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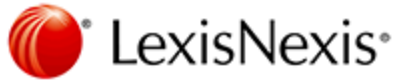
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Highlight

[*236]

We can then say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them en mass because of their race, their ethnic background or their religion, and it is within our power to stop it, we will stop it. - President Bill Clinton, after Rwanda
1

Text

Introduction

In 2005, when the UN Security Council for the first time exercised its power to refer a case to the International Criminal Court (ICC), it described the subject of the referral somewhat vaguely as "the situation in Darfur since 1 July 2002" (i.e., since the date that the ICC became operational).² The ICC was established by the Rome Statute as a forum of last resort to try individuals for the worst offenses of international concern - namely, genocide, war crimes, and crimes against humanity - when individual states have proved unable or unwilling to do so.³ The Security Council did not specify what incidents or types of crimes the ICC Prosecutor should investigate in Darfur, Sudan; it expressed a more general concern about "violations of international humanitarian law and human rights

¹ Henry Kissinger, Does America Need a Foreign Policy? 254 (2001).

² S.C. Res. 1593, P 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

³ See Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Crimes within the ICC's jurisdiction are detailed in Article 5. While a fourth crime, the crime of aggression, is also covered by the Rome Statute, that crime has yet to be defined by States Parties.

law" ⁴ The Prosecutor therefore had latitude to examine the conflict in Darfur, decide what specific violations, if any, were occurring, and make recommendations for further action by the Court. On February 27, 2007, after conducting over seventy missions in seventeen countries for the collection of evidence, the Prosecutor presented a much anticipated application to the ICC's Pre-Trial Chamber, requesting summonses for two Sudanese nationals suspected of war crimes and crimes against humanity. ⁵ Arrest warrants were issued two months later, on April 27, and the ICC warrants were quickly denounced by the Sudanese government. ⁶

[*237] While the ICC Prosecutor's application expressed condemnation of atrocities that have occurred in Darfur, it was also criticized by one commentator as "dilatatory, exceedingly cautious, of little consequence, and taking minimal cognizance of the salient ethnic features of human destruction in Darfur." ⁷ The two accused individuals, who are identified as Arabs, are alleged to have orchestrated and carried out horrific mass attacks on black African civilians in 2003 and 2004. The significance of the Prosecutor's failure to identify the "salient ethnic features" of the crimes is that in effect the ICC has declined to find an essential element of the crime of genocide. The decision not to use the label "genocide" is in line with the conclusion of the UN Commission of Inquiry on Darfur (COI), which in 2004 issued a report describing what it too called "war crimes" and "crimes against humanity," but not "genocide." ⁸ Regional state organizations have been equally evasive: the African Union (AU) determined that the conflict in Darfur does not constitute genocide, ⁹ and the Parliament of the European Union declared by a vote of 566 to 6 that events were "tantamount to genocide" but not actually genocide. ¹⁰ The U.S. Congress, however, has twice declared the contrary. First, in 2004, Congress urged the United Nations "to assert leadership by calling **[*238]** the atrocities being committed in Darfur by their rightful name: "genocide." ¹¹ Congress reaffirmed its characterization of the conflict in the Darfur Peace and Accountability Act of 2006, which authorized financial and logistical support for the AU peacekeeping mission and instituted economic sanctions against Sudan. ¹²

Why all the semantic wrangling, when most observers agree that, by whatever name, mass killing, rape, and torture of civilians are terrible crimes that should be stopped? The immediate reason is that calling a conflict "genocide" appears to trigger a legal obligation - albeit a very broadly worded one - under the Convention on the Prevention

⁴ S.C. Res. 1593, *supra* note 2, pmb.

⁵ Situation in Darfur, the Sudan: Prosecutor's Application Under Article 58(7) (Public Redacted Version), 2007 I.C.C.-02/05 (Feb. 27).

⁶ Mohamed Hasni, Sudan Rejects ICC Arrest Warrants Over Darfur Crimes, *Agence Fr.-Presse*, May 2, 2007. On July 14, 2008, the ICC Prosecutor formally requested an arrest warrant for Sudanese President Omar al-Bashir on charges of genocide, war crimes, and crimes against humanity. In response, the Sudanese government denied President al-Bashir's guilt. A decision on the request is expected before the end of 2008. More details and the Prosecutor's application are available from the ICC's website. See Press Release, Int'l Criminal Court, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur (July 14, 2008), available at <http://www.icc-cpi.int/press/pressreleases/406.html>; see also Marlise Simons et al., Arrest is Sought of Sudan Leader in Genocide Case, *N.Y. Times*, July 15, 2008, at A1. The Arab League, the Organisation of Islamic Conference, and the African Union have criticized the ICC Prosecutor's action, though activists and Darfuri refugees have expressed support for it. Eric Reeves, Victims of Genocide in Darfur: Past, Present, and Future, Aug. 9, 2008, at <http://www.sudanreeves.org/article221.html>. Some observers initially raised concerns about possible retaliation against aid workers and the few foreign peacekeeping troops currently on the ground. It appears, however, that since the warrant was requested, President al-Bashir has made diplomatic efforts to improve his image abroad. See Jeffrey Gettleman, As Charges Loom, Sudan Chief Mounts Charm Offensive, *N.Y. Times*, July 24, 2008, at A6; Eric Reeves, Turning up the Heat in Darfur, *Guardian*, July 17, 2008, at <http://www.guardian.co.uk/commentisfree/2008/jul/17/sudan.warcimes>.

⁷ Eric Reeves, The ICC "Application" Concerning International Crimes in Darfur, Feb. 27, 2007, at <http://sudanreeves.org/article155.html>.

⁸ Int'l Comm'n of Inquiry on Darfur, Report of the Commission of Inquiry to the Secretary-General, P P 627, 640, delivered to the Secretary-General on the Question of Darfur, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter COI Report].

⁹ Symposium, An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur, 40 *Int'l Law* 41, 64 (2006).

and Punishment of the Crime of Genocide (Genocide Convention) for State Parties "to prevent and to punish" the acts in question.¹³ The possibility that a finding of genocide carries a legal imperative to act means the label (or nonlabel) is often the result of a protracted political debate. Additionally, the word "genocide" carries a historical and moral weight that is not present with other types of crimes and that therefore tends to create a moral obligation in the view of the public. As David Luban stated after the COI released its report, "With headlines such as Murder - But No Genocide, the motivation to intervene was gone... . Genocide sounds like it might be our business, but 'mere' murder is theirs."¹⁴ In short, calling a conflict genocide spreads responsibility throughout the international community in a way that "regular" mass killing does not.

We need not search far in history to learn what can result from the international community's failure to recognize genocide for what it is. In Rwanda in 1994, as many as 800,000 Tutsis and moderate Hutus (or one-tenth of the population of Rwanda) were slaughtered in one hundred days while the world looked the other way. Even as it became clear from press reports and intelligence analyses that Hutu extremists intended to eradicate the entire population of Tutsis, interagency discussions in the Clinton administration were filled with concerns about committing U.S. troops and other resources. Indeed, U.S. government [*239] documents that have been declassified since the Rwandan debacle reveal an explicit U.S. policy of nonintervention that relied on finding that genocide was not occurring.¹⁵ Regarding the possibility of an investigation into human rights abuses in Rwanda, one Department of Defense memorandum warned, "Be Careful. Legal at State was worried about this [issue] - Genocide finding could commit [the U.S. government] to actually "do something."¹⁶ The same document also expresses ambivalence toward UN attempts to achieve a cease-fire, suggesting that the United States change the wording of its own policy from "attempts" to "political efforts" because "without "political' there is a danger of signing up to troop contributions."¹⁷ In the end, what happened in Rwanda was the most efficient genocide in history. World leaders' refusal to use the word "genocide" helped them circumvent the Genocide Convention and thus avoid a crucial military intervention that might have saved hundreds of thousands of lives.

¹⁰ Eric Reeves, Europe's Indifference to Darfur, *New Republic*, Oct. 27, 2006, at <http://www.sudanreeves.org/article132.html>.

¹¹ Concurring Resolution Declaring Genocide in Darfur, Sudan, S. Con. Res. 133, 108th Cong. (2004).

¹² Darfur Peace and Accountability Act of 2005, H.R. Res. 3127, 109th Cong. (2005).

¹³ Convention on the Prevention and Punishment of the Crime of Genocide art. 1, opened for signature Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 [hereinafter Genocide Convention] ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."). The United States signed the Genocide Convention on December 11, 1948, shortly after it opened for signature, and ratified it on November 25, 1988.

¹⁴ David Luban, Calling Genocide By Its Rightful Name: Lemkin's Word, Darfur, and the UN Report, *7 Chi. J. Int'l L.* 303, 306 (2006).

¹⁵ The declassified documents were obtained by an independent nongovernmental research institute, the National Security Archive, via the Freedom of Information Act, and are available at <http://www.gwu.edu/nsarchiv/>. Samantha Power has written a detailed account of the United States' policy with regard to Rwanda, based on a three-year investigation that included assessment of the declassified documents cited in this Note, as well as numerous interviews with U.S. officials and others involved in the international response. See Samantha Power, Bystanders to Genocide, *Atlantic Monthly*, Sept. 2001, at 84, available at <http://www.theatlantic.com/doc/200109/power-genocide>.

¹⁶ Office of the Deputy Assistant Sec'y of Def. for Middle East/Afr., Dep't of Def., Discussion Paper 1 (May 1, 1994), available at <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB53/rw050194.pdf>. The paper was prepared for an interagency discussion of the situation in Rwanda and possible U.S. responses.

¹⁷ *Id.*

The comparison between Darfur and Rwanda has become a sad cliché, though its lesson seems not to have taken root. The killing in Darfur continues, despite at least twenty-four UN resolutions,¹⁸ two detailed [*240] studies by high-level UN commissions,¹⁹ and economic sanctions, not to mention numerous academic articles, nongovernmental organizations' reports, and countless demonstrations, editorials, and petitions by activists.²⁰ Estimates of casualties range from 200,000 to 500,000 dead and up to 4.5 million displaced since the current conflict began in 2003.²¹ Although a limited peace accord was signed between the government of Sudan and one of the three main rebel groups in May 2006, it has had virtually no effect; in fact, the violence appears to be increasing.²² Moreover, there is little chance that the ICC will get far with its case because officials in Khartoum have refused to cooperate, claiming the ICC does not have jurisdiction.²³

The Genocide Convention, which entered into force in 1951, defines the crime of genocide as certain enumerated acts - killing, causing serious bodily or mental harm, deliberately inflicting conditions that threaten life, preventing births, and forcibly transferring children out of the community - committed "with intent to destroy, in whole or in part,

¹⁸ See S.C. Res. 1828, U.N. Doc. S/RES/1828 (July 31, 2008); S.C. Res. 1812, U.N. Doc. S/RES/1812 (Apr. 30, 2008); S.C. Res. 1784, U.N. Doc. S/RES/1784 (Oct. 31, 2007); S.C. Res. 1779, U.N. Doc. S/RES/1779 (Sept. 28, 2007); S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007); S.C. Res. 1755, U.N. Doc. S/RES/1755 (Apr. 30, 2007); S.C. Res. 1714, U.N. Doc. S/RES/1714 (Oct. 6, 2006); S.C. Res. 1713, U.N. Doc. S/RES/1713 (Sept. 29, 2006); S.C. Res. 1709, U.N. Doc. S/RES/1709 (Sept. 22, 2006); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006); S.C. Res. 1679, U.N. Doc. S/RES/1679 (May 16, 2006); S.C. Res. 1672, U.N. Doc. S/RES/1672 (Apr. 25, 2006); S.C. Res. 1665, U.N. Doc. S/RES/1665 (Mar. 29, 2006); S.C. Res. 1663, U.N. Doc. S/RES/1663 (Mar. 24, 2006); S.C. Res. 1651, U.N. Doc. S/RES/1651 (Dec. 21, 2005); S.C. Res. 1627, U.N. Doc. S/RES/1627 (Sept. 23, 2005); S.C. Res. 1593, *supra* note 2; S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005); S.C. Res. 1590, U.N. Doc. S/RES/1590 (Mar. 24, 2005); S.C. Res. 1588, U.N. Doc. S/RES/1588 (Mar. 17, 2005); S.C. Res. 1585, U.N. Doc. S/RES/1585 (Mar. 10, 2005); S.C. Res. 1574, U.N. Doc. S/RES/1574 (Nov. 19, 2004); S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004); S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

[*241] a national, ethnical, racial or religious group, as such." ²⁴ There is little doubt that the mass killings, rapes, bodily harm, torture, and destruction of entire villages satisfy the physical element of the crime's actus reus, so the debate over whether or not the conflict constitutes genocide centers around two other questions, which I examine in this Note. First, do the victims in Darfur constitute "a national, ethnical, racial or religious group"? Reports and news stories frequently refer to a racial conflict between "black Africans" and "Arabs," but what exactly are these groups? Do the terms do justice to the history of the region and the complexity of the current situation, or is the racial characterization an expedient simplification, adopted by outside observers, of another type of conflict? Second, is the group "as such" being targeted "with intent to destroy"? Some argue the conflict is a fight over land and water, and any division along racial lines is incidental. The Sudanese government insists that its actions are in self-defense against rebel attacks, with no racial animus. Are these descriptions accurate, or are they political cover for the true nature of a racial conflict?

At the heart of this Note is the question: How has the international community - in particular, the United States and the United Nations - managed to dodge its moral obligation to take action, when even the sparse framework of international law explicitly condemns mass violence against civilians? There are of course many nonlegal reasons, including the political sensitivity of Western intervention in a state dominated by self-identified Arab Muslims and widespread bias against the perceived (black) race of the victims and aggressors. Moreover, any nation's political will to expend resources (and potentially lives) on a foreign rescue mission will nearly always be weak. But it is the role of international law, as embodied in the Genocide Convention, to insist that the international community act to halt the worst atrocities when a state turns against its own population. The Genocide Convention and other international legal instruments have failed to do this for Darfur. As I argue below, a major reason for the failure is that existing legal mechanisms do not account adequately for the reality of civil conflicts in postcolonial nations today. Instead, contemporary international law mistakenly imputes universal salience to the concepts of "ethnicity" and **[*242]** "race," and the Western professionals who write and interpret treaties obfuscate the complex, strategic

¹⁹ See COI Report, supra note 8; Sec. Council Comm., Panel of Experts, Report Established Pursuant to Resolution 1591 (2005) Concerning the Sudan Prepared in Accordance with Paragraph 2 of Resolution 1665, U.N. Doc. S/2006/795 (Oct. 3, 2006) [hereinafter Panel of Experts Report].

²⁰ See, e.g., Human Rights Watch, Darfur 2007: Chaos by Design, Sept. 2007, at <http://hrw.org/reports/2007/sudan0907/sudan0907webwcover.pdf>; Int'l Crisis Group, Darfur's New Security Reality, Africa Report No. 134, Nov. 26, 2000, at http://www.crisisgroup.org/library/documents/africa/horn_of_africa/134_darfur_s_new_security_reality.pdf; Globe for Darfur, at <http://www.globefordarfur.org/> (last visited Aug. 28, 2008); Eric Reeves, Sudanreeves.org, at <http://www.sudanreeves.org/> (last visited Aug. 28, 2008); Save Darfur Coalition, Global Campaigns, at http://www.savedarfur.org/pages/global_campaigns/ (last visited Aug. 28, 2008).

²¹ The United Nations has reported that over 200,000 have been killed and two million displaced; in addition, about 234,000 have fled to neighboring Chad since conflict in Darfur began in 2003. It is also believed that fifteen thousand Dinka women and children have been abducted and some have been sold into slavery. Eric Reeves, a leading scholar on Sudan, estimated in April 2006 that at least 450,000 had died since February 2003 from violence and conflict-related disease and malnutrition, while in April 2005 the Coalition for International Justice, based on interviews with the World Health Organization, estimated 400,000 deaths. U.S. Dep't of State, Sudan: Country Reports on Human Rights Practices 2006 (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm>; Marc Lacey, The Mournful Math of Darfur: The Dead Don't Add Up, N.Y. Times, May 18, 2005, at A4; Eric Reeves, Quantifying Genocide in Darfur (Part 1), Apr. 28, 2006, at <http://www.sudanreeves.org/article102.html>.

²² See, e.g., Eric Reeves, Boiling Over, New Republic, Feb. 27, 2008, at <http://www.tnr.com/politics/story.html?id=72da66e1-fb02-44b8-8039-2fa202f5b1f8>.

²³ See, e.g., Sudanese Justice Minister Rejects ICC Indictments on Darfur, Sudan Trib., Mar. 9, 2007, at <http://www.sudantribune.com/spip.php?article20669>. Although Sudan is not a signatory to the Rome Statute, the Statute confers on the Security Council the authority to refer UN member states to the ICC for investigation and prosecution regardless of party status. Rome Statute, supra note 3, art. 13. The Rome Statute does not, however, allow for trial in absentia, meaning that in order for a prosecution to go forward, Sudan will have to extradite the two accused individuals, which it has already declared it will not do.

ways in which collective identities arise, solidify, and change in postcolonial contexts. As a result, legal experts and political leaders alike have trouble recognizing, in the mixed-up reality of a postcolonial conflict, the crime that was so painstakingly defined in the Genocide Convention. In the case of Darfur, the mismatch between the legal framework and the urgent reality it seeks to address allows a reticent international community to escape the legal obligation to act, or at least to stall for unacceptable lengths of time, by characterizing a genocidal conflict as something other than the "crime of crimes" ²⁵ that it is.

I begin my analysis by describing the multilayered conflict that is occurring in Darfur, with the purpose of revealing the extent to which the region's racial and ethnic group dynamics have been misunderstood and oversimplified in the Western media. In doing so, I examine the ways that colonial rule, anticolonial struggle, and decolonization have shaped group identities in postcolonial Africa. Turning next to the definition of genocide, I argue that the Genocide Convention's requirements of (1) a protected victim group and (2) specific intent should be viewed as the product of a unique moment in history - Europe's collective response to the Holocaust - rather than as a universal rubric for evaluating atrocity. Applying the definition to the conflict in Darfur, I show how the Convention inevitably fails to identify and stop genocidal warfare in the postcolonial world. Finally, I discuss possible ways to refocus the law of genocide on its humanitarian ends. Specifically, I argue in favor of a movement away from the Convention's "prevent and punish" paradigm to a broader "responsibility to protect" model that could be more effective in spurring timely, effective responses to ongoing atrocities.

I. Race, Ethnicity, and the Legacy of Colonialism

A. Confusion on the Ground

Many journalists, activists, and political leaders, especially in Western countries, as well as some Darfuris, describe the conflict in Darfur as either an ethnic or a racial conflict between Sudanese blacks (or Africans) and Arabs. Reports are fairly consistent in identifying blacks as **["*243]** victims and Arabs as aggressors, though they vary in their degree of nuance. Described this way, the situation seems to fit within the parameters of the Genocide Convention. The Arab-versus-black characterization is somewhat misleading, however, because these groups are neither internally cohesive nor fully distinct from each other. Collectivities in Sudan are multidimensional - as they are anywhere in the world, but especially so here. The geographic region in which Sudan is located has long been a mosaic of migrating peoples; intermingling of tribes and ethnicities has been documented since the arrival and spread of Islam (and writing) in the twelfth century. As I discuss in greater detail below, successive waves of conquest and colonial rule, both Arab and British, have brought about a unique mixture of cultural and political identities in Sudan. As a result, racial and ethnic lines are difficult to draw.

Making the situation especially confusing to outsiders, the country has spent most of its years since independence consumed by a civil war between self-identified Arab Muslims in the North and black Christians and animists in the South. That conflict, the longest running civil war in modern history, killed nearly two million. It ostensibly ended in 2005 with the largely U.S.-brokered Comprehensive North-South Peace Accord, but the peace between North and South has been fragile. ²⁶ Among other problems, prejudicial policies of the minority Arab government have continued to disenfranchise the majority non-Arab (or black) population, while the fundamentalist regime's

²⁴ Article 2 defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." Genocide Convention, *supra* note 13, art. 2.

²⁵ David Bosco, *Crime of Crimes: Does It Have to Be Genocide for the World to Act?*, Wash. Post, Mar. 6, 2005, at B1 (quoting the judges of the International Criminal Tribunal for Rwanda).

²⁶ Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, Jan. 9, 2005, available at <http://www.unmis.org/english/documents/cpa-en.pdf>.

imposition of Sharia law makes life difficult for non-Muslims.²⁷ It is important to note that black and non-Muslim are not coextensive groups, even though Sudanese Arabs are almost exclusively Muslim.²⁸ Darfur is mostly Muslim as well as mostly black. In 2003, a violent rebel uprising by blacks began in Darfur. The Sudanese government responded by destroying entire villages suspected of harboring rebels, with a devastating impact on black [*244] civilians. That is the conflict that, quite separately from the North-South civil war, continues today.²⁹ Perhaps because the previous "religious conflict" between North and South matched the familiar paradigm of the "clash" between Christian and Muslim "civilizations,"³⁰ that war was easier for Americans and Europeans to understand than the current conflict in Darfur, which is characterized by violence not only between Muslims, but also between dark-skinned people who Westerners perceive as all black.

The Sudanese government insists that the Darfur conflict is actually a decentralized series of smaller disputes, none of them based on a clear racial or ethnic divide, and that reports of mass atrocities are exaggerated.³¹ It also claims that any destructive actions by Sudanese troops are solely in response to rebel attacks.³² It is no secret, however, that the government has recruited, armed, and actively supported the Janjaweed, a loosely organized, mostly Arab militia that continues to terrorize black African villages and refugee camps.³³ The government of President Omar al-Bashir has waged an effective stalling campaign against intervention. Although the Security Council voted in 2007 to send a "hybrid" AU/UN peacekeeping force into Darfur,³⁴ Sudan has continually obstructed the deployment, resisting any Western presence within its borders.³⁵ Currently, only a small number of severely undersupplied AU troops have been permitted inside Darfur, a region roughly the size of France, and they appear to have been entirely ineffective at deterring further attacks on civilians.³⁶ The partial peace accord signed in 2006 by the government and one rebel group did little to stop the fighting, but it did regrettably lead some observers to believe progress was made, according [*245] to Eric Reeves, a leading Sudan scholar and activist. He has written that the accord allowed "influential people to speak euphemistically about the crisis Human destruction and displacement are no longer 'genocidal,' but rather a function of rebel fractiousness, opportunistic

²⁷ Sudan: Losing Ground on Peace?: Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations of the H. Comm. on International Relations, 109th Cong. 14-19 (2005) (statement of Rep. Donald Payne, Member, H. Comm. on International Affairs) [hereinafter HIRC Hearing].

²⁸ It is not uncommon for news reports to suggest that the Darfur conflict is being waged primarily between Muslims and non-Muslims, though that is not the case; the New York Times' Sudan website, for instance, states that Janjaweed militia members are attacking "rebels who complained that the black residents of the region had been neglected by the Muslim central government." New York Times, Sudan News, at <http://topics.nytimes.com/top/news/international/countriesandterritories/sudan/index.html> (last visited Mar. 30, 2008).

²⁹ See HIRC Hearing, supra note 27, at 19.

³⁰ See Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* 137, 253, 254 (1996).

³¹ Sudanese President: Media "Exaggerating" Darfur Conflict, CNN, Mar. 11, 2008, at <http://edition.cnn.com/2008/WORLD/africa/03/11/sudan.darfur/index.html>.

³² Lydia Polgreen, *Scorched-Earth Strategy Returns to Darfur*, N.Y. Times, Mar. 2, 2008, at A1, available at <http://www.nytimes.com/2008/03/02/world/africa/02darfur.html>.

³³ See COI Report, supra note 8, at 31-35; see also reports collected at the website of the Damanga Coalition for Freedom and Democracy, at <http://www.damanga.org/> (last visited Apr. 8, 2008) [hereinafter Damanga Reports]; Human Rights Watch, *Darfur Documents Confirm Government Policy of Militia Support*, July 19, 2004, at <http://www.hrw.org/backgrounder/africa/072004darfur.pdf>

banditry, and a generalized "insecurity."³⁷ In reality, the situation inside Darfur is deteriorating. Recent fighting along the border with Chad has intensified and cross-border rebel attacks have increased. Although Chad and Sudan signed a pact in early 2008 aimed at containing the conflict, the agreement was dismissed by Chadian rebel leaders.³⁸ To make matters worse, the UN High Commission for Refugees has withdrawn its personnel due to the violence, and Khartoum has suspended humanitarian flights to the region.³⁹

As observers continue to mull over the nature of the violence, it is important to understand the stakes in the debate. For the Sudanese government, denying that race or ethnicity drives the conflict is a tactic to stave off foreign intervention. As long as the violence is "political" and purely domestic, Sudan's resistance to foreign involvement prevails under the principle of state sovereignty and the government can continue committing crimes against civilians. Without a clear case of genocide, the deployment of foreign troops without Sudan's consent is extremely unlikely. As the COI noted, "Internal disturbances and tensions, 'such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are generally excluded from" the purview of international humanitarian law.⁴⁰ For this reason, it is tempting for human rights activists to seek evidence of genocide in order to spur an international military response. The search for genocide becomes more difficult, however, as one more closely examines the groups involved in the conflict.

The U.S. Genocide Convention Implementation Act of 1987,⁴¹ also called the Proxmire Act, defines racial group as "a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."⁴² An ethnic group is "a set of individuals whose identity as such is distinctive in terms of common cultural traditions or [*246] heritage."⁴³ The two definitions invoke a familiar parsing of identity between immutable physical or biological characteristics (race) on the one hand, and less tangible, mutable traits like culture or heritage (ethnicity) on the other.

While not particularly controversial in themselves, the definitions can be difficult to apply in Darfur. In Sudan today, the government and its followers claim ascendancy based on their Arab identity, but the term Arab is notoriously confusing.⁴⁴ For starters, the type of collectivity the term refers to is unclear. In common usage, it may mean a cultural or religious tradition (e.g., Arab or Islamic civilization, which are often conflated), a racial grouping (e.g., Arab versus black), an ethnic identity or category of tribal affiliations (e.g., Arab Bedouin peoples, nomadic Arab tribes), or even a national grouping (e.g., the Arab League). "Black African" is generally understood as a racial category, subdivided into ethnic groups or tribes, though that does not make it much easier to define than Arab. Describing the conflict simply as Sudanese Arabs on one side and Sudanese blacks on the other ignores several inescapable commonalities between the two groups. First, to the Western eye, both Arabs and blacks in Darfur look

³⁴ John Sullivan, U.N. Security Council Approves Joint Force of Up to 26,000 Peacekeepers for Darfur, N.Y. Times, Aug. 1, 2007, at A8, available at <http://www.nytimes.com/2007/08/01/world/africa/01nations.html>.

³⁵ Polgreen, *supra* note 32, at A1.

³⁶ See, e.g., Reeves, *supra* note 22.

³⁷ *Id.*

³⁸ Reuters, Darfur-Related Pact Rejected By Rebels, Int'l Herald Trib., Mar. 14, 2008, at <http://www.ihf.com/articles/2008/03/14/africa/sudan.php>.

³⁹ See, e.g., Reeves, *supra* note 22.

⁴⁰ COI Report, *supra* note 8, at 26.

⁴¹ [18 U.S.C. §§1091-93](#) (West 2000 & Supp. 2008).

⁴² *Id.* § 1093(6).

⁴³ *Id.* § 1093(2).

⁴⁴ See Gerard Prunier, *Darfur: The Ambiguous Genocide* 76 (2005).

black, the result of centuries of genetic mixing.⁴⁵ In addition to physical similarities, Arabs and blacks share many common cultural traits, most notably the predominant language (Arabic) and religion (Islam).⁴⁶ The definitions of race and ethnicity contained in the Proxmire Act, which are based on either physical or cultural traits, are unsatisfactory as a way to clearly differentiate one group from the other in Darfur.

To understand what is happening in Darfur, we must look instead to history. An examination of colonialism, decolonization, and the formation of new nation-states in Africa sheds light on the identity groups that comprise today's independent nation of Sudan. The seemingly entrenched group divisions that fuel many of today's postcolonial conflicts are actually a relatively new phenomenon. The categories of race and ethnicity, as they are used today in reference to African populations, are substantially products of nineteenth-and twentieth-century colonialism and anticolonial struggle. Legal definitions such as those in the Proxmire Act, while based on parlance commonly used throughout the world, reflect a view of human groups that originated in the West. When **[*247]** they are applied to Africa, such definitions reveal at least as much about European colonialism as they do about the racial or ethnic group members themselves.

B.

"Imagined (African) Communities"

As V. Y. Mudimbe wrote in *The Invention of Africa*, "Explorers do not reveal otherness. They comment on 'anthropology,' that is, the distance separating savagery from civilization" ⁴⁷ European explorers who believed they were interpreting their encounters with Africa with scientific accuracy sometimes actually relied on misappropriations of evolutionary theory and their own preconceptions about "primitive" peoples to explain the differences between themselves and black Africans. ⁴⁸ Religion, too, gave credence to the idea that the races were "naturally" unequal. It was believed by many Europeans that the Bible described "the same origin for all human beings, followed by geographical diffusion and racial and cultural diversification. And it was believed that the Bible stipulated that the African could only be the slave of his brethren." ⁴⁹ European artists rounded out this view of Africa by helping those in Europe imagine the exotic, faraway race, via paintings and drawings that created "cultural distance, thanks to an accumulation of accidental differences, namely, nakedness, blackness, curly hair, bracelets, and strings of pearls." ⁵⁰ The physical differences depicted through art reinforced the "truth" of scientific and religious explanations of race.

During European colonial rule, race became a principle of governance based on the perceived "natural" racial hierarchy that was posited as a justification for colonialism, and it has proved difficult, if not impossible, to shake. In South Africa, for example, the official policy of apartheid survived well into independence. ⁵¹ Throughout sub-Saharan Africa, colonial rule imbued existing group distinctions within the Negroid race with new importance, particularly as Christians emerged as a subgroup within African "tribes," and race became the firm basis for a prejudicial political and economic class system. ⁵² The colonizing structure **[*248]** created "a dichotomizing system ... and with it a great number of current paradigmatic oppositions ... [such as] traditional versus modern; oral versus written and printed; agrarian and customary communities versus urban and industrialized civilization;

⁴⁵ Id. at 4-5.

⁴⁶ Id. at 4.

⁴⁷ V. Y. Mudimbe, *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge* 15 (1988).

⁴⁸ See id.

⁴⁹ Id. at 8-9.

⁵⁰ Id. at 9.

⁵¹ Bureau of African Affairs, Dep't of State, Background Note: South Africa (2008), at <http://www.state.gov/r/pa/ei/bgn/2898.htm> (last visited Aug. 28, 2008).

⁵² See Mudimbe, *supra* note 47, at 4.

subsistence economies versus highly productive economies." ⁵³ Some would argue that these dichotomies survive today as pervasive assumptions underlying contemporary Western policies with regard to sub-Saharan Africa.

Noting that precolonial African societies were anything but ahistorical or unchanging (though historians, anthropologists, and political theorists have frequently depicted them as such), Bruce Berman writes that constantly shifting, conflicting, and overlapping collective identities were always the norm. In his view, ethnicity has never been "a fixed condition or essence, but [is] a historical process that can only be studied in specific contexts... . Ethnicities are the ambiguous, constantly contested and changing results of cultural politics ... always simultaneously old and new, grounded in the past and perpetually in the process of creation." ⁵⁴ In other words, ethnic identities are not distinct cultural traditions that formed long ago and continue largely unchanged into the future. Instead, Berman argues, ethnic identities can only be understood at any given point in time in light of both historical change and a fluctuating political environment. ⁵⁵

Berman criticizes political theories that ignore this dynamic reality and focus unduly on the ways in which internally divided African states fail to meet Western expectations of cultural, political, and economic development. ⁵⁶ Such theories presume that newly independent states are (or should be) following a liberal path toward civic governance, the endpoint of which is a society in which national identity supersedes other types of identity such as race or ethnicity. As Berman writes, "The continuing and even increasing salience of communal solidarities in African politics ... cannot be adequately understood by theories preoccupied with the reproduction of the modernist paradigms of state and society, with what Africa is not, rather than with explaining what it is." ⁵⁷ To the extent that ethnic affiliations are seen as hampering the development of stable political processes, Western observers tend to interpret political violence in Africa as a poor transition from traditional [*249] (tribal or ethnic) identities to modern (national) identities. More recent scholarship on nationalism and national identity has begun to question this approach.

In *Imagined Communities*, an influential examination of the origins and rise of nationalism originally published in 1983, Benedict Anderson sought to expand the understanding of nationalism beyond the "Eurocentric provincialism" that he felt dominated scholarship. Starting with the invention of the printing press and its impact on political life in Europe, he traced the development of nationalism into its newer manifestations in the Americas and Southeast Asia. The breadth of the work has made it one of the most widely cited texts in political and cultural theory. In 1991, Anderson revisited his work to correct what he acknowledged was a "serious theoretical flaw" in the first edition: the oversimplification of the nationalism of the nineteenth-century colonial state and the trajectory of "Third World" nationalisms that arose in the context of decolonization. ⁵⁸ He writes in a new chapter:

My short-sighted assumption then was that official nationalism in the colonized worlds of Asia and Africa was modelled directly on that of the dynastic states of nineteenth-century Europe. Subsequent reflection has persuaded me that this view was hasty and superficial and that the immediate genealogy should be traced to the imaginings of the colonial state. ⁵⁹

The dominant scholarship on postcolonial nationalism, exemplified by Anderson's 1983 edition, has generally taken a teleological view: just as European dynastic states "overcame" ethnic and racial divisions to become peaceful, modern nation-states, so, we predict, will postcolonial African states. But in the revised edition, Anderson recognized that group dynamics unfolding within postcolonial states were categorically different from those of the

⁵³ *Id.*

⁵⁴ Bruce Berman, *Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism*, 97 *Afr. Aff.* 305, 311-12 (1998).

⁵⁵ *Id.* at 310-12.

⁵⁶ *Id.* at 307.

⁵⁷ *Id.* at 306-07.

⁵⁸ Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* xiii (2d ed. 1991).

⁵⁹ *Id.* at 163.

European states that used to rule them. The "imaginings of the colonial state" (that is, the conceptualization of the colony as a community by both colonizer and colonized) are not just European nationalism with an African face. Rather, the coalescing of identity groups into a nation after independence from European colonial rule is tied integrally to the fact of colonialism.

Anderson's rethinking of his own prior work has led to the acknowledgement of the ways through which European colonialism itself has [*250] impeded the development of cohesive national identities in many African states, including Sudan. Take, for instance, the concept of the "tribe," a kinship-based community with an internal leadership structure. Through Western eyes, this is a primitive form of group identity that should fade as a population progresses into nationalism. As Immanuel Wallerstein has observed, "Everyone 'knows' that something called 'racial tensions' exists in South Africa, in the United States, in Great Britain... . Conversely, everyone 'knows' that 'tribalism' exists in Black Africa."⁶⁰ Tribalism is often thought of (disparagingly) as a central feature of African politics and one that runs counter to the demands of peaceful nation building. This ignores the fact that tribal divisions were for many years assiduously cultivated and enforced by the same colonial powers that now press for tribalism to disappear in the name of peace and democracy.

Nineteenth-century Europeans believed that Africans belonged to tribes "just as every European belonged to a nation."⁶¹ Tribes are essentially a prehistoric parallel to the nation-state - simple, orderly, and self-contained - and the idea was critical to the colonial enterprise: tribes do not require national independence because they can be neatly subsumed by another's overarching statehood. They need not be included in decision making at the national level because they have no international interests. In a colonial scheme, it is enough that a European nation-state represents its African tribes (its colonies) on the international scene.

Although many modern scholars of African history recognize that precolonial African societies were characterized by "flexibility, fluidity and ambiguity," colonial rulers viewed mixing between communities as abnormal for Africans as well as disruptive to the colonial enterprise. This view was encouraged by the anthropological theory that black Africans had lived since the beginning of time in clearly defined, unchanging, and primitive "tribes."⁶² The colonial construction of the tribe led to the division of African societies into administrative units based on what officials perceived as rigid, preexisting group identities. In many areas, colonial administrators deliberately empowered and enriched local tribal chiefs and village headmen, and relied on them to be the day-to-day [*251] "muscle of colonial domination."⁶³ Such a system encouraged the formation of distinct hierarchies out of already existing social cleavages (tribal or otherwise).

When African peasants eventually mobilized against colonial rule, their struggle bridged some of the tribal and ethnic divisions within their class. Consequently, the power of local chiefs, which had become intertwined with European administration and exploitation, began to function as a "fundamentally conservative instrument of political fragmentation and isolation."⁶⁴ After independence, many tribal leaders sought to consolidate their power over communities through patronage and authoritarian control and wished to preserve and legitimize their power by taking control of the new national government. This led to sharp political divisions that formed in the image of Western politics - that is, as political parties that vied for legitimacy and power - under the guidance, and with the economic assistance of, their former European rulers. Many of the political parties, however, were essentially based on tribal identities, whereas in the United States and Europe disparate social and economic interests were more likely to define political parties.

⁶⁰ Immanuel Wallerstein, *Social Conflict in Post-Independence Black Africa: The Concepts of Race and Status-Group Reconsidered*, in *Race, Nation, Class: Ambiguous Identities* 187, 187 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

⁶¹ Berman, *supra* note 54, at 320 (quoting John Iliffe, *A Modern History of Tanganyika* 323 (1979)).

⁶² *Id.*

⁶³ *Id.* at 316.

⁶⁴ *Id.* at 317-18.

In some areas, the "divide and rule" strategy of early European colonialism - that is, cultivating the tribe as essentially a "subnation" in a sort of representative form of government - gradually gave way to the development of a more integrated colony with officially recognized "ethnic" divisions (e.g., in Rwanda, to which I return below). Ethnic groups did not organize or rule themselves; they were not extensions of the colonial regime like tribes were. Today, the terms tribe and ethnic group are sometimes used interchangeably, but the former retains a connotation of the "prenational." The Genocide Convention reflects this distinction. Because "tribe" is not an enumerated category, tribal disputes are not a matter of international concern under the Convention, whereas "interethnic violence" may rise to the level of genocide, with moral and legal consequences for the international community.

In my view, it is no accident that tribe is not a protected category in the Genocide Convention, but that nation, race, and ethnicity are. Darfur is said to be home to ninety tribes;⁶⁵ some studies have put the number as high as 130.⁶⁶ It is debatable whether these same groups constitute [*252] "ethnic groups" within the meaning of the Genocide Convention, but the COI apparently concluded that they do not. To explain its finding that genocide was not occurring in Darfur, the COI wrote: "The [government's] policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds."⁶⁷ Tribes, in the view of the COI, are different from the other types of identity groups. A theoretical distinction between tribe and ethnic group may prove useful. R. Brian Ferguson has pointed out that ethnic groups have "only latent organizational potential," while individual tribes by definition have a clear political structure.⁶⁸ The well-established authority of a tribal leader over individual tribe members potentially rivals that of a national government. Therefore, the tribe as a primary source of identity must be diminished in order for the typical African state to function peacefully. The idea of an ethnic group is more compatible with the modern nation-state because an ethnic group does not necessarily have a leader, so members of the ethnic group can (at least in theory) accept the authority of the state without conflict.

As David Scheffer has noted, only when an ethnic group develops nationalistic tendencies does a political structure emerge, and "ethnonationalism," by virtue of its aspirations to independence and political authority, is clearly at odds with state sovereignty.⁶⁹ Violence between ethnic groups must be suppressed by law (e.g., under the Genocide Convention) in order for ethnicities to coexist peacefully within the social and political contours of the state. Tribes, on the other hand, could be seen as inherently threatening to the state, both in concept and in reality. They are not, therefore, recognizable under international law. I would suggest that the Convention does not account for the category of the tribe because, in a sense, tribes are not supposed to exist in the world of the modern nation-state. The prevailing idea is that in order for an African population to progress into statehood on its own, the tribe must be left behind. The destruction of the tribe as an identity category is not only not genocide, but it might be considered by some as a necessary step along the path to European-style statehood.

[*253] The manipulation of both ethnicity and tribal identity by colonial administrators has had grave consequences for post-independence nation building, and it is only in the judicial setting that we must choose our language wisely. By way of example, the intergroup animosity that escalated into the Rwandan genocide in 1994 was substantially a product of Belgian rule. Although the Tutsi and Hutu "tribes" had existed prior to colonial rule, they were fluid categories based partly on lineage, partly on socioeconomic class. The groups had their own, distinct internal social structures, but individuals moved between the groups as a result of intermarriage or change

⁶⁵ Scott Anderson, *How Did Darfur Happen?*, N.Y. Times, Oct. 17, 2004, § 6 (Magazine), at 52, 56, available at <http://www.nytimes.com/2004/10/17/magazine/17DARFUR.html>.

⁶⁶ Sudanese Studies Center, *Darfur Report 2006*, at 15 (Hayder Ibrahim Ali ed., 2006).

⁶⁷ COI Report, *supra* note 8, at 4 (emphasis added).

⁶⁸ R. Brian Ferguson, *The Violent Edge of Empire*, in *War in the Tribal Zone: Expanding States and Indigenous Warfare* 1, 15 (R. Brian Ferguson & Neil Whitehead eds., 1992).

⁶⁹ See David J. Scheffer, *U.N. Engagement in Ethnic Conflicts*, in *International Law and Ethnic Conflict* 147, 150 (David Wippman ed., 1998).

in economic circumstances. ⁷⁰ In the 1930s, Belgium consolidated its colony by reshaping it into a single, rigid ethnic hierarchy whose individual members were ruled directly by the colonial administration. In an effort to organize the population in a rational manner, the Belgians required black Rwandans to carry identity cards that stated their ethnicity (ubwoko in Kinyarawanda and ethnies in French). ⁷¹ Because the Belgians viewed Tutsis as more intelligent and civilized, they became the favored ethnic group in Rwanda and received greater political privileges than the Hutus, who comprised eighty-four percent of the population and who were generally shorter and darker skinned. ⁷² The group divisions were perceived incorrectly by the Belgians to be static and clearly defined and, over time, they were enforced in order to ease the exercise of Belgian authority. ⁷³ The resultant social tensions flared after independence into a struggle for power that manifested itself as a raging ethnic dispute.

Alison Desforges, an expert witness who testified before the International Criminal Tribunal for Rwanda (ICTR), described the Rwandan ethnic groups this way:

The primary criterion ... is the sense of belonging to that ethnic group. It is a sense which can shift over time But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time Reality is an interplay between the actual conditions and peoples' subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience which imposed a categorisation [*254] which was probably more fixed, and not completely appropriate to the scene This practice was continued after independence ... to such an extent that [it] became an absolute reality. ⁷⁴

Desforges's testimony in *Prosecutor v. Akayesu* helped secure one of the tribunal's (and the world's) first convictions for genocide. Jean-Paul Akayesu, a bourgmestre in charge of the police force in his prefecture, participated in genocide against the Tutsi population, as well as crimes against humanity. In all, he presided over the murder of approximately two thousand Tutsis. In order to prove the "special intent" that was a necessary element of Akayesu's crime, Desforges needed to trace the manufacture of the ethnic groups in Rwanda during Belgian colonial rule to show how the ethnic conflict was entrenched.

The judgment in *Akayesu* recognized the limitations of the Genocide Convention's literal language in a way that political debates about Darfur often do not: "In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux preparatoires, was patently to ensure the protection of any stable and permanent group." ⁷⁵ In other words, the four enumerated categories should not be viewed as the Convention's strict parameters, but should be seen instead as examples of group identities protected by the Convention. Nevertheless, it was important for Desforges's testimony to emphasize Rwanda's colonial history and to point out that the Belgians had an official system for differentiating the manufactured ethnic groups. Evidence of the Belgian practices helped prosecutors to establish that the Hutus and Tutsis were indeed ethnic groups within the meaning of the Genocide Convention - as stable and permanent as they could be, given that they were shaped by European colonial rule.

With *Akayesu*, the ICTR demonstrated that the Genocide Convention can be used as a source of law for punishing genocide after the fact, but the question that confounds us with respect to Darfur is whether the Genocide Convention can be effective at preventing genocide. The protection it offers is conditioned upon identifying a clear victim group that fits into one of the enumerated categories; it is inadequate simply to identify any group of victims.

⁷⁰ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, P 2 (Sept. 2, 1998), available at <http://www.un.org/ict/english/judgements/akayesu.html>.

⁷¹ *Id.* P P 2, 5.1.

⁷² *Id.* P 2.

⁷³ See *id.*

⁷⁴ *Id.* P 5.1

⁷⁵ *Id.* P 6.3.1.

But since it is unclear to most journalists, analysts, or politicians who is fighting whom and why, the political debate and the violence both continue. Despite the huge and rising civilian [*255] death toll in Darfur, the Genocide Convention has remained a rhetorical tool, and, as such, it has slowed rather than spurred action on the part of political leaders. The definition of genocide written in the Genocide Convention was constructed to reflect the threat as it was understood in its context. The definition loses some of its power, however, when applied to conflicts occurring outside of Europe and after the end of colonial rule.

II. Identifying Genocide in Darfur

A. The Invention of Genocide

The creation of the Genocide Convention at the end of World War II, after the breathtaking extent of atrocities committed against Jews had come to light, was largely the effort of Raphael Lemkin, a Polish attorney and consultant to the League of Nations. Lemkin coined the term "genocide" not because the act was new, but because it was not cognizable in the existing international legal framework despite having existed throughout human history. ⁷⁶ Winston Churchill had called it "a crime without a name." ⁷⁷

It is significant that Lemkin invented his new word during the era of the emergence of the League of Nations, the product of an unprecedented convergence of national interests. The relatively new concept of a rule-bound international arena in which nation-states are the primary official actors was critical to the backdrop against which the law of genocide was written. The League affirmed the supremacy of the nation-state in the global order: national governments created it and national values and interests propelled it. The same could be said of the Genocide Convention. Lemkin describes genocide as the "antithesis" of the conventional wisdom that "war is conducted against states and armed forces and not against populations"; ⁷⁸ as such, genocide is a threat to the nation-state's monopoly on the use of force. A global order based on the interaction of sovereign states provides the greatest potential for the regulation of genocide because only states have the power to [*256] consent to and enforce an agreement for collective suppression of the crime. Lemkin argued that criminalizing the act of genocide was necessarily an international obligation because of the fact that state leaders could perpetrate genocide against their own people and therefore could not be trusted to prosecute the crime domestically. ⁷⁹

It should be noted that the term "national," as Lemkin used it, was broad, including within its scope numerous aspects of group identity, tied in different ways to the state and targeted through distinct genocidal tactics. ⁸⁰ Nevertheless, once national groups were enshrined in the Genocide Convention as a protected category, alongside "racial, ethnical, and religious groups," the term took on a narrower legal meaning, distinct from the three other categories. Today, "national" refers to state identity; race, ethnicity, and religion are group identities that coexist with nationality and that have the potential both to unify and divide nations.

Genocide is both a product and a perversion of nationalism, and a large part of its insidiousness lies in the conflation of nationality with one or more of the other protected categories. In the case of Germany, genocide eviscerated the protective functions of the state as it attempted to racially "purify" the German nationality, "dignifying

⁷⁶ Raphael Lemkin, *Genocide - A Modern Crime*, Free World, Apr. 1945, at 39, 39, available at <http://www.preventgenocide.org/lemkin/freeworld1945.htm>.

⁷⁷ David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 *Tex. Int'l L.J.* 231, 236 (2002) (citing Raphael Lemkin, *Genocide*, 15 *Am. Scholar* 227, 227 (1946)).

⁷⁸ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress* 80 (1944).

⁷⁹ Lemkin, *supra* note 76, at 42-43.

⁸⁰ *Id.* at 39. The Jews and Armenians, for example, could be called national groups in Lemkin's usage.

genocide as a sacred purpose of the German people." ⁸¹ Lemkin defined the crime of genocide as a nationalistic endeavor, consisting of two steps: first, "the destruction of the national pattern of the oppressed group" and, second, "the imposition of the national pattern of the oppressor." ⁸² By way of example, Lemkin wrote: "If one uses the term 'Germanization' of the Poles ... it means that the Poles, as human beings, are preserved and that only the national pattern of the Germans is imposed upon them." ⁸³ Along with the process of Germanization, the Nazi regime attempted to shape the German nationality by preserving it as a space free of Jews and certain other groups. Lemkin referred to genocide as "a new term and new conception for destruction of nations," ⁸⁴ as opposed to the destruction of individual people, and noted that "the attack on individuals [***257**] is only secondary to the annihilation of the national group to which they belong." ⁸⁵

B.

"Blacks" and "Arabs" in Darfur

In order to interpret the events in Darfur as a genocide, it is necessary to distinguish the groups involved and understand the nature of the perpetrators' animosity toward the victims. As I have begun to show, that is a difficult task. Sudan is culturally divided between North and South, with Arab history and culture pervading the North and greater Christian and sub-Saharan African influences in the South. Most black Darfuris today are Muslim and many speak Arabic rather than their native tribal language; others speak both languages or a mixture of both. Due to centuries of intermarriage, black Africans and Arabs in Darfur do not look like different groups. By appearances, all are black, though some insist there are differences in facial features that distinguish the groups. ⁸⁶ The COI notes that members of certain Arab tribes (e.g., the Misseriya, the Rizeigat) are fighting on the side of the black African rebels, while some blacks side with the Arab government or fight in the Sudanese military. ⁸⁷ Moreover, there have been reports of clashes between Arab tribes ⁸⁸ and between black African rebel groups or tribes, ⁸⁹ as well as between Arabs and blacks. In 2007, the New York Times reported, "What started out four years ago in western Sudan as a rebellion and brutal counterinsurgency has cracked wide open into a fluid, chaotic, confusing free-for-all" ⁹⁰

Nevertheless, the racism observed by outsiders is fact as well as fiction - though its roots are complex. To understand the racism involved, one must look to Sudan's relationship with the rest of the world, in particular the Middle East. Gerard Prunier, in his analysis of the Darfur genocide, writes:

"Arabs" and "Black Africans" are not at each other's throats because they are like cats and dogs but rather because, for the "Arabs" at least, they are not completely sure of what and who they [***258**] are. In the Sudan they are "Arabs", but in the Arab world they are seen as mongrels who hardly deserve that name. They desperately

⁸¹ Id.

⁸² Lemkin, *supra* note 78, at 80.

⁸³ Id.

⁸⁴ Id. at 79.

⁸⁵ Lemkin, *supra* note 76, at 39.

⁸⁶ For a thorough, insightful examination of the racial and ethnic history of Darfur, see Prunier, *supra* note 44.

⁸⁷ COI Report, *supra* note 8, at 32.

⁸⁸ See, e.g., Jeffrey Gettleman, Chaos in Darfur Rises as Arabs Fight With Arabs, N.Y. Times, Sept. 3, 2007, at A1, available at <http://www.nytimes.com/2007/09/03/world/africa/03darfur.html>.

⁸⁹ See, e.g., Reeves, *supra* note 22.

⁹⁰ Gettleman, *supra* note 88.

strive for recognition of their "Arab" status by other Arabs, who tend to look down upon them - even using for them the dreaded name of *abd* (slave) that they use for those more black than they are.⁹¹

The epithet *abd* recalls the Sudanese slave trade, which flourished under the control of Arab migrants in the eighteenth and nineteenth centuries,⁹² and remnants of which continue to this day.⁹³

The Arab world's disdain for Sudan is reflected in Arab leaders' refusal to even discuss the events in Darfur, much less intervene to bring peace to the people of Darfur. The 2007 U.S.-Islamic World Forum in Doha, Qatar remarkably made no mention of the situation in Darfur until a Darfuri activist, Mohamed Yahya, stood up from the audience to lambaste the conference body for ignoring the matter.⁹⁴

As Prunier describes it, Sudanese Arabs are essentially "Arabized" black African tribes - that is, tribes into which Arab (or previously Arabized) settlers intermarried during two major waves of migration. The first wave was an Arab migration in the fourteenth through sixteenth centuries; the second was a migration of Arabized tribes from the Nile Valley region in the eighteenth and nineteenth centuries. The Arabized tribes that resulted from the first migration are often referred to as "native Arabs" to distinguish them from the later arrivals. According to Prunier, the later migrants "were conquerors rather than settlers," since they took over the existing slave and elephant trade and settled in towns rather than integrating with nomadic groups.⁹⁵ In Darfur, though not in the South, they were viewed as an elite group of foreigners who held power and prestige based on "their wealth and their Islamic learning, real or supposed."⁹⁶ Because of their common language and cultural (and later political) identity, they viewed themselves as part of the native Arab population. Prunier remarks, "We see later what this elite did [***259**] with its prestige and power."⁹⁷ Paradoxically, although Arabs have historically viewed themselves as more civilized than black Africans, "Arab" could also be a contemptuous label because nomads, who considered themselves Arab, were poor.⁹⁸ Marc Lavergne, chair of the UN's Panel of Experts on the Sudan, stated in an interview, "The notion of 'Arab' is cultural, not at all racial. The militias can be considered Arab because they have been Arabized... . In my view, everyone in this story is black. The notion of racism has no place."⁹⁹ Lavergne believes it is only newer generations that have become militantly "racist" in any familiar sense of the term.¹⁰⁰

The COI uses "Janjaweed" to refer to the Arab militias operating in Darfur "with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions."¹⁰¹ Lavergne describes the Janjaweed as a generation of young, impoverished mercenaries who have been armed by the government and told

⁹¹ Prunier, *supra* note 44, at 77.

⁹² *Id.* at 2, 4, 7.

⁹³ Int'l Eminent Persons Group, U.S. Dep't of State, Slavery, Abduction and Forced Servitude in Sudan 17-18 (2002), available at <http://www.state.gov/documents/organization/11951.pdf>.

⁹⁴ Press Release, Mohamed Yahya, Damanga Coalition for Freedom and Democracy, US-Islamic World Forum Fails to Address Darfur (Feb. 28, 2007), at http://www.damanga.org/newsroom/press_releases/2007/press_022807.html.

⁹⁵ Prunier, *supra* note 44, at 7.

⁹⁶ *Id.* at 8.

⁹⁷ *Id.*

⁹⁸ *Id.* at 5.

⁹⁹ Said Ait-Hatrit, Le conflit du Darfour n'est pas racial, *Afrik.com*, July 16, 2004, at <http://www.afrik.com/article7464.html> ("Cette notion d'<sqtl> Arabe <sqtr> est culturelle, elle n'a rien de raciale. Les milices peuvent être qualifiées d'arabes parce qu'elles ont été arabisées... . Pour moi, tout le monde est noir dans cette histoire. La notion de racisme n'a pas sa place.") (author's translation).

¹⁰⁰ See *id.*

¹⁰¹ COI Report, *supra* note 8, at 31-32.

that they can do whatever they want: "They are not the real problem. In a sense, one could say they are the poor fighting the poor." ¹⁰² When antigovernment rebel groups began their attacks in Darfur in early 2003, the Sudanese government recruited a significant number of Arabs, including outlaws, convicted felons, and foreign fighters from Chad and Libya to assist in suppressing the rebellion. ¹⁰³ Since that time, the government has insisted repeatedly and unconvincingly that it does not support the militias. More recently, however, the Sudanese government appears to be giving up the pretence of distinguishing between its own forces and the Janjaweed. Civilians have even reported clear cases of joint attacks carried out by the Sudanese Army and Janjaweed forces. ¹⁰⁴

[*260] As for the victims of the "genocide," those called black Africans do not generally think of themselves as black first and foremost, but as members of their tribes. In Darfur, these are principally the Fur ("Darfur" meaning "land of the Fur"), Masseleit, and Zagawa. ¹⁰⁵ They are, however, viewed as a single collectivity by the Janjaweed militias and the Sudanese government. A common feature of the atrocities committed in Darfur is name calling. One of the most common epithets is *abd*, or slave, ¹⁰⁶ a reminder of the racism perpetuated by a stark regional history of slavery. This is not to say that there are no Arabs or blacks in Darfur, or that all groups are one and the same. Many Sudanese Arabs do identify themselves as Arabs, based on their claims of Arab ancestry, and do feel themselves to be a collectivity different from non-Arabs. This is the case despite the fact that Arabs in other countries reject that characterization. It is unclear, though, that non-Arabs constitute a single collectivity. In the end, what news reports suggest - genocide perpetrated by Sudanese Arabs, with government support, against black Africans - is actually far from certain.

C.

"Intent to Destroy"

As discussed above, genocide is not a synonym for mass killing or even mass killing of a particular group of people, but refers to the underlying attempt to eradicate an entire collectivity as such. Genocide is not only a crime that requires specific intent; it can be said to be a crime of intent, since it is the *mens rea* that makes it what it is. Lemkin describes the intent as preceding the violence:

The end may be accomplished by the forced disintegration of political and social institutions, of the culture of the people, of their language, their national feelings and their religion. It may be accomplished by wiping out all basis of personal security, liberty, health and dignity. When these means fail the machine gun can always be utilized as a last resort. ¹⁰⁷

The physical destruction of individual people may be a tactic employed by the genocidaires, but it is not required. Where this tactic has occurred, it does not necessarily constitute genocide. Even if it could be shown that the conflict in Darfur was clearly a racial or ethnic conflict **[*261]** between Arabs and blacks (which, as I have argued, is a fraught proposition), the situation in Darfur cannot be not genocide without a clear intent to destroy an entire collectivity. While substantial numbers of civilian deaths is suggestive of such intent, it is not determinative.

¹⁰² Ait-Hatrit, *supra* note 99 ("Ils ne sont pas le vrai probleme. En exagerant, on pourrait dire que ce sont la des pauvres qui se battent contre des pauvres.") (author's translation).

¹⁰³ COI Report, *supra* note 8, at 32.

¹⁰⁴ See, e.g., *id.* at 34; Damanga Coalition for Freedom and Democracy, Janjaweed and Government Troops Terrorize El-Fasher, Mar. 21, 2007, at http://www.damanga.org/newsroom/reports/2007/report_032107.html; Damanga Coalition for Freedom and Democracy, Sudanese Army, Janjaweed Militia Join Forces Near El Fasher, Mar. 12, 2007, at http://www.damanga.org/newsroom/reports/2007/report_031207b.html.

¹⁰⁵ Prunier, *supra* note 44, at 77.

¹⁰⁶ Mark Lacey, Sudan Memo; In Darfur, Appalling Atrocity, but Is That Genocide?, N.Y. Times, July 23, 2004, at A3, available at <http://query.nytimes.com/gst/fullpage.html?res=9B04E0DC163DF930A15754C0A9629C8B63>.

¹⁰⁷ Lemkin, *supra* note 76, at 39.

When the COI was created, one of its tasks was "to determine whether or not acts of genocide have occurred."¹⁰⁸ It determined that genocide was not occurring, arguing that the Sudanese government's actions in Darfur lacked the essential element of specific intent. The COI noted, rather confusingly, that "in some instances individuals, including Government officials, may commit acts with genocidal intent," though such instances would have to be evaluated case by case in a judicial setting.¹⁰⁹ Some who deny genocide is occurring attribute the violence (which they view as two sided) instead to severe droughts that have plagued the region since the 1980s. In that version of events, the shortage of water caused nomadic groups to travel farther distances and eventually settle in semi-pastoral villages that competed for resources with the farming communities that already lived there. Scarcity led to violent clashes as each group attempted to remove the other from the area.¹¹⁰ Yet another explanation is the "counter-insurgency gone wrong" theory, in which the Sudanese government responded unwisely with excessive force to a spate of rebel uprisings.¹¹¹

Prunier refers to such theorizing as "improvising a final solution," invoking the difficulty of fitting Darfur into a legal framework that was created in response to the Holocaust, a very different kind of genocide.¹¹² Similarly, Scott Anderson, a writer for the New York Times, has observed:

If this is a genocide, it doesn't look very much like those we've known before. No public proclamations about "the enemy within," no extermination lists Instead, it is shadowy, informal; the killing takes place offstage. It is the destruction of a people in a place where it is virtually impossible to distinguish incompetence from conspiracy. Is that by design, the sheer evil genius of it all, or just more evidence of a government's utter haplessness? A genocide may, it seems, occur almost inadvertently.¹¹³

[*262] At the heart of the problem is the near impossibility of finding specific intent within the mixed-up reality of a postcolonial civil conflict. One thing that made the Holocaust unique was the absolutely clear, well-documented intent to destroy. In Darfur, there has never been a stable, technocratic regime or a bureaucracy to plan, execute, and document an orderly mass killing. Darfur never had a close relationship with the central government in Khartoum. Without documentation produced by a state bureaucracy with a genocidal mission, the burden of proving intent is great. Furthermore, there are not enough resources or time for international observers to investigate a shadowy, informal killing campaign for evidence of genocidal specific intent before intervening to save the victims.

Complicating the picture, the terms "ethnic cleansing," "extermination," and "persecution" are also commonly used in reference to Darfur - often interchangeably, though legally they have distinct meanings and implications. For instance, the term ethnic cleansing does not actually appear in any major treaty. It may be "used for the political purpose of avoiding the charge of genocide," or invoked as an alternative charge when specific intent for genocide is difficult to prove.¹¹⁴ The UN Commission of Experts on the former Yugoslavia has defined ethnic cleansing as "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas."¹¹⁵ Ethnic cleansing is essentially the product of a land dispute: one group claims a geographic region for its own and proceeds to cleanse

¹⁰⁸ COI Report, *supra* note 8, at 4.

¹⁰⁹ *Id.*

¹¹⁰ Anderson, *supra* note 65, at 56.

¹¹¹ Prunier, *supra* note 44, at 110.

¹¹² *Id.*

¹¹³ Anderson, *supra* note 65, at 63.

¹¹⁴ Nsongurua J. Udombana, *An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur*, 40 *Int'l Law* 41, 57 (2006).

¹¹⁵ The Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, P 130, delivered to the Security Council, U.N. Doc. S/1994/674 (May 27, 1994).

the area of another population currently living there.¹¹⁶ Although case law and official reports characterize ethnic cleansing as a subset of war crimes or crimes against humanity, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has determined that acts of ethnic cleansing may constitute genocide if genocidal intent is revealed.¹¹⁷ Matthew [*263] Lippman reminds us that the Holocaust is not the best model for regulating mass atrocities that occur in civil conflicts today:

The singularity of Jewish suffering ... is enhanced by the fact that various [modern] victim groups lack the organization, resources or popular pull to construct their suffering as genocide. ... Unable to successfully capture the flag of genocide, victim groups retreat to the safety and security of less controversial and novel categories such as ethnic cleansing.¹¹⁸

Where genocide is difficult to prove, ethnic cleansing becomes a next-best label - a crime similar in actus reus but lacking the requirement of specific intent. The disadvantage of an ethnic cleansing label is that it does not invoke the power of an international treaty such as the Genocide Convention.

Under the Rome Statute, extermination is another crime against humanity that involves "intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."¹¹⁹ Like ethnic cleansing, it is a crime whose actus reus may resemble certain acts of genocide, but whose mens rea requirement is easier to fulfill when it comes to prosecution. As such, it has also served as an alternative to a charge of genocide when specific intent is difficult to prove. Persecution, like genocide, requires discriminatory intent.¹²⁰ This makes it, in the view of the ICTY, the closest crime in essence to genocide: "When persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide."¹²¹ Like genocide, persecution requires the targeting of a particular collectivity. Although ethnic cleansing, extermination, and persecution are all international crimes that have been addressed in judicial settings, they do not carry the same weight that a charge of genocide does. If labeling a situation as genocide cannot spur action, it is unlikely that any other label will either.

[*264]

///. Redefining State Obligation

A. The Politics of (In)Action

Certainly, the ambiguities built into international legal institutions and treaties do not cause inaction, but they give reluctant international decision makers a way to justify inaction that results for other reasons. Given the range of atrocities that have been criminalized under international law, an argument for international intervention could be made with little imagination, even if the conflict's racial and ethnic lines are not completely clear. But the absence of political will leads nations to interpret legal instruments in ways most favorable to their own interests rather than to the victims' interests. The United Nations is authorized to use force to achieve its mission of maintaining international peace and security, but it has opted to pursue ineffective diplomatic channels in the case of Darfur,

¹¹⁶ See *id.*

¹¹⁷ See Matthew Lippman, *Genocide: The Crime of the Century: The Jurisprudence of Death at the Dawn of the New Millennium*, 23 *Hous. J. Int'l L.* 467, 503-04 (2001).

¹¹⁸ *Id.* at 527.

¹¹⁹ Rome Statute, *supra* note 3, art. 7(2)(b).

¹²⁰ *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, P 636 (Jan. 20, 2000); Lippman, *supra* note 117, at 499-500.

¹²¹ *Kupreskic*, Case No. IT 95-16-T, Judgment, P 636; Lippman, *supra* note 117, at 499-500.

deferring to the much more powerful mandate to protect state sovereignty (specifically Sudan's).¹²² The case of Darfur, like many other crises in UN history, highlights the structural impediments to swift, effective action. China and Russia, both veto-holding permanent members of the Security Council, not only oppose the use of UN force without consent from the Sudanese government, but have actually been accused of breaching the multilateral arms embargo against Sudan by supplying weapons to Khartoum.¹²³ More recently, evidence is mounting that Chinese small arms are being used to continue the destruction in Darfur.¹²⁴

As far as the American public is concerned, many people are aware of and are concerned about the crisis in Darfur, but public support and U.S. troop readiness for military intervention are uncertain. A June 2007 Pew Research Center poll, which characterized the situation in Darfur as "ethnic genocide," found that although nearly half (forty-nine percent) of Americans still believe the United States should "do something" about Darfur, the percentage that supported the use of U.S. troops had actually declined over the previous six months (from fifty-three to **[*265]** forty-five percent).¹²⁵ In addition, the long running war in Iraq has placed a strain on U.S. military resources, such that new foreign military interventions may be difficult.¹²⁶ Disenchantment with the war in Iraq has led to some wariness about foreign intervention - especially in a Muslim nation led by an Arab government. Ironically, the "war on terror" provides a potential rationale for unilateral U.S. intervention: negotiating for peace with the Sudanese government (i.e., instead of sending peacekeeping or intervention forces to Sudan) may be seen as compromising with "the same bloody hands that let Osama bin Laden live in that country from 1991 to 1996, that planned the bombing of the [U.S. embassies in] Nairobi and ... Dar es Salaam."¹²⁷ On April 23, 2006, Osama bin Laden reaffirmed his connection with Sudan by releasing a video declaration, aired by Al Jazeera, in which he rejected the Darfur Peace Agreement and called for a jihad in Darfur.¹²⁸ Because of America's troubled relationship with the Middle East, American interests (political, economic, and moral) with respect to Darfur are unclear. Such a state of affairs makes unilateral intervention very unlikely.

In addition, determining whether or not a situation constitutes genocide is a process fraught with biases. Lippman has written that the difficulty of deciding when states are obligated to intervene, and whether or not they want to expend the resources to do so

confronts us with the crisis of conceding that there are limits to our compassion and concern and that some people are expendable. The notion that the Western World makes a moral distinction between European and Third World genocide is particularly problematic. Thus, we seek solace in the self-delusion that we are not witnessing genocide.¹²⁹

¹²² The UN Charter provides in Chapter 7 justifications for the use of force in the most serious situations of international concern, expressly for the purpose of neutralizing imminent threats to peace. U.N. Charter arts. 39-43. Use of multinational troops for peacekeeping and humanitarian purposes is generally authorized when invited by the target state.

¹²³ China, Russia Breaking Darfur Arms Embargo: Amnesty, Reuters, May 8, 2007, at <http://www.reuters.com/article/worldnews/idusl0864670120070508>.

¹²⁴ Paul Eckert, U.S. Report Links China Arms Sales to Darfur Carnage, Int'l Herald Trib., Mar. 14, 2008, at <http://www.iht.com/articles/reuters/2008/03/14/asia/OUKWD-UK-DARFUR-CHINA-REPORT.php>.

¹²⁵ Pew Research Center, Public Wants to Know More About Darfur and Many Favor U.S. Involvement, June 7, 2007, at <http://www.pewresearch.org/pubs/504/darfur>.

¹²⁶ Lolita C. Baldor, War Demands Strain U.S. Military Readiness, Huffington Post, Feb. 8, 2008, at <http://www.huffington.post.com/2008/02/08/war-demands-strain-us-mil> n 85797.html.

¹²⁷ HIRC Hearing, *supra* note 27, at 33.

¹²⁸ Panel of Experts Report, *supra* note 19, P 12.

¹²⁹ Lippman, *supra* note 117, at 528.

More pointedly, Simon Deng, a former Sudanese slave who is now an outspoken activist, attributes the lack of action to a deep-rooted belief, conscious or unconscious, in many societies that black African lives are worth less than others: "It is very painful to say this, but we Sudanese victims can not avoid uttering the truth, at least among ourselves: we are black, and therefore nobody cares about us. We are the ultimate victims [*266] of a global racism that continues even in the new millennium."¹³⁰ Critics argue that, at the very least, Khartoum has engaged in disproportionate and collective punishment for rebel attacks, targeting entire civilian villages that it believes are harboring rebels.¹³¹ In response, the Sudanese government has brought its information war against its critics to the United States. In the face of economic sanctions and official condemnation from the U.S. government, "the [Bush] Administration has ... issued a waiver to permit the Government of Sudan to hire a Washington lobbyist to permit the architect of genocide in Darfur to develop and sell a public relations strategy on Capitol Hill."¹³² The political process of responding to ongoing atrocities in Darfur has utterly confounded whatever legal obligation the Genocide Convention confers.

B. Revising Genocide Law: From Prevention and Punishment to Protection

In the aftermath of the Holocaust, the international community was rightfully horrified at the determination and thoroughness with which the Nazi regime had sought to eliminate fully a recognized collectivity, the Jewish people. The Genocide Convention was conceived as a deterrent to future genocides, but it was also a confession of collective responsibility by all nations for failing to identify and stop the Holocaust while it was occurring, a treaty with a healing purpose as well as a legal one.¹³³ Unfortunately, as Lippman has argued, since then, the Genocide Convention has served as little more than "a symbolic denunciation of Nazi depredations," and it is invoked so rarely that genocide has become virtually "a victimless crime in a world without perpetrators."¹³⁴ The conflicts that are occurring in the postcolonial world today require a new approach. In calling for a "reconceptualization" of the law of genocide, Lippman writes that a new jurisprudence must adopt as its touchstone "the alleviation of individual suffering rather than deference to [*267] state sovereignty and political self-interest."¹³⁵ The question, of course, is how to accomplish this goal.

There are two potential routes toward such an international jurisprudence. First, the Genocide Convention's "prevent and punish" paradigm could be maintained, but the definition of the crime would be broadened to include a greater range of scenarios. Alternatively, the international community could move away from the "prevent and punish" paradigm toward a model that focuses less on the specific crime of genocide and more on the human cost. Such a model might be found in the movement to codify a "responsibility to protect" in international humanitarian law. Both approaches have their drawbacks, but in my view, the latter offers more hope of bringing about effective action to stop mass atrocities such as the one occurring in Darfur.

Those who recommend redefining the crime of genocide recognize the need for a law that is more responsive to the conflicts that are actually occurring in the world today. There is a wide gap between the legal imperatives provided by existing international humanitarian law and the world's unmet moral demands. Perhaps this gap could be narrowed by altering the language of the Genocide Convention. Among the new definitions that have been proposed are ones that would broaden the scope of genocide protection by expanding the protected categories.

¹³⁰ Simon Deng, Remarks at the Conference on "Victims of Jihad" Hosted by the Association for World Education, the Association of World Citizens, and the International Humanist and Ethical Union (Apr. 18, 2005), available at <http://www.iheu.org/node/1539>.

¹³¹ See, e.g., John Prendergast, Op-Ed., A Dying Deal in Darfur, Boston Globe, July 13, 2006, at A9, available at http://www.boston.com/news/world/africa/articles/2006/07/13/a_dying_deal_in_darfur.

¹³² HIRC Hearing, supra note 27, at 8.

¹³³ Lippman, supra note 117, at 527.

¹³⁴ Id. at 530.

¹³⁵ Id. at 533.

Helen Fein, for example, has defined genocide as "sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim." ¹³⁶ Fein's definition avoids the discussion of what constitutes a race or an ethnic group by extending protection to any "collectivity."

Frank Chalk and Kurt Jonassohn have argued that victim groups must be recognized as subjective constructions. Thus they define genocide as a "one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator." ¹³⁷ This definition could be useful in Darfur, where self-identified Arabs appear to have targeted "black Africans," who do not see themselves as one race or ethnicity but rather as members of many different tribes. In Chalk and Jonassohn's formulation of genocide, it **[*268]** would be unnecessary to show that the victim group is objectively a single collectivity, as long as there is a clear pattern of group identification by the perpetrators.

Another way to redefine genocide is to focus on the destructive intent of the crime, rather than on attempting to enumerate the right types of groups that need protection. In at least one definition, the collectivity element is missing altogether. Israel Charny has written of genocide as "the mass killing of substantial numbers of human beings, when not in the course of military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims." ¹³⁸ In Charny's formulation, it would not matter which groups the civilian victims in Darfur belong to or which side is killing more people. It would be sufficient that up to half a million "defenseless" and "helpless" victims, many of them living in unsecured refugee or international displaced people camps, have died as a result of violence, disease, and malnutrition arising from the conflict.

These alternate definitions of genocide might be able to expand the coverage of the current genocide law, or they could just shift the semantic debate slightly and leave the central question intact. The deeper problem is that, whatever the definition of genocide, there is no clear mandate for the international community to act so long as there is doubt as to the existence of a victimized group. Although Charny's definition does not require the identification of a particular collectivity, one could imagine arguing over whether enough people have died, or whether it counts when people die as an indirect result of violence (e.g., from disease or malnutrition among the displaced).

The problem of focusing on definitions of genocide is, as Jerry Fowler of the U.S. Holocaust Museum has pointed out, that legal definitions are useful in judicial settings after a crime has occurred, but they do nothing to prevent the crime from occurring or to stop it while it is in progress. ¹³⁹ He writes that "the question of prevention is not a legal question, the question of prevention is a political question, and predicating political action on satisfaction of a legal definition is a recipe for inaction." ¹⁴⁰ Indeed, asking the question "Is genocide occurring?" before taking action means that observers must process the question of guilt or **[*269]** innocence before acting to prevent further killing. To avoid such delays, Fowler argues, parameters for intervention should be set separately from the judicial standard for criminal responsibility. For that reason, the U.S. Holocaust Museum has developed a "three-tier warning system: genocide watch, genocide warning, and genocide emergency," intended to trigger protective action without wrangling over definitions. ¹⁴¹ The system attempts to provide a principled basis for international

¹³⁶ Helen Fein, *Genocide: A Sociological Perspective* 24 (1993) (emphasis added).

¹³⁷ Frank Chalk & Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* 23 (1990) (emphasis added).

¹³⁸ Israel W. Charny, *Toward a Generic Definition of Genocide*, in *Genocide: Conceptual and Historical Dimensions* 64, 75 (George J. Andreopoulos ed., 1994) (emphasis added).

¹³⁹ Jerry Fowler, *Diplomacy and the "G-Word"*, [35 Case W. Res. J. Int'l L. 213, 214-15 \(2003\)](#).

¹⁴⁰ *Id.*

¹⁴¹ [Id. at 215](#).

intervention when "indicators" of genocide are present. The idea is: "We can let a court later decide whether it actually was genocide in the legal sense, but first we have laid a basis for political action."¹⁴²

Such a "basis for political action" presupposes a certain responsibility on the part of the international community that is different from that set forth in the Genocide Convention: the responsibility to protect victims rather than to prevent and punish crimes. That obligation, a relatively new concept not yet widely accepted as international law, was articulated in the 2005 World Summit Outcome Document:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁴³

The advantage of the "responsibility to protect" model is that it turns away from the judicial perspective toward the political and focuses on the decisions made by global actors in response to an ongoing or impending crisis. In addition, it reaches beyond genocide to cover crimes that do not require specific intent or a sure determination that victims **[*270]** are members of a protected group. Proponents of the responsibility to protect argue that members of the international community (specifically, decision makers at the United Nations, including the Security Council) would have a more comprehensive mandate to protect against atrocities that may not fit the legal definition of genocide. For this reason, codifying a responsibility to protect would be a more effective approach to the regulation of genocide (or genocide-like crimes) than attempting to alter the definition of genocide within the current framework of the Convention. Implementing Fowler's "genocide watch" mechanism would be consistent with a responsibility to protect, because it emphasizes timely response to ongoing atrocities and complements existing judicial models for punishing genocide after the fact.

Certainly, the concept of a universal responsibility to protect has its detractors. The language of the World Summit's Outcome Document still enumerates specific crimes that are subject to interpretation just as genocide is, and it is not explicit about thresholds for determining when "peaceful measures" can be considered to have failed. In addition, as Nicholas Wheeler has pointed out, it is unclear what happens when members of the Security Council are unable or unwilling to act (e.g., if one veto-holding permanent member resists authorizing the use of force).¹⁴⁴ Nevertheless, the most important difference is that the responsibility to protect lessens the focus on enumerated categories and specific genocidal intent, making the moral obligation to act more difficult to ignore when atrocities are occurring. Unlike the Genocide Convention, the Outcome Document focuses more on the failure of a nation-state to protect its own citizens than on whether those citizens are deserving of protection. As such, the nature of collectivities, however they have developed in various parts of the world and in disparate historical contexts, matters much less.

Conclusion

In world leaders' discussions of the conflict in Darfur, semantic wrangling serves as a stalling mechanism for those who fear triggering an obligation to prevent and punish genocide, but it also reflects serious, widespread confusion about the meanings of ethnicity and race. Because of a belief among former colonial powers that ethnicity and race

¹⁴² *Id.*

¹⁴³ G.A. Res. 60/1, P P 138-39, U.N. GAOR, 16th Sess., U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (emphasis added).

¹⁴⁴ See Nicholas J. Wheeler, A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit, 2 J. Int'l L. & Int'l Rel. 95, 95 (2005).

are universally applicable concepts, international law fails to account for the [*271] more complex history and nature of modern collectivities in postcolonial societies. Moreover, the mistaken notion of the tribe, left over from racist, colonial-era policies, has been an obstacle to understanding contemporary collectivities. As a result, the Genocide Convention, which was created in response to the Holocaust and prior to the end of colonial rule in nearly all European colonies, envisions a certain paradigm of genocide that does not fit the circumstances of mass atrocities in developing countries.

The weaknesses in genocide law have made the international community susceptible to propaganda by the Sudanese government claiming that the conflict in Darfur is a purely domestic dispute between tribes over land and resources. They have also made decision makers vulnerable to stereotypes about black African societies being intractably violent - the view that the infighting will never end because it has no rational purpose or explanation. Such a view, of course, reflects ignorance of the colonial history of the region. As a result, fatalism and a sense of decreased moral urgency - brought on partly by misunderstanding, partly by racial bias - make Western intervention unlikely in Darfur. Compounding the problem is the fact that the United Nations is structurally unable to respond quickly to crisis situations like the one in Darfur. Although the United Nations is the only global body charged with ensuring peace and security and authorized to use force, the Security Council allows a small number of countries (or even one country) to block interventions that are unfavorable to these countries' economic or strategic interests. In addition, a major purpose of the United Nations is to protect state sovereignty, which leads the United Nations to defer to the sovereignty of repressive regimes even when it is totally inappropriate.

The current antigenocide framework, consisting of the United Nations and a small set of treaties and international courts, is inadequate to protect people in African and other decolonized countries. Alternate theories and perhaps new instruments of international law are needed to protect people effectively from genocide. Many resources have been dedicated to developing international fora to bring justice after the fact, but this does nothing to stop atrocities occurring in the moment, and so far the fora have had no discernable deterrent effect. One idea is to broaden the definition of genocide in order to declare more clearly an obligation to intervene regardless of disagreement about the meanings of ethnicity or race; this is unlikely because of political opposition. A relatively new legal theory that has greater potential is the responsibility [*272] to protect, which charges the international community with the responsibility to intervene to prevent the mass killing of civilians when their own national governments are unwilling or unable to protect them. In any event, any changes instituted must take into account the ways in which conflicts in postcolonial societies may differ from those envisioned by the writers of the Genocide Convention back in 1948.