . [W]hat happened after that, if mistakes or crimes took place -- well, that is the government's responsibility, not ours."
2004	Lt. Gen. Ibrahim Suleiman, former Governor of North Darfur <sup>174</sup>	"When the problems with the rebels started in Darfur, we in the government of Sudan had a number of options. We chose the wrong one. We chose the very worst one."
2004	Janjaweed communiqué <sup>175</sup>	"[E]xecution of all directives from the president of the republic," including: "Change the demography of Darfur and make it void of African tribes," by "killing, burning villages and farms, terrorizing people, confiscating property from members of African tribes and forcing them from Darfur."

169. ENTRENCHING IMPUNITY, *supra* note 44, at 26.

170. *Id.*

171. *Sudanese President Says War Against Outlaws Is Government Priority*, ASSOCIATED PRESS, Dec. 31, 2003.

172. ALEX DE WAAL, *DARFUR: A SHORT HISTORY OF A LONG WAR* 106 (2005).

173. Scott Anderson, *How Did Darfur Happen?*, N.Y. TIMES MAG., Oct. 17, 2004, Magazine, <http://www.nytimes.com/2004/10/17/magazine/17DARFUR.html?8br=&pagewanted=print&position=>.

174. *Id.*

175. Nicholas D. Kristof, Op-Ed., *The Secret Genocide Archive*, N.Y. TIMES, Feb. 23, 2005, available at [http://www.nytimes.com/2005/02/23/opinion/23kristof.html?\\_r=1&oref=login](http://www.nytimes.com/2005/02/23/opinion/23kristof.html?_r=1&oref=login).

2004	Sudanese Brigadier General <sup>176</sup>	"I talked to the Sudanese brigadier general on the ground. He told me his mission was to clear the road from Labado all the way to Khartoum, which is about 100 kilometers away. If he encountered any resistance he was going to fight back and take the villages out. Those were his orders, he told me, and they came directly from Khartoum."
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Second, genocide may be established by evidence of the intent to destroy a "substantial part" of the group.<sup>177</sup> Genocidal intent may be inferred quantitatively, from proof that a large number of victims have been targeted for destruction,<sup>178</sup> or qualitatively, from proof that a group's leaders have been targeted.<sup>179</sup>

The former principle provides a basis to infer a genocidal intent from what the Commission of Inquiry itself described as the "systematic killing of civilians belonging to particular tribes, [and the] large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes."<sup>180</sup> The Commission erroneously declined to conclude that genocide had taken place even when its factual findings directly paralleled the Genocide Convention's definition of genocide.<sup>181</sup> The Commission also should have inferred genocidal intent from its findings as to the Sudanese government's interference with relief aid to the victims of *Janjaweed* or Sudanese

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176. Quoted by U.S. State Department official working with the African Union Mission in Sudan (AMIS), in Marc L. Goldberg, *Anatomy of a Genocide*, THE AMERICAN PROSPECT (Mar. 17, 2005), <http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleID=9339>.

177. See *Prosecutor v. Milosevic*, *supra* note 166, at ¶ 132 (citing *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Chamber, Judgement, ¶ 12 (Apr. 19, 2004), available at <http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.htm>).

178. See *id.*

179. See *Id.*

180. ICID Report, *supra* note 4, ¶ 507.

181. Compare *id.* (finding "massive and deliberate infliction on [non-Arab] tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle)"), with Genocide Convention, *supra* note 6, at art. 2 ("In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part").

military attacks in Darfur.<sup>182</sup>

The Commission acknowledged that intent may be satisfied qualitatively as well, citing an influential U.N. report on the Genocide Convention, which concluded that genocide includes acts directed at “a significant section of a group such as its leadership.”<sup>183</sup> The Commission should have applied this principle to infer genocide from several attacks in which many non-Arab community leaders in Darfur were shot to death or bombed.<sup>184</sup>

Third, the drafters of the Genocide Convention decided that mixed political or economic motives should not prevent a judicial finding of genocidal intent to destroy a group in whole or in part.<sup>185</sup> This should have led the Commission to conclude that genocide could be inferred from the actions of the Sudanese government even though it may have had mixed or mutually reinforcing motives of ethnic destruction, counter-insurgency warfare, and economic policy.<sup>186</sup> It should also have led the Commission to reject the notion that the Sudanese military and allied *Janjaweed* did not manifest a “special intent to kill a member of a group to destroy the group as such” simply because they sometimes steal camels or cattle while shooting or brutally beating their owners, and thereby obtain an economic benefit

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182. See Christa Rottensteiner, *The Denial of Humanitarian Assistance as a Crime under International Law*, INT’L REV. OF THE RED CROSS No. 835, at 555 (1999), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ32>.

183. ICID Report, *supra* note 4, at ¶ 492 n.175 (citing Benjamin Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/1985/6, at § 29).

184. *Id.* ¶¶ 253, 274-75.

185. See Hurst Hannum & David Hawk, *The Case Against the Standing Committee of the Communist Party of Kampuchea*, in JEFFREY L. DUNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESSES: A PROBLEM-ORIENTED APPROACH (2002) (drafters of Genocide Convention decided against precluding finding of genocide where mixed motives existed, because that “would be a powerful weapon in the hands of guilty parties and would help them to avoid being charged with genocide”) (quoting representative of Venezuela); see also Prosecutor v. Jelisić, *supra* note 167 ¶ 49 (personal economic motive is consistent with the specific intent to commit genocide); Prosecutor v. Kayishema & Ruzindana, *supra* note 157, ¶ 161 (same).

186. ICID Report, *supra* note 4, at ¶ 518.

as well as inflict an ethnic harm.<sup>187</sup> Such a requirement of unadulterated, purely hateful motives is impossible to meet in any genocide, including the Holocaust, in which the looting of Jewish and Slavic property was widespread.<sup>188</sup>

Fourth, because confessions and direct evidence of genocidal intent are rare, the Yugoslav and Rwandan tribunals have repeatedly held that intent must usually be inferred from evidence of, *inter alia*, “the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”<sup>189</sup> The Commission conceded this.<sup>190</sup>

Each of the factors from which genocidal intent may be inferred is present in the case of Darfur, including large numbers of affected group members, repeated acts violating the economic and familial foundation of the affected groups, systematic and deliberate targeting of non-Arabs accompanied by the exclusion of Arabs from liability to attack, and routine use of language perceived to be

187. *Id.* ¶ 517. See also Reeves, *supra* note 89 (commission of inquiry “confused ‘intent’ and ‘motive’”).

188. See *Prosecutor v. Tadic*, Case No.: IT-94-1-T, Judgment ¶¶ 255-269 (July 15, 1999) (rejecting any requirement of non-personal motives because it would lead to the acquittal, for example, of a Nazi official who claimed that he participated in the genocide of Jews and Roma people “only for the ‘purely personal’ reason that he feared losing his job,” and endorsing instead “the requirement that the accused’s acts be part of a context of large-scale crimes, and that the accused knew of this context”) Need; Judgment: Goering, in Judgment of the International Military Tribunal for the Trial of German Major War Criminals (1947), available at <http://www.yale.edu/lawweb/avalon/imt/proc/judgoeri.htm> (Hermann Goering, a “prime leader[] of the Nazi movement,” persecuted the Jews and fined the Jewish community one billion Deutsche marks, and his “interest was primarily economic--- how to get their property and how to force them out of the economic life of Europe.”).

189. *Prosecutor v. Milosevic*, *supra* note 166 at ¶ 120 (quoting *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 47 (July 5, 2001), available at <http://www.un.org/icty/Supplement/supp26-e/jelistic.htm>); see also *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, at 15, ¶ 40 (7 July 2006), available at [http://69.94.11.53/ENGLISH/cases/Gacumbitsi/judgement/judgement\\_appeals\\_070706.pdf](http://69.94.11.53/ENGLISH/cases/Gacumbitsi/judgement/judgement_appeals_070706.pdf).

190. See ICID Report, *supra* note 4, at ¶ 502 n.185.



derogatory, such as the word “slave.”<sup>191</sup> Moreover, the Sudanese government’s designation of *Janjaweed* fighters as “mujahideen” was a declaration of “holy war” upon their enemies, a declaration which led to large-scale massacres of civilians in the south and the Nuba mountains.<sup>192</sup> References to Darfurians as “Nuba” underline the importance of this fact.<sup>193</sup>

Fifth, the Commission noted that the systematic nature of acts of rape committed in Darfur is “indicative of the genocidal intent” of the perpetrators of these rapes.<sup>194</sup> The Rwanda tribunal has confirmed that rape and sexual assault may be genocidal acts if they are committed with the requisite intent and if they cause (1) serious bodily or mental harm, (2) women to bear children of the aggressor group, or (3) women of the victim group to be unable or willing to give birth to new members of their group due to the trauma of rape.<sup>195</sup> Such rapes

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191. See *id.* ¶¶ 184-402, 507-11, 516. See also Human Rights Watch, *Entrenching Impunity*, *supra* note 44, at 30.

192. See *Sudanese President Says War Against Outlaws Is Priority*, *supra* note 171 (declaring that the president would use “mujahedeen” forces to “get rid of the rebellion”); ENTRENCHING IMPUNITY, *supra* note 44, at 30 (Sudanese provincial commissioner, who organized “mass executions” of civilians of Fur and other tribes, stated: “Zaghawa, Fur and Masalit have become rebels. We will burn everything down and only leave behind the trees . . . . This is now jihad.”); *id.* at 23 (a Sudanese government memorandum to state and provincial security forces orders them to attack rebels’ “elements among civilians” and allow “the activities of the mujahedeen and the volunteers under the command of Sheikh Musa Hilal”).

193. ENTRENCHING IMPUNITY, *supra* note 44, at 6 (“The government’s response drew upon tactics used in the civil wars in southern Sudan and the Nuba Mountains: aerial bombardment, the recruitment of ethnic militias as proxy ground forces, forced displacement—on an ethnic basis—of rural civilians on a massive scale, and persecution of real or perceived political opposition.”); *id.* at 16 (Sudanese pilots referred to Zaghawa civilians as “‘Nuba, abid [slave],’ and said things like, ‘I am going to give those slaves a lesson they will not forget.’”); *id.* at 27 (civilian in Darfur stated that: “When the *Janjaweed* militia arrived, they were screaming ‘Nuba, abid’ he said.”); *id.* at 29 (eyewitness of 2003 *Janjaweed* attack reported that attacker screamed “‘Nuba, Nuba, you are . . . all slaves.’”).

194. ICID Report, *supra* note 4, at ¶ 513.

195. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, § 6.3.1 (Sept. 2, 1998), available at <http://www.un.org/ict/english/>

help destroy groups because they destroy female members, their families, and perhaps entire communities.<sup>196</sup> As of early 2004, the Yugoslav tribunal had indicted thirteen individuals for genocide by acts of rape, and the Rwanda tribunal had amended nearly all of its indictments that alleged sexual assault “to charge them as genocide.”<sup>197</sup> The testimony of the victims in Darfur demonstrates the applicability of these precedents. Victims report that the circumstances in which they were raped demonstrated an intention to attack their entire ethnic group, rather than to abuse them personally. Women have reported that the rapists who attacked them used racist language such as “dirty black Nuba” or “slaves,”<sup>198</sup> or declared that they wanted to “make more Arab babies.”<sup>199</sup>

Finally, the Commission of Inquiry on Darfur raised the question, without expending the effort to answer it, whether Sudanese political and military officials were criminally culpable for complicity in genocide, attempted genocide, or conspiracy to commit genocide.<sup>200</sup> As indicated above, there is ample evidence from which to conclude that Sudanese officials have given orders to, supplied weapons to, supported, transported, and failed to investigate or punish groups such as the *Janjaweed* and the PDF. But while the Commission cited the Yugoslav tribunal for the idea that genocidal intent is a “stringent requirement[]” that must be “unequivocally established,” it failed to

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judgements/akayesu.html; see also Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Trial Chamber I, Judgment and Sentence, ¶¶ 513, 517 (April 25, 2005), summary available at <http://69.94.11.53/ENGLISH/cases/Muhimana/judgement/280405summary.pdf>; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Trial Chamber III, Judgment and Sentence, ¶¶ 476-77 (May 15, 2003), available at <http://69.94.11.53/ENGLISH/cases/Semanza/judgement/6.htm>; Kristof, *Genocide in Slow Motion*, *supra* note 63; Catherine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940, 947 (2006).

196. See *Akayesu*, *supra* note 195, ¶ 731.

197. MacKinnon, *supra* note 195, at 947-49 nn.40-41.

198. Human Rights Watch, *Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad: A Briefing Paper* 5 (Apr. 12, 2005), available at <http://www.hrw.org/backgrounder/africa/darfur0505/darfur0405.pdf>.

199. See Lydia Polgreen, *Darfur’s Babies of Rape Are on Trial From Birth*, N.Y. TIMES, Feb. 11, 2005, at A1.

200. See ICID Report, *supra* note 4, ¶ 520.

recognize the tribunal's conviction in the same case of an individual who lacked such a personal genocidal intent for "complicity in genocide."<sup>201</sup> In that case, the Trial Chamber of the Yugoslav tribunal convicted a general in the Bosnian Serb army for having "fulfilled a key co-ordinating role in the implementation of the killing campaign" against the "military-aged Bosnian Muslim men of Srebrenica," even though he "did not . . . kill them personally."<sup>202</sup> The Appeals Chamber affirmed, but designated the conviction as for aiding and abetting genocide.<sup>203</sup> Similarly, a conspiracy to commit genocide may occur even if genocide itself does not ensue.<sup>204</sup> Having failed to conduct a similar analysis, the Commission's report remains incomplete.

### **III. THE ROLE OF OIL EXPLORATION IN SUDAN'S GENOCIDE**

#### **A. The "Clearing" of Oil Producing Areas**

U.N. reports and victim groups have accused the Sudanese government of committing genocide against non-Arab groups in order to cordon off and exploit regions of the country containing significant oil deposits.<sup>205</sup> The U.N. Commission on Human Rights concluded that "long-term efforts by the various Governments of Sudan to protect oil production have included a policy of forcible population displacement

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201. *Id.* ¶ 503.

202. Prosecutor v. Krstic, Case No. IT-98-33-T, Trial Chamber, Judgement, ¶ 644 (2 Aug, 2001), *available at* <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e-1.htm#IIB>.

203. *Krstic* Appeal Judgment, *supra* note 161, ¶ 143.

204. See WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE 137, 181 (2006).

205. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 300-303, 321-28 (S.D.N.Y., 2004) (recounting allegations of plaintiffs, which court assumed to be true). See also Second Amended Class Action Complaint, ¶¶ 17-51, Presbyterian Church of Sudan v. Talisman Energy, Inc., (No. 01 Civ. 9882), *available at* <http://www.bergermontague.com/pdfs/SecondAmendedClassActionComplaint.pdf>; Jemera Rone, Human Rights Watch, *Sudan: Rebels, Religion and Oil* (Nov. 25, 2003), <http://hrw.org/english/docs/2003/11/25/sudan12988.htm>.

in order to clear oil producing areas and transportation routes of southern civilians.”<sup>206</sup>

By 1980, the American oil company Chevron had discovered oil in Sudan.<sup>207</sup> Chevron planned to finance a refinery in the Upper Nile region and an oil pipeline to the Red Sea.<sup>208</sup> Other Western oil companies worked to develop oil projects in southern Sudan.<sup>209</sup> In 1984, the Chevron Oil Company of the Sudan suspended its plans to export oil from the country, due to southern Sudanese rebel attacks on its installations,<sup>210</sup> including an incident in which rebels seized a Chevron facility and killed three workers.<sup>211</sup> In 1990, Chevron sold its oil exploration rights to Arakis Energy Corporation, a Canadian company.<sup>212</sup> Arakis completed the oil wells that Chevron had begun to drill, and planned to complete Chevron’s pipeline.<sup>213</sup>

In 1998, Talisman Energy, a transnational oil company traded on U.S. stock exchanges and headquartered in Canada, acquired the assets and liabilities of Arakis, including its Sudan exploration rights, for \$223 million.<sup>214</sup> During that same year, the Sudanese government

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206. Second Amended Class Action Complaint, *supra* note 212, ¶ 58(a).

207. *See Sudan Pushing Cotton Exports*, N.Y. TIMES, July 12, 1980, at 23. At that time, Sudan imported about \$360 million in oil per year. *See id.*

208. *Oil Project Loan to Sudan*, N.Y. TIMES, Aug. 20, 1981, at D10; Reuters, *Socal to Speed Up Sudan Production*, N.Y. TIMES, Sept. 15, 1982, at D4. Chevron reportedly spent \$600 million to discover 200 million barrels of oil in Sudan, and planned to spend over \$1 billion more on the pipeline. *See Socal-Sudan Deal*, N.Y. TIMES, Jan. 11, 1983, at D5.

209. Alan Cowell, *Regional Dispute Divides the Sudan; Nimeiry Move to Subdivide the South Stirs Opposition and Fear of New Civil Strife*, N.Y. TIMES, Feb. 22, 1982, at A7.

210. *State of Emergency Is Declared in Sudan*, N.Y. TIMES, Apr. 30, 1984, at A3.

211. *See Sudanese Rebels Seize Chevron Oil Installation*, N.Y. TIMES, Feb. 3, 1984, at A5.

212. *See Dagne, supra* note 76.

213. *See* Phillip M. Mobbs, *The Mineral Industry of Other Countries of East Africa*, U.S. GEOLOGICAL SURVEY, MINERAL INDUSTRY YEARBOOK 1995, at 5, <http://minerals.usgs.gov/minerals/pubs/country/1995/9248095.pdf>.

214. *See Presbyterian Church of Sudan*, 244 F. Supp. 2d at 299-300 (recounting allegations of plaintiffs, which court assumed to be true). *See also* Arakis Energy, *Talisman Agrees to Acquire Arakis* (Aug. 17, 1998), <http://www.prnewswire.co.uk/cgi/news/release?id=58078>.

incited nomadic Arabs of Darfur and South Kordofan to attack Dinka-populated areas “to quash SPLA support in the . . . region and ‘secure the oil fields around Bentiu, the capital of Unity State.’”<sup>215</sup> As one expert described this campaign, the army achieved the “clearance of the oilfield zones” of Southern Sudan by mobilizing militias and inflicting “deliberate starvation” on civilians.<sup>216</sup>

In 1999, the SPLA targeted the Talisman Energy oil facilities as a source of foreign exchange for the government and allied militias to purchase weapons, and the Canadian Government announced a fact-finding mission to investigate claims that Talisman’s operations could be aggravating the civil war and causing human rights violations.<sup>217</sup> The mission discovered that there was a continuing “major displacement of civilian populations related to oil extraction,” and that bomber aircraft and helicopter gunships that attacked southern Sudanese villages took off from an airstrip within the Talisman Energy oil concession.<sup>218</sup> In 2000, however, Canada and the United States refused to impose sanctions on Talisman Energy, with Canada preferring a policy of “dialogue.”<sup>219</sup> The United States, curiously, imposed sanctions on the Greater Nile Petroleum Operating Co. of Sudan (GNPC), but not on its “international corporate owners,” i.e., “China National Petroleum Corp. (CNPC) (40% equity interest); Petronas Carigali Overseas Shd. Bhd. of Malaysia (30%); and State Petroleum Corp., which was a subsidiary of Talisman Energy Inc. of Canada (25%).”<sup>220</sup> In March 2003, Talisman Energy sold its stake in the GNPC for \$720 million to an Indian company.<sup>221</sup> China succeeded

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215. BURR, GENOCIDE, *supra* note 39, at 83.

216. De Waal, *supra* note 28.

217. See Phillip M. Mobbs, *The Mineral Industry of Sudan – 1999*, <http://minerals.usgs.gov/minerals/pubs/country/1999/su99.pdf>.

218. See Second Amended Compl., Talisman Energy, *supra* note 214, ¶ 58(b).

219. See Phillip M. Mobbs, *The Mineral Industry of Sudan – 2000*, U.S. GEOLOGICAL SURVEY MINERALS YEARBOOK, 1999, *available at* <http://minerals.usgs.gov/minerals/pubs/country/2000/sumyb00.pdf>.

220. *Id.*

221. See U.S. DEPARTMENT OF STATE, 2003 SUDAN PEACE ACT REPORT, *available at* <http://www.state.gov/p/af/rls/rpt/2003/19790.htm>; *Diplomatic Arm-twisting Clears Sudan Oil Deal*, THE TIMES OF INDIA, Mar. 13, 2003, *available at* <http://timesofindia.indiatimes.com/articleshow/40190193.cms>; Embassy of the Republic of the Sudan to India, *Canadian Firm Hopes to Sell*

where Chevron and Talisman struggled, for example by dispatching “security personnel to protect their managers and workers.”<sup>222</sup>

## **B. Financing Purchases of Weaponry and Militia Supplies**

Oil exports have also provided the Sudanese regime with the funding to import technologies designed to end human life on a mass scale.<sup>223</sup> Sudan’s military and paramilitary forces utilize these technologies, ranging from military aircraft to helicopter gunships to automatic weapons, to carry out genocide against non-Arab populations.<sup>224</sup> Sudan’s oil exports began in 1999 and eventually earned it billions of dollars.<sup>225</sup> Sudan promptly doubled its military budget with the proceeds.<sup>226</sup> A southern Sudanese bishop described oil as a “curse” that was financing government acquisitions of assault

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25% *Stake in Sudan Oil Project by Month End* (2003), <http://64.233.167.104/search?q=cache:EqgOarGzzR4J:www.embassysudanindia.org/news/11marongc.html>.

222. Henry Lee & Dan A. Shalmon, *Searching for Oil: China's Initiatives in the Middle East*, 49 ENVIRONMENT 8 (2007).

223. See Government of Canada, *Report of the Harker Commission on Talisman Energy Operations in Sudan* (2000), <http://www.dfait-maeci.gc.ca/foreignp/3110186-e.pdf>; Christian Aid, *The Scorched Earth: Oil and War in Sudan* (Mar. 2001), available at [http://sudanreport.unep.ch/sudan\\_website/doccatcher/data/documents/The%20s scorched%20earth.pdf](http://sudanreport.unep.ch/sudan_website/doccatcher/data/documents/The%20s scorched%20earth.pdf).

224. See discussion *supra* Part II.

225. See Dagne, *supra* note 76, at CRS-10; U.S. DEP’T OF STATE, 2004 SUDAN PEACE ACT REPORT (OIL SECTOR), *supra* note 221 (“Human Rights Watch reported in late 2003 that Sudan spent more than 60% of its 2001 oil revenues (\$580.2 million) to buy weapons”); Jeffrey Gettleman, *War in Sudan? Not Where the Oil Wealth Flows*, N.Y. TIMES, Oct. 24, 2006, at A1 (Sudan’s “crude oil production” of “512,000 barrels a day” was “enough to bring billions of dollars”).

226. See Dagne, *supra* note 76, at CRS-6, CRS-10 (“[With] the new oil revenue . . . the government of Sudan has been acquiring new weapons, especially helicopter gunships and fighter planes, from Russia and other countries. Critics maintain that the government of Sudan is using these newly acquired weapons to terrorize civilian populations, especially in the oil fields.”).

rifles, military vehicles, and other sophisticated weapons.<sup>227</sup>

For the campaign in Darfur, Sudan's oil revenues secured "expensive bombers, helicopters, and arms supplies" to bomb civilians and equip militias in violation of human rights.<sup>228</sup> The Commission of Inquiry on Darfur noted that the Sudanese air force bombarded villages in Darfur using "Mi-8 helicopters, Mi-24 helicopters and Antonov aircraft . . . ."<sup>229</sup> Table 3 charts the rise of Sudan's oil exports and its military spending during the genocides against the south and Darfur.

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227. Online NewsHour: Sudan's Troubles, PBS, July 25, 2001, available at [http://www.pbs.org/newshour/bb/africa/july-dec01/sudan\\_7-25.html](http://www.pbs.org/newshour/bb/africa/july-dec01/sudan_7-25.html).

228. AMNESTY INT'L, *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, AI Index Number AFR 54/139/2004 (Nov. 16, 2004), available at <http://web.amnesty.org/library/index/engaf541392004>. See also Ronan Farrow & Mia Farrow, *The 'Genocide Olympics'*, WALL ST. J., Mar. 28, 2007, , at A17, available at <http://maloof.wordpress.com/2007/04/01/the-genocide-olympics-by-ronan-and-mia-farrow>.

229. ICID Report, *supra* note 4, at ¶ 243; Human Rights Watch, *Sudan: Government Offensive Threatens Darfur Civilians* (Apr. 26, 2006), available at <http://hrw.org/english/docs/2006/04/26/sudan13276.htm>; HUMAN RIGHTS WATCH, WORLD REPORT 2006: SUDAN 140 (Jan. 11, 2007), available at <http://hrw.org/englishwr2k7/docs/2007/01/11/sudan14715.htm>.

**Table 3**  
**Sudan's Oil Exports and Military Spending, 1999-2006**

Year	Oil Revenue (\$US)	Military Spending (\$US)	Source
1999	\$0.06 billion	\$242 million	Human Rights Watch <sup>230</sup>
2000	\$0.55 billion	\$250.9 million	Human Rights Watch <sup>231</sup>
2001	\$0.57 billion	\$345 million	Human Rights Watch <sup>232</sup>
2002	\$1 billion	\$312.7 million	Human Rights Watch <sup>233</sup> <i>The New York Times</i> <sup>234</sup>
2003	\$2 billion	Unknown	<i>The Times (U.K.)</i> <sup>235</sup>
2004	\$3 billion	Unknown	<i>Toronto Star</i> <sup>236</sup>
2005	\$4+ billion	\$733 million	Oil – ECOS <sup>237</sup> Military – U.S. CIA <sup>238</sup>
2006	\$6.3 billion	\$733 million	Oil – Foreign Affairs <sup>239</sup> Military – U.S. CIA <sup>240</sup>

230. Human Rights Watch, Sudan, Oil, and Human Rights (2003), tbl. 1, <http://www.hrw.org/reports/2003/sudan1103/21.htm>

231. *See id.*

232. *See id.*

233. *See id.*

234. *Id.* *See* Warren Hoge, *U.S. Proposes a Softer Threat on Sudan's Oil*, N.Y. TIMES, Sept. 15, 2004, at A13.

235. *See* Michael Dynes, *Warring Factions Agree Sudan Peace*, THE TIMES (U.K.), May 27, 2004, at 24. *See also* *Facts About Africa's Largest Country*, CHINA DAILY, May 28, 2004.

236. Editorial, *Ease Sudan's Crisis*, THE TORONTO STAR, July 2, 2004.

237. European Coalition on Oil in Sudan, *Fact Sheet II: The Economy of Sudan's Oil Industry* (Oct. 2007), at 9, [http://www.ecosonline.org/back/pdf\\_reports/2007/Oil/ECOS%20factsheetII%20October%202007.pdf](http://www.ecosonline.org/back/pdf_reports/2007/Oil/ECOS%20factsheetII%20October%202007.pdf). *But cf.* David Blair, *Darfur Bleeds in the Great Scramble for Sudan's Oil*, THE DAILY TELEGRAPH (U.K.), Feb. 8, 2006, at 17 (2005 oil revenues of \$1.7 billion).

238. *See* U.S. Central Intelligence Agency, *The World Factbook: Sudan* (2007), <https://www.cia.gov/library/publications/the-world-factbook/print/su.html> [hereinafter *CIA World Factbook: Sudan*].

239. David Blair, *Oil Seals Friendship for China and 'Rogue' Sudan*, THE DAILY TELEGRAPH (U.K.) Feb. 2, 2007, at 19. *But cf.* John Prendergast & Colin Thomas-Jensen, *Blowing the Horn*, FOREIGN AFFAIRS, Mar.-Apr. 2007, at 59 (\$4 billion).



Although oil is not considered to be as important a factor behind the violence in Darfur as it is in the violence surrounding the GNPC oilfield, Darfur is also expected to contain significant oil deposits, which Chinese and British interests have paid millions to explore.<sup>241</sup> After the arrival of Chinese corporations in Sudan, the country switched from being an oil importer to being an exporter of \$2 billion in oil annually.<sup>242</sup> Chinese corporations have invested about \$10 billion in Sudan's energy industry.<sup>243</sup> Indeed, in 2005, Sudan received more Chinese "investment" than any other African country.<sup>244</sup> About 20% of Sudan's imports originate in China; Sudan's other major trading partners are Saudi Arabia and Japan.<sup>245</sup>

In exchange for its investments and political and military

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240. See *CIA World Factbook: Sudan*, *supra* note 238.

241. See Chandra Lekha Sriram, *Forum: China, Human Rights and the Sudan*, JURIST (Jan. 30, 2007), <http://jurist.law.pitt.edu/forumy/2007/01/china-human-rights-and-sudan.php>; David Leigh & Adrian Gattton, *Briton Named as Buyer of Darfur Oil Rights*, THE GUARDIAN (U.K.), June 10, 2005, <http://www.guardian.co.uk/sudan/story/0,14658,1503470,00.html>.

242. See European Coalition on Oil in Sudan, *supra* note 237.

243. See *Khartoum Character*, INVESTOR'S BUSINESS DAILY, April 17, 2007, at A3; Samuel Hoff, *Genocide in Sudan Must Be Halted Immediately*, THE NEWS JOURNAL (DEL.), Apr. 25, 2006, at 7A.

244. See Laura Macinnis, *Sudan Top Target for Chinese Investment in Africa*, REUTERS, Mar. 27, 2007, <http://africa.reuters.com/wire/news/usnL27206739.html>. China's economic ties with Sudan extend beyond Sudanese exports of oil to China. Among other China-Sudan trade, China is building the "largest hydro-electric project" in all of Africa in association with Sudan, a project valued at approximately \$2 billion and capable of doubling Sudan's electricity supply. Agence France Presse, *supra* note 3; see also *Power of Displacing People*, FIN. TIMES, Mar. 14, 2007, available at <http://archive.gulfnews.com/articles/07/03/14/10110878.html>. Saudi Arabia has also exported arms to Sudan in potential violation of U.N. arms embargos. See Victor T. Le Vine & Ruth Iyob, *Region Requires Forceful Response*, ST. LOUIS POST-DISPATCH, Oct. 8, 2006, at B6. Like China, it has been a prominent player in the failure by the U.N. Human Rights Council to condemn the genocide in Darfur. See Pablo Bachelet, *Group Critical of Rights Panel*, MIAMI HERALD, Jan. 12, 2007; *China, Russia seek to block UN report on Darfur*, REUTERS, Mar. 19, 2007, [http://www.savedarfur.org/newsroom/clips/china\\_russia\\_seek\\_to\\_block\\_un\\_report\\_on\\_darfur/](http://www.savedarfur.org/newsroom/clips/china_russia_seek_to_block_un_report_on_darfur/).

245. See *CIA World Factbook: Sudan*, *supra* note 238.

alliance with Sudan, China is securing increasing control over Sudan's oil industry. For example, China bought seventy percent of Sudan's exports in 2006.<sup>246</sup> The CNPC, which is owned by the Chinese government, controls ninety-five percent of Block 6, a particularly large oil concession that includes territory within the Darfur region<sup>247</sup> and could be worth billions of dollars over time.<sup>248</sup>

Additionally, along with Saudi Arabia, China has exported arms to Sudan in violation of U.N. arms embargos.<sup>249</sup> During the genocide in southern Sudan, indigenous African rebels captured government bases, and found "large numbers of relatively new Chinese arms and ammunition," including tanks, howitzers (artillery), anti-personnel mines, machine guns, and ammunition.<sup>250</sup> Chinese engineers reportedly helped Sudan build factories for tanks, military vehicles, rocket-propelled grenades, and heavy weapons.<sup>251</sup> In defiance of U.N. sanctions implemented in 2005 to prohibit arms sales to the government of Sudan as well as anti-government rebels,<sup>252</sup> Chinese

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246. See Small Arms Survey, *Arms, Oil, and Darfur* 7 (2007), [http://64.233.169.104/search?q=cache:zcVjwucTnd8J:www.smallarmssurvey.org/files/portal/spotlight/sudan/Sudan\\_pdf/SIB%25207%2520Arms.pdf](http://64.233.169.104/search?q=cache:zcVjwucTnd8J:www.smallarmssurvey.org/files/portal/spotlight/sudan/Sudan_pdf/SIB%25207%2520Arms.pdf).

247. Human Rights Watch, *Sudan, Oil, and Human Rights*, *supra* note 230. The European Coalition on Oil in Sudan (ECOS), *Oil Development in Northern Upper Nile, Sudan* (2006).

248. See U.S. Department of Energy, Energy Information Administration, *Sudan* (2007), <http://www.eia.doe.gov/emeu/cabs/Sudan/Oil.html>.

249. See Sriram, *supra* note 241; Le Vine & Iyob, *supra* note 245, at B6.

250. Small Arms Survey, *supra* note 246, at 5.

251. See *id.* A report issued after 2006 by a U.N. Panel of Experts documented that the ammunition being used in the Darfur was manufactured either in Sudan or in China. See *id.*

252. See S.C. Res. 1591 ¶¶ 1, 7, S/RES 1556 (Mar. 29, 2004) (condemning the Government of Sudan's air strikes in Darfur and its failure to disarm "Janjaweed" militiamen and apprehend and bring to justice Janjaweed leaders and their associates who have carried out human rights and international humanitarian law violations and other atrocities," and acting under Chapter VII of the UN Charter to establish an arms embargo against "all the parties to the N'djamena Ceasefire Agreement and any other belligerents in the states of North Darfur, South Darfur and West Darfur," which includes the Government of Sudan unless it seeks prior approval from a sanctions committee to move arms or materiel into Darfur).

corporations exported arms and ammunition worth \$24 million to Sudan in 2005, as well as aircraft parts and equipment worth \$57 million, and helicopter and airplane parts worth \$2 million.<sup>253</sup> Amnesty International condemned China for helping Sudan violate the arms embargo.<sup>254</sup> China even “built several munitions factories for the Sudanese government, in part to avoid being accused of exporting arms to Sudan.”<sup>255</sup> Arms factories near Khartoum produce “ammunition, light infantry weapons, military vehicles and Sudanese versions of the T-55 tank, seen in Darfur, for the Sudanese armed forces.”<sup>256</sup>

The Chinese government has repeatedly blocked U.N. Security Council resolutions that would have condemned or intervened against genocide in Darfur.<sup>257</sup> A panel established by the U.N. Security Council in 2005 to consider sanctions against Sudanese leaders failed even to recommend any sanctions, as China, Russia, and the Gulf Arab state of Qatar “opposed efforts to impose sanctions on members of Khartoum’s government.”<sup>258</sup>

The U.N. arms embargo on the parties to the conflict in Darfur was so ineffectual that it did not stop China from arming Sudanese troops to guard Chinese energy installations, or from providing Sudan with “tanks, aircraft, helicopters and other weapons . . . to clear civilians and rebels from oil-fields rich in petroleum.”<sup>259</sup> The U.N. sanctions committee reported in late 2007 that Darfur continued to be bombed by the government, that weapons continued to be shipped into

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253. See Amnesty International, *Sudan: Arms Continuing to Fuel Serious Human Rights Violations in Darfur*, *supra* note 142. The Russian Federation also exported \$21 million worth of aircraft and associated equipment to Sudan in 2005, as well as \$13.7 million of helicopters. *See id.*

254. *See id.*

255. Lee & Shalmon, *supra* note 222.

256. AMNESTY INT’L, *Sudan: Arms Continuing to Fuel Serious Human Rights Violations in Darfur*, *supra* note 142.

257. See Agence France Presse, *China Offers Aid For ‘Peaceful Resolution’ of Darfur Conflict*, SUDAN.NET, Feb. 2, 2007, available at [http://209.85.165.104/search?q=cache:oyxFbYv\\_dQoJ:www.sudan.net/news/poisted/14064.html](http://209.85.165.104/search?q=cache:oyxFbYv_dQoJ:www.sudan.net/news/poisted/14064.html).

258. Colum Lynch, *Sanctions Against Sudanese Officials Sought Over Darfur*, WASH. POST, Feb. 23, 2006, at A20.

259. *Blood for Oil*, INVESTOR’S BUS. DAILY, May 2, 2005, <http://www.investors.com/editorial/editorialcontent.asp?secid=1501&status=article&id=156744&secure=2799>.

Darfur on an airplane disguised as a U.N. flight, and “that widespread violations of international humanitarian law and human rights law continued with impunity in Darfur.”<sup>260</sup> Despite its findings, however, the U.N. failed to tighten the sanctions.<sup>261</sup>

#### IV. RESPONSES TO GENOCIDE: CRIMINAL TRIBUNALS OR REPARATIONS?

##### **A. Criticisms of the Criminal Law Focus of International Law**

The failure of the international community to deter governments from engaging in genocide has not been principally a failure of international criminal law. If criminal sanctions could deter government officials from implementing genocide as a solution to their nations’ political and economic problems, the trial and sentencing of several heads of state and high officials over the past century should already have achieved this goal.<sup>262</sup>

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260. Security Council Committee Established Pursuant to Resolution 1591, Annual Report, S/2007/779, ¶¶ 13, 25, 27 (Dec. 31, 2007), <http://daccessods.un.org/access.nsf/Get?OpenAgent&DS=S/2007/779&Lang=E&Area=UNDOC>.

261. *Id.* ¶ 27.

262. See Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S, Trial Chamber, Judgment (Sept. 4, 1998), <http://www.un.org/ict/english/judgements/kambanda.html>, *aff’d* Case No. ICTR 97-23-A, Appeals Chamber, Judgment (2000), <http://69.94.11.53/ENGLISH/cases/Kambanda/judgement/191000.htm>; Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, Amended Indictment (Bosnia) (2002), available at <http://www.un.org/icty/indictment/english/mil-ai040421-e.htm>; Judgment: Goering, *supra* note 195; Judgement: Bormann, *supra* note 195; Judgement: Rosenberg, *supra* note 195; Judgement: Ribbentrop, in Judgment of the International Military Tribunal for the Trial of German Major War Criminals (1946) available at <http://www.yale.edu/lawweb/avalon/imt/proc/judribb.htm>; Judgment: Streicher, in Judgment of the International Military Tribunal for the Trial of German Major War Criminals (1946), available at <http://www.yale.edu/lawweb/avalon/imt/proc/judstre.htm>; *Saddam’s YouTube Execution*, RED HERRING, Dec. 30, 2006, available at <http://www.redherring.com/Article.aspx?a=20519>; Kirk Semple, *Iraqi Court Sentences Saddam to Death*, INT’L HERALD TRIB., Nov. 5, 2006, available at

Legal scholars have questioned whether international criminal tribunals are sufficient or even helpful, standing alone, as deterrents to genocide. Among other problems with criminal deterrence, leaders often positively embrace their own and their subordinates' sacrifices for the benefit of the nation; military command structures complicate individual cost-benefit calculations; the sheer numbers of soldiers and instigators of massacres create such a mob-like mentality that punishing all perpetrators is impossible; state-sanctioned hatred and mass violence resist rational analysis and deliberation; and criminal trials may themselves valorize perpetrators of genocide as national or ethnic martyrs.<sup>263</sup> Moreover, empirical research into the effect of the death

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<http://www.iht.com/articles/2006/11/05/news/saddam.php>; International Criminal Tribunal for the Former Yugoslavia, Press Release, Slobodan Milosevic Found Dead in His Cell at the Detention Unit (2006), *available at* <http://www.un.org/icty/pressreal/2006/p1050-e.htm>; MIKI Y. ISHIKIDA, TOWARD PEACE: WAR RESPONSIBILITY, POSTWAR COMPENSATION, AND PEACE MOVEMENTS AND EDUCATION IN JAPAN 15-16 (2005); Vahakn N. Dadrian, *The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish Military Tribunal*, 23 INT'L J. OF MIDDLE EAST STUDIES 549, 556, 561-62, 575 (1991); Gerard Chaliand, *Prologue* to JACQUES DEROGY, RESISTANCE AND REVENGE: THE ARMENIAN ASSASSINATION OF THE TURKISH LEADERS RESPONSIBLE FOR THE 1915 MASSACRES AND DEPORTATIONS (1990), *available at* <http://www.maclester.edu/courses/intl345/docs/derogy.pdf>.

263. For a sense of the literature over the past decade questioning the deterrent effect of penal sentences handed down by international criminal tribunals, in roughly chronological order, see Theodor Meron, *From Nuremberg to the Hague*, 149 MIL. L. REV. 107, 110-11 (1995); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2079-80 (1998); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 9-13, 30-31 (2001); Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities, 2000-2003* THIRD WORLD LEGAL STUD. 169, 173-74; Laurel E. Fletcher and Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 579-80, 592 (2002); Allison Danner & Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 147-48 (2005); Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 589-91 (2005); Jenia Iontcheva, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 25 (2005); Mark Osiel, *The*

penalty in the United States has shown that only large-scale executions will deter murder, and that small numbers of executions merely brutalize the population by fomenting an atmosphere of revenge-killing, thereby increasing rather than decreasing the murder rate in U.S. states that execute small numbers of offenders.<sup>264</sup> The persistence of genocide despite successful criminal convictions and private justice against architects of genocide from Talaat Pasha to Saddam Hussein indicates that the international community may need to pay more attention to collective, rather than individual, responsibility for genocide, and to economic, rather than criminal, disincentives to genocide.

### **B. The Case for Ensuring that Reparations Be Paid to Genocide Victims**

Despite the relative infrequency until recent years of cases seeking civil compensation for genocide, international law is fairly clear, when it is properly and impartially construed, that such compensation must be paid.<sup>265</sup> For this reason, the International Court of Justice has “observe[d] that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act.”<sup>266</sup> Such reparations must compensate for all “damage caused to all natural or legal persons

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*Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1770 (2005).

264. See Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 206-07, 247-48 (2005).

265. See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 ICJ LEXIS 1, ¶ 259 (Dec. 2005) [hereinafter *Congo Case*]; U.N. Comm. on Human Rights, Human Rights Res., *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. E/CN. 4/2005/L. 48 (Apr. 13, 2005), available at <http://www.icj.org/IMG/pdf/UNRemedyReparation.pdf>.

266. *Congo Case*, *supra* note 265, ¶¶ 259, 345, 2005 ICJ LEXIS 1, \*202, 254 (citing, *inter alia*, *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, at 59, ¶ 119).

concerned”<sup>267</sup> and, “as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>268</sup>

International human rights instruments also require that individuals be made whole for violations of their rights by their governments. For example, the International Covenant on Civil and Political Rights, which Sudan ratified in 1986,<sup>269</sup> states that any person whose rights are violated “shall have an effective remedy . . . .”<sup>270</sup> Under international law, this notion of an “effective remedy” entails a thorough investigation, punishment of the guilty, and the payment of compensation.<sup>271</sup> Similarly, the African Charter on Human and People’s Rights<sup>272</sup> states that peoples despoiled of their wealth and natural resources “shall have the right to the lawful recovery of [their] property as well as to an adequate compensation.”<sup>273</sup> Sudan has ratified this code of human rights.<sup>274</sup> Under these authorities, the primary objective of international human rights law is “to protect the

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267. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ¶ 152, 2004 ICJ LEXIS 20 (July 9) (quoting *Factory at Chorzow*, Merits, Judgment No. 13, 1928 P.C.I.J. (ser. A) No. 17, at 47).

268. *Id.* (quoting *Factory at Chorzow*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.).

269. AMNESTY INT’L, *Sudan: 1.2 Million Internally Displaced People at Risk in Darfur* (July 1, 2004), available at <http://web.amnesty.org/library/Index/ENGAFR540782004?open&of=ENG-2AF>.

270. International Covenant on Civil and Political Rights, Art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171, 174.

271. *Mentes v. Turkey*, 37 I.L.M. 858, 882 (Eur. Ct. Hum. Rts. Nov. 28, 1998); see also Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 27-28 (2006).

272. African (Banjul) Charter on Human and Peoples’ Rights, art. 21 (June 27, 1981), 21 I.L.M. 58 (1982), available at <http://www1.umn.edu/humanrts/instreet/z1afchar.htm>.

273. *Id.* at art. 21 (June 27, 1981), 21 I.L.M. 58 (1982), available at <http://www1.umn.edu/humanrts/instreet/z1afchar.htm>.

274. AMNESTY INT’L, *Sudan, Darfur: "Too Many People Killed," supra* note 92.

victims and to provide for the reparation of damages.”<sup>275</sup>

Despite the abundance of international law on the subject, courts and tribunals have been extremely slow to impose economic penalties for genocide, and when penalties do come, they rarely make victim communities whole. This may explain why governments and peoples engage in genocide with such regularity. Victims of Japan’s occupation, mass murder, and enslavement of Asian populations during World War II have received very little in reparations payments, compared to what they have lost.<sup>276</sup> Few of the victims of other mass

275. *Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. Human Rights (ser. C) No. 4, at ¶ 134 (July 29, 1988), available at [http://www.javier-leon-diaz.com/enforced\\_disappearances/Velasquez%20Rodriguez.pdf](http://www.javier-leon-diaz.com/enforced_disappearances/Velasquez%20Rodriguez.pdf)

276. See Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 *BERKELEY J. INT’L L.* 11, 32 (2002). Japan never paid reparations to China, the principal victim of its colonial and genocidal policies during World War II. See Kitaoka Shinichi, *Answering China’s Japan Bashers* (Part 2 of 3), *JAPAN NOW*, Vol. 1, No. 2 (2005), available at [http://www.us.emb-japan.go.jp/jicc/EJN\\_no2.htm](http://www.us.emb-japan.go.jp/jicc/EJN_no2.htm) (Japan never paid reparations to China); MARIA HSIA CHANG, *RETURN OF THE DRAGON: CHINA’S WOUNDED NATIONALISM*, at 80-83 (2001) (China lost 10 to 20 million people and \$100 billion to Japan’s attacks). But cf. Jane Jila Simmons, *Japan’s Foreign Aid to China Conundrum*, 22(2) *ABAC JOURNAL*, May 2002, at 2-3 [http://www.journal.au.edu/abac\\_journal/2002/may02/article1\\_may02.pdf](http://www.journal.au.edu/abac_journal/2002/may02/article1_may02.pdf) (China “became the top recipient of Japanese aid” in 1980s and 1990s, but aid was motivated by export-promotion and national security as well as “compensation for wartime damages”); Melinda Liu & Christian Caryl, *Asia: Furies Unleashed*, *NEWSWEEK*, April 25, 2005, available at <http://www.msnbc.msn.com/id/7529463/site/newsweek/> (Japan distributed \$34 billion in development aid to China through 2005). Japan did pay reparations to Burma, Indonesia, the Philippines, Vietnam, and South Korea, but only in the amount of about \$1.3 billion not counting loans, or about \$300 for each of the at least four million people it killed in these countries, assuming that neither purely economic losses nor any of the estimated 125 million rapes committed by Japanese troops were compensated. See Larry A. Niksch, Congressional Research Service Report, *Japan’s World War II Reparations: A Fact Sheet*, (Mar. 7, 1991), available at [http://digital.library.unt.edu/govdocs/crs//data/1991/upl-meta-crs13/91216f\\_1991Mar07.txt?PHPSESSID=2b22e6d689c8dbf0ef09975067b65fee](http://digital.library.unt.edu/govdocs/crs//data/1991/upl-meta-crs13/91216f_1991Mar07.txt?PHPSESSID=2b22e6d689c8dbf0ef09975067b65fee) (noting that Japan paid about \$1.3 billion in reparations to Burma, Indonesia, the Philippines, and South Korea, and “minor” amounts to Vietnam, Cambodia, and Laos); MIKIO SUMIYA, *A HISTORY OF JAPANESE TRADE AND INDUSTRIAL POLICY* 237 (2001) (Japan paid only \$39 million in reparations to



killings, including those in Indonesia, Pakistan, Cambodia, Guatemala, Iraq, Bosnia, Rwanda, and the Congo, have received substantial compensation for their losses.<sup>277</sup> The main exception to this rule is Germany, which finally, by 1998, paid out roughly US\$60 billion in reparations to Holocaust victims; however, even Germany paid “very little” in individual compensation in the first decade after 1945.<sup>278</sup> It was only starting in the late 1990s, after fifty years of little to no redress, that many victims of Nazi genocide and slave labor received compensation in U.S. courts.<sup>279</sup>

### **C. Exploring Alternative Mechanisms for Genocide Reparations in Sudan**

Over the past few years, the victims of genocide in Darfur have seen their prospects for compensation improve, albeit only very marginally. On May 5, 2006, two years of diplomacy by the African

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Vietnam); HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 657, 690 (2000) (stating that Japan claimed 2 million victims in Vietnam and 1 million in the Philippines).

277. See, e.g., JOSEPH NEVINS, *A NOT-SO-DISTANT HORROR: MASS VIOLENCE IN EAST TIMOR* 178 (2005) (East Timor); LOUISE KRABBE BOSERUP, *HUMAN RIGHTS IN DEVELOPMENT 2001 REPARATIONS: REDRESSING PAST WRONGS* 64 (2003) (East Pakistan/Bangladesh); VICTOR D. MONTEJO, *MAYA INTELLECTUAL RENAISSANCE: IDENTITY REPRESENTATION, AND LEADERSHIP* 196-97 (2005) (Guatemala); Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment 459-470 (I.C.J. 26 Feb. 2007), available at <http://www.icj-cij.org/docket/index.php?p1=3&PHPSESSID=f63dc11009628f59386d98e083651b4e&case=122&code=ybh&p3=4> (Bosnia); Drumbl, *supra* note 263, at 1271 n.232 (Rwanda). The compensation process for dispossession of Kurdish properties has begun in Iraq, but the amounts awarded have been criticized as inadequate and too slow in coming. See Internal Displacement Monitoring Centre, *Iraq: Sectarian violence, Military Operations Spark New Displacement, As Humanitarian Access Deteriorates* (May 23, 2006), available at [http://www.icmc.net/pdf/idmc\\_report\\_iraq.pdf](http://www.icmc.net/pdf/idmc_report_iraq.pdf).

278. Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1189 (2004).

279. See *id.* at 1157, 1164; Bazzyler, *supra* note 276, at 12, 15-25, 36-37 (\$8 billion in payouts).

Union, the United States, the European Union, and the Arab League culminated in the Darfur Peace Agreement (DPA).<sup>280</sup> Abdel Wahid al-Nur, the leader of the “main part” of the Sudan Liberation Army, including most of its Fur members, and the movement’s founder, refused to sign the agreement, characterizing its \$30 compensation fund for genocide victims as paltry, the provisions for disarmament of the *Janjaweed* as toothless, and the continued exclusion of Darfurians from legislative and executive power as intolerable.<sup>281</sup> Minni Minawi, a leader of a mostly Zaghawan faction of the Sudan Liberation Movement, did sign the DPA. Predictably, the implementation of the DPA has been lacking. The African Union took on the responsibility of overseeing the implementation, but established no plan for disarming the *Janjaweed* and monitoring the decommissioning process.<sup>282</sup> Six months after the signing of the agreement, no disarmament had occurred, the *Janjaweed* were receiving even more weapons than before,<sup>283</sup> and the government of Sudan had breached its promise under the DPA to provide \$500 million in reconstruction aid to the Darfur region.<sup>284</sup>

Leaders of the Fur people, as well as U.N. and U.S. officials, have questioned the existence and adequacy of the compensation under the DPA.<sup>285</sup> At least one student of the situation in Darfur has noted

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280. U.S. Department of State, *Darfur Peace Agreement* (2006), <http://www.state.gov/r/pa/prs/ps/2006/65972.htm>.

281. Alex de Waal: ‘I Will Not Sign’: Alex de Waal Writes About the Darfur Peace Negotiations, Nov. 30, 2006, LONDON REV. OF BOOKS, [http://www.lrb.co.uk/v28/n23/waal01\\_.html](http://www.lrb.co.uk/v28/n23/waal01_.html).

282. *See id.*

283. *See id.*; *see also* Amnesty International, *Sudan: Arms Continuing to Fuel Serious Human Rights Violations in Darfur*, *supra* note 142; *Sudan Has Failed to Cooperate*, *supra* note 138; Sudan Presidential Aide Briefs UN, *AU Envoys on Progress of Darfur Peace Process*, BBC MONITORING MIDDLE EAST - SOLITICAL, Feb. 13, 2007.

284. *See Backgrounder: Darfur's Peace Proces*, N.Y. TIMES, June 18, 2007, [http://www.nytimes.com/glogin?URI=http://www.nytimes.com/cfr/world/slot3\\_20070618.html&OQ=\\_rQ3D1&OP=d15a620Q2FeqHPeQ5B\\_Q27mp\\_\\_IjeQ27apeq\\_pQ7BQ5BemQ7B\\_IQ7DQ22jQ3CQ3CEQ3CM3s\)TIQ24Q7B](http://www.nytimes.com/glogin?URI=http://www.nytimes.com/cfr/world/slot3_20070618.html&OQ=_rQ3D1&OP=d15a620Q2FeqHPeQ5B_Q27mp__IjeQ27apeq_pQ7BQ5BemQ7B_IQ7DQ22jQ3CQ3CEQ3CM3s)TIQ24Q7B); *Sudan Not Making Payments to Darfur Fund*, SUDAN TRIBUNE, Feb. 18, 2008, <http://www.sudantribune.com/spip.php?article26034>.

285. *See Nigerian President Warns of "Near Genocide" in Darfur*, BBC MONITORING AFRICA – ROLITICAL, Oct. 12, 2006; *Brookings-Bern Project on*

that, even if \$30 million in compensation were paid, that amount divided among the four million people who have suffered from the government's policies would amount to less than \$8 per person.<sup>286</sup> He notes that Darfurians living in displaced persons camps felt "tremendous anger" at being asked to accept such a pittance for all that they had suffered.<sup>287</sup> In any event, the compensation is unlikely to be paid. Most of the victims are scattered among refugee and IDP camps and have little capacity to file whatever forms will be required, and the Sudanese government has a long history of establishing tribunals for prosecuting crimes or compensating victims, but allowing very few actual cases to proceed.<sup>288</sup>

Proceeding on the sound assumption that voluntary agreements between the Sudanese government and representatives of the Fur, Masalit, and Zaghawa peoples will fail to achieve adequate compensation, the international community must take the lead in assuring that the government fulfills its obligation to pay reparations. The world should do this for two reasons: first, to ensure the survival of the groups subjected to genocide in Darfur, and second, to deter the government and *Janjaweed* from continuing to exterminate members of minority ethnic and religious groups with the intention of stealing their land, water and mineral resources, and cattle. People from Darfur frequently lack homes to sleep in or water to drink, and sometimes eat

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*Internal Displacement Discussion; Subject: International Policy Toward Darfur (remarks of Jean-Marie Guehenno, Undersecretary-General, United Nations, Peacekeeping Operations)*, FEDERAL NEWS SERVICE, Nov. 20, 2006; *Dr. Al-Khalifa Holds UN Responsible for Delay*, SUNA NEWS AGENCY, Nov. 26, 2006; Andrew Natsios, *Special State Department Briefing by the President's Special Envoy on Sudan*, FEDERAL NEWS SERVICE, Nov. 20, 2006 (victims say \$30 million is insufficient to rebuild damaged farms and cattle stocks).

286. *VOA News: Peace Eludes Darfur*, US FED NEWS, Nov. 29, 2006.

287. *Id.*

288. See Sima Samar, Report of the Special Rapporteur on the Human Rights Situation in the Sudan, U.N. Commission on Human Rights, 62nd Sess., Item 19 of the Provisional Agenda, Advisory Services And Technical Cooperation in the Field of Human Rights, E/CN.4/2006/111, ¶¶ 44-49, 79 (11 Jan. 2006), available at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1L05392IK7144.21469&profile=bib&uri=full=3100001~!794425~!9&ri=1&aspect=alpha&menu=search&source=~!horizon>.

tree bark in a desperate bid to stay alive.<sup>289</sup> The Holocaust litigation in the United States has already demonstrated the possibility that legal institutions could compensate victims and contribute to the survival of destitute survivors of genocide, notably elderly Holocaust survivors living in the former Soviet Union.<sup>290</sup> Reparations payments, unlike criminal prosecutions, “provide at least the possibility that victims may be compensated for lost property, for injuries suffered, or for emotional distress caused.”<sup>291</sup>

From a deterrence perspective, the chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda has called on the U.N. Security Council to “to break this cycle of violence” in Darfur by assessing reparations.<sup>292</sup> He argued that forming a “trust fund” out of a portion of Sudan’s oil revenues to compensate the victims, provide humanitarian relief, and rebuild destroyed villages, would provide a “strong incentive for Khartoum to admit a UN-authorized protection force and to cooperate with the International Criminal Court.”<sup>293</sup> Without strong action by the international community to penalize the Sudanese government, it “has no incentive to stop its current campaign of atrocities.”<sup>294</sup> Thus, both Human Rights Watch and Amnesty International have called for a compensation fund for Darfur’s victims to be financed by oil revenues.<sup>295</sup>

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289. *700,000 Lack Access To Clean Water in Darfur*, UNICEF UK NEWS (25 May 2004), available at [http://www.unicef.org.uk/press/news\\_detail\\_full\\_story.asp?news\\_id=288](http://www.unicef.org.uk/press/news_detail_full_story.asp?news_id=288); Charlotte Sector, *Aid Worker Fears 'Disaster of Biblical Proportions' in Darfur*, ABC NEWS (Mar. 31, 2006), available at <http://abcnews.go.com/International/story?id=1786781&page=2>.

290. See Dubinsky, *supra* note 278, at 1179.

291. John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 48 (1999).

292. Richard Goldstone, *An 'Oil-for-Food' Program for Darfur*, INT’L HERALD TRIB., June 12, 2007, <http://www.iht.com/articles/2007/06/12/opinion/edgold.php>.

293. *Id.*

294. Nick Grono & John Prendergast, *To Halt Sudan’s Atrocities, Follow the Money*, INT’L HERALD TRIB., Aug. 22, 2006, available at <http://www.iht.com/articles/2006/08/21/opinion/edgrono.php>.

295. See Human Rights Watch, *UN: Create Darfur Recovery Fund for Sudanese Oil Revenues* (Mar. 16, 2007), <http://www.hrw.org/english/docs/>

A precedent exists for such a compensation fund in the U.N. Compensation Commission (UNCC), established after Iraq's war with Kuwait by U.N. Security Council Resolution 687.<sup>296</sup> The U.N. required Iraq to pay compensation to persons affected by the war with Kuwait, up to a limit of "30 per cent of the annual value of the exports of petroleum and petroleum products from Iraq."<sup>297</sup> The UNCC, operating as a subsidiary of the U.N. Security Council, paid out over \$21.8 billion in reparations to Kuwaiti, Saudi, Jordanian, Palestinian, Israeli, and American corporations and citizens.<sup>298</sup> The UNCC apparently intends to distribute \$30 billion more, for over \$50 billion in total compensation paid out of the Iraqi people's oil resources.<sup>299</sup>

A compensation fund for genocide victims in Darfur would actually be much more justifiable than the UNCC turned out to be, for several related reasons. First, while many Kuwaitis died in the Iraq war, they were not victims of genocide. Estimates place the number of victims somewhere between a few hundred and 10,000, a ratio of one Kuwaiti victim for every fifty to 1,000 Darfurian victims.<sup>300</sup> Second,

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2007/03/19/sudan15517.html; Human Rights Watch, *Sudan: Darfur Demands Sanctions, Not Words*, AFRICA NEWS, Dec. 12, 2006; Amnesty International, *Darfur: "Too Many People Killed,"* *supra* note 92.

296. See S/RES/687 (1991), available at <http://www.fas.org/news/un/iraq/sres/sres0687.htm>.

297. S/RES/705 ¶ 2 (1991), available at <http://www2.unog.ch/uncc/resolutio/res0705.pdf>. The percentage was reduced to 25 percent in December 2000. See OFFICE OF THE DIRECTOR OF CENTRAL INTELLIGENCE, COMPREHENSIVE REPORT OF THE SPECIAL ADVISOR TO THE DCI ON IRAQ'S WMD (2004), available at [https://www.odci.gov/cia/reports/iraq\\_wmd\\_2004/chap2\\_annxD.html](https://www.odci.gov/cia/reports/iraq_wmd_2004/chap2_annxD.html).

298. See UNCC, *At a Glance* (2007), available at <http://www.unog.ch/uncc/atagance.htm>; UNCC, *Opening of the Sixty-Second Session of the UNCC Governing Council* (16 Feb. 2007), available at [http://www2.unog.ch/uncc/pressrel/pr\\_62o.pdf](http://www2.unog.ch/uncc/pressrel/pr_62o.pdf); UNCC, *United Nations Compensation Commission Governing Council Has Concluded Its Sixty-First Session* (3 Nov. 2006), available at [http://www2.unog.ch/uncc/pressrel/pr\\_61c.pdf](http://www2.unog.ch/uncc/pressrel/pr_61c.pdf); UNCC, *Opening of the Fifty-Sixth Session of the UNCC Governing Council* (24 June 2005), available at [http://www2.unog.ch/uncc/pressrel/pr\\_56o.pdf](http://www2.unog.ch/uncc/pressrel/pr_56o.pdf).

299. UNCC, *Opening of the Sixty-Second Session*, *supra* note 298.

300. See Human Rights Watch, *Iraq and Occupied Kuwait*, in HUMAN RIGHTS WATCH WORLD REPORT 1990, available at [http://www.hrw.org/reports/1990/WR90/MIDEAST.BOU-03.htm#P200\\_49710](http://www.hrw.org/reports/1990/WR90/MIDEAST.BOU-03.htm#P200_49710)

the people of Kuwait remained wealthy by regional standards despite the war with Iraq, and therefore, were in much less need of compensation than the destitute civilians of Darfur.<sup>301</sup> Third, the vast majority of UNCC awards represented lost revenues or profits that might have been earned by corporations, among them a \$15.9 billion award to the Kuwait Petroleum Corporation, rather than payments to the survivors of war victims or to persons who lost their homes or limbs.<sup>302</sup> Fourth, the UNCC administered a fund payable out of revenues that otherwise would have fed, clothed, and provided medical care to victims of genocide inside Iraq. For example, the Kuwait Petroleum Corporation received twice as much as the \$10 billion in Iraqi oil revenues that was allocated between 1996 and 2000 for the nutrition and other survival needs of the entire population of Iraq.<sup>303</sup> Victims of genocide in Iraq who might have benefited from these funds included the Kurdish and Assyrian survivors of the 1980s Anfal campaign.<sup>304</sup> Fifth, the UNCC was part of a sanctions regime that

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(citing estimates of 600 victims in first three months of Iraqi occupation of Kuwait); Judith Miller, *Standoff in the Gulf: Atrocities by Iraqis in Kuwait: Numbers Are Hard to Verify*, N.Y. TIMES, Dec. 16, 1990, at 1-1 (citing Kuwaiti estimates of up to 7,000 victims).

301. See *Kuwait*, in CIA WORLD FACTBOOK 1992, available at [http://es.rice.edu/projects/Poli378/CIA\\_Factbook/kuwait.html](http://es.rice.edu/projects/Poli378/CIA_Factbook/kuwait.html) (Kuwait had per capita GDP of \$11,100 in 1992); *Kuwait*, in CIA, WORLD FACTBOOK 2006, available at <http://www.cia.gov/cia/publications/factbook/print/ku.html> (Kuwait had per capita GDP of nearly \$23,000 in 2005).

302. See Alain Gresh, *A Debt of Dishonour; Oil for Food: The True Story*, LE MONDE DIPLOMATIQUE, Oct. 2000, available at <http://www.globalpolicy.org/security/sanction/iraq1/oilforfood/00gresh.htm>; UNCC Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning Part Three of the Third Instalment of "F3" Claims*, S/AC.26/2003/15, ¶ 419 (26 June 2003) (\$16 billion awarded for lost profits).

303. See Gresh, *supra* note 302. See also Denis J. Halliday, *The Impact of UN Sanctions on the People of Iraq*, 28 J. OF PALESTINE STUD. 29, 31 (1999) (only \$2.6 billion available to import food in Iraq each year during sanctions period).

304. See Al Anfal, Special Verdict Pertaining to Case No 1/C Second/2006, at 22-24 (Iraqi High Tribunal, Second Criminal Court, June 24 2007), <http://law.case.edu/grotian-moment-blog/anfal/opinion.asp> (verdict of Iraqi High Tribunal finding that Anfal campaign, starting in 1987, affected "all villages from Iraqi Kurdistan [sic]," with a "toll [that] reached tens of

reduced civilian rations for food and other essentials below subsistence levels, thereby contributing to a 160 percent increase in child mortality in Iraq,<sup>305</sup> and to huge declines in life expectancy, nutrition, health care, and access to education.<sup>306</sup> In contrast, a properly-executed compensation mechanism for genocide victims in Darfur could improve rations and reduce mortality. Finally, the UNCC wasted

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thousands of Kurdish victims between martyrs killed by raids (whether conventional or chemical weapons), or miss[ing] individuals buried in mass graves, found and anonymous, which are known as (The anfalized).”; Michael A. Newton, *The Significance of the Anfal Campaign Indictment*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 220-22 (2006) (estimates of toll of Anfal campaign range from 100,000 to 200,000 deaths, 2,000 to 4,000 villages in northern Iraq destroyed, and deportation of 500,000 Kurds into “barren concrete ‘collective towns’”); Hannibal Travis, “Native Christians Massacred”: *The Ottoman Genocide of the Assyrians during World War I*, 1.3 GENOCIDE STUDIES AND PREVENTION 327, 346 (2006) (Iraqi forces killed over 1,000 Assyrians, tortured many Assyrians, and destroyed many Assyrian churches in Anfal campaign). The orders for the Iraqi army’s massacres in northern Iraq did not refer specifically to Kurds, let alone “Kurdistan,” but to “prohibited” villages or “areas,” within which “the armed forces must kill any person or animal present.” MIDDLE EAST WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS 79-84 (1993).

305. See H.C. Graf Sponeck, *Sanctions and Humanitarian Exemptions: A Practitioner’s Commentary*, 13 EUR. J. INT’L L. 81, 82 (2002). See also Halliday, *supra* note 303, at 30 (former U.N. assistant secretary-general and humanitarian coordinator for Oil-for-Food Program in Iraq wrote that sanctions caused deaths of 5,000 to 7,000 Iraqi children per month in the 1990s).

306. See U.N. Children’s Fund, *Iraq* (2008), [http://www.unicef.org/infobycountry/iraq\\_statistics.html](http://www.unicef.org/infobycountry/iraq_statistics.html) (life expectancy in Iraq declined from 63 years in 1990 to 60 years in 2005); Sponeck, *supra* note 305, at 81-83; Halliday, *supra* note 303, at 30; Eric Herring, *Between Iraq and a Hard Place: A Critique of The British Government’s Case for UN Economic Sanctions*, 28 REV. OF INT’L STUD. 39, 51-52 (2002) (mortality rate in north of Iraq where most Kurds live rose in first five years of U.N. sanctions); Abbas Alnasrawi, *Iraq: Economic Sanctions and Consequences, 1990–2000*, 22 THIRD WORLD Q. 205, 209-214 (2001) (describing U.N. sanctions on Iraq as contributing to soaring infant and child mortality rates, deaths of up to 1.5 million people, including more than 500,000 children, and deterioration in access to food, health care, electricity, and education); Mel Lehman, *Death by Sanctions: Iraqi Churches Persevere Despite U.N. Embargo*, 44 CHRISTIANITY TODAY, Oct. 2, 2000, at 29 (describing adverse impact of U.N. sanctions on Iraqi Chaldeans and other Christians).

billions of dollars that could have fed Iraqis or compensated Kuwaitis, and spent an astronomical \$482 million on administrative costs.<sup>307</sup>

The U.N. Security Council should establish a mechanism for compensating victims of genocide from Darfur and eastern Chad that incorporates the lessons of the UNCC. The mechanism should focus on compensating victims of genocide for lost family members, health, and homes. The process should not favor large claims for lost corporate profits or business assets as the UNCC did.<sup>308</sup> It should also keep administrative costs under control so that reparations are not transformed into a slush fund for bureaucrats and international consultants. And the Sudanese government should be given detailed notice of, and an opportunity to respond to, claims against it, so that waste, fraud, and overpayments do not deplete the fund's resources.<sup>309</sup>

If the U.N. does not establish a compensation scheme for Darfur, the focus will likely shift to the U.S. federal courts. These courts have distinguished themselves by serving as the principal forum for victims seeking compensation for the Holocaust, the Yugoslav civil

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307. See Colum Lynch, *Volcker Probe Faults U.N. Auditors on Iraq*, WASH. POST, Jan. 10, 2005, at A14 (UNCC "may have wasted billions"); Stephanie Nebehay, *Gulf War Victims Overpaid by \$5 Billion – UN Auditors*, REUTERS (Jan. 9, 2005), available at <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=12184> (waste, fraud, and overpayments may have totaled \$5 billion); Nick Wadhams, *Oil-for-food Probe Finds Mismanagement*, ASSOCIATED PRESS, July 15, 2005, [http://www.usatoday.com/news/world/2005-07-16-food-probe\\_x.htm](http://www.usatoday.com/news/world/2005-07-16-food-probe_x.htm); INDEPENDENT INQUIRY COMMITTEE INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME, BRIEFING PAPER, INTERNAL AUDIT REPORTS ON THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME 9 (Jan. 9, 2005), <http://www.iic-offp.org/documents/IAD%20Briefing%20Paper.pdf> (commission may have made "[m]any very large potential overpayments").

308. See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 406, 408, 410-12 (2d ed. 2005) (1999) (the UNCC set forth maximum compensation rates of: \$5 million for initial awards to corporations for their lost profits, lost property, and increased expenses, compared to the following much lower amounts for individuals: \$15,000 for the death of a spouse, child, or parent; \$15,000 for dismemberment or permanent disfigurement; \$5,000 for torture or sexual assault; or \$2,500 for economic losses).

309. Iraq's government was denied the ability to examine the claims and investigate their veracity, even though it was forced to pay for the administration for the UNCC. See Gresh, *supra* note 302.



wars, and other mass killings.<sup>310</sup> Since 1789, U.S. law has provided a cause of action for a “violation of the law of nations,” in what is often called the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350.<sup>311</sup> A leading case in this area stated that an individual may be found liable for genocide or war crimes based on acts of murder, rape, or torture intended to destroy religious or ethnic groups in part, regardless of whether an individual acted on behalf of a state.<sup>312</sup> Similarly, the Torture Victim Protection Act of 1991 (“TVPA”)<sup>313</sup> recognizes that torture or extrajudicial killing gives rise to a private right of action for violation of U.S. law.<sup>314</sup> In addition, victims of discriminatory seizures of their property abroad have common-law claims for conversion under U.S. law.<sup>315</sup>

Initially, U.S. courts dismissed claims by Holocaust survivors on the grounds that international law only gave rise to claims between states and was not self-executing in the absence of implementing legislation in Congress.<sup>316</sup> This erroneous interpretation of §1350 was

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310. See Bazyler, *supra* note 276, at 15-25; Dubinsky, *supra* note 278, at 1157, 1164; Michael J. Bazyler & Adrienne Scholz, *Holocaust Restitution Litigation in the United States and Other Claims for Historical Wrongs – An Update*, in ACLU International Civil Liberties Report (2003), available at [http://www.sdshh.com/ICLR/ICLR\\_2003/6\\_bazyler.pdf](http://www.sdshh.com/ICLR/ICLR_2003/6_bazyler.pdf); Christine Haughney & Bill Miller, *Karadzic Told to Pay Victims \$745 Million*, WASH. POST, Friday, Aug. 11, 2000, at A13.

311. 28 U.S.C. § 1350 (1948); see *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994). *Accord* *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) (“ATCA provides a cause of action in tort for breaches of international law.”).

312. *Kadic v. Karadzic*, 70 F.3d 232, 240, 242 (2d Cir. 1995) (defendant could be found liable for genocide, murder, and torture against part of Bosnian Muslim population).

313. 28 U.S.C. § 1350 (2000).

314. See *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (TVPA provides cause of action for properly pleaded claims of torture or extrajudicial killing), *cert. denied by* *Abub v. Enahoro*, 2006 U.S. LEXIS 1210 (2006); *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 105 (2d Cir. 2000) (similar).

315. See *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 177 (2d Cir. 2006); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452 (2d Cir. 2000).

316. See *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976). See also *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949).

corrected within a few years,<sup>317</sup> and since 1980, the U.S. federal courts have exercised universal jurisdiction in a nearly unbroken line of cases involving offenses properly alleged to have been committed elsewhere in violation of international law.<sup>318</sup>

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317. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

318. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 & n.20 (2004) (U.S. courts have jurisdiction over “private claims under federal common law for violations of any international law norm [that has sufficiently] definite content and acceptance among civilized nations,” such as prohibition on genocide); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1200-10 (9th Cir. 2007) (ATCA provided cause of action for racial discrimination and other violations of international law), *vacated upon grant of reh’g en banc* by 499 F.3d 923 (9th Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-53 (11th Cir. 2006) (ATCA provides a cause of action for allegations of torture and crimes against humanity that are properly pleaded in the complaint), *cert. denied*, 127 S. Ct. 596 (2006); *Alperin v. Vatican Bank*, 410 F.3d 532, 544-58 (9th Cir. 2005); *Alvarez-Machain v. United States*, 331 F.3d 604, 615 n.7 (9th Cir. 2003) (resolution of claims for torts committed in violation of international law “has been constitutionally committed . . . [to] the Judiciary”) (quoting *Kadic*, 70 F.3d at 249), *rev’d on other grounds*, *Sosa*, 542 U.S. 692 ; *John Doe I v. Unocal Corp.*, 395 F.3d 932, 958-60 (9th Cir. 2002) (ATCA provides cause of action for “torture, murder, and slavery [which] are jus cogens violations and, thus, violations of the law of nations”); *Abebe-Jira v. Negewo*, 1993 U.S. Dist. LEXIS 21158, No. 90-CV-2010, 1993 WL 814304, at \*4 (N.D. Ga. Aug.20, 1993), *aff’d*, *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (ATCA provides cause of action for torture or “cruel, inhuman and degrading treatment or punishment,” at least as defined by Eighth Amendment to U.S. Constitution); *Kadic*, 70 F.3d at 249 (ATCA provides a cause of action for genocide); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475-76 (9th Cir. 1994) (ATCA “creates a cause of action for violations of specific, universal and obligatory international human rights standards which confer fundamental rights upon all people vis-a-vis their own governments.”); *Telesat Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1010-24 (S.D. Ind. 2007) (ATCA provides a cause of action for forced labor); *Burnett v. Al Baraka Inv. & Dev. Corp. (In re Terrorist Attacks)*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005) (ATCA provides cause of action against foreign defendants for conspiracy to support, and aiding of abetting of, terrorist aircraft hijackings); *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (ATCA provides cause of action for “cruel, inhuman, or degrading” treatment); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002) (ATCA

Under the doctrine of universal jurisdiction, a nation with the capacity to do so may sanction violations of the law of nations and crimes against humanity, even if the underlying events occurred outside the sanctioning state.<sup>319</sup> International comity does not require U.S. courts to sit idle while genocidal regimes such as Sudan adjudicate their own responsibility for massacring religious minorities who have little to no hope of receiving justice in their courts.<sup>320</sup> The United States and other nations have a strong interest in “affording alleged victims of atrocities a method to vindicate their rights.”<sup>321</sup> Defenses such as sovereign immunity and the act of state doctrine should not stand in the

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provides cause of action for torture or “cruel, inhuman, or degrading treatment”); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1331-33, 1359 (S.D. Fla. 2002) (ATCA provides cause of action for extrajudicial killing, torture, and “cruel, inhuman and degrading treatment”); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at \*8 (S.D.N.Y. Feb. 28, 2002) (similar); *Doe v. Karadzic*, No. 93 Civ. 0878 (PKL), 2001 U.S. Dist. LEXIS 12928, \*2 (S.D.N.Y. 2001) (ATCA provides cause of action for genocide, war crimes, crimes against humanity, and other human rights abuses); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (ATCA provides cause of action for murder, mutilation, torture, cruel or inhumane treatment, kidnapping, summary executions, and other violations of Common Article 3 of the Geneva Conventions); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186-89 (D. Mass. 1995) (ATCA provides cause of action for torture, summary executions, disappearances, and arbitrary detention); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993), *later proceeding at* 901 F. Supp. 330 (S.D. Fla. 1994) (ATCA provides cause of action for torture or cruel/inhuman treatment); *Lafontant v. Aristide*, 844 F. Supp. 128, 138-39 (E.D.N.Y. 1994) (ATCA provides cause of action for torture); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (similar).

319. *See Sosa*, 542 U.S. at 762 (Breyer, J., concurring in the judgment) (“Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (courts may exercise universal jurisdiction over “offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . .”); *see also Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985).

320. *See Talisman Energy*, 244 F. Supp. 2d at 335-43.

321. *Id.* at 340.

way of this kind of deterrence, particularly where a foreign state is engaged in commercial activity that has a direct effect on the United States and has violated *jus cogens* norms of international law, as Sudan has done.<sup>322</sup> Genocide and crimes against humanity are almost by definition assaults on the international legal order, and are therefore *jus cogens* and *erga omnes* norms from which there can be no valid derogation, claim of sovereign right, or jurisdictional limits.<sup>323</sup> Genocide is a uniquely grievous crime, which warrants strong civil remedies, including the imposition of exemplary damages “as a warning or deterrence to others,” and “to make an example of a defendant’s conduct” to prevent its recurrence.<sup>324</sup>

Sudan has committed much more serious crimes than has Iraq, with a far higher toll of dead and displaced persons. Therefore, the international community has a stronger basis to pierce Sudan’s sovereignty and assess reparations. Insofar as both war crimes and genocide are *jus cogens* and *erga omnes* violations, there is no reason to distinguish on legal or jurisdictional grounds between Iraq’s invasion of Kuwait and Sudan’s genocide against non-Arabs in southern Sudan and Darfur. Thus, there is no merit to the contention of at least one

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322. See 28 U.S.C. § 1605(a)(3) (2007); H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6618; *Rio Tinto*, 487 F.3d at 1209-10 (“Acts of racial discrimination are violations of *jus cogens* norms,” to which deference to sovereign authority does not apply because “[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act”); see also *Unocal*, 395 F.3d at 958-60; *Kadic*, 70 F.3d at 250; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 710 (9th Cir. 1992); *United States v. Alstötter et al. ("The Justice Case")*, 3 Trials of War Criminals Before Nuremberg Military Tribunals under Control Council Law No. 10, at 983 (1946-1949) (“As the prime illustration of a crime against humanity under [Control Council] Law 10, which by reason of its magnitude and international repercussions has been recognized as a violation of common international law, we cite ‘genocide’ . . .”).

323. See *Alstötter*, *supra* note 322, at 983; Institute of International Law / Institut de droit international, Resolution: *Obligations Erga Omnes in International Law*, Art. 1 (2005) (“For purposes of the present articles, an obligation *erga omnes* is: (a) an obligation under general international law that a State owes in any given case to the international community, . . . so that a breach of that obligation enables all States to take action . . .”).

324. *Hilao v. Estate of Marcos*, 103 F.3d 767, 771-72, 781 n.7 (9th Cir. 1996); *Filartiga*, 577 F. Supp. at 864-67 (awarding punitive damages under ATCA to effectuate international law).

prominent scholar that it would impermissibly invade Sudan's sovereignty to utilize its oil exports to pay reparations to the victims of genocide in southern Sudan and Darfur.<sup>325</sup> Iraq only lost its sovereignty and became subject to UNCC reparations once the international community decided to impose reparations for alleged international crimes. The sanctions framework for Iraq, including the UNCC, represented the first time that the U.N. determined the "financial liability" of a member state, and decided that a member state owed payment for such liability.<sup>326</sup> Such an assertion of judicial power would be morally unacceptable and potentially discriminatory if the Security Council did not take "comparable actions" in other cases, or establish "clear rules of general applicability."<sup>327</sup>

#### **D. Liability of Oil Companies for Complicity in Genocide**

More recently, courts have held that civil compensation for genocide is available to aliens filing suit in the United States under the ATCA. The United States Supreme Court has held that U.S. courts should recognize a private cause of action for genocide under the ATCA as long as the prohibition against genocide is an international law norm with specific content and wide acceptance among civilized nations.<sup>328</sup> There can be little doubt that the Genocide Convention

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325. See Christian Tomuschat, *Darfur: Compensation for the Victims*, J. OF INT'L CRIM. JUSTICE 579, 589 (2005). Tomuschat states:

In the case of Iraq . . . [t]he Security Council was able to control the export shipments of oil. Revenues from those shipments were available for distribution by the UNCC. In the case of Sudan, no such monies are available. Sudan is a sovereign state which has . . . [not] been deprived of its right to make sovereign determinations on its foreign trade.

*Id.*

326. Jose E. Alvarez, *The Once and Future Security Council*, 18 WASH. Q. 3 (1995).

327. *Id.*

328. See, e.g., *Sosa*, 542 U.S. at 732 & n.20; see also *id.* at 748-49 (Scalia, J., dissenting) (majority opinion endorsed private right of action for genocide).

satisfies these criteria.<sup>329</sup> A number of lower courts have found public officials liable or potentially liable for genocide under the ATCA.<sup>330</sup> In this way, the ATCA may provide a “federal judicial forum for redressing violations of customary international law that often accompany religious persecution” and deterring violations of international law.<sup>331</sup>

The international law ban on genocide extends to conspiracy to commit genocide and complicity in genocide.<sup>332</sup> Liability for aiding and abetting genocide should extend to all instances in which a corporation acts “in concert with” a government carrying out a campaign of genocide or crimes against humanity, as in Sudan.<sup>333</sup> A corporation so acts in concert with a government when it provides practical assistance with knowledge that the assistance will facilitate perpetration of a crime.<sup>334</sup>

Talisman Energy and the other oil companies doing business in Sudan have provided extensive financial and logistical assistance to

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329. *See, e.g., Kadic*, 70 F.3d at 242; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2005 WL 2082846, \*2 & n.5 (S.D.N.Y. Aug. 30, 2005) (similar).

330. *See, e.g., Kadic*, 70 F.3d at 238 (ban on genocide is “well-established” and “universally recognized”).

331. Brief for the Presbyterian Church of Sudan as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) as Amici Curiae in Support of Respondent, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-485), available at [http://www.nosafehaven.org/\\_legal/atca\\_pro\\_Sudan\\_Presbyterian.pdf](http://www.nosafehaven.org/_legal/atca_pro_Sudan_Presbyterian.pdf).

332. *See, e.g., Genocide Convention*, *supra* note 6, Art. III.

333. *Kadic*, 70 F.3d at 245; *Unocal*, 395 F.3d at 949-56.

334. *See Unocal*, 395 F.3d at 950-51. Whether *Talisman Energy* provided such assistance is a question of fact winding its way through the federal courts, as will similar facts raised by analogous cases in the future. 454 F. Supp. 2d 633 (granting summary judgment to defendant), *on appeal*, No. 07-0016 (2d Cir.). The district court found that Talisman’s knowledge that its royalties and other payments would finance weapons purchases by Sudan did not amount to aiding and abetting its crimes, but only because the court imposed a requirement of “an intent to assist in those attacks by the payment of royalties.” *Id.* at 676. Such a requirement is not supported by aiding and abetting cases decided under the ATCA and by international criminal tribunals, which impose liability based on knowledge as well as intent. *See, e.g., Khulumani*, 504 F.3d at 274-76 (Katzmann, J., concurring); *id.* at 290-91 (Hall, J., concurring); *Unocal I*, 395 F.3d at 949-56.

the Sudanese government with constructive and actual knowledge of ongoing genocide and crimes against humanity.<sup>335</sup> Table 4 documents the reported revenues and profits of corporations that have purchased oil or oil concessions from the government of Sudan.

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335. Google Finance (Beta), Talisman Energy, Inc. (USA) (2008), <http://finance.google.com/finance?client=ob&q=TLM>.

**Table 4**  
**Reported Net Income of Corporations Dealing with Sudan**

MNC	Sudan Energy Consortia and Their Estimated 2007 Output	2006 Net Income	Sources
China National Petroleum Corp.	Greater Nile Petroleum Operating Co. (GNPC) (40%), 92 million barrels; Petrodar Operating Co. (PDOC) (41%), 59 million barrels; CNPCIS, 21.9 million barrels	\$13.5 billion	Petroleum Intelligence Weekly (PIW), Dec. 3, 2007, & Oct. 1, 2007
Petronas	GNPC (30%), 92 million barrels; PDOC (41%), 59 million barrels; White Nile Production Operating Co. 1 (WNPOC) (68.9%), 9.7 million barrels	\$14.4 billion	PIW, Dec. 10, 2007, Dec. 3, 2007, & Oct. 1, 2007
ONGC Videsh	WNPOC 1 (24.1%), 9.7 million barrels	\$3.5 billion	PIW, Dec. 3, 2007
Talisman Energy	GNPC (25%), 92 million barrels [Talisman Energy helped develop but no longer has an interest in the production in this consortium]	\$1.9 billion	Google Finance <sup>336</sup>

These corporations, and those knowingly shipping arms or ammunition to the Sudanese government or allied militias in violation of U.N. sanctions, are liable for aiding and abetting any crimes that they knowingly facilitate.

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336. *Id.*



## V. CONCLUSION

The historical record and legal principles reviewed in this Article support the conclusion that genocide has occurred in Sudan, most notably in southern Sudan, the Nuba Mountains, and Darfur. Misled by an unreasonably narrow construction placed upon the Genocide Convention by a commission that it established to investigate the atrocities in Darfur, the U.N. Security Council has failed to act vigorously to put an end to genocide in these regions of Sudan. Applying the Genocide Convention in light of the precedents established by national and international tribunals that have construed it reveals that genocide has occurred in Sudan, notwithstanding the government's failure to completely exterminate the affected groups.

This Article has attempted to chart a new course for genocide scholarship by emphasizing economic incentives to commit genocide, and the role of the law in deterring such conduct. That focus represents a departure from most legal scholarship on genocide and its prevention, which stresses the importance of international criminal tribunals as methods of punishing genocide, rather than economic reparations as compensation and a deterrent. Nevertheless, genocide in Sudan and elsewhere is difficult to explain without reference to economic motivations on the part of the dominant group to expropriate a foreign or minority population's land, natural resources, property, and uncompensated labor. These economic motivations become especially powerful when oil companies hold out the prospect of generous revenues to a regime willing to kill or displace any ethnic or religious group that resists the government's efforts to exploit the national wealth in a discriminatory fashion. Accordingly, the redistribution of stolen resources and wealth to the victim groups should take center stage in genocide prevention. Even if the deterrence effect of such measures proves to be inadequate, their adoption will help ensure that victims of widespread massacres and deportations have some means to survive.

