

## WHY THE KILLING IN DARFUR IS GENOCIDE

By Jennifer Trahan\*

### INTRODUCTION

The world has shamelessly stood by as the atrocities committed in Darfur, Sudan have occurred over the last several years. While 200,000-400,000<sup>1</sup> have been killed and an estimated 2.5 million displaced,<sup>2</sup> all based on tribal ethnicity, pledges of “never again” made *both* after the Holocaust and the Rwandan genocide, have once again rung hollow. It should not matter whether

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1. A survey by the Coalition for International Justice puts the fatality figures near 400,000 from February 2003 to April 2005. See Eric Reeves, *Quantifying Genocide in Darfur*, SUDAN TRIB., Sept. 17, 2006. Other studies have used figures of 170,000-255,000, 220,000-270,000, and even 500,000. See *id.*; see also *Current Situation in Darfur: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 53 (2007) (statement of Hon. Tom Lantos, Chairman, Comm. on Foreign Affairs) (using a figure of “as many as 400,000 people . . .”); Eric Reeves, *Quantifying Genocide in Darfur (Part I)*, SUDANREEVES.ORG, Apr. 28, 2006, <http://www.sudanreeves.org/Article/02.html> (putting figure at over 450,000).

2. See, e.g., Warren Hoge, *U.N. Secretary General To Meet Sudanese Leader*, N.Y. TIMES, Aug. 29, 2007 (“An estimated 2.5 million people have been forced from their land in Darfur . . .”). Human Rights Watch currently appears to be using the figure 2.4 million displaced. See HUMAN RIGHTS WATCH [HRW], *DARFUR 2007: CHAOS BY DESIGN—PEACEKEEPING CHALLENGES FOR AMIS AND UNAMID 5 (2007)*, available at <http://hrw.org/reports/2007/sudan0907/sudan0907web.pdf> [hereinafter CHAOS BY DESIGN]. As of October 2007, the Office of the United Nations (“U.N.”) Deputy Special Representative of the U.N. Secretary-General for Sudan U.N. Resident and Humanitarian Coordinator put the figure at 2,387,000 displaced, with 4.2 million “conflict-affected.” U.N. Deputy Special Representative of the U.N. Secretary-General for Sudan Resident and Humanitarian Co-ordinator, *Darfur Humanitarian Profile No. 29*, at 3, Oct. 1, 2004, available at [http://www.unsudanig.org/docs/HNP%2029\\_narrative\\_1%20October%202007.pdf](http://www.unsudanig.org/docs/HNP%2029_narrative_1%20October%202007.pdf).

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the killing in Darfur is characterized as “genocide,” mass murder, extermination or ethnic cleansing for the world community—and particularly, the United Nations Security Council—to have acted forcefully before now.<sup>3</sup> It matters little to those on the ground what legal nomenclature is used to characterize the crimes by which they were killed. Yet, sometimes semantics do appear to matter, particularly in terms of garnering media and public attention on the crowded world stage.<sup>4</sup> While various countries and institutions have characterized the killing as “genocide”—including the United States Government<sup>5</sup> and

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3. The U.N. can utilize both non-forceful and forceful intervention under Chapter VII of the U.N. Charter when a situation requires it to “maintain or restore international peace and security.” U.N. Charter art. 39; *see id.* art. 41 (regarding measures not involving the use of armed force); *see also id.* art. 42 (regarding the use of force). Because the killing has now spilled over into Chad and the Central African Republic, there is no doubt that Chapter VII could be utilized, and could have been utilized before now. *See, e.g.*, S.C. Res. 1672, U.N. Doc. S/RES/1672 (Apr. 25, 2006) (determining that the situation in Sudan “continues to constitute a threat to international peace and security in the region . . .”). It is widely viewed that it is the threat of China’s veto vote that has prevented forceful Security Council action. China imports between four percent and seven percent of its oil from Sudan and the Sudan oil project is its most successful international oil development endeavor. *See* HUMAN RIGHTS WATCH, Q & A: CRISIS IN DARFUR 5 (2007), available at [http://hrw.org/english/docs/2004/05/05/darfur8536\\_txt.htm](http://hrw.org/english/docs/2004/05/05/darfur8536_txt.htm). Security Council action could have long before now taken a variety of forms, such as protecting refugees in camps, deploying peacekeepers into Chad and the Central African Republic, and even deploying peacekeepers into Darfur to prevent further killings. The consent of Sudan would not have been required for a forceful Chapter VII deployment.

4. As a legal matter, while early decisions of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) suggested there was a “hierarchy” of crimes, with genocide being the worst crime, that approach was subsequently abandoned. *See* William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1717 (2006). However, there still remains a popular perception of genocide as “the crime of crimes.” *See id.* at 1716; *see also* 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) (“To everyone in the world other than a handful of international lawyers, genocide is the ‘crime of crimes,’ regardless of what the judges on the Appellate Chambers in The Hague say.”).

5. Colin Powell stated before the Senate Foreign Relations Committee that “genocide has been committed in Darfur.” *The Crisis in Darfur: Testimony Before the Senate Foreign Relations Committee* (statement of Secretary of State Colin Powell) (Sept. 9, 2004), available at <http://www.state.gov/secretary/former/powell/remarks/36042.htm>. Powell’s conclusions were based on interviews with 1136 randomly chosen refugees in Chad in July and August 2004, with the findings published in a report on the State Department’s website. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR & BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP’T OF STATE, DOCUMENTING ATROCITIES IN DARFUR 2, 4 (2004) [hereinafter DOCUMENTING ATROCITIES].

others<sup>6</sup>—various other key international actors, such as the United Nations<sup>7</sup> (“U.N.”) and certain international non-governmental organizations (“NGOs”)<sup>8</sup> have not done so. In fact, there is good reason to conclude that the killing is genocide.

This Article details the legal requirements of the crime of genocide, with specific emphasis on the *dolus specialis*—the special intent requirement of genocide.<sup>9</sup> The Article also compiles factual information as to the crimes that have occurred in Darfur and demonstrates how each of the legal requirements regarding genocide has been met. Part I provides background on the crimes that have occurred. Part II examines the legal require-

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6. Others who have described the situation as genocide include the Parliament of the European Union, the Defense Minister of the Government of Germany, General Romeo Dallaire of Canada (U.N. peacekeeping force commander in Rwanda), and a great many international genocide scholars. See Eric Reeves, *Report of the International Commission of Inquiry on Darfur: A Critical Analysis (Part II)*, IDEA, Oct. 14, 2005, <http://www.ideajournal.com/articles.php?id=39>. Additional groups that have declared the crisis in Darfur to be genocide include: Physicians for Human Rights, U.S. Committee for Refugees, Africa Action, Justice Action (U.K.), Yad Vashem, Genocide Watch, and The Campaign to Prevent Genocide. Interview with Eric Reeves (Jan. 5, 2008).

7. The U.N.’s International Commission of Inquiry on Darfur was established by Security Council Resolution 1564, and published its findings after a three-month investigation into crimes in Darfur. See S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004). The Commission deemed that some of the violations committed by Sudan and the Janjaweed were “very likely to amount to war crimes” and “crimes against humanity.” See U.N. Int’l Comm’n of Inquiry on Darfur [ICID], *Report to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564*, ¶ 630, U.N. Doc. S/2005/60 (Jan. 25, 2005), available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) [hereinafter *Commission of Inquiry*]. It suggested that “in some instances, individuals, including Government officials” may have committed “acts with genocidal intent,” although it concluded that “the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned.” *Id.* ¶¶ 640-41. Several articles have since been published discussing potential legal errors in the Commission’s conclusions. See, e.g., Luban, *supra* note 4, at 306; Jamie A. Mathew, *The Darfur Debate: Whether the ICC Should Determine That the Atrocities In Darfur Constitute Genocide*, 18 FLA. J. INT’L L. 517 (2006); Beth Van Schaack, *Darfur And The Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101 (2005); Eric Reeves, *Report of the International Commission of Inquiry on Darfur: A Critical Analysis (Part I)*, IDEA, Oct. 14, 2005, <http://www.ideajournal.com/articles.php?id=38>. Additional errors are suggested in Part II.E. of this Article.

8. Human Rights Watch, for example, has termed the killing “ethnic cleansing,” but not “genocide.” See, e.g., HUMAN RIGHTS WATCH, *DARFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN* 39 (2004), available at <http://www.hrw.org/reports/2004/sudan0504/> [hereinafter *DARFUR DESTROYED*].

9. See *Prosecutor v. Jelišić*, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 45 (July 5, 2001) (“This intent [required for the crime of genocide] has been referred to as, for example, special intent, specific intent, *dolus specialis*, particular intent and genocidal intent.”).

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ments of the crime of genocide—the four part “*dolus specialis*” and the underlying crimes. Specifically, Part II.A examines the requirement that there be “intent to destroy.” Part II.B discusses the requirement that there be intent to destroy a group “in whole or in part.” Part II.C discusses the requirement that the intent to destroy must target “a national, racial, ethnical or social group.” Part II.D discusses the requirement that the intent to destroy must target a national, racial, ethnical or social group “as such.” Each of these subparts also includes factual information showing how the crimes that have occurred in Darfur satisfy these legal requirements.<sup>10</sup> Part II.E examines two contrary arguments that have sometimes been invoked to suggest the absence of genocidal intent. Finally, Part II.F examines the elements of three underlying crimes—killing, intentional infliction of serious bodily or mental harm, and intentionally inflicting upon the group conditions calculated to bring about destruction of the group in whole or in part—and shows, based on factual information from Darfur, that those crimes have occurred. While the information discussed in this Article is not evidence—that will have to be, and presumably has been, gathered by the International Criminal Court (“ICC”), which is investigating the crimes,<sup>11</sup> or by other courts—the facts compiled suggest that genocide has occurred. The Article finishes with a brief discussion in Part III of the challenges facing the ICC in its Darfur prosecutions.

The Article ultimately concludes that international actors should not hesitate to call the crime genocide,<sup>12</sup> and the ICC—

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10. This information has been compiled largely from the following Human Rights Watch reports: DARFUR DESTROYED, *supra* note 8; HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY: GOVERNMENT RESPONSIBILITY FOR INTERNATIONAL CRIMES IN DARFUR (2005), available at <http://www.hrw.org/reports/2005/darfur1205/> [hereinafter ENTRENCHING IMPUNITY]; HUMAN RIGHTS WATCH, DARFUR DOCUMENTS CONFIRM GOVERNMENT POLICY OF MILITIA SUPPORT (2004), available at <http://www.hrw.org/english/docs/2004/07/19/darfur9096.htm> [hereinafter DARFUR DOCUMENTS].

11. The situation in Darfur was referred to the International Criminal Court (“ICC”) by the U.N. Security Council. *See* S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

12. At least one noted genocide scholar suggests the hesitation to call the crimes “genocide” stems from a fallacious notion that if the crimes were deemed genocide, there would be an obligation of humanitarian intervention; that scholar, however, notes that the more logical reading of the Convention on the Prevention and Punishment of the Crime of Genocide is that it does not require such intervention. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Schabas, *supra* note 4, at 1718; *see also* Luban,

which, to date, has issued warrants for war crimes and crimes against humanity against two individuals regarding crimes committed in Darfur<sup>13</sup>—should consider charging the crime of genocide. Of course, none of these legal arguments should matter because the international community should have acted long before now, and what the killing is called should be irrelevant. The killing should have been brought to a halt by an international force deployed by the U.N. Now that the goals of the genocide have largely been accomplished, the challenge for the international community is to ensure that the violence is brought to an immediate halt, those on the ground receive needed protection, the violence does not extend further into Chad<sup>14</sup> and the Central African Republic,<sup>15</sup> there is a negotiated political settlement as to the future of Darfur, and justice for these crimes occurs—both through robust support of the ICC and additional justice mechanisms. Yet, if there was any doubt as to what crime has been occurring, those doubts should be extinguished.<sup>16</sup>

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*supra* note 4, at 306 (“the [Genocide Convention] imposes no legal obligation to act”). Others have speculated that the U.N.’s commission of experts may have been motivated by “crude anti-Americanism” in not deeming the situation genocide, given that the United States had been vocal in calling it genocide. *See generally* Reeves, *supra* note 6.

13. The warrants are for Ahmad Muhammad Harun, former Minister of State for the Interior and current Minister of State for Humanitarian Affairs, and Ali Muhammad Ali Abd Al Rahman, known as Ali Kushayb, a Janjaweed militia leader. *See* U.N. Security Council, *Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR1593*, ¶ 2 (Dec. 5, 2007) [hereinafter *Sixth Report*].

14. *See, e.g.*, HUMAN RIGHTS WATCH, THEY CAME HERE TO KILL US: MILITIA ATTACKS AND ETHNIC TARGETING OF CIVILIANS IN EASTERN CHAD (2007), available at <http://www.hrw.org/reports/2007/chad0107/> (documenting a drastic deterioration in the human rights situation in eastern Chad, where more than 300 civilians were killed and at least 17,000 people displaced in militia violence in November 2006); *see also* Comprehensive Peace in Sudan Act of 2004 § 3(10), 50 U.S.C. § 1701 (2006) (referring to “Government of Sudan . . . aerial attack missions and deadly raids across the international border between Sudan and Chad . . .”).

15. *See* Press Release, Human Rights Watch, Security Council’s Troop Plan in Chad/CAR Risks Failing Many: Forces Should Protect All Civilians in Danger (Sept. 27, 2007), <http://hrw.org/english/docs/2007/09/27/chad/6965.htm> (“Security Council resolution 1778 focuses assistance on areas of eastern Chad and northeastern CAR where continued armed conflict, general lawlessness, and chronic instability—partly related to the conflict in the adjoining Darfur region of Sudan—have exacerbated the humanitarian crisis.”).

16. This Article does not attempt to show precisely who among the perpetrators of the genocide bears individual and/or command responsibility within the Janjaweed or Government of Sudan, although it does illustrate the close coordination between the

## I. BACKGROUND

The crimes in Darfur commenced in the Spring of 2003, when Sudanese government forces and a militia force known as the “Janjaweed”<sup>17</sup> attacked primarily three African tribes—the Fur, Masalit and Zaghawa<sup>18</sup>—in the rural areas of Darfur, a large area in Western Sudan. The attack was a response to the insurgency that had been led by two Darfurian rebel movements, the Sudan Liberation Army/Movement (“SLA/SLAM”) and the Justice and Equality Movement (“JEM”).<sup>19</sup> The Janjaweed are primarily “camel-herding nomads who migrated to Darfur from Chad and West Africa in the 1970s, and from Arab camel-herding tribes from North Darfur.”<sup>20</sup>

The conflict has its roots in inter-communal conflict between these nomadic camel and cattle-herders, and sedentary farmers, competing for land and water resources.<sup>21</sup> “Until the 1970s, these tensions were kept under control by traditional conflict resolution mechanisms.”<sup>22</sup> These tensions escalated in recent decades due to extended periods of drought, competition for scarce resources, a lack of good governance, and the availability of weapons.<sup>23</sup> A 1994 reorganization by the Sudanese Government of President Omar El Bashir gave Arab groups new positions of power in Darfur, which the Fur, Masalit and Zaghawa saw as an attempt to undermine their leadership roles and

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Janjaweed and Sudanese armed forces in perpetrating crimes. *See infra* Part II.A.2.b, II.A.2.d.

17. “The term ‘Janjaweed’ . . . is reported to be an amalgamation of three Arabic words for ghost, gun, and horse that historically referred to criminals, bandits or outlaws.” DARFUR DOCUMENTS, *supra* note 10, at 2 n.3.

18. Other communities impacted include the Dajo, Tunjur, Meidob, Jebel, Berti, and other non-Arab tribes. *See* ENTRENCHING IMPUNITY, *supra* note 10, at 7. It is quite possible that these groups, also targeted on an ethnic basis, are part of the genocide. Interview with Eric Reeves, *supra* note 6.

19. *See* ENTRENCHING IMPUNITY, *supra* note 10, at 6. The army and Janjaweed’s response, however, could in no way be characterized as simply targeting the insurgents. In many cases, there was “little or no” rebel presence when villages were targeted, and, even if rebels were present, there was no attempt to distinguish between combatants and non-combatants in villages under attack. *See id.* at 7. The Sudan Liberation Army/Movement (“SLA/M”) and the Justice and Equality Movement (“JEM”) rebel groups also appear to have committed serious abuses. *See id.*

20. DARFUR DOCUMENTS, *supra* note 10, at 2. There are also cattle herding Arabs in the Janjaweed. Interview with Eric Reeves, *supra* note 6.

21. *See* DARFUR DOCUMENTS, *supra* note 10, at 2 n.4.

22. DARFUR DESTROYED, *supra* note 8, at 6.

23. *See id.*

power.<sup>24</sup> Hostilities broke out in West Darfur in 1998 and 1999, resulting in hundreds killed.<sup>25</sup> The current outbreak of large-scale crimes was prompted by an SLA attack on Fasher in April 2003.<sup>26</sup>

After the attack on Fasher, the government and Janjaweed commenced a full-scale attack upon the Fur, Masalit and Zaghawa that consisted of a combination of aerial bombardment by Government of Sudan armed forces, with the Janjaweed moving in on horseback.<sup>27</sup> The crimes, detailed below, have been described as “scorched-earth tactics”<sup>28</sup> that leave almost nothing remaining of the villages attacked. This Article concentrates on crimes committed in 2003 and 2004, which represent arguably the high point of the killing in Darfur,<sup>29</sup> and are the years at issue in the ICC’s warrants.<sup>30</sup> Although the killing in Darfur appears to be in decline, individuals in camps continue to be attacked,<sup>31</sup> and other killing continues as well.<sup>32</sup> The violence has now spilled beyond the borders of Darfur into Chad and the

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24. *See id.* The 1994 reorganization created the three Darfur states of North, South and West Darfur. The effect of the reorganization was to negate in particular the political power of the Fur, the largest ethnic group in Darfur. Interview with Eric Reeves, *supra* note 6.

25. *See* DARFUR DESTROYED, *supra* note 8, at 6-7.

26. *See id.* at 7.

27. *See id.*

28. *See id.*; Comprehensive Peace in Sudan Act of 2004 § 3(7), 50 U.S.C. § 1701 (2006).

29. *See, e.g.*, ENTRENCHING IMPUNITY, *supra* note 10, at 8 (“The pervasive pattern of government-militia coordinated attacks on villages [in Darfur] has declined in 2005 in comparison with previous years, but this is largely because most of the targeted population has already been displaced from the most fertile, desirable rural areas.”).

30. The International Criminal Court was referred the situation of Darfur by the U.N. Security Council. *See* S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). To date, as a result of the International Criminal Court’s investigation, two warrants have been issued. *See supra* note 13 and accompanying text.

31. *See, e.g.*, HUMAN RIGHTS WATCH, SEXUAL VIOLENCE AND ITS CONSEQUENCES AMONG DISPLACED PERSONS IN DARFUR AND CHAD 3-9 (2005), *available at* <http://www.hrw.org/background/africa/darfur0505/> (documenting how Sudanese security forces, deployed to protect displaced persons, and Janjaweed continue to commit rape and sexual violence against women and girls in camps in Chad and Darfur); *see also* CHAOS BY DESIGN, *supra* note 2, at 17.

32. *See, e.g.*, Hoge, *supra* note 2 (reporting on U.N. Secretary General Ban Ki-moon’s concern about the deaths of hundreds of people in the [summer of 2007] in Darfur); Press Release, Human Rights Watch, New Clashes Jeopardize Civilians: Escalating Violence Highlights Need for Civilian Protection (Oct. 10, 2007), <http://hrw.org/english/docs/2007/10/10/darfur/7063.htm>; Lydia Polgreen, *Scorched-Earth Strategy Returns To Darfur*, N.Y. TIMES, March 2, 2008, at A1 and A16.

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Central African Republic.<sup>33</sup> African Union (“AU”) forces, as part of an AU observer mission (“AMIS”), were deployed starting in July 2004,<sup>34</sup> and a U.N./AU hybrid force has been scheduled for a January 1, 2008 deployment.<sup>35</sup>

## II. *THE LEGAL ELEMENTS OF THE CRIME OF GENOCIDE*

The definition of “genocide”<sup>36</sup> has remained essentially unchanged since the 1948 Genocide Convention.<sup>37</sup> It requires a showing of the *dolus specialis*—the “special intent” requirement of genocide—consisting of:

- (1) intent to destroy
- (2) in whole or in part
- (3) a national, ethnical, racial or religious group
- (4) as such.<sup>38</sup>

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33. See *supra* notes 14-15 and accompanying text.

34. The African Union Observer Mission started in July 2004 as a small military observer presence to monitor the April 2004 humanitarian ceasefire agreement; as of October 2005, it had increased to approximately 7000 personnel. See *ENTRENCHING IMPUNITY*, *supra* note 10, at 7.

35. The Security Council has authorized a January 1, 2008 deployment of 26,000 peacekeepers (UNMID) to replace the 7000 African Union peacekeepers that have been in Sudan. Editorial, *Delay, Obstruction and Darfur*, N.Y. TIMES, Dec. 10, 2007, at A22. The government of Sudan has been actively obstructing deployment of the force. Press Release, Human Rights Watch, U.N.: Security Council Should End Sudan’s Obstruction (Dec. 19, 2007), <http://hrw.org/english/docs/2007/12/18/darfur/7589.htm>.

36. Raphael Lemkin coined the word “genocide” in 1944. The word is derived “from the Greek word *genos*, meaning ‘race’ or ‘tribe’ and the Latin word *cide*, meaning ‘killing.’” Toby Jack, *Sudan’s Genocide: Punishment Before Prevention*, 24 PENN ST. INT’L L. REV. 707, 708 (2006) (citing RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944)).

37. See Genocide Convention, *supra* note 12, art. 2. The Government of Sudan acceded to the Genocide Convention on October 12, 2003. Office of the U.N. Comm’r for Human Rights, Status of Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, <http://www2.ohchr.org/english/bodies/ratification/1.htm> (last visited Apr. 29, 2008). The Convention includes an obligation to extradite or prosecute perpetrators of genocide. See Genocide Convention, *supra* note 12, art. 1 (“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.”). Crimes committed in Sudan prior to October 12, 2003 could also constitute genocide because genocide is accepted as customary international law and as a *jus cogens* norm from which no derogations are permitted. See William W. Bishop, Jr., *Reservations to the Convention on Genocide*, *International Court of Justice Advisory Opinion*, 45 AM. J. INT’L L. 579, 584 (1951) (“[T]he principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”).

38. See generally JENNIFER TRAHAN, HUMAN RIGHTS WATCH, *GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNA-*



Additionally, proof of one or more underlying crimes or acts (the “underlying crimes”) is required.<sup>39</sup> They are:

- (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.<sup>40</sup>

These same requirements are today found in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”),<sup>41</sup> the International Criminal Tribunal for Rwanda (“ICTR”),<sup>42</sup> the ICC,<sup>43</sup> and the Extraordinary Chambers in the Courts of Cambodia.<sup>44</sup> “It is widely recognised that the law set out in the [Genocide] Convention reflect[s] customary international law and that the norm prohibiting genocide constitutes *jus cogens*.”<sup>45</sup> The United States criminalizes genocide by federal statute.<sup>46</sup>

Additionally, to prosecute an individual for genocide, one

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TIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 144-68 (2006) [hereinafter ICTY DIGEST].

39. See Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 640 (Jan. 17, 2005) (“[T]he Statute characterises genocide by the following constitutive elements: (1) one or several of the underlying acts of the offence . . . ; and (2) the specific intent of the crime of genocide, which is described as the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”); see also Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 681 (Sept. 1, 2004); Prosecutor v. Jelišić, Case No. IT-95-10-T, Judgment, ¶ 62 (Dec. 14, 1999).

40. See Rome Statute of the International Criminal Court art. 6, July 1, 2002, 2187 U.N.T.S. 90.

41. See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 4, S.C. Res. 808, U.N. Doc. S/25704 (May 3, 1993).

42. See Security Council Statute of the International Criminal Tribunal for Rwanda art. 2, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

43. See Rome Statute of the International Criminal Court, *supra* note 40, art. 6.

44. See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 4 (2001) (Cambodia), *amended by* NS/RKM/1004/006 (Oct. 27, 2004).

45. Prosecutor v. Blagojević, Case No. IT-02-06-T, Judgment, ¶ 639 (Jan. 17, 2005); Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 680 (Sept. 1, 2004); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 500 (July 31, 2003).

46. See 18 U.S.C. § 1091 (2006).

would require a form of individual responsibility—such as committing, instigating, ordering, planning, aiding and abetting, or joint participation—or command responsibility.<sup>47</sup> While these forms of responsibility are key to proving the guilt or innocence of a particular individual, this Article does not address the responsibility of particular individuals.

### A. *The Requirement of “Intent To Destroy”*

#### 1. The Legal Criteria

As to the first legal requirement of the *dolus specialis*—“intent to destroy”—case law from the ICTY shows that:

- (1) there must be a goal of destroying a group as a separate and distinct entity;<sup>48</sup>
- (2) even if destruction was not the original goal, it may become the goal;<sup>49</sup>
- (3) there must be an intentional attack against a group, and the intention to participate in or carry out the attack.<sup>50</sup>

Knowledge that the underlying crime would inevitably or likely result in destruction is insufficient—destruction must be the aim.<sup>51</sup> Because specific intent to destroy is key, it is not necessary to prove actual destruction of the group or groups in whole or in

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47. See Rome Statute of the International Criminal Court, *supra* note 40, art. 25 (describing individual responsibility); *id.* art. 28 (describing command responsibility). Joint Participation has sometimes been articulated as “joint criminal enterprise,” see ICTY DIGEST, *supra* note 38, at 390-438, and also the “common purpose doctrine.”

48. See *Blagojević*, Case No. IT-02-06-T, Judgment, ¶ 670 (“[T]he Trial Chamber recalls that the specific intent must be to destroy the group as a separate and distinct entity.”); see also *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 698 (“The Trial Chamber concurs with the observation made by the *Sikirica* Trial Chamber that: “[t]he ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.”).

49. See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 572 (Aug. 2, 2001) (“It is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation.”).

50. See *Prosecutor v. Jelišić*, Case No. IT-95-10-T, Judgment, ¶ 78 (Dec. 14, 1999) (“[T]he Trial Chamber will have to verify that there was both an intentional attack against a group and an intention upon the part of the accused to participate in or carry out this attack.”).

51. See *Blagojević*, Case No. IT-02-06-T, Judgment, ¶ 656 (“It is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group. The destruction, in whole or in part, must be the aim of the underlying crime(s).”).

part, although actual destruction may constitute evidence of specific intent.<sup>52</sup> No lengthy premeditation is required.<sup>53</sup> A policy or plan of “destruction” is not required, although it may be an important factor in helping to establish that the accused possessed the requisite genocidal intent.<sup>54</sup>

#### a. Seeking Physical or Biological Destruction

The majority view is that destruction must intend or seek the “physical or biological” destruction of the group or groups. As explained by the ICTY Appeals Chamber in *Prosecutor v. Krstić*:

The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. The Chamber stated: “[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. [A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct

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52. See *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 522 (July 31, 2003) (“The key factor is the specific intent to destroy the group rather than its actual physical destruction . . . . It is the genocidal *dolus specialis* that predominantly constitutes the crime.”). As specified by the ICTY:

In view of the specific intent required for genocide, it is not necessary to prove the *de facto* destruction of the group in whole or in part. Nevertheless, the *de facto* destruction of the group may constitute evidence of the specific intent and may also serve to distinguish the crime of genocide from the inchoate offences in Article 4(3) of the Statute, such as the attempt to commit genocide.

*Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 697.

53. See *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 572 (“Article 4 of the Statute does not require that the genocidal acts be premeditated over a long period.”).

54. As stated in the *Jelisić* decision:

[T]he existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.

*Jelisić*, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 48 (July 5, 2001); see *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 225 (Apr. 19, 2004) (quoting *Jelisić*, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 48); *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 705 (quoting *Jelisić*, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 48); *Blagojević*, Case No. IT-02-60-T, Judgment, ¶ 656 (“The Appeals Chamber has held that the existence of a plan or policy is not a legal requirement of the crime.”).

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from the rest of the community would not fall under the definition of genocide.”<sup>55</sup>

It is not, however, required that the perpetrator choose the most efficient method of destruction.<sup>56</sup> Acts that do not cause death are included in destruction.<sup>57</sup>

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55. *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 25 (quoting *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580); *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 694. The contrary view has also been expressed, for example, in *Blagojević*, where the Trial Chamber stated:

[T]he Trial Chamber recalls the opinion of Judge Shahabuddeen, in the *Krstić* Appeals Judgment, according to which a “distinction should be made between the nature of the listed ‘acts’ [of genocide] and the ‘intent’ with which they are done.” While the listed acts indeed must take a physical or biological form, the same is not required for the intent. With the exceptions of the acts listed in Article 4(2)(c) and (d), “the Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part.” Judge Shahabuddeen found that:

It is the group which is protected. A group is constituted by characteristics—often intangible—binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.

Judge Shahabuddeen concluded that “[t]he intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological.”

*Blagojević*, Case No. IT-02-60-T, Judgment, ¶ 659 (quoting *Krstić*, Case No. IT-98-33-A, Partial Dissenting Opinion of Judge Shahabuddeen, ¶¶ 45-54).

56. The Appeals Chamber in *Krstić* explained:

In determining that genocide occurred at Srebrenica, the cardinal question is whether the intent to commit genocide existed. While this intent must be supported by the factual matrix, the offence of genocide *does not require proof that the perpetrator chose the most efficient method to accomplish his objective* of destroying the targeted part. Even where the method selected will not implement the perpetrator’s intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent. The international attention focused on Srebrenica, combined with the presence of the UN troops in the area, prevented those members of the VRS [Army of Republika Srpska] Main Staff who devised the genocidal plan from putting it into action in the most direct and efficient way. Constrained by the circumstances, they adopted the method which would allow them to implement the genocidal design while minimizing the risk of retribution.

*Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 32 (emphasis added).

57. The ICTY Trial Chamber in *Blagojević* explained:

A broader notion of the term “destroy,” encompassing also “acts which may fall short of causing death,” had already been considered by the ICTR. In the *Akayesu* case the Trial Chamber found that acts of rape and sexual violence formed an integral part of the process of destruction of the Tutsi as a group and could therefore constitute genocide.

## b. Forcible Transfer May Be Part of the Destruction

Forcible transfer may be a basis from which to infer intent to destroy.<sup>58</sup> According to the ICTY Appeals Chamber, when considering whether the “Srebrenica massacre”<sup>59</sup> in the former Yugoslavia was genocide:

[F]orcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer [of the women and children] completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself . . . .

The Trial Chamber—as the best assessor of the evidence presented at trial—was entitled to conclude that the evidence of the transfer supported its finding that some members of the VRS [Army of Republika Srpska] Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff. The genocidal intent may be inferred, among other facts, from evidence of “other culpable acts systematically directed against the same group.”<sup>60</sup>

On the other hand, there is some contrary authority. One trial chamber rejected forcible transfer as a basis for inferring intent to destroy where the number displaced was far higher than the

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*Blagojević*, Case No. IT-02-60-T, Judgment, ¶ 662.

58. See *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 31 (“[F]orcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica.”); *id.*, Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 35 (“[S]tanding alone, forcible transfer is not genocide. But in this case the transfer did not stand alone . . .”).

59. In the Srebrenica massacre, 7000-8000 Bosnian Muslim men and boys were executed after the fall of Srebrenica, a so-called “U.N. safe area,” by Republika Srpska forces under the military control of Ratko Mladic. See generally HUMAN RIGHTS WATCH, BALKANS: SREBRENICA’S MOST WANTED REMAIN FREE (2005), available at <http://www.hrw.org/english/docs/2005/06/29/bosher11228.htm>. Neither Mladic, nor Radovan Karadzic—the Republica Srpska political leader at the time—have been arrested, despite the fact that the ICTY has had arrest warrants out for them for many years. See *id.*; Warren Hoge, *Prosecutor Says Serbia Blocked Arrests in Killings*, N.Y. TIMES, Dec. 11, 2007, at A20.

60. *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶¶ 31, 33.

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number killed.<sup>61</sup> Another trial chamber rejected deportation as showing intent to destroy where the deportation was “not accompanied by methods seeking the physical destruction of the group.”<sup>62</sup>

c. Distinguishing Specific Intent from Motive

The law is clear that specific intent needs to be distinguished from motive. The Appeals Chamber in *Prosecutor v. Blaškić*<sup>63</sup> explained that:

*Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act. The Appeals Chamber has held that, as far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law, but it “becomes relevant at the sentencing stage in mitigation or aggravation of the sentence.”<sup>64</sup>

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61. See *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 976. The Trial Chamber rejected mass deportation as evidence of special intent to commit genocide:

The extremely high number of Bosnian Muslim and Bosnian Croat men, women and children forcibly displaced from the [Autonomous Region of Krajina] in this case, particularly when compared to the number of Bosnian Muslims and Bosnian Croats subjected to the acts enumerated in Article 4(2)(a), (b) and (c), does not support the conclusion that the intent to destroy the groups in part, as opposed to the intent to forcibly displace them, is the only reasonable inference that may be drawn from the evidence.

*Id.*

62. *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 557, *aff'd*, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶¶ 46-48 (March 22, 2006). As explained by the Trial Chamber:

Had the aim been to kill *all* Muslims, the structures were in place for this to be accomplished. The Trial Chamber notes that while approximately 23,000 people were registered as having passed through the Trnopolje camp at various times when it was operational and through other suburban settlements, the total number of killings in Prijedor municipality probably did not exceed 3,000.

*Stakić*, IT-97-24-T, Judgment, ¶ 41 (quoting *Stakić*, IT-97-24-T, Judgment, ¶ 553).

63. *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment (July 29, 2004).

64. *Id.* ¶ 694. The Appeals Chamber continued:

As the Appeals Chamber held in the *Jelisić* and *Kunarac* Appeal Judgements and in the ICTR *Kayishema* and *Ruzindana* Appeal Judgement:

The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.

Thus, the Appeals Chamber in *Stakić* explained: “[T]he Tribunal’s jurisprudence distinguishes between motive and intent; in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt.”<sup>65</sup>

#### d. Intent to Destroy May Be Inferred

The law permits intent to be inferred.<sup>66</sup> When “the prosecution relies upon proof of a state of mind of an accused by in-

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The Appeals Chamber wishes to assert the important distinction between “intent” and “motivation.” The Appeals Chamber holds that, even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.

The Appeals Chamber notes that criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts proscribed in Article 2(2)(a) through to (e) were committed “with intent to destroy, in whole or in part a national, ethnical, racial or religious group.”

*Id.* (quoting Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-I-A, Appeals Chamber Judgment, ¶ 161 (June 1, 2001)). Similarly, as explained in *Jelisić*:

The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.

Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 49 (July 5, 2001); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeals Chamber Judgment, ¶ 102 (Sept. 17, 2003) (quoting *Jelisić*, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 49); *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 696 (quoting *Jelisić*, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 49).

65. *Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 45. “[A]n accused can be found guilty of committing genocide even if his personal motivation went beyond the criminal intent to commit genocide.” Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgment, ¶ 479 (Sept. 12, 2006).

66. See *Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 18 (“[E]vidence of intent to destroy may be inferred from an accused’s actions or utterances *vis-à-vis* the targeted group . . . .”); *Krstić*, Case No. IT-98-33-A, Judgment, ¶ 34 (“Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.”); Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment, ¶ 413 (Dec. 13, 2005) (“In the absence of direct evidence, a perpetrator’s intent may be inferred from relevant facts and circumstances.”); *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 704 (“The Trial Chamber notes that it is generally accepted in the jurisprudence of the Tribunal and of the ICTR that, in the absence of direct evidence, the

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ference, that inference must be the only reasonable inference available on the evidence.”<sup>67</sup> Some of the factors that have been looked to for inferring specific intent include: (a) the extent of the actual destruction; (b) the existence of a genocidal plan or policy; (c) the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct; (d) the utterances of the accused.<sup>68</sup> Courts have also looked to “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”<sup>69</sup> “It is generally accepted, particularly in the jurisprudence of both [the ICTY] and the Rwanda Tribunal, that genocidal *dolus specialis* can be inferred either from the facts, the concrete circumstances, or ‘a pattern of purposeful action.’”<sup>70</sup>

The targeting of military-aged men (which might, for example, suggest a tactic of eliminating a potential military threat)<sup>71</sup>

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specific intent for genocide can be inferred from ‘the facts, the concrete circumstances, or a pattern of purposeful action.’”).

67. *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 41. “Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime. Where an inference needs to be drawn, it has to be *the only reasonable inference available on the evidence.*” *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 970 (emphasis added).

68. See *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶¶ 971-89.

69. *Jelišić*, Case No. IT-95-10-A, Judgment, ¶ 47; *Simba*, Case No. ICTR-01-76-T, Judgment, ¶ 413.

70. *Stakić*, Case No. IT-97-24-T, Judgment, ¶ 526. The International Criminal Tribunal for Rwanda (“ICTR”) has stated:

In the light of the Tribunal’s jurisprudence, the specific intent of genocide may be inferred from certain facts or indicia, including but not limited to (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts and (i) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.

Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgment, ¶ 320 (Dec. 13, 2006).

71. See *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 26 (“The Trial Chamber rejected the Defence’s argument that the killing of [military-aged] men was motivated solely by the desire to eliminate them as a potential military threat.”).



has sometimes been considered to be part of the genocide,<sup>72</sup> and sometimes not.<sup>73</sup> For example, in the *Krstić* case, the ICTY found the killing at Srebrenica of 7,000-8,000 Bosnian Muslim men was genocide because the targeting of the military-aged men was part of the destruction of the 40,000 in Srebrenica, since without the men, the group could not procreate.<sup>74</sup>

Proof of the mental state for underlying acts or crimes may serve as evidence from which to infer specific intent.<sup>75</sup> It is not

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72. In *Krstić*, the ICTY Appeals Chamber, in part, reasoned that the killing of military-aged men was not just to eliminate a potential military threat because both civilians and severely handicapped were also killed. See *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶¶ 26-27. In the situation of Darfur, both civilians and elderly have been killed. See *infra* note 286 and accompanying text.

73. As explained in *Brđjanin*:

[T]he victims of the underlying acts in Article 4(2)(a) to (c), particularly in camps and detention facilities, were predominantly, although not only, military-aged men. This additional factor could militate further against the conclusion that the existence of genocidal intent is the only reasonable inference that may be drawn from the evidence. There is an alternative explanation for the infliction of these acts on military-aged men, and that is that the goal was rather to eliminate any perceived threat to the implementation of the Strategic Plan in the [Autonomous Region of Krajina] and beyond. Security for the Bosnian Serbs seems to have been the paramount interest. In the words of one witness: "the aim was to reduce the threat to the detainer, the detainer's community, and anyone . . . who looked as if they would fight, once sent to the other side, would be eligible for detention."

See *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 979.

74. The Appeals Chamber in *Krstić* explained:

The Trial Chamber determined that Radislav Krstić had the intent to kill the Srebrenica Bosnian Muslim men of military age. This finding is one of intent to commit the requisite genocidal act—in this case, the killing of the members of the protected group, prohibited by Article 4(2)(a) of the Statute. From this intent to kill, the Trial Chamber also drew the further inference that Krstić shared the genocidal intent of some members of the VRS [Army of Republika Srpska] Main Staff to destroy a substantial part of the targeted group, the Bosnian Muslims of Srebrenica.

See *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 21. It further found:

[T]he massacred men amounted to about one fifth of the overall Srebrenica community. The Trial Chamber found that, given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would "inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica." Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.

*Id.* ¶ 28.

75. See *id.* ¶ 20 ("The proof of the mental state with respect to the commission of

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necessary to prove statements showing genocidal intent.<sup>76</sup> An inference of genocidal intent may be drawn even where individuals with intent are not precisely identified.<sup>77</sup>

e. Destruction of Cultural and Religious Property May Be Evidence of Intent to Destroy

Where physical or biological destruction occurs simultaneously, “attacks on cultural and religious property . . . may legitimately be considered as evidence of an intent to physically destroy the group.”<sup>78</sup>

f. Sexual Violence as Part of Intent to Destroy

Case law also recognizes that sexual violence can form an integral part of the process of destruction of a group. As the ICTR recognized in *Prosecutor v. Akayesu*: the “rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”<sup>79</sup>

2. Factual Information Suggesting “Intent to Destroy” Is Satisfied

In the situation of Darfur, extensive factual information<sup>80</sup> strongly suggests that “intent to destroy” exists on the part of the Government of Sudan and the Janjaweed. Of course, in building a case against a particular individual, one would, to a large extent, want to focus on that individual’s intent, although not

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the underlying act can serve as evidence from which the fact-finder may draw the further inference that the accused possessed the specific intent to destroy.”); *see also Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 706.

76. *See, e.g., Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 34. (“The absence of such statements [indicating genocidal intent] is not determinative. Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.”). *Id.*

77. *See id.* (“The inference that a particular atrocity was motivated by genocidal intent may be drawn . . . even where the individuals to whom the intent is attributable are not precisely identified.”); *see also Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 707.

78. *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580.

79. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998).

80. The Author does not mean to suggest that this factual information would be “evidence” of the crimes, but rather, that it is indicative of the type of information that could be collected by a court (such as the International Criminal Court).

exclusively.<sup>81</sup> As mentioned above, the bulk of the information cited below pertains to crimes committed in 2003 and 2004, which have also been the years as to which the ICC's initial investigation focused.<sup>82</sup> By emphasizing crimes committed in those years, this Article does not mean to suggest that crimes have not continued—indeed, they have.<sup>83</sup>

#### a. The Extent of the Actual Destruction

As mentioned above, one of the indicators of whether there has been “intent to destroy” is the scope of the actual destruc-

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81. For example, it would be possible to show that there was “intent to destroy” by one individual, and another individual knowingly and intentionally aided the first, which could show that the second person was an “aider and abettor” of genocide. *See, e.g., Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Judgment, ¶¶ 330, 342 (Dec. 13, 2006) (considering the utterances of others, in determining whether the accused was aware of the intention of the attackers to commit genocide for case of aiding and abetting genocide). Thus, as explained in *Brđjanin*:

Complicity in genocide, where it consists of aiding and abetting genocide, does not require proof that the accomplice had the specific intent to destroy, in whole or in part, a protected group. In that case the Prosecution must prove beyond reasonable doubt “that an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender’s state of mind; it need not show that an accused shared the specific intent of the principal offender.”

*Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 730 (citation omitted). For aiding and abetting genocide, additionally, it must be shown that “[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.” *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 45 (July 29, 2004) (quoting *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶ 102 (Feb. 23, 2004)).

82. *See Sixth Report*, *supra* note 13, at 2. The Prosecutor recently announced an intention to open Sudan investigations in two new areas: (a) attacks on peacekeepers, and (b) the pattern of attacks against those who have been displaced. *See U.N. Security Council, Statement by Mr. Luis Moreno Ocampo, Prosecutor of the International Criminal Court: Statement to the United Nations Security Council Pursuant to UNSCR1593* (Dec. 5, 2007), available at [http://www.icc-cpi.int/cases/Darfur/s0205/s0205\\_un.html](http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html).

83. According to Human Rights Watch, in assessing the situation in 2007:

The situation in Darfur remains grave. The violations of international human rights and humanitarian law that Darfurians suffered in recent years have continued into 2007. Government air and ground forces have repeatedly conducted indiscriminate attacks in areas of rebel activity, causing numerous civilian deaths and injuries. Looting, beatings, murder, and rape perpetrated primarily (but not exclusively) by government forces, Janjaweed, and former rebels have created a climate of fear that impinges on everyday life for millions of people in towns, villages, and displaced persons camps.

CHAOS BY DESIGN, *supra* note 2, at 14; *see also* Polgreen, *supra* note 32.

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tion, although extensive actual destruction is not required.<sup>84</sup> Here, estimates are that 200,000-400,000 have been killed<sup>85</sup> and 2.5 million displaced.<sup>86</sup> Large swaths of rural Darfur have been emptied of their original populations.<sup>87</sup> These facts and those detailed further below clearly suggest that there has been extensive actual destruction.

b. The Perpetration and/or Repetition of Destructive or Discriminatory Acts Committed as Part of the Same Pattern of Conduct

Here, one clearly sees the perpetration and/or repetition of destructive or discriminatory acts committed as part of the same pattern of conduct—another factor from which genocide may be inferred.<sup>88</sup>

The attacks, at least during the period in question, form a clear pattern: (i) there has been clear coordination between the Janjaweed and Government of Sudan forces to target the Fur, Masalit and Zaghawa; (ii) the Sudanese military forces<sup>89</sup> commence with aerial bombardment using Antonovs and MiG planes and attack helicopters;<sup>90</sup> (iii) the Janjaweed then move in on foot to kill, loot, burn and perpetrate other crimes at close range, while government forces move in by Land Cruisers; (iv) sometimes military gunships reappear a few days after the initial

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84. As stated in *Brđjanin*:

In view of the specific intent required for genocide, it is not necessary to prove the *de facto* destruction of the group in whole or in part. Nevertheless, the *de facto* destruction of the group may constitute evidence of the specific intent and may also serve to distinguish the crime of genocide from the inchoate offences in Article 4(3) of the Statute, such as the attempt to commit genocide.

*Brđjanin*, Case No. IT-99-36T, Judgment, ¶ 697.

85. See *supra* note 1 and accompanying text.

86. See *supra* note 2 and accompanying text.

87. See *DARFUR DESTROYED*, *supra* note 8, at 26.

88. See *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶¶ 893-94.

89. Some of the Sudanese armed forces who participated in attacks in Darfur are believed to come from the first and sixth Infantry Divisions. See *ENTRENCHING IMPUNITY*, *supra* note 10, at 33.

90. According to Human Rights Watch, “[t]he rebel groups in Darfur do not have aircraft, so it can be assumed that the Antonov and MiG planes and attack helicopters used to bomb villages belong to the Sudanese armed forces. In addition, eyewitnesses have seen the Antonovs, MiGs, and helicopters at government airports in Darfur.” *DARFUR DESTROYED*, *supra* note 8, at 7 n.10. The Antonovs dropped “barrel bombs” filled with metal shards. *Id.* at 24.

attacks, as if to verify that the village had been destroyed.<sup>91</sup>

For example, witness statements reveal the pattern of bombardment by government armed forces with the Janjaweed following on horseback to commit crimes at close range:

- Sildi was attacked, first by air and then by land, on February 7, 2004. Abdul, a forty-two-year-old farmer, said *two Antonovs bombed first*, destroying two huts and sending women and children running for shelter in the hills. “*Then the Janjaweed and the government came*,” he said. “Twelve were killed in the village, then it was burned. Some were killed point-blank.”<sup>92</sup>
- Another farmer, forty-year-old Ahmad, said he saw only one Antonov—at 8:00 a.m. “At 9:00 am,” he said, “*the Janjaweed came with horses and camels and behind them the army with cars*.” In the next few days, thirty villages of Sildi were looted and burned.<sup>93</sup>
- Tunfuka was attacked, by air and land, on February 7, 2004, killing at least twenty-six people, according to villagers now in Chad. Izhaq, a twenty-four-year-old farmer, said *two Antonovs bombed for an hour and killed eight people*—including three men, three children and two old women. He said seven camels and thirteen cows were killed, and the village began to burn. *The army arrived in vehicles and the Janjaweed followed* an hour later,

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91. According to Human Rights Watch:

Gunships have also been used to reconnoitre villages immediately after they have been burned and attacked – arriving within one to three days of the initial attacks, according to villagers. Sheikh Abdullah of Terbeba said gunships and Antonovs flew over Terbeba three or four days after the village was destroyed. “They did not bomb,” he said. “We think they were looking – to see what was there and to make sure the village was empty.”

*Id.* at 25. One report, published on the U.S. Department of State website, characterizes the “pattern” of attacks slightly differently:

- 1) GOS [Government of Sudan] aircraft or helicopters bomb villages.
- 2) GOS soldiers arrive in trucks, followed closely by Jingaweit militia riding horses or camels.
- 3) GOS soldiers and militia surround and then enter villages, under cover of gunfire.
- 4) Fleeing villagers are targets in aerial bombing.
- 5) The Jingaweit and GOS soldiers loot the village after most citizens have fled, often using trucks to remove belongings.
- 6) Villages often experience multiple attacks over a prolonged period before they are destroyed by burning or bombing.

DOCUMENTING ATROCITIES, *supra* note 5, at 5.

92. DARFUR DESTROYED, *supra* note 8, at 17 (quoting a Human Rights Watch interview in Abdul on March 29, 2004) (emphasis added).

93. *Id.* (quoting a Human Rights Watch interview in Ahmad on March 29, 2004) (emphasis added).

shouting racial abuse, shooting eighteen people dead and looting the cattle.<sup>94</sup>

- “On February 10, 2004, Antonov planes bombed the village of Tullus in advance of an attack on the village by Janjaweed.”<sup>95</sup>
- “Antonovs bombed Habila six times that day,” he said. “Twenty-four people were killed. All were civilians.”<sup>96</sup>
- “The attack [on Terbeba] was done by some 300 Janjaweed on horses and camels, accompanied by four government cars—three Land Cruisers carrying soldiers and a Renault for logistics [ammunition].”<sup>97</sup>

Countless similar accounts exist.<sup>98</sup> Those taking eye-witness testimony have concluded that: “Villages were not attacked at random, but were emptied across wide areas in operations that reportedly lasted for several days or were repeated several times until the population was finally driven away.”<sup>99</sup>

As part of these attacks, as detailed further below, a panoply of crimes have been committed, including murder—not only of military-age men, but also of children, women and the elderly—mass executions,<sup>100</sup> torture, rape, individuals being buried alive, detentions, denial of access to medical treatment,<sup>101</sup> looting, theft of cattle, destruction of food stocks, destruction of mosques, and burning of villages.<sup>102</sup>

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94. *Id.* at 18 (quoting a Human Rights Watch interview in Izhaq, Chad on April 14, 2004) (emphasis added).

95. *Id.*

96. *Id.* at 25.

97. *Id.* at 20 (emphasis added).

98. See generally, *DARFUR DESTROYED*, *supra* note 8; *ENTRENCHING IMPUNITY*, *supra* note 10.

99. *DARFUR DESTROYED*, *supra* note 8, at 26.

100. See *infra* Part II.F.1.

101. See *infra* Part II.F.2.

102. See *infra* Part II.F.3. The U.N. Commission of Inquiry found that the crimes committed in Darfur included:

[I]ndiscriminate attacks on civilians, killing of civilians, killing of detained enemy servicemen, killing of wounded enemy servicemen, wanton destruction of villages or devastation not justified by military necessity, forcible transfer of civilian populations, rape and other forms of sexual violence, torture, outrages upon personal dignity and cruel, inhuman or degrading treatment, plunder, unlawful confinement, incommunicado detentions and enforced disappearances, and recruitment and use of children under the age of 15 in armed hostilities.

Mathew, *supra* note 7, at 535-36.

As to the coordination between the Government of Sudan (or its armed forces) and the Janjaweed militias, that can be seen not only from their joint operations, but the fact that, as detailed further below, Sudanese armed forces have recruited the Janjaweed, and provided them with weapons, ammunition, uniforms, communication equipment and vehicles.<sup>103</sup>

### c. Ethnically Charged Utterances

There are numerous accounts of racially charged epithets accompanying the killing—another factor that is used to infer genocidal intent.<sup>104</sup> For example, eyewitnesses have stated:

- “They came into Kondoli saying: ‘*Kill the Nuba! Kill the Nuba!*’ They shot a child who was lying on the ground because he was afraid. They said: ‘Get up so we can see you.’ But he was afraid. So they shot him. He was called Maji Gumr Zahkariah and he was three years old.”<sup>105</sup>
- “[S]even army Land Cruisers came. The Janjaweed arrived an hour later. They burned the village, rounded up the cattle and shot people who were running away. They killed eighteen people. Then the Janjaweed left with the cattle followed by the government. The Janjaweed were shouting: ‘*Kill the Nuba!*’”<sup>106</sup>
- “The Janjaweed were shouting: ‘*Kill all the Nuba!*’ About 90 percent of them were wearing army uniforms and the rest were in ordinary clothes.”<sup>107</sup>
- “It was 2:30 p.m., time for prayers. The Janjaweed went in, on foot and on horseback, and killed ten people including the imam, Yahya Gabat. Then they turned and started shooting into the market. The bullets were falling like rain and they were shouting: ‘*Kill the Nuba! Kill the Nuba!*’ They killed my seventy-five-year-old aunt, Kaniya Hassan, because she re-

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103. See ENTRENCHING IMPUNITY, *supra* note 10, at 65.

104. See Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶¶ 985-88 (September 1, 2004); see also Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 52 (March 22, 2006) (“[E]thnic slurs . . . might reasonably be understood as an implied call for the group’s destruction.”).

105. DARFUR DESTROYED, *supra* note 8, at 14-15 (emphasis added). “Nuba” refers to people from the Nuba Mountains of central Sudan, but is used derogatorily by Janjaweed and others to refer to ethnic Africans. *Id.* at 15 n.29; see also ENTRENCHING IMPUNITY, *supra* note 10, at 16 n.35.

106. DARFUR DESTROYED, *supra* note 8, at 18 (describing the attack in Tunfuka) (emphasis added).

107. *Id.* at 20 (describing the attack on Terbeba) (emphasis added).

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fused to let them take her sheep and goats.”<sup>108</sup>

- “The Janjaweed came and surrounded the market. At first people thought they had come to protect it. But then they began to shout: ‘*Kill the Nuba!*’ and they attacked. They had RPGS and M79 grenade launchers and killed many people and stole everything from the market.”<sup>109</sup>
- “The Janjaweed brought camels into the village and they ate all the sorghum. They burned the village and stole all my things—including fourteen cows. They were shouting: ‘*Kill the Nuba! Kill the Nuba!*’ All this is because we are black. We could defend ourselves against the Arab nomads, but not against the Janjaweed. The government has given them very good guns and attacks with them.”<sup>110</sup>
- Adam, a thirty-two-year-old farmer burned out of Gokar village near Geneina, said a Janjaweed leader in Geneina, Omda Saef, told local people: “*This place is for Arabs, not Africans.*”<sup>111</sup>
- One victim described radio conversation he had overheard from Sudanese army pilots: “in their conversations on the radio they called us ‘Nuba, abid,’ and said things like, ‘*I am going to give those slaves a lesson they will not forget.*’”<sup>112</sup>
- A twenty-seven-year-old Fur man from Arwalla who was arrested and beaten said those doing the beatings insulted the victims, saying: “*You slaves, this is not your country.*”<sup>113</sup>
- An eyewitness to the August 15, 2003 attack on Bindisi said that the leader of the attack, Ali Kosheib,<sup>114</sup> was screaming during the attack: “Nuba, Nuba, you are *monarada* [opposition], you *are all slaves.*”<sup>115</sup>

Those being attacked have explained: “The government wants

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108. *Id.* at 29 (emphasis added).

109. *Id.* (emphasis added).

110. *Id.* at 30 (emphasis added). The African tribes refer to themselves as “black,” as a way of distinguishing themselves from the Janjaweed attackers. It should be noted, however, that the Janjaweed are also dark in skin color.

111. *Id.* at 42 (emphasis added).

112. ENTRENCHING IMPUNITY, *supra* note 10, at 16 (quoting a Human Rights Watch interview conducted in a refugee camp in Chad on June 29, 2005) (emphasis added). “Abid” is Arabic for slave. *Id.*

113. *Id.* at 29 (emphasis added).

114. Kosheib was also described as giving orders during the attack, and present during a March 2004 attack on Tanako. *Id.*

115. *Id.* (quoting a Human Rights Watch interview conducted in a refugee camp in Chad on June 27, 2005) (emphasis added). The most commonly used epithets are “abid” (slave) and “zurga” (blue/black or dirty/black). “Nuba” is not used more commonly than those. Interview with Eric Reeves, *supra* note 6.



to kill all African people, Muslim or not Muslim, so as to put Arabs in their places,”<sup>116</sup> and “they killed everything black . . . they don’t want African tribes in this place.”<sup>117</sup> The Janjaweed have also been described as rendering “Arabization” services to the Government of Sudan.<sup>118</sup> According to survivors who fled an attack on Hamada on January 13-14, 2005, the Janjaweed attackers repeatedly stated their intention of “cleaning the whole area.”<sup>119</sup>

#### d. The Existence of a Genocidal Plan or Policy

There also appears to be both inferential evidence of a joint Government of Sudan/Janjaweed “plan or policy” of destruction, and possibly actual evidence of such a “plan or policy.” As noted above, the law suggests that a plan or policy of destruction can be a strong indicator of intent, although it is not required.<sup>120</sup>

The coordination between the Government of Sudan armed forces and the Janjaweed—discussed above—suggests that there was a plan to attack the Fur, Masalit and Zaghawa. Additionally, it is possible that command and control lines were or are actually intertwined:<sup>121</sup>

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116. DARFUR DESTROYED, *supra* note 8, at 28.

117. *Id.* at 27.

118. *See id.* at 29.

119. ENTRENCHING IMPUNITY, *supra* note 10, at 55 (quoting interviews with displaced people from Hamada conducted in January, 2005). As explained by a report on the U.S. State Department website:

Numerous credible reports corroborate the use of racial and ethnic epithets by both the Janjaweed and GOS military personnel; “[k]ill the slaves; [k]ill the slaves!” and “[w]e have orders to kill all the blacks” are common. One refugee reported a militia member stating, “[w]e kill all blacks and even kill our cattle when they have black calves.”

DOCUMENTING ATROCITIES, *supra* note 5, at 5.

120. *See supra* note 54 and accompanying text (discussing legal requirements for the existence of a plan or policy); Prosecutor v. Simba, Case No. ICTR-01-76-A, Appeals Chamber Judgment, ¶ 260 (Nov. 27, 2007) (“[A]ccording to the jurisprudence of this Tribunal as well as that of the ICTY the existence of an agreement or a plan is not an element required for a conviction for genocide.”). As to the U.N. Commission of Inquiry’s conclusion that “no genocidal policy has been pursued and implemented in Darfur,” *Commission of Inquiry, supra* note 7, ¶ 642, not only is the law clear that there need *not* be a genocidal policy, but the facts below clearly suggest that the killing has been pursuant to a plan or policy.

121. *See* ENTRENCHING IMPUNITY, *supra* note 10, at 32 (suggesting that responsibility for Sudanese military and possibly Janjaweed crimes would go up the chain of command to former Minister of Defence Maj. Gen. Bakr Hassan Salih, Chief of Staff Abbas Arabi, and President El Bashir as the Commander-in-Chief).

- For example, in a remarkable admission, one Sudanese army official stated that all of Janjaweed leader Musa Hilal's operations were under the control of the army.<sup>122</sup>
- Some Janjaweed appear to have been incorporated into various units of the security forces or the Central Reserve Police.<sup>123</sup>
- On one occasion, Janjaweed Commander Musa Hilal was overheard prior to a February 27, 2004 attack on Tawila on "Thurayas [satellite phone] with someone in Khartoum, to arrange the point where the plane should land to bring the required ammunition" to the Janjaweed.<sup>124</sup>
- Additionally, a forty-two-year old Zaghawa man reported that Janjaweed commander Musa Hilal gave "orders to both soldiers and Janjaweed."<sup>125</sup>
- At a mass execution of several hundred men at Wadi Saleh, discussed further below,<sup>126</sup> high level government officials<sup>127</sup> were present while the Janjaweed and soldiers carried out the attacks;<sup>128</sup> Wadi Saleh victims were first detained in police or military custody prior to execution by the Janjaweed and soldiers.<sup>129</sup>
- As part of several attacks on villages in the Kutum area, a former Sudanese army soldier heard a Sudanese army commander named Major Gaddal Fadlallah give clear instructions to attack civilians, stating: "On your way, every house and village needs to be burned completely. I do not want to see any left after the battle." He added: "All men, even civilians that you see should be killed."<sup>130</sup> Others observed that

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122. *See id.* at 12 (citing a Human Rights Watch interview with Maj. Gen. Mohamed Fazey of the Sudan army in Fashir, North Darfur, on Oct. 6, 2004).

123. *See id.* at 54.

124. *Id.* at 17 (quoting a Human Rights Watch interview with a trader in North Darfur on Oct. 4, 2004).

125. *Id.* at 18 (quoting a Human Rights Watch interview in a refugee camp in Chad on July 2, 2005).

126. *See infra* Part II.F.1.

127. The then-commissioners of Mukjar, El Tayib Abdallah Torshain, and of Garsila, Ja'afar Abdul el Hakh, were present. *See* ENTRENCHING IMPUNITY, *supra* note 10, at 24.

128. *See id.* The Janjaweed were commanded by "Ali Kosheib," which is apparently the *nom de guerre* of Ali Mohammed Ali, an ex-army soldier. *See id.* at 25.

129. *See id.*

130. *Id.* at 44 (quoting a Human Rights Watch interview with a former army soldier in Darfur on July 14, 2005).

the Janjaweed were “commanded by a military officer.”<sup>131</sup>

- Sudanese security officials are believed to serve as liaisons with Janjaweed leaders, and military intelligence is believed to have been a conduit for supplies for the Janjaweed.<sup>132</sup>
- The Janjaweed have also stated “we are the government”<sup>133</sup> and wear uniforms similar to government uniforms.<sup>134</sup>

It is also clear that the Government of Sudan has taken no serious steps to prevent or punish those implicated in crimes.<sup>135</sup> Indeed, recently, the government of Sudan promoted Janjaweed militia leader, Musa Hilal to an official government position.<sup>136</sup> All of this coordinated action by the Janjaweed and Government armed forces is circumstantial evidence that there was a joint plan to attack the Fur, Masalit and Zaghawa.

Furthermore, there is some suggestion that there may have been an actual plan memorialized in government memoranda. For example, there appear to be government documents that authorize the recruitment and arming of the Janjaweed militia, “provision of military support to allied ethnic groups, and in one case, provid[ing] relative impunity for abuses committed by Janjaweed militia members against civilians.”<sup>137</sup> For example:

- A November 22, 2003, letter from South Darfur governor Adam Hamid Musa to the commissioner of Nyala and then-commissioner of Kass requests the commissioners to “prepare for the recruitment of three hundred knights [Janjaweed] for

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131. *Id.* at 45 (quoting a Human Rights Watch interview in Khartoum on October 21, 2004).

132. *See id.* at 51.

133. DARFUR DESTROYED, *supra* note 8, at 14, 30. “‘We are the government!’ Time and again, members of Darfur’s Masalit community told Human Rights Watch that this was the response of the Janjaweed—at checkpoints, in the streets, in the course of robberies or cattle rustling—whenever civilians attempted to defend themselves and their property.” *Id.* at 42.

134. *See id.* at 45 (noting that the Janjaweed are “headed by officers who wear the same stripes as generals in the regular army. The only difference between Janjaweed and army uniforms, Masalit say, is a badge depicting an armed horseman that the Janjaweed sport on their breast pocket.”).

135. *See* ENTRENCHING IMPUNITY, *supra* note 10, at 63. The International Commission of Inquiry on Darfur to the United Nations Secretary-General has also concluded that “[t]he Sudanese justice system is unable and unwilling to address the situation in Darfur.” *Commission of Inquiry*, *supra* note 7, at 5.

136. *See Sudan Gives Advisor Role to Militia Leader*, N.Y. TIMES, Jan. 21, 2008, at A8.

137. DARFUR DOCUMENTS, *supra* note 10, at 4.

Khartoum.”<sup>138</sup>

- Another memorandum dated February 12, 2004, outlines the necessary step of “designing a plan for resettlement operations of nomads [Janjaweed] in places from which the outlaws [African Tribes] withdrew . . . .”<sup>139</sup>
- A further memorandum dated February 13, 2004 orders security units to “allow [or permit] the activities of the mujahadeen and the volunteers under the command of Sheikh Musa Hilal [the Janjaweed] to proceed in the area of [North Darfur] and to secure their vital needs.”<sup>140</sup>
- The document continues: “We also highlight the importance of non-interference so as not to question their authorities and to overlook minor offences by the mujahadeen [Janjaweed] against civilians who are suspected members of the rebellion . . . .”<sup>141</sup>
- Another document, marked “highly confidential” provides that the Janjaweed will “protect” internally displaced Darfurians in camps.<sup>142</sup>
- An unauthenticated document seized from a Janjaweed official, dated August 2005, calls for the “execution of all directives from the president of the republic.” The document urges regional commanders and security officials to: “Change the demography of Darfur and make it void of African tribes,” and encourages “killing, burning villages and farms, terrorizing people, confiscating property from members of African tribes and forcing them from Darfur.”<sup>143</sup>

As mentioned above, there are also references to “Arabization” being conducted,<sup>144</sup> so that the plan may in fact have a name (although it is unclear whether those who perpetrated or planned the killings used that term).

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138. ENTRENCHING IMPUNITY, *supra* note 10, at 22; DARFUR DOCUMENTS, *supra* note 10, at 7.

139. ENTRENCHING IMPUNITY, *supra* note 10, at 23.

140. *Id.* at 23; DARFUR DOCUMENTS, *supra* note 10, at 5.

141. DARFUR DOCUMENTS, *supra* note 10, at 5.

142. *See id.* at 9 (citing the “highly confidential” February 2004 memorandum).

143. Nicholas D. Kristof, *The Secret Genocide Archive*, N.Y. TIMES, Feb. 23, 2005, at A19. Kristof noted that the document is possibly a forgery, although the African Union believes it to be authentic. *See id.*; *see also* WILLIAM G. O’NEILL & VIOLETTE CASSIS, BROOKINGS INSTITUTE-UNIV. OF BERN, PROTECTING TWO MILLION INTERNALLY DISPLACED: THE SUCCESSES AND SHORTCOMINGS OF THE AFRICAN UNION IN DARFUR (2005).

144. *See* DARFUR DESTROYED, *supra* note 8, at 28-29.

e. Destruction of Cultural and Religious Property as Added Evidence of Intent to Destroy

The attacks also show destruction of “cultural and religious property” which, while not in and of itself a form of genocide, again helps to show intent.<sup>145</sup>

As to the destruction of cultural property, for example, the U.S. Congress and Human Rights Watch, as mentioned above, have characterized the joint Government of Sudan and Janjaweed militia attacks as “scorched-earth tactics,”<sup>146</sup> in which everything within the villages in Darfur has been destroyed:

Since August 2003, wide swathes of [the homelands] of the Fur, Masalit and Zaghawa], among the most fertile in the region, have been burned and depopulated. With rare exceptions, the countryside is now emptied of its original Masalit and Fur inhabitants. Everything that can sustain and [succor] life—livestock, food stores, wells and pumps, blankets and clothing—has been looted or destroyed. Villages have been torched not randomly, but systematically—often not once, but twice.<sup>147</sup>

Because virtually nothing is left remaining of villages that were attacked, any cultural property was destroyed.

As to the destruction of religious property, there are accounts of Government and Janjaweed forces having “burned at least sixty-five mosques in Dar Masalit.”<sup>148</sup> The “Janjaweed who attacked Urum in November 2003 killed . . . the imam and his orphaned three-year-old grandson.”<sup>149</sup> The “Janjaweed also rode into the mosque in Mulli and shot dead ten people including the imam . . . .”<sup>150</sup> There are also reports of Janjaweed defecating on Korans.<sup>151</sup>

f. Sexual Violence as Added Evidence of Intent to Destroy

Finally, the law also suggests that sexual violence can help

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145. See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 580 (Aug. 2, 2001).

146. Comprehensive Peace in Sudan Act of 2004 § 3(7), 50 U.S.C. § 1701 (2006); DARFUR DESTROYED, *supra* note 8, at 7.

147. DARFUR DESTROYED, *supra* note 8, at 2.

148. *Id.* at 28. Human Rights Watch has created a list of some of the mosques that were burned in Dar Masalit. See *id.* at 66, Appendix C.

149. *Id.* at 28.

150. *Id.*

151. See *id.*

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show intent to destroy.<sup>152</sup> There are numerous eyewitness accounts of rape. For instance, according to testimony of one survivor: “The Janjaweed took girls into the grass and raped them there—in Dingo and Koroma. They raped thirteen including eighteen-year-old Khadija.”<sup>153</sup> “Near Sissi, three women, aged thirty-two, twenty-two and twenty-five, were abducted at a water hole and taken to Nouri school, which was abandoned, and were raped.”<sup>154</sup> “In the village of Dureysa, on the Masalit-Fur border, a seventeen-year-old girl who resisted rape was killed and her naked body left on the street.”<sup>155</sup> Between November 30 and December 2, 2004, those women and girls who had not managed to leave Adwah were raped.<sup>156</sup> As part of the January 13-14, 2005 attack on Hamada, the Janjaweed raped women and girls, some repeatedly.<sup>157</sup> One woman reported being raped repeatedly by Sudanese military and Janjaweed in front of her father; afterwards, her father was dismembered in front of her.<sup>158</sup> Another woman was held for a week against her will and repeatedly raped in front of her nine-month-old daughter; they eventually escaped to a refugee camp in Southern Chad.<sup>159</sup> According to Human Rights Watch, “[r]ape appears to be a feature of most attacks in Fur, Masalit, and Zaghawa areas of Darfur;” however, the extent of the rape is difficult to determine because the subject is not freely discussed.<sup>160</sup> One survey reported that sixteen percent of respondents indicated that they had been raped or

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152. See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 731 (Sept. 2, 1998).

153. *DARFUR DESTROYED*, *supra* note 8, at 10 (quoting a Human Rights Watch interview in Chad on March 28, 2004).

154. *Id.* at 34 (quoting a Human Rights Watch interview in Feisal, Darfur, on April 5, 2004).

155. *Id.*

156. See *ENTRENCHING IMPUNITY*, *supra* note 10, at 38.

157. See *id.* at 43.

158. See *DOCUMENTING ATROCITIES*, *supra* note 5, at 5.

159. See *id.*

160. See *DARFUR DESTROYED*, *supra* note 8, at 33. Congress has referred to “the systematic rape of thousands of women and girls . . . .” Comprehensive Peace in Sudan Act of 2004 § 3(9), 50 U.S.C. § 1701 (2006). For an extensive discussion of rape in Darfur, see TARA GINGERICH & JENNIFER LEANING, U.S. AGENCY FOR INT’L DEV./OTI, *THE USE OF RAPE AS A WEAPON OF WAR IN THE CONFLICT IN DARFUR, SUDAN (2004)*, available at <http://physiciansforhumanrights.org/library/documents/reports/the-use-of-rape-as-a-weapon.pdf>. A Darfurian NGO had documented 9,300 cases of rape by 2004. *Id.* at 16.

heard of someone being raped.<sup>161</sup>

g. Displacement in Deplorable Conditions as Added Evidence of Intent to Destroy

As mentioned above, the law is somewhat unsettled whether displacement can be viewed as an additional indicator of “intent to destroy,” although the majority view appears to be that it can.<sup>162</sup> Accordingly, a possible additional argument would be that the conditions in which the displacement occurred were so deplorable that they suggested a more slow moving, but nonetheless lethal, attempt to destroy, among others, the Fur, Masalit and Zaghawa.<sup>163</sup> The argument would be that because: (a) the conditions of displacement—where those displaced had no “means of sustenance or shelter”<sup>164</sup>—were insufficient to sustain life;<sup>165</sup> and (b) attacks have continued against displaced persons in “camps,” the way in which the displacement occurred provides added indications of intent to destroy. Indeed, Human Rights Watch has concluded:

The subsequent denial of humanitarian assistance to this population by the government of Sudan, in conditions where the population has been rendered entirely dependent on relief, can also be considered as part of a strategy to weaken and perhaps destroy a large proportion of the displaced population and prevent their return to their home villages.<sup>166</sup>

As to the displacement occurring in deplorable conditions, that cannot be denied. Civilians displaced into camps have suffered tremendously due to inadequate humanitarian assistance—which has sometimes even been blocked by the Govern-

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161. See DOCUMENTING ATROCITIES, *supra* note 5, at 5.

162. See *supra* notes 59-65 and accompanying text.

163. The crime of “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction” covers methods of destruction by which the perpetrator does not immediately kill group members, but which, ultimately, seek their physical destruction. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 517 (July 31, 2003).

164. Comprehensive Peace in Sudan Act of 2004 § 3(12), 50 U.S.C. § 1701 (2004) (discussing the Sudanese government’s restriction of access on humanitarian and human rights workers to the Darfur area).

165. Indeed, one estimate is that “one in three children in the refugee settlements in Chad is suffering from acute malnutrition.” DOCUMENTING ATROCITIES, *supra* note 5, at 3.

166. DARFUR DESTROYED, *supra* note 8, at 40.

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ment of Sudan.<sup>167</sup> Those displaced have largely been deprived of their assets, land, security, and freedom of movement; because they are confined in camps and unable to access their land or even the wild foods, markets, and labor migration that could normally sustain them in times of crisis, they are entirely dependent on humanitarian assistance.<sup>168</sup> As to crimes continuing against those displaced, eyewitness accounts indicate that militias continue to attack displaced civilians, “beating women and children who attempt to leave these settlements in order to collect firewood, wild foods or other essential items, and sometimes killing them; women have been raped.”<sup>169</sup> According to a 2007 report:

People forced to flee their homes who make it into the camps invariably find themselves trapped there. If they venture outside to collect firewood, farm, or attempt to return to their villages they risk being harassed, robbed, beaten, or murdered by Janjaweed or other armed men. Women and girls attempting to carry out the routine activities of daily life are often sexually harassed and raped by these armed men, who include government forces or even former rebels who once claimed to be fighting on behalf of their victims. Insufficient security in the camps has exacerbated problems of domestic violence and sexual exploitation.<sup>170</sup>

Men have also been tortured and killed.<sup>171</sup>

Accordingly, in the situation of Darfur, there is a plethora of factual information suggesting the existence of “intent to destroy.” In fact, virtually every indicator that the law suggests as to “intent to destroy” appears to be present. One has to wonder, if this is not enough evidence of “intent to destroy,” what evidence would be enough? Raphael Lemkin—who coined the term “genocide”<sup>172</sup>—clearly indicated that “genocide” did not need to wait until entire groups were actually destroyed; that is why genocide is an intent crime, and prohibits destruction of protected groups not only “in whole” but “in part.”<sup>173</sup>

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167. *See id.* at 50.

168. *See id.* at 58-59.

169. *Id.* at 42.

170. CHAOS BY DESIGN, *supra* note 2, at 17.

171. *See* DARFUR DESTROYED, *supra* note 8, at 42.

172. *See* Jack, *supra* note 36, at 708.

173. *See* Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment, ¶ 412 (Dec. 13, 2005) (“To find an accused guilty of the crime of genocide it must be established that



## B. *The Requirement of "In Whole or In Part"*

### 1. The Legal Criteria

The next requirement of genocide's *dolus specialis* is that there be intent to destroy a group or groups "in whole or in part." As to this requirement, case law explains that there must be intent to destroy *a distinct* part of the group, not isolated individuals within it:<sup>174</sup>

Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area.<sup>175</sup>

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he committed any of the enumerated acts . . . with the specific intent to destroy, in whole or in part, a group, as such, that is defined by one of the protected categories of nationality, race, ethnicity, or religion.").

174. As explained by the Trial Chamber in *Brđjanin*:

[U]nder the Genocide Convention, the terms "in whole or in part" speak to the intended scope of destruction, as opposed to the actual destruction of the group . . . . The Trial Chamber agrees with the *Krstić* and *Stakić* Trial Chambers that "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it."

Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 700 (Sept. 1, 2004); see Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 524 (July 31, 2003). The Trial Chamber in *Krstić* explained:

[T]he intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.

Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 590 (Aug. 2, 2001).

175. *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 590.

## a. Requirement of a “Substantial Part”

Where the entire group is not targeted for destruction, but only a “part” of the group, case law specifies that the part of the group targeted must be a “substantial” part of the whole group.<sup>176</sup> Thus, the Appeals Chamber in *Krstić* explained:

It is well established that where a conviction for genocide relies on the intent to destroy a protected group “in part,” the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.<sup>177</sup>

The Appeals Chamber in *Krstić* further opined on when the

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176. See, e.g., *Simba*, Case No. ICTR-01-76-T, Judgment, ¶ 412 (“Although there is no numeric threshold, the perpetrator must act with the intent to destroy at least a substantial part of the group.”); *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Judgment, ¶ 479 (Sept. 12, 2006) (“While there is no upper or lower limit to the number of victims from the protected group, the Prosecution must prove beyond reasonable doubt that the perpetrator acted with the intent to destroy at least a substantial part of the group.”).

177. *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 8. The *Krstić* decision continued:

The question has also been considered by Trial Chambers of the ICTR, whose Statute contains an identical definition of the crime of genocide. These Chambers arrived at the same conclusion. In *Kayishema*, the Trial Chamber concluded, after having canvassed the authorities interpreting the Genocide Convention, that the term “‘in part’ requires the intention to destroy a considerable number of individuals who are part of the group.” This definition was accepted and refined by the Trial Chambers in *Bagilishema* and *Semanza*, which stated that the intent to destroy must be, at least, an intent to destroy a substantial part of the group.

*Id.* ¶ 9.

In the *Krstić* case, the Appeals Chamber held that “[t]he intent requirement of genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group.” It further stated that “the substantiality requirement both captures genocide’s defining character as a crime of massive proportions and reflects the Convention’s concern with the impact the destruction of the targeted part will have on the overall survival of the group.”

*Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 701; see *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 634 (“[A]n intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively.”); *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 82 (Dec. 14, 1999) (“[I]t is widely acknowledged that the intention to destroy must target at least a *substantial* part of the group.”) (citation omitted); *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶¶ 10-11 (discussing the sources of the “substantial part” requirement, including Raphael Lemkin, who coined the term genocide and was instrumental in drafting the Genocide Convention).

targeted part of the group satisfies the “substantial part” requirement:

The determination of when the targeted part is substantial enough to meet this [substantial part] requirement may involve a number of considerations. The *numeric size of the targeted part of the group is the necessary and important starting point*, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its *prominence within the group can be a useful consideration*. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.<sup>178</sup>

#### b. Destruction May Be Limited to a Geographical Zone

Case law also establishes that destruction may be limited to a geographical zone.<sup>179</sup> Thus, the Trial Chamber in *Krstić* explained: “the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.”<sup>180</sup> Thus for example, the Trial Chamber in *Stakić* suggested that destruction even within a single municipality might constitute genocide,<sup>181</sup> although it noted that that approach “might distort the definition of genocide if it is not applied with caution.”<sup>182</sup>

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178. *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶¶ 12, 14 (emphasis added).

179. *See Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 703 (“[T]he jurisprudence of the Tribunal supports the approach that permits a [characterization] of genocide even when the specific intent to destroy a group, in part, extends only to a limited geographical area.”); *see also Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 83.

180. *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 590.

181. *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 523 (July 31, 2003).

182. *Id.* (“In construing the phrase ‘destruction of a group in part,’ the Trial Chamber with some hesitancy follows the jurisprudence of the Yugoslavia and Rwanda Tribunals which permits a [characterization] of genocide even when the specific intent extends only to a limited geographical area, such as a municipality.”); *see also Luban*, *supra* note 4, at 313 (arguing that “once the group is reinterpreted as a ‘group-within-a-given-territory,’ the difference between genocide and the crime against humanity of extermination begins to thin dramatically.”).

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Applying these criteria, for example, the ICTY Appeals Chamber in *Krstić* concluded that the targeting of 40,000 Bosnian Muslims of Srebrenica was a “substantial part” of the targeted group.<sup>183</sup> There, the Appeals Chamber found that the Army of Republika Srpska Main Staff and Radislav Krstić targeted the “Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia.”<sup>184</sup> The size of the Bosnian Muslim population in Srebrenica prior to its capture by the Army of Republika Srpska forces in 1995 amounted to approximately forty thousand people.<sup>185</sup> While the court concluded that the 40,000 “constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time,” it held that “the importance of the Muslim community of Srebrenica is not captured solely by its size.”<sup>186</sup> The court found relevant that Srebrenica was of “immense strategic importance to the Bosnian Serb leadership”<sup>187</sup> and that “Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community”—as a so-called “safe area.”<sup>188</sup>

In *Prosecutor v. Brđjanin*, the ICTY Trial Chamber found that the Bosnian Muslims and Bosnian Croats of the municipalities of the Autonomous Region of Krajina (“ARK”) constituted a substantial part of the Bosnian Muslim and Bosnian Croat groups in Bosnia and Herzegovina (“BiH”).<sup>189</sup> There, “the targeted parts of the groups were the Bosnian Muslims and Bosnian Croats of the ARK” and “there were 2,162,426 Bosnian Muslims and 795,745 Bosnian Croats in BiH” according to a 1991 census, and there were “233,128 Bosnian Muslims and 63,314 Bosnian Croats liv[ing] in the relevant . . . municipalities.”<sup>190</sup> The Court concluded that “the Bosnian Muslims and Bosnian Croats of the . . . municipalities of the ARK . . . constituted a substantial part, both intrinsically and in relation to the overall Bosnian Muslim and

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183. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 23 (Apr. 19, 2004).

184. *Id.* ¶ 15.

185. *See id.*

186. *Id.*

187. *Id.*

188. *Id.* ¶ 16.

189. *See Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 967 (Sept. 1, 2004).

190. *Id.* Note that the ratios of those targeted to the larger populations approximate 1/10th.

Bosnian Croat groups in BiH.”<sup>191</sup>

## 2. Factual Information Suggesting the “In Whole or In Part” Requirement Is Satisfied

Here, the factual information suggests that the part of the Fur, Masalit and Zaghawa tribes that was targeted satisfies the “in part” requirement of genocide’s *dolus specialis*.

Initially, it is clear that individuals were targeted due to their group membership, not as isolated individuals. This is illustrated by the ethnically charged utterances of the attackers, which make clear that members of certain African tribes were being targeted, not particular individuals.<sup>192</sup>

As to the requirement that the part of the group targeted be “substantial,” this can be met in two ways. First, one might argue that the number targeted (represented by the number killed, 200,000-400,000)<sup>193</sup> is substantial. Using a purely numerical inquiry—the starting point suggested by the ICTY Appeals Chamber in *Krstić*<sup>194</sup>—the number 200,000-400,000 sounds “substantial.” Moreover, when measured as a percentage of the estimated total Fur, Masalit and Zaghawa population of approximately six million that had been in Darfur,<sup>195</sup> the percentage approximates 1/30th–1/15th, and the latter percentage approximates the approximately 1/10th percentage found to satisfy the “in part” requirement in *Brđjanin*.<sup>196</sup> More importantly, the *Krstić* case explains that one may look at the “prominence” of the group targeted, and whether it is “emblematic of the overall group, or is essential to its survival.”<sup>197</sup> Here, huge swaths of land have been de-populated of their original inhabitants<sup>198</sup>—most of the rural areas of Darfur. Thus, certainly a

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191. *Id.*

192. See *infra* Part II.A.2.c.

193. See generally Reeves, *supra* note 1.

194. Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 12 (Apr. 19, 2004) (“The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry.”).

195. See ENTRENCHING IMPUNITY, *supra* note 10, at 2 (estimating Darfur’s population at six million); see also HUMAN RIGHTS WATCH, *supra* note 3.

196. See *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 967.

197. *Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 12 (“Prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.”).

198. See DAFUR DESTROYED, *supra* note 8, at 26.

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prominent part of the groups has been attacked. Furthermore, given all the crimes in aggregate and conditions of displacement, certainly the survival of the groups (or at least the rural parts of the groups), has been most distinctly threatened. Thus, the attacks certainly have targeted a very prominent part of the groups. Additionally, the *Brđjanin* case makes clear that the targeting can be limited to a geographical zone,<sup>199</sup> as has happened here, where the displacement is basically limited to rural Darfur.

An alternative argument (mentioned above) would be that the conditions of displacement have been so horrific, that those displaced are part of the genocide. Under that analysis, the group targeted would include the two and a half million displaced<sup>200</sup> and the 200,000-400,000 killed, or nearly three million (approximating one-half of the populations). This would clearly satisfy both the numerosity and substantiality criteria. Thus, there appear to be at least two alternative ways of showing that the “in whole or in part” requirement has been met.

C. *The Requirement of “A National, Ethnical, Racial or Religious Group”*

1. The Legal Criteria

The next requirement of the *dolus specialis* of genocide is that the intent to destroy must target one of four protected groups— a national, ethnical, racial or religious group.<sup>201</sup> Thus,

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199. See *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 703 (“[T]he jurisprudence of the Tribunal supports the approach that permits a characterisation of genocide even when the specific intent to destroy a group, in part, extends only to a limited geographical area.”); see also *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 83 (Dec. 14, 1999).

200. See generally Hoge, *supra* note 2.

201. As explained by the ICTY Trial Chamber in *Brđjanin*:

The Genocide Convention and, correspondingly, Article 4 of the Statute, protects national, ethnical, racial or religious groups. These groups are not clearly defined in the Genocide Convention or elsewhere. The Trial Chamber agrees with the *Krstić* Trial Chamber that:

The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as “national minorities,” rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.

for example, destruction of political groups is not covered.<sup>202</sup> Similarly, targeting of the cultural or sociological characteristics of the group would not suffice,<sup>203</sup> although, as explained above, “attacks on cultural and religious property” “may legitimately be considered as evidence of an intent to physically destroy the group.”<sup>204</sup>

Case law states that the group should be evaluated on a “case-by-case” basis using “objective and subjective criteria.”<sup>205</sup> Perceived stigmatization of the group, by either the perpetrator or the victim on the basis of “perceived national, ethnical, racial or religious characteristics” is relevant to satisfy the subjective criterion. As the ICTY Trial Chamber in *Brđjanin* explained:

[T]he relevant protected group may be identified by means of the subjective criterion of the [stigmatization] of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself

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*Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 682; *see also* Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 554 (Aug. 2, 2001) (“[T]he Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnical, racial or religious groups.”).

202. *See* Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 22 (Mar. 22, 2006) (“members of [those drafting the definition of genocide] declined to include destruction of political groups within the definition of genocide.”); *see also* Jelisić, Case No. IT-95-10-T, Judgment, ¶ 69 (Dec. 14, 1999) (“Article 4 of the Statute . . . excludes members of political groups. The preparatory work of the [Genocide] Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting ‘stable’ groups objectively defined and to which individuals belong regardless of their own desires.”).

203. *See* Krstić, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 25 (“[A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.”).

204. Krstić, Case No. IT-98-33-T, Judgment, ¶ 580.

205. *See, e.g.,* Stakić, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 25 (suggesting the application of both subjective and objective criteria); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgment, ¶ 484 (Sept. 12, 2006) (as to the criteria for determining protected groups, “Trial Chambers have tended to decide the matter on a case-by-case basis, taking into consideration both the objective and subjective particulars”); Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 667 (Jan. 17, 2005) (“The Trial Chamber finds that the correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria.”); *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 684. (“The correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria.”).

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or herself to belong to the aforesaid group.<sup>206</sup>

However, the ICTY Appeals Chamber clarified that “a subjective definition alone is not enough to determine victim groups.”<sup>207</sup>

There are ICTY Trial Chamber decisions suggesting that “where more than one group is targeted, the elements of the crime of genocide must be considered in relation to each group separately.”<sup>208</sup> However, the Appeals Chamber more recently clarified that while “each individual group which makes up the aggregate group” must be “a positively defined target group,” after that, “more than one protected group may be aggregated into a larger ‘negative’ group [e.g., non-Arabs] for the purposes of protection under the [genocide statute].”<sup>209</sup>

An ethnic group typically has been defined “as a group whose members share a common language or culture,”<sup>210</sup> although those criteria are not always applied strictly.<sup>211</sup>

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206. As explained in *Brđjanin*:

Although the objective determination of a religious group still remains possible . . . it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber . . . elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.

*Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 683; see also *Jelisić*, Case No. IT-95-10-T, ¶ 70.

207. See *Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 25.

208. *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 686; see also *Stakić*, Case No. IT-97-24-T, Judgment, ¶ 512 (“[A] targeted group may be distinguishable on more than one basis and the elements of genocide must be considered in relation to each group separately, e.g. Bosnian Muslims and Bosnian Croats.”).

209. *Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 27. The Appeals Chamber held that the Trial Chamber “did not err in concluding that the elements of genocide must be separately considered in relation to Bosnian Muslims and Bosnian Croats.” *Id.* ¶ 28. In that case, “there was insufficient evidence to show that the Bosnian Croats were a targeted group.” *Id.* ¶ 29. Here, by contrast, if one were to look at the targeting of Fur, Masalit and Zaghawa separately, it is clear that each group is being targeted.

210. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 513 (Sept. 2, 1998).

211. See Schabas, *supra* note 4, at 1713 (“Whether the Tutsi were in fact ethnically distinct from the Hutu, in an objective sense, is a question that has been set aside because the racist extremists who perpetrated the genocide saw them as being ethnically distinct.”); see also Luban, *supra* note 4, at 318 (“The evolving case law has moved from defining ethnicity by objective characteristics such as shared language and culture to subjective self-identification (we Tutsis are an ethnic group if we think of ourselves as one)—and, crucially, to identification as an ethnic group by others, namely the perse-



## 2. Factual Information Suggesting the Targeting of Ethnic Groups

Here, the facts suggest that the Fur, Masalit and Zaghawa (as well as other smaller African tribes under attack) are “ethnic” groups that are distinct from the Arab Janjaweed attackers. The Fur, Masalit and Zaghawa each have a distinct language and culture.<sup>212</sup>

Members of these groups also self-identified themselves as distinct from the Janjaweed attackers.<sup>213</sup> For example, a twenty-seven-year-old farmer called Feisal, when asked how he recognized the Janjaweed stated: “It is their color, their language and their clothes. They are not as we are.”<sup>214</sup> Similarly, a man interviewed said: “They killed everything black—guns or no guns, cattle or no cattle. This is the program: they don’t want African tribes in this place.”<sup>215</sup> Adam, a thirty-two-year-old farmer burned out of Gokar village near Geneina, said a Janjaweed leader in Geneina, Omda Saef, told local people: “This place is for Arabs, not Africans.”<sup>216</sup> As mentioned above, numerous at-

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cutors.”); Van Schaack, *supra* note 7, at 1117, 1119, 1121-22 (“whether or not there is an ‘objective’ distinction between victim and perpetrator groups in Darfur is increasingly irrelevant from the perspective of” international criminal law; the Hutu and Tutsi speak the same language, share the same culture and religion, live in the same places, and are in no sense tribes or distinct ethnic groups, yet ICTR case law has concluded they should be considered as separate ethnic groups because they perceived themselves as such (citing testimony of Alison DesForges of Human Rights Watch)).

212. Human Rights Watch describes the targeted communities as “sharing the *ethnicity of* or geographic proximity to the two main rebel movements.” ENTRENCHING IMPUNITY, *supra* note 10, at 6-7 (emphasis added). There are apparently “many different ethnic groups in Darfur with their own languages and customs”—the three main ethnic groups being the Fur, Zaghawa and Masalit, all of which are considered non-Arab. See generally HUMAN RIGHTS WATCH, *supra* note 3.

213. Indeed, on this basis, the U.N.’s Commission of Inquiry concluded that this element of genocide was present—there was a “protected group being targeted.” *Commission of Inquiry*, *supra* note 7, ¶ 640. It found: “Recent developments have led members of African and Arab tribes to perceive themselves and others as two distinct ethnic groups. . . . The tribes in Darfur supporting rebels have increasingly come to be identified as ‘African’ and those supporting the Government as ‘Arabs.’” *Id.* The Commission did not reach the nuance that there are in fact at least three African ethnic groups being targeted.

214. DARFUR DESTROYED, *supra* note 8, at 36.

215. *Id.* at 27 (citing a Human Rights Watch interview with Mohammed in Chad on Apr. 13, 2004).

216. *Id.* at 42 (emphasis added) (citing a Human Rights Watch interview with Adam in Chad on Apr. 2, 2004).

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tackers have referred to those being attacked as “Nuba”<sup>217</sup>—a derogatory term used to refer to ethnic Africans.<sup>218</sup>

Although an over-simplification,<sup>219</sup> the conflict largely breaks down along Arab and non-Arab lines. The African groups (called “Zurga”) are defined by the facts that they do not speak Arabic as their native language and that they are farmers (with the exception of the Zaghawa, who are nomadic).<sup>220</sup> Accordingly, the Fur, Masalit and Zaghawa appear to be distinct “ethnic groups” when compared to their Janjaweed attackers, and, in large part, are distinct from the Government of Sudan.<sup>221</sup>

#### D. *The Requirement of “As Such”*

##### 1. The Legal Criteria

The final legal requirement regarding the *dolus specialis* of the crime of genocide is that the national, ethnical, racial or religious group be targeted “as such.” That is, “[t]he victims of the crime must be targeted because of their membership in the protected group.”<sup>222</sup> As the Appeals Chamber in *Stakić* explained: “the words ‘as such’ . . . focus[ ] on the destruction of groups,

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217. See *supra* Part II.A.2.

218. See *DARFUR DESTROYED*, *supra* note 8, at n.29; see also *ENTRENCHED IMPUNITY*, *supra* note 10, at n.35.

219. There are members of the Sudanese armed forces who come from the groups under attack. This is thought to explain why the Sudanese Government has in large part used Janjaweed forces as a proxy to conduct the attacks, given the concern that members of the Sudanese armed forces who were Fur, Masalit and Zaghawa might not attack fellow group members. See, e.g., *ENTRENCHING IMPUNITY*, *supra* note 10, at 9 (noting that many of the armed forces were from Darfur and, for that reason, the Sudanese government utilized the Janjaweed as the main ground forces). In another exception to the rule that the Arabs are attacking the African tribes, Ja’afar Abdul El Hakh, provincial commissioner of Garsila from 2003 through March 2004, who had a role in the March 2004 executions at Garsila and Deleig, is himself Fur. See *id.* at 33. “There are also many larger Arab tribes in Darfur who have their own homelands or dars, and have not participated in the conflict.” *HUMAN RIGHTS WATCH*, *supra* note 3.

220. See *HUMAN RIGHTS WATCH*, *DARFUR IN FLAMES: ATROCITIES IN WESTERN SUDAN* 6 (2004), available at <http://hrw.org/reports/2004/sudan0404/sudan0404.pdf>. While there has been destruction that appears to be “religious” in form, because both the African tribes and Janjaweed are Muslim, this Article does not suggest there is a particularly religious motivation to the attacks. See *DARFUR DESTROYED*, *supra* note 8, at 28.

221. There are also smaller African and Arab ethnic groups in Darfur who are not direct participants in the conflict. See *DARFUR DESTROYED*, *supra* note 8, at n.1. Thus, the Article does not intend to suggest that all Arab and African groups in Darfur are part of the conflict.

222. *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, ¶ 669 (Jan. 17, 2005).

not individuals;”<sup>223</sup> the words show “that the offence requires intent to destroy a collection of people who have a particular group identity.”<sup>224</sup> Thus, for example, the Trial Chamber in *Krstić* explained:

[T]he victims of genocide must be targeted *by reason of* their membership in a group . . . . The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. Mere knowledge of the victims’ membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such.<sup>225</sup>

Thus, the group *per se* must be targeted, not specific individuals.<sup>226</sup> As the Trial Chamber in *Jelisić* explained:

“[T]he intention must be to destroy the group ‘as such,’

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223. Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 24 (Mar. 22, 2006).

224. *Id.* ¶ 20.

225. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 561 (Aug. 2, 2001). As stated by the Appeals Chamber in *Stakić*:

The group must be targeted because of characteristics peculiar to it, and the specific intent must be to destroy the group as a separate and distinct entity. As the Trial Chamber in *Sikirica* pointed out: “Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.”

*Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 521. Similarly, the Trial Chamber in *Jelisić* explained:

The special intent which [characterizes] genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group which he is seeking to destroy. Where the goal of the perpetrator or perpetrators of the crime is to destroy all or part of a group, it is the “membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide.”

Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 67 (Dec. 14, 1999).

226. The trial chamber in *Sikirica* explained:

The evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase “as such” in the chapeau. Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group.

Prosecutor v. Sikirica et al., Case No. IT-95-8-T, Judgment on defense motions to acquit, ¶ 89 (Sept. 3, 2001); *see also* *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 551 (“[G]enocide must target not only one or several individuals but a group as such.”).

meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.” By killing an individual member of the targeted group, the perpetrator does not thereby only manifest his hatred of the group to which his victim belongs but also knowingly commits this act as part of a wider-ranging intention to destroy the national, ethnical, racial or religious group of which the victim is a member.<sup>227</sup>

## 2. Factual Information Suggesting “As Such” Is Satisfied

Here, it is quite clear that the group members—the Fur, Masalit and Zaghawa—are being targeted because of their group membership (as African tribes), not as specific individuals. As victims have stated: “They killed everything black . . . they don’t want African tribes in this place.”<sup>228</sup> Another witness described the motives of the attackers: “All this is because we are black.”<sup>229</sup>

Accordingly, it appears clear that all four elements of genocide’s *dolus specialis* have been met in the situation of Darfur.

### E. Examination of Potential Weaknesses as to “Intent to Destroy”

While so much factual information suggests that there is “intent to destroy” in the situation of Darfur, because credible sources have suggested that the bulk of the killing is not necessarily genocide,<sup>230</sup> it is useful to examine what may be potential weaknesses in the above positions in order to understand some of the hesitance. Below, we examine two arguments: (a) that the situation is more prominently about displacement than outright killing, and the extensive displacement negates “intent to destroy”; and (b) that there are political or other motivations (such as obtaining natural resources) for the killing, and these other motivations negate “intent to destroy.” The first argument is rebuttable and the second one is incorrect as a matter of

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227. *Jelisić*, Case No. IT-95-10-T, Judgment, ¶ 79.

228. DARFUR DESTROYED, *supra* note 8, at 27.

229. *Id.* at 30. For further discussion of motives, see *infra* Part II.E.2.

230. It is important to note that neither Human Rights Watch nor the U.N.’s Commission of Inquiry found that the situation was not genocide. The U.N. Commission clearly left open the possibility that some acts of genocide might be occurring when it stated “in some instances, individuals, including Government officials” may have committed “acts with genocidal intent.” *Commission of Inquiry*, *supra* note 7, ¶ 641; *see also* Luban, *supra* note 4, at 303-04 (lamenting the news coverage of the Commission’s findings, which misstates the findings as determining that no genocide occurred).

law.<sup>231</sup>

### 1. The Argument That the Situation Primarily Concerns Displacement

One potential argument against there being “intent to destroy” is that the displacement has been so extensive (2.5 million)<sup>232</sup> compared to the killing (200,000-400,000)<sup>233</sup> that the predominant crime is displacement, not killing.<sup>234</sup> The argument would be that the fact that so many were displaced and not killed—when more could have been killed outright—negates “intent to destroy.” This argument would be bolstered, for ex-

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231. Additional reasons why the U.N. Commission of Inquiry determined that genocidal intent was lacking, at least on the part of the Government of Sudan, were: (a) that young males were killed, not entire village populations; (b) because villages containing both Africans and Arab tribes were not attacked; (c) and because on one occasion a person who did not resist having his camels stolen was spared, while his brother who resisted was killed. *Commission of Inquiry*, *supra* note 7, ¶¶ 513, 516, 517. These arguments are unpersuasive. First, factually, not only young males have been killed. See *infra* Part II.F.1. Furthermore, as explained above, the *Krstić* case found that the killing of military-age men was consistent with genocidal intent. See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶¶ 26-27 (Apr. 19, 2004); see also Mathew, *supra* note 7, at 540-42 (explaining why the U.N.’s conclusion was inconsistent with the *Krstić* case). Second, the fact that villages containing both Africans and Arab tribes were not attacked could in fact bolster the conclusion that only Africans were being targeted—the attackers “are hostile only to the targeted group, and don’t want to risk damage to other groups.” Luban, *supra* note 4, at 315. Third, the fact that a man who gave up his camels was spared while his brother, who would not, was killed, hardly negates genocidal intent. It might indicate that that camel-thief lacked genocidal intent. *Id.* at 315. Moreover, the ICTY in the *Jelisić* case found that random acts of mercy did not negate genocidal intent. See *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 71 (July 5, 2001); Van Schaack, *supra* note 7, at 1130-31 (invoking *Jelisić* to explain errors in the Commission’s conclusions: “the fact that not every potential victim was killed or abused should not be a bar to a finding of genocide”); see also Luban, *supra* note 4, at 315 (criticizing the Commission’s conclusion: “the fact that Adolf Eichmann at one point allowed a trainload of Hungarian Jews to escape to safety in return for money is [no] ‘evidence’ that the Holocaust was not a genocide”).

232. See *supra* note 2 and accompanying text.

233. See *supra* note 1 and accompanying text.

234. The U.N. Commission of Experts suggested this argument when it found that because survivors were not killed but forced into camps, that negated genocidal intent:

Another element that tends to show the Sudanese Government’s lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in IDP [Internally Displaced Persons] camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government.

*Commission of Inquiry*, *supra* note 7, ¶ 515.

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ample, by the ICTY's *Stakić* decision, discussed above, which found that the killing in a certain "camp" in Bosnia-Herzegovina was not genocide, because so many more individuals passed in transit through the camp (approximately 27,000) than were killed in Prejidor (approximately 3000).<sup>235</sup>

The potential responses to this would be several. First, one should not extrapolate from the fact that people were successful in fleeing that there was not originally intent to destroy large numbers. Genocide is largely a crime of "intent," so what happens on the ground is less significant than actual intentions.<sup>236</sup> Second, one might argue that the conditions of displacement, as discussed above, were so horrific that it was basically international humanitarian assistance that kept large numbers of Fur, Masalit and Zaghawa alive in camps, not the Government of Sudan, so that the displacement is part of the genocide.<sup>237</sup> In fact, as shown below, the displacement, in the situations that existed in Darfur, constitutes the underlying crime of "inflicting conditions of life calculated to destroy the group in whole or in part."<sup>238</sup> Third, one could argue that based on the ICTY's *Krstić*

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235. See Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 553 (July 31, 2003), *aff'd*, Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 42 (Mar. 22, 2006) ("the fact that more Bosnian Muslims could have been killed, but were not, indicates that the Appellant lacked *dolus specialis*.").

236. *Stakić*, Case No. IT-97-24-T, Judgment, ¶ 522 ("The key factor is the specific intent to destroy the group rather than its actual physical destruction . . . . It is the genocidal *dolus specialis* that predominantly constitutes the crime.").

237. The Commission of Inquiry concluded that "the living conditions in those camps . . . do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong," because "the Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance." *Commission of Inquiry*, *supra* note 7, ¶ 515. In fact, the death rate at the camps is quite high, with mortality rates similar to famine conditions. See Reeves, *supra* note 6. There has also been evidence of the Government of Sudan impeding humanitarian assistance. See Reeves, *supra* note 6 ("a number of camps have indeed been extermination sites at some point in their history"); see also *infra* Part II.F.2. Reeves notes that conditions in camps vary considerably, but that some are akin to "concentration camps," such as the Kailek camp south of Kass in South Darfur. Eric Reeves, *African Auschwitz: The Concentration Camps of Darfur; The UN and the International Community Are Acquiescing in Genocide*, SUDANREEVES.ORG, May 12, 2004, <http://www.sudanreeves.org/Sections-article191-pl.html>. The U.N. suggested conditions at Kailek showed "a strategy of systematic and deliberate starvation being enforced by the [Government of Sudan] and its security forces." Jim Lobe, *Pressure for Intervention in Darfur Grows*, ONEWORLD US, June 16, 2004, <http://us.oneworld.net/article/view/88343/1/>.

238. See *infra* Part II.F.3. Beth Van Schaack, for example, argues that the U.N. Commission erred in not fully appreciating the deleterious effects of such conditions:

decision, which found that transfer of the women and children was “an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica,”<sup>239</sup> transfer of part of the population has been recognized not to negate genocidal intent.<sup>240</sup> Finally, one could distinguish *Stakić* because there the Trial Chamber looked at the 3000 deaths to conclude that the group was not targeted in “substantial part”<sup>241</sup>—not to suggest that the definition of genocide requires the whole group to be killed (which it clearly does not, since it protects groups “in whole or in part”). Here, by contrast, where 200,000-400,000 have been killed, the “in part” analysis is far stronger.<sup>242</sup> Furthermore, in *Stakić*, the Trial Chamber also concluded that the accused “merely intended to displace, but not to destroy, the Bosnian Muslim group.”<sup>243</sup> Here, by contrast, there are very strong indicators of intent to destroy at least substantial parts of the protected groups.<sup>244</sup>

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[B]y focusing only on how many individuals were killed, as opposed to the number of persons subjected to other genocidal acts enumerated in the Convention, the Report [by the U.N. Commission of Inquiry] does not fully appreciate the range of genocidal acts encompassed by the Convention and thus disregards the notion of non-killing genocide. The Genocide Convention purposefully reaches acts that fall short of murder but that will lead to the destruction of a group. . . . Implementing such a policy in Sudan would enable the government to blame any subsequent deaths on the harsh Sudanese conditions or external factors such as famine and deflect attention away from a program of extermination.

Van Schaack, *supra* note 7, at 1131-32.

239. Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 31 (Apr. 19, 2004). The *Krstić* decision also suggested that the decision to displace the women and children rather than killing them might have been explained “by the Bosnian Serbs’ sensitivity to public opinion.” *Id.* In other words, the international outcry would have been far more strenuous had women and children been executed. Here, of course, similar logic could be employed: placing people in camps rather than killing them outright avoids more strenuous international condemnation. See Luban, *supra* note 4, at 314 (making this argument, and concluding: “the similarity with Srebrenica is striking, but the ICTY and the U.N. Commission reach opposite conclusions on remarkably similar evidence”).

240. See Mathew, *supra* note 7, at 542-43.

241. *Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 42 (explaining Trial Chamber’s reasoning).

242. See *supra* Part II.B.

243. See *Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ 56 (construing Trial Chamber).

244. See *supra* Part II.A.

## 2. The Argument That There Are Other Motivations at Issue Which Negate Intent to Destroy

Another argument that has been made is that the attackers were not motivated by intent to destroy the groups per se, but based on other reasons. This appears to be the key reason why the U.N.'s Commission of Inquiry concluded that, at least on the part of the central Government, genocidal intent was lacking:

The crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. *Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.*<sup>245</sup>

A more expansive argument would be, for example, that the Government's motivations were to control the counter-insurgency, punish the ethnic groups from which the counter-insurgency sprang, and prevent a political solution that would have provided the African tribes in Darfur with political rights. The argument could be, regarding the Janjaweed, that they, by contrast, had no such political motivations, but were content to be the proxy-fighting force for the Government of Sudan because they were paid salaries by the Government of Sudan,<sup>246</sup> receive cattle, and received land and access to water once the African tribes were removed.

The response to these arguments is that they confuse intent and motive. As explained above, the law is clear that in examining genocidal intent, the focus is whether there is intent to destroy, not *why* there is intent to destroy (or motive).<sup>247</sup> Even the

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245. *Commission of Inquiry, supra* note 7, ¶ 640 (emphasis added).

246. *See, e.g., DARFUR DOCUMENTS, supra* note 10, at 1 (Janjaweed were "supplied with arms, communications equipment, *salaries* and uniforms by government officials") (emphasis added).

247. The Appeals Chamber in *Jelisić* noted the "irrelevance" of motives in criminal law and highlighted:

[T]he necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.



U.N. Commission recognized this distinction.<sup>248</sup> Both the ICTR's *Media* decision<sup>249</sup> and the Iraqi High Tribunal's *Anfal* decision<sup>250</sup> apply just that distinction, explaining that a political motivation (of the Hutu and then-Iraqi regime, respectively) did not negate genocidal intent (in targeting the Tutsi and Kurds of Northern Iraq, respectively).

Thus, in the ICTR's *Media* decision, the Trial Chamber explained that the fact that the Hutu had a "political agenda" did not negate genocidal intent:

Based on the evidence set forth above, the Chamber finds beyond a reasonable doubt that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze acted with intent to destroy, in whole or in part, the Tutsi ethnic group. *The Chamber considers that the association of the Tutsi ethnic group with a political agenda, effectively merging ethnic and political identity, does not negate the genocidal animus that motivated the Accused.* To the contrary, the identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi ethnicity, underscores the fact that their membership in the ethnic group, as such, was the sole basis on which they were targeted.<sup>251</sup>

A similar conclusion was recently reached by the Trial Chamber judges of the Iraqi High Tribunal (a national tribunal sitting in Baghdad) in concluding that genocide had been committed against the Iraqi Kurds when they were subjected in 1988 to chemical weapons attacks and other crimes as part of the "Anfal campaign" under Saddam Hussein's regime.<sup>252</sup> The Trial

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Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 49 (July 5, 2001); *see also* Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶ (Mar. 22, 2006) ("[T]he Tribunal's jurisprudence distinguishes between motive and intent; in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt.").

248. *See Commission of Inquiry, supra* note 7, ¶ 493 ("From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group.").

249. Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 969 (Dec. 3, 2003).

250. Anfal Trial Chamber Judgment, Case No. 1/C Second 2006, Iraqi High Tribunal (English Translation) (June 24, 2007).

251. *Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 969 (emphasis added); *see also* Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment, ¶ 412 (Dec. 13, 2005) ("The perpetrator need not be solely motivated by a criminal intent to commit genocide.").

252. As part of the "Anfal campaign," the Tribunal found that more than 3000

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Chamber stated: “It is important to mention that the relation between ethnic group and political program, which practically merge between ethnic and political identifies, does not [negate] the intention of genocide . . . .”<sup>253</sup> In other words, where a protected ethnic group was being targeted (the Kurds of Northern Iraq), the fact that there was also a political motivation for the targeting did not negate “intent to destroy.”<sup>254</sup>

That this is the correct legal result is reinforced by examining additional cases where courts found that genocide occurred, but there were clearly varying motives. For example, in the former Yugoslavia, some of the killing—such as the Srebrenica massacre—has been held by the ICTY to constitute genocide.<sup>255</sup> Yet, if one examines the motivations at issue, it is clear that the Bosnian-Serb political and military leadership did not target Bosnian-Muslims out of some “purity” of ethnic hatred, but because they wanted to control the land that Srebrenica was on, thereby connecting two land areas under Republic Srpska control, and strengthening Serb power (all political motivations).<sup>256</sup> Simi-

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villages were destroyed and that there were at least “tens of thousands of victims,” with some fatality estimates as high as 182,000. Anfal Trial Chamber Judgment, Case No. 1/C Second 2006, at 501.

253. Anfal Trial Chamber Judgment, Case No. 1/C Second 2006, at 629 (citing *Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 969).

254. The Tribunal concluded that the Kurds “were targeted by [the] former [Ba’ath] regime and Saddam Hussein for their ethnicity and nationalism.” Anfal Trial Chamber Judgment, Case No. 1/C Second 2006, at 630, 634.

255. See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶¶ 95-97 (Apr. 19, 2004).

256. As the ICTY Appeals Chamber explained in *Krstić*:

Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republica Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted. The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia.

*Id.* ¶ 15. Proving the U.N. impotent to protect its “safe area” and the Bosnian Muslims may also have been a motivation. As the Appeals Chamber further explained:

In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. The town of Srebrenica was the most visible of the “safe areas” established by the U.N. Security Council in Bosnia. By 1995 it had received significant attention in the international media. In its resolution declaring Srebrenica a safe area, the

larly, the killing in Rwanda has been deemed genocide in many decisions of the ICTR. There again, there may have been a great amount of ethnic hatred *per se*, but the killing was largely motivated by a Hutu grab to consolidate political power and win the ongoing war against the Tutsi.<sup>257</sup> Yet, these underlying motivations are never suggested to negate genocidal intent. Similarly, if the Genocide Convention had existed at the time of World War II,<sup>258</sup> we would not inquire *why* the Nazi Government determined to exterminate the Jewish people of Germany and the occupied territories (their political motivations); rather, the fact that they set out to exterminate a substantial part of the Jewish people would suffice to constitute genocide. Accordingly, it does not matter that the Government of Sudan may have had political and/or military motivations in launching its campaign against the Fur, Masalit and Zaghawa—the law is clear, such motivations do *not* negate genocidal intent.<sup>259</sup>

Thus, the two most serious potential arguments as to why

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Security Council announced that it “should be free from armed attack or any other hostile act.” This guarantee of protection was re-affirmed by the commander of the U.N. Protection Force in Bosnia (“UNPROFOR”) and reinforced with the deployment of U.N. troops. The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces.

*Id.* ¶ 16; see also SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 248-49 (2002) (explaining that the violence against Croats and Muslims was motivated by a desire to establish Republika Srpska).

257. ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 2* (1999) (“The [Hutu] believed that the extermination campaign would restore the solidarity of the Hutu under their leadership and help them win the war [against the Tutsi armed forces—the Rwandan Patriotic Front], or at least improve their chances of negotiating a favorable peace.”).

258. The Genocide Convention dates from 1948 and its creation is largely a response to the Holocaust. Genocide Convention, *supra* note 12.

259. See Reeves, *supra* note 7 (arguing that the U.N. Commission confused motive and intent in a “fundamental” “intellectual failing” which “vitiates[s] any conclusion deriving from this line of reasoning”). As another author has explained, it would be a mistake to characterize the conflict in Darfur as one not about ethnic conflict but resources, even though the Janjaweed may have been motivated by the ability to gain:

[L]oot and access . . . [to] fertile land and water resources. . . . In international law, however, motive is distinguishable from intent. Even though the perpetrators may have been motivated by economic gain, that motive does not necessarily negate the simultaneous existence of genocidal intent. A genocidist may possess both financial motive and the requisite intent for genocide.

Mathew, *supra* note 7, at 539.

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genocidal intent might be lacking are either rebuttable or incorrect as a matter of law.

#### F. *The Underlying Crimes*

Finally, as mentioned above, in addition to the *dolus specialis* or special intent for genocide, it is necessary to show one or more of the following underlying crimes:

- (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.<sup>260</sup>

Here, the facts clearly show that at least the first three crimes have been committed.<sup>261</sup>

#### 1. Killing Members of the Group

For “killing”<sup>262</sup> to suffice as an underlying crime, it must be killing of members of the protected group.<sup>263</sup> Whereas the focus of the *dolus specialis* is the intention to commit genocide,<sup>264</sup> regarding the underlying crimes, “proof of a result” is required.<sup>265</sup> The mens rea for killing requires intent, but not necessarily pre-

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260. See Rome Statute of the International Criminal Court, *supra* note 40, art. 6.

261. Indeed, the U.N. Commission of Inquiry also reached this conclusion that “the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely [sic] to bring about physical destruction,” had occurred. *Commission of Inquiry*, *supra* note 7, at ¶ 640.

262. See Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 642 (Jan. 17, 2005) (“In the jurisprudence of the Tribunal, the term ‘killings’ referred to under Article 4(2)(a) has been equated with murder.”).

263. See Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 689 (Sept. 1, 2004) (“The killing must be of members of the targeted national, ethnical, racial or religious group.”).

264. See, e.g., Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 522 (July 31, 2004) (“The key factor is the specific intent to destroy the group rather than its actual physical destruction.”).

265. *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 688 (“The acts in subparagraphs (a) and (b) of Article 4(2) require proof of a result.”).

meditation.<sup>266</sup>

Here, the facts suggest there has been extensive killing of members of the Fur, Masalit and Zaghawa tribes:

- There are numerous accounts of bombardment of villages of the Fur, Masalit and Zaghawa African tribes by the Sudanese Air Force.<sup>267</sup>
- Subsequent to bombardment, the Janjaweed move in on horseback, followed by the army in cars, and start killing. For example, in the words of one witness:

“The army was in Land Cruisers and the Janjaweed on horses and camels . . . . The Janjaweed entered the village first, followed by the cars. They were shooting indiscriminately. They went into *tukls* [huts] and killed people who were hiding under their beds.”<sup>268</sup>

The following killings—which are believed to be typical of a broader pattern—were documented:

- Mororo village, close to the Masalit-Fur border: 40 dead;<sup>269</sup>
- The Murnei area, twelve villages: 82 dead;<sup>270</sup>
- Mango, in the Terbeba-Arara area: at least 20 killed;<sup>271</sup>
- Urum, near Habila: 112 killed in two attacks;<sup>272</sup>
- The Barih area, east of Geneina: 111 killed;<sup>273</sup>
- Habila Canare, twenty-five kilometers east of El Geneina: 50 killed;<sup>274</sup>
- Kondoli, in the Misterei area: 24 killed;<sup>275</sup>
- Nouri, near Murnei: 136 killed;<sup>276</sup>

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266. *Stakić*, Case No. IT-97-24-T, Judgment, ¶ 515 (“As regards the underlying acts, the word ‘killing’ is understood to refer to intentional but not necessarily premeditated acts.”).

267. See *DARFUR DESTROYED*, *supra* note 8, at 24-25 (discussing aerial bombardment of civilians).

268. *Id.* at 16 (quoting a Human Rights Watch interview with Feisal in Chad on Apr. 5, 2004).

269. *Id.* at 9.

270. *Id.* at 10.

271. *Id.* at 11.

272. *Id.*

273. *Id.* at 12.

274. *Id.* at 13.

275. *Id.* at 14.

276. *Id.* at 15.

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- Kenyu, near Forbranga: 57 killed;<sup>277</sup>
- Sildi, south-east of Geneina: 12 killed;<sup>278</sup>
- Tunfuka, south of Murnei: 26 killed;<sup>279</sup>
- Tullus: at least 27 killed;<sup>280</sup>
- Terbeba: 26 killed;<sup>281</sup>
- Millebeeda village and area, south-west of Geneina: 59 civilians killed.<sup>282</sup>
- There are instances of mass executions by the Janjaweed, such as at Wadi Salih, where several hundred men were executed over a few days in early March 2004.<sup>283</sup> According to testimony taken in Chad:
 

A survivor of one of the mass killings, a farmer who was shot in the back rather than the neck, told a neighbor that the arrested men were taken, in army trucks and cars, to a valley a few miles south of Deleig. “Then they lined us up, made us kneel down and bend our heads—and shot us from behind,” he told a neighbor. “I was left for dead . . .” The executioners were army soldiers and Janjaweed, operating together.<sup>284</sup>
- Children and elderly are among those killed<sup>285</sup> (making it

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277. *Id.* at 16.

278. *Id.* at 17.

279. *Id.* at 18.

280. *Id.*

281. *Id.* at 20.

282. *Id.* at 21; *see also id.* at Appendix D (massacre and mass killing victims, by village).

283. *ENTRENCHING IMPUNITY*, *supra* note 10, at 26-28.

284. *DARFUR DESTROYED*, *supra* note 8, at 22 (citing Human Rights Interview in Chad on Apr. 14, 2004). Ja’afar Abdul El Hakh, provincial commissioner of Garsila from 2003 through March 2004, appears to have had a direct role in planning and coordinating March 2004 mass executions in Deleig and Garsila, and distributing weapons to the Janjaweed. *See ENTRENCHING IMPUNITY*, *supra* note 10, at 28-33. He was later promoted to governor of West Darfur. *Id.* at 55.

285. *DARFUR DESTROYED*, *supra* note 8, at 12 (three-year-old orphaned grandson of an imam killed); *id.* at 13 (a one hundred-year-old man, Barra Younis, from Terchana, was “burned . . . alive in his hut”); *id.* (helicopter pilot killed a woman—seventy-year-old Mariam Abdul Qadar—in the Bareh area, east of Geneina); *id.* at 17 (as to Kenyu, near Fobranga: “So many children were killed”); *id.* at 24 (child and old woman burned to death in her house in Kundung by the Janjaweed); *id.* at 31 (seven year old killed in Kudumule, outside Misterei); *ENTRENCHING IMPUNITY*, *supra* note 10, at 51 (An elderly Zaghawa woman who lived in Marla said: “Many people and children were killed during that attack [on Marla, December 15-16, 2004] and in front of us, but we had to leave their bodies unburied and run.”) (quoting Human Rights Watch interview with Internally displaced person from Marla, February 2005); *id.* (children were killed, some while fleeing the school in Hamada, January 13-14, 2005).

clear that not solely military-age men have been targeted, although men have probably been the predominant targets);<sup>286</sup>

• There are also instances where severely ill or wounded villagers were denied access to larger towns with hospitals and health care.<sup>287</sup> For example, a witness from a village approximately fifteen km from Garsila said his child “died after he was forced to wait six days for a Janjaweed escort before taking the child to a health center in Garsila.”<sup>288</sup> Wounded and villagers were also detained in Adway without being able to seek medical care after men were summarily executed and women raped by government soldiers and Janjaweed.<sup>289</sup>

Thus, it seems quite clear that the crime of intentionally killing protected group members has occurred.

## 2. Causing Serious Bodily or Mental Harm to Members of the Group

As to the underlying crime of causing serious bodily or mental harm to members of the group, the ICTY Trial Chamber in *Krstić* explained that the “actus reus is an intentional act or omission causing serious bodily or mental suffering.”<sup>290</sup> “The [ICTR] Trial Chamber in the *Kayishema & Ruzindana* case found that bodily harm refers to harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”<sup>291</sup>

Case law specifies that “the harm need not be permanent or irremediable, but ‘[i]t must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.’”<sup>292</sup> Put another way, “[t]he harm inflicted need not be permanent and irremediable, but needs to be serious.”<sup>293</sup> Mental harm thus “refers to more than minor or temporary impairment of mental faculties.”<sup>294</sup> Whether an act consti-

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286. For instance, at Wadi Salih, the men were purposefully singled out and executed. See *DARFUR DESTROYED*, *supra* note 8, at 21-23. This also occurred in the valley south of Deleig. *Id.* at 22.

287. *Id.* at 35.

288. *Id.* at 39 (citing Human Rights Watch interview in Darfur on Apr. 2004).

289. See generally *ENTRENCHING IMPUNITY*, *supra* note 10.

290. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 513 (Aug. 2, 2001).

291. Prosecutor v. Blagojević & Jokić, IT-02-60-T, Judgment, ¶ 645 (Jan. 7, 2005).

292. *Id.*

293. Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 690 (Sept. 1, 2004); see also Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 516 (July 31, 2003).

294. *Blagojević*, Case No. IT-02-60-T, Judgment, ¶ 645 (invoking the *Semanza* Trial

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tutes “serious bodily or mental harm . . . must be assessed on a case-by-case basis, with due regard for the particular circumstances of the case.”<sup>295</sup>

Acts that have been recognized to constitute “serious bodily or mental harm” include: torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, deportation,<sup>296</sup> and “harm that damages health or causes disfigurement or serious injury.”<sup>297</sup> The ICTR has recognized the refusal to allow refugees to obtain food as causing “serious bodily or mental harm.”<sup>298</sup> As with killing, proof of a result is required—the act must occur, not just be intended.<sup>299</sup> As to the mens rea, “the harm must be inflicted intentionally.”<sup>300</sup>

Thus, for example, trauma and wounds suffered by individuals who survived the Srebrenica mass executions constituted “serious bodily and mental harm.”<sup>301</sup> An ICTY Trial Chamber in

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Judgment decision); see also *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 513 (“[S]erious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”).

295. *Blagojević*, Case No. IT-02-60-T, Judgment, ¶ 646.

296. *Id.* (listing “torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and deportation”); *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 513 (listing “inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury”). The Trial Chamber in *Blagojević* recognized that deportation was included:

In particular, the *Krstić* Trial Chamber held that “inhuman treatment [. . .] and deportation are among the acts which may cause serious bodily or mental injury.” It found support for this in the case law of this Tribunal as well as in other sources. The Eichmann Judgement rendered by the Jerusalem District Court on 12 December 1961 had already included “deportation” among the acts that could constitute serious bodily or mental harm.

*Blagojević* Case No. IT-02-60-T, Judgment, ¶ 646.

297. See *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 690 (listing “torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group”); see also *Stakić*, Case No. IT-97-24-T, Judgment, ¶ 516.

298. See Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgment, ¶ 330 (Dec. 13, 2006).

299. See *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 688 (“The acts in subparagraphs (a) and (b) of Article 4(2) require proof of a result.”).

300. *Blagojević*, Case No. IT-02-60-T, Judgment, ¶ 645; *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 690.

301. See *Blagojević*, Case No. IT-02-60-T, Judgment, ¶¶ 647-49.



*Blagojević & Jokić* explained: “The fear of being captured, and, at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends’ safety as well as for their own safety, is a traumatic experience from which one will not quickly—if ever—recover.”<sup>302</sup> The forced displacement of women, children and elderly from Srebrenica was held to be a “traumatic experience” which caused “serious mental harm.”<sup>303</sup> The Trial Chamber also considered, inter alia, that there was not “adequate supplies of food, medicine or even water for the thousands of Bosnian Muslims” displaced.<sup>304</sup>

Here, there are numerous crimes that would constitute “serious bodily or mental harm”:

- *Torture*: “Government forces . . . regularly arbitrarily detained and sometimes tortured Fur, Zaghawa, and Masalit students, political activists, and other individuals in Darfur and Khartoum.”<sup>305</sup> In one case of torture reported from the Garsila area, a Fur man was detained and whipped until all the skin was flayed from his back; holes were then gouged out of

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302. *Id.* ¶ 647. The Trial Chamber continued:

The Trial Chamber finds that the men suffered mental harm having their identification documents taken away from them, seeing that they would not be exchanged as previously told, and when they understood what their ultimate fate was. Upon arrival at an execution site, they saw the killing fields covered of bodies of the Bosnian Muslim men brought to the execution site before them and murdered. After having witnessed the executions of relatives and friends, and in some cases suffering from injuries themselves, they suffered the further mental anguish of lying still, in fear, under the bodies—sometimes of relative or friends—for long hours, listening to the sounds of the executions, of the moans of those suffering in pain, and then of the machines as mass graves were dug.

*Id.* ¶ 647.

303. *See id.* ¶¶ 650, 652-54. For example, the Trial Chamber held that:

The Trial Chamber has no doubt that the suffering of the women, children and elderly people who were cruelly separated from their loved and forcibly transferred, and the terrible consequences that this had on their life, reaches the threshold of serious mental harm under Article 4(2)(b) of the Statute. The Trial Chamber also finds that the level of mental anguish suffered by the women, children and elderly people who were forcibly displaced from their homes—in such a manner as to [traumatize] them and prevent them from ever returning—obliged to abandon their property and their belongings as well as their traditions and more in general their relationship with the territory they were living on, does constitute serious mental harm.

*Id.* ¶ 652.

304. *Id.* ¶ 650.

305. DARFUR DESTROYED, *supra* note 8, at 7.

his flesh.<sup>306</sup> In another case, a forty-two-year old Zaghawa man reported that: “They hung me with hooks piercing my chest. They also burned me . . . . They tied us [himself and about thirty other men] together and interrogated us about animals . . . . [They] shot and slaughtered some of [the men] in front of my eyes.”<sup>307</sup> In a further case, a one hundred-year-old man, Barra Younis, from Terchana, was “burned . . . alive in his hut.”<sup>308</sup> A child and old woman were burned to death in her house in Kundung by the Janjaweed.<sup>309</sup> A seventy-five-year old trader from Arwalla was mutilated by the Janjaweed, who cut the skin on top of his head and ears then threw him into a fire and left him for dead.<sup>310</sup> Torture has continued in camps controlled by the Janjaweed.<sup>311</sup>

- *Rape*: As detailed above, there are numerous eye-witness accounts of rape.<sup>312</sup>
- *Individuals being buried alive*: There are reports of men being buried alive around Garsila and Deleig by Janjaweed.<sup>313</sup>
- *Detentions*: At Wadi Saleh, men were detained by police or military personnel, then transferred to trucks and military cars and transported out of town prior to execution by the

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306. *Id.* at 33.

307. ENTRENCHING IMPUNITY, *supra* note 10, at 18 (quoting Human Rights Watch interview in a refugee camp in Chad on July 2, 2005).

308. DARFUR DESTROYED, *supra* note 8, at 13 (quoting Human Rights Watch interview with Adam in Chad on April 8, 2004).

309. *Id.* at 24 (citing Human Rights Watch interview in Darfur in April 2004).

310. ENTRENCHING IMPUNITY, *supra* note 10, at 28 (quoting Human Rights Watch interview in a refugee camp in Chad on June 27, 2005).

311. DARFUR DESTROYED, *supra* note 8, at 42.

312. *See supra* Part II.A.2.f. The ICTR has suggested that rape might also constitute the underlying crime of inflicting “measures intended to prevent births,” another of genocide’s underlying crimes:

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within the group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 507 (Sept. 2, 1998). Additionally, the rape of large numbers of younger girls who have suffered resulting medical problems, and the scarring and branding of women, as well as the public infliction of rape to which often renders the women unfit as marriage partners arguably also constitute “measures intended to prevent births.” Interview with Eric Reeves, *supra* note 6. The crime of “forcibly transferring children of the group to another group” may also have occurred based on reports of mass abductions of non-Arab/African children. *Id.*

313. *See* DARFUR DESTROYED, *supra* note 8, at 33 (quoting Human Rights Watch interviews in Darfur in April 2004).

Janjaweed and government soldiers.<sup>314</sup> As part of the January 13-14, 2005 attack on Hamada, the residents were detained in the village and not allowed to flee, while some of the men and boys were executed, and some of the women and girls raped.<sup>315</sup>

• *Denial of humanitarian assistance and displacement in conditions where there were inadequate supplies of food, medicine or water for thousands of individuals displaced into camps:* The government of Sudan has denied humanitarian assistance to those displaced. For example, the U.S. Congress has found that:

[T]he Government of Sudan has restricted access by humanitarian and human rights workers to the Darfur area through intimidation by military and security forces, and through bureaucratic and administrative obstruction, in an attempt to inflict the most devastating harm on those individuals displaced from their villages and homes without any means of sustenance or shelter.<sup>316</sup>

As clearly documented in U.N. memoranda,<sup>317</sup> “[t]he Government of Sudan almost completely banned humanitarian agencies from Darfur for [at least] four crucial months, from late October 2003 through late-February 2004.”<sup>318</sup> As of May 2006, it was reported that “[t]he Sudanese government and rebel groups in Darfur [were] hindering humanitarian agencies from reaching hundreds of thousands of civilians dependent on international aid in many areas of Darfur;” at that point, “the U.N. estimat[ed] that at least 650,000 people [were] partly or wholly inaccessible to international humanitarian agencies.”<sup>319</sup> As mentioned above, civilians displaced into camps are entirely dependent on humanitarian assis-

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314. See ENTRENCHING IMPUNITY, *supra* note 10, at 26.

315. See *id.* at 55.

316. Comprehensive Peace in Sudan Act of 2004 § 3(11), 50 U.S.C. § 1701 (2006).

317. See Reeves, *supra* note 7. As of December 8, 2003, Tom Vraalsen, U.N. special envoy for humanitarian affairs in Sudan, declared in a memo to the U.N. humanitarian coordinator for Sudan (Mukesh Kapila), that “Khartoum was ‘systematically’ denying access to areas in which non-Arab/African tribal populations were concentrated. . . . While [Khartoum’s] authorities claim unimpeded access, they greatly restrict access to the areas under their control, while imposing blanket denial to all rebel-held areas.” *Id.* (citing Tom Vraalsen, Note to the Emergency Relief Coordinator, *Sudan: Humanitarian Crisis in Darfur*, December 8, 2003). Reeves estimates that Khartoum’s deliberate impeding of humanitarian deployment and access, which he states occurred over half a year, may have cost 100,000 lives. *Id.*

318. DAFUR DESTROYED, *supra* note 8, at 50.

319. HUMAN RIGHTS WATCH, DAFUR: HUMANITARIAN AID UNDER SIEGE 2 (2006), available at <http://hrw.org/backgrounder/africa/sudan0506/darfur0506.pdf>.

tance.<sup>320</sup>

- *Denial of access to medical treatment:* As detailed above, there are also instances where severely ill or wounded villagers were denied access to larger towns with hospitals and health care.<sup>321</sup>

- *Mental suffering:* The infliction of all of the above and additional crimes has caused a great deal of mental suffering to the people of Darfur—their villages were subjected to aerial bombardment, individuals were attacked, houses were burned, foodstuffs were looted, cattle were stolen, and individuals were subjected to physical assault, torture, sexual violence, detention, being buried alive, denial of humanitarian assistance, denial of access to medical treatment and forced displacement.

Thus, it appears clear that there has been: (a) infliction of serious bodily harm; (b) infliction of serious mental harm; and (c) that at least some of the harm was inflicted intentionally. As to the bodily harm, there can be no doubt that it was “serious.”<sup>322</sup> Indeed, case law has already acknowledged that torture, rape and displacement—crimes that have all occurred in Darfur—constitute “serious bodily harm.”<sup>323</sup> Additionally, if the forced displacement of women, children and elderly from Srebrenica was held to cause “serious mental harm,”<sup>324</sup> then certainly forced displacement accompanied by numerous other crimes has also caused “serious mental harm” to the people of Darfur.

### 3. Deliberately Inflicting On the Group Conditions of Life Calculated to Bring About Its Physical Destruction in Whole or in Part

As to the crime of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in

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320. See *DARFUR DESTROYED*, *supra* note 8, at 58-59.

321. See *supra* Part II.F.1.

322. Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 645 (Jan. 17, 2005) (defining serious bodily harm as “harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses”).

323. See *id.* ¶ 646 (listing “torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and deportation”).

324. See *id.* ¶ 652.

whole or in part, the group targeted must be one of the protected groups.<sup>325</sup> The conditions inflicted “must be calculated to bring about the physical destruction of the targeted group in whole or in part and must be inflicted on it deliberately.”<sup>326</sup> As mentioned above, the crime covers methods of destruction by which the perpetrator does not immediately kill group members, but which, ultimately, seek their physical destruction.<sup>327</sup>

Acts covered by this crime “include, but are not limited to . . . subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services;” “[a]lso included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.”<sup>328</sup> The Rome Statute’s Elements of Crimes explains that the crime “may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”<sup>329</sup>

For this underlying crime, it is not required to prove physical destruction in whole or in part of the targeted group.<sup>330</sup> In the *Brđjanin* case, an ICTY Trial Chamber found that the conditions at various camps and detention facilities “were calculated to bring about physical destruction [of] Bosnian Muslim and Bosnian Croat detainees and . . . were inflicted deliberately.”<sup>331</sup>

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325. Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 692 (Sept. 1, 2004) (“The group upon which these conditions are inflicted must be a protected group under the terms of the Genocide Convention.”).

326. *Id.*

327. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 518 (July 31, 2003) (“The Trial Chamber in *Akayesu* held that the expression [calculated to bring about its physical destruction] ‘should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.’”).

328. *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 691; *see also Stakić*, Case No. IT-97-24-T, Judgment, ¶ 517.

329. Rome Statute of the International Criminal Court, *supra* note 40, art. 6(c) (elements of genocide include “deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part”).

330. *See Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 691 (“‘Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ under sub-paragraph (c) does not require proof of the physical destruction in whole or in part of the targeted group.”); *see also Stakić*, Case No. IT-97-24-T, Judgment, ¶ 517 (similar).

331. *Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 909; *see id.* ¶¶ 909-62 (discussing the Manjaca camp, the Mlavke football stadium, the Bosanski Novi fire station, the Kotor Varos prison, the Omarska camp, the Keraterm camp, the Trnopolje camp, the

Here, there is a large amount of factual information showing that the crime of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part has been committed:

- “*Scorched-earth tactics:*” As mentioned above, both Human Rights Watch and the U.S. Congress have categorized the joint attacks by the Sudanese armed forces and Janjaweed militias as “scorched-earth tactics.”<sup>332</sup> Virtually nothing remains of the villages attacked—items essential for survival are systematically destroyed.<sup>333</sup>
- *Janjaweed burned villages, looted and stole cattle:* As part of these “scorched-earth tactics, there are countless eye-witness accounts of Janjaweed burning villages,<sup>334</sup> looting,<sup>335</sup> and

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Sloga shoe factory, the Betonirka factory garages, the Pribinic camp, and the Territorial defense building in Teslic municipality).

332. See *DARFUR DESTROYED*, *supra* note 8, at 7; see also Comprehensive Peace in Sudan Act of 2004 § 3(8), 50 U.S.C. § 1701 (2006).

333. *DARFUR DESTROYED*, *supra* note 8, at 2 Similarly:

Human Rights Watch research in Darfur in March and April 2004 confirmed reports from refugees in Chad and other sources that Sudanese government forces and Janjaweed have systematically attacked and destroyed villages, food stocks, water sources and other items essential for the survival of Fur and Masalit villagers in large parts of West Darfur.

*Id.* at 26.

334. *Id.* at 9 (on August 30, 2003, soldiers and Janjaweed attacked and burned Mororo); *id.* at 10 (Mororo was later burned a second time); *id.* (eye-witness to attack in the Murnei area: “They burned everything, looted everything.”); *id.* (Murnei was later burned a second time); *id.* at 11 (“In November 2003, Janjaweed attacked at least four villages close to Mango - Angar, Bayda, Nyorongta and Shushta – and remained in the villages after burning them.”); *id.* (“The villages burned included Gororg, Dureysa, Tirja, Maliam, Mororo, Gorra and Korkojok,” said thirty-seven-year-old Ahmad, a former Urum resident.); *id.* at 13 (village in the Barih area, east of Geneina burned); *id.* at 14 (Habla Canare, east of El Geneina burned); *id.* at 15 (Kondoli, in the Misterei area burned); *id.* at 17 (as to Kenyu, near Fobranga: “Everything was burned”; “[o]n the same day they burned Buranga”); *id.* (thirty villages of Sildi were looted and burned); *id.* at 18 (in Tunfuka, south of Murnei, they burned the village); *id.* at 19 (Janjaweed burned Tullus); *id.* at 20 (at Terbeba, the army burned houses); *id.* at 22 (a large area of Wadi Salih was burned: “Dozens of villages around Deleig have been burned by the government”); *id.* at 23 (both Bindisi and Kudung were partly burned and destroyed); *id.* at 25 (only one hut in Korkoria was unburned); *id.* at 26 (“[i]n one of the areas systematically surveyed by Human Rights Watch in April [2004],” all villages were partially or totally burned).

335. *Id.* at 10 (eye-witness to attack in the Murnei area; “They . . . looted everything.”); *id.* at 20 (at Terbeba, the army stole some grain and burned the rest); *id.* at 23 (as to both Bindisi and Kudung, the market and shops were totally looted); see *id.* at 26 (“Sudanese government forces and Janjaweed have systematically attacked and destroyed villages, food stocks, water sources and other items essential for the survival of Fur and Masalit villagers in large parts of West Darfur.”); *id.* (in one of the areas system-

stealing cattle.”<sup>336</sup> The looting, for example, was clearly organized and premeditated. Army troops and Janjaweed have been told they could keep their looted goods if they “fight well.”<sup>337</sup> A former government soldier clarified the policy: “You keep what you have taken. It applies to the officers too. One exception: the animals. The animals are given to Janjaweed nomads who keep them. Then they are sold.”<sup>338</sup>

- *Food stocks were systematically destroyed:* As part of the “scorched–earth tactics,” food stocks have been systematically destroyed.<sup>339</sup>

- *Putting dead bodies down wells to contaminate water supply:* There have been accounts of Janjaweed putting dead bodies down wells in Darfur in order to contaminate water supplies.<sup>340</sup>

- *Destroying mosques and Korans:* As discussed above,<sup>341</sup> there are accounts of Government and Janjaweed forces having burned at least sixty-five mosques in Dar Masalit, killed people in mosques as well as imams, and defecated on Korans.<sup>342</sup>

- *Denial of access to medical treatment:* As discussed above, witnesses have stated that severely ill or wounded villagers were

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atically surveyed by Human Rights Watch in April [2004], “[f]ood storage containers and other items necessary for the storage and preparation of food were all destroyed”).

336. *Id.* at 9 (on August 30, 2003, soldiers and Janjaweed attacked and burned Mororo, stealing cattle); *id.* at 11 (in one village in the Mango cluster, Mango Buratta, soldiers and Janjaweed stole all the cattle in the village); *id.* at 12 (eyewitnesses reported in November 2003, that Janjaweed came to Urum and took 3,000 head of cattle); *id.* at 18 (in Tunfuka, south of Murnei, they rounded up the cattle); *id.* at 20 (at Terbeba, the army stole 1,000 cattle); *see id.* at 31 (discussing the lucrative business of cattle rustling); *see also* ENTRENCHING IMPUNITY, *supra* note 10, at 6 (estimating in total the theft of millions of livestock).

337. ENTRENCHING IMPUNITY, *supra* note 10, at 20 (quoting Human Rights Watch interview with former African Union military observer in the Netherlands on Sept. 15, 2005).

338. *Id.* at 20 (quoting Human Rights Watch interview with government soldier in SLA custody in North Darfur on July 14, 2005).

339. *See* DARFUR DESTROYED, *supra* note 8, at 26 (“Sudanese government forces and Janjaweed have systematically attacked and destroyed villages, food stocks, water sources and other items essential for the survival of Fur and Masalit villagers in large parts of West Darfur.”); *id.* (in one of the areas systematically surveyed by Human Rights Watch in April [2004], “[f]ood storage containers and other items necessary for the storage and preparation of food were all destroyed”).

340. Interview with Eric Reeves, *supra* note 6. Congress has referred to the “poisoning of . . . wells.” Comprehensive Peace in Sudan Act of 2004 § 3(9), 50 U.S.C. § 1701 (2006).

341. *See supra* Part II.A.2.

342. *See* DARFUR DESTROYED, *supra* note 8, at 28.

denied access to hospitals and health care.<sup>343</sup>

- *Others are resettled into the areas formerly occupied by the African tribes:* The return of those displaced has largely been prevented by resettlement of Janjaweed and other Arab ethnic groups in areas previously populated by Masalit and Fur.<sup>344</sup>
- *Denial of humanitarian assistance:* As described above, the Government of Sudan has denied humanitarian assistance to those displaced.
- *Rape and other forms of sexual violence:* As discussed above, large numbers of rapes and other forms of sexual violence have occurred.<sup>345</sup>

Here, it certainly appears that these conditions were both (a) calculated to bring about the physical destruction of the targeted groups in whole or in part, and (b) inflicted deliberately. As to the acts that have been deemed to be covered by this crime, case law has included, for instance: subjecting the group to a subsistence diet; systematic expulsion from homes; denial of the right to medical services; lack of proper housing and clothing<sup>346</sup>—all crimes present here. Thus, it is quite clear that this underlying crime has been committed.

Accordingly, factual information gathered as to the crimes committed in Darfur clearly shows the *dolus specialis* of genocide: (1) intent to destroy; (2) in whole or in part; (3) the Fur, Masalit and Zaghawa ethnic groups; (4) as such. Arguments that the extensive displacement negates “intent to destroy,” or that other motives were at issue than destruction, are rebuttable or legally incorrect. The facts also clearly show that at least three of genocide’s underlying crimes have been committed (any one of which would suffice for a legal case): killing, serious bodily or mental harm, and deliberately inflicting conditions of life calcu-

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343. *Id.* at 35.

344. *Id.* at 40. As explained by Human Rights Watch:

[T]he land on which displaced persons and refugees once lived has become free for the taking, open to use and occupation by the ethnic groups comprising the Janjaweed, by new arrivals fleeing a linked conflict in neighboring Chad, and by others. Land occupation serves to consolidate the ethnic cleansing campaign, and greatly threatens the prospects for long-term peace in the region.

CHAOS BY DESIGN, *supra* note 2, at 22.

345. *See infra* Part II.A.2.f.

346. Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 691 (Sept. 1, 2004); *see* Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 517 (July 31, 2003).



lated to destroy the group in whole or in part. Thus, while this Article does not take the additional step of examining individual criminal responsibility—as a criminal case would be required to—the law and facts strongly indicate that genocide has indeed occurred.<sup>347</sup>

### III. *THE NEED TO SUPPORT THE INTERNATIONAL CRIMINAL COURT IN ITS PROSECUTION EFFORTS*

Even if the crimes in Darfur are genocide, however, that does not necessarily mean they should be prosecuted as such in the current situation. Ideally, of course, they would be. Yet, it is one thing to acknowledge something as genocide, and another to bring a prosecution against an individual—proving that individual's genocidal intent beyond a reasonable doubt. It is furthermore, a much more difficult step to do so where the investigation is being impeded by the Government of the country who's cooperation the Prosecutor would need in order to obtain documentary evidence and investigate on the ground. Because of the difficulties in the instant situation, this Article urges the ICC Prosecutor to consider charging the crime of genocide, but does not argue emphatically that he need do so.

Under the current circumstances, even if the ICC does not charge the crime of genocide, it will need strong support from the international community in order to succeed in any of its Darfur prosecutions. As noted above, the ICC has already issued arrest warrants for two individuals charged with war crimes and crimes against humanity committed in Darfur—Ahmad Muhammad Harun, former Minister of State for the Interior and current Minister of State for Humanitarian Affairs, and Ali Muhammad Ali Abd Al Rahman (known as Ali Kushayb), a Janjaweed militia leader.<sup>348</sup> The Government of Sudan opposes ICC prosecutions and has refused to execute the warrants.<sup>349</sup> Thus, the

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347. While this approach is somewhat artificial, it follows that of the ICTY and ICTR which "have undertaken a threshold inquiry of whether genocide writ large occurred in the region in which the individual was operating. Then, the tribunals consider whether the particular defendant possessed genocidal intent." Van Schaack, *supra* note 7, at n.110.

348. See *Sixth Report*, *supra* note 13, ¶ 2.

349. For example, rather than executing the ICC's warrant for Harun, Sudan's president Omar Bashir has refused to turn him over and instead put him on a committee overseeing deployment of the new peacekeeping mission. See generally *Delay, Obstruction and Darfur*, *supra* note 35. As mentioned above, the Government of Sudan has also

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ICC's Darfur investigation is quite different, for example, than its investigations regarding crimes in the Democratic Republic of Congo, Uganda and the Central African Republic. All three of those countries had joined the Rome Statute, and their Governments invited the ICC Prosecutor to open investigations.<sup>350</sup> Sudan, by contrast, has not joined the Rome Statute; the situation was referred to the ICC not by the Sudan, but by the U.N. Security Council,<sup>351</sup> and the Government of Sudan is openly hostile to the ICC's work. Thus, *if* there are to be any successful ICC prosecutions of the crimes in Darfur—which there most emphatically *should* be—a great deal of international pressure must be used to ensure that the Government of Sudan cooperates with the ICC (including in executing arrest warrants), as it is currently obligated to do by Security Council resolution.<sup>352</sup>

Serious attention should also be paid to the number of individuals being prosecuted. To date, the ICC has issued two public arrest warrants (although perhaps more are under seal). Given the magnitude of the crimes committed, two prosecutions (or even a few more),<sup>353</sup> would hardly suffice as “doing justice.”<sup>354</sup>

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recently given a government post to Janjaweed leader Musa Hilal, who is implicated in various crimes. *See Sudan Gives Advisor Role to Militia Leader, supra* note 136.

350. *See* Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), [http://www.iss-cpt.int/press-release\\_details&id=19&l=en.html](http://www.iss-cpt.int/press-release_details&id=19&l=en.html); Press Release, ICC President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2005), [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html); Press Release, ICC, Prosecutor Receives Referral Concerning Central African Republic (Jan. 7, 2005), [http://www.icc-cpt.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpt.int/pressrelease_details&id=87&l=en.html).

351. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). A day after ICC Prosecutor Luis Moreno Ocampo on June 6, 2005 announced that the ICC would investigate the crimes in Darfur, Sudan announced the establishment of the Special National Criminal Court for Darfur. *See ENTRENCHING IMPUNITY, supra* note 10, at 68-69. The timing of the announcement suggests there will be an attempt by Sudan to avoid the ICC's jurisdiction by raising a challenge under Article 17 of the Rome Statute. *See Rome Statute of the International Criminal Court, supra* note 40, art. 17.

352. *See* S.C. Res. 1593, ¶ 2, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (the U.N. Security Council decided “that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance”) (emphasis added).

353. The International Commission of Inquiry compiled a list of fifty-one names of individuals who should be investigated for crimes in Darfur. *See Commission of Inquiry, supra* note 7, ¶ 645. Human Rights Watch has named at least twenty-two. *See ENTRENCHING IMPUNITY, supra* note 10, at Annex 1 (“Partial list of individuals who should be investigated by the ICC,” naming seven Sudanese national officials, including President Bashir; five current or former regional officials; four Sudanese military commanders and six Janjaweed militia leaders).

Furthermore, under the current regime in Sudan, one can hardly rely upon Sudanese courts to prosecute additional cases.<sup>355</sup>

The way forward requires: (a) the Government of Sudan and Janjaweed militias to end all attacks; (b) immediate security needs being met by successful deployment of the combined African Union and U.N. “hybrid” peacekeeping force (“UNAMID”);<sup>356</sup> (c) eventually, a political solution for the people of Darfur; (d) containment of the violence in Chad and the Central African Republic; (e) strong support for the ICC’s Darfur prosecution; and (f) eventually, additional justice efforts.

### CONCLUSION

The facts clearly suggest that the crimes committed in Darfur are genocide. All of the elements of the *dolus specialis* (special mental state) of genocide are present, and at least three of genocide’s underlying crimes have clearly been committed. The United States was correct when it determined the situation to be genocide.<sup>357</sup> It is disappointing that international actors, such as the U.N. and/or NGOs, such as Human Rights Watch, have not taken that step. *Not* that it *should* matter what mass killing is called before it is stopped; yet, it might have facilitated the situation had the decision been made earlier to identify the crimes as genocide. Of course, the more urgent priority is stopping the crimes—which has still not been achieved—due in large part to China’s shameful threat over the last several years to veto forceful U.N. deployment of troops in Darfur,<sup>358</sup> and Sudanese stalling of the agreement to consensual deployment of U.N. troops.

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354. As is often quoted: it is “of fundamental importance that *justice should not only be done, but should manifestly and undoubtedly be seen to be done.*” *King v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233 (emphasis added).

355. See Press Release, Human Rights Watch, National Courts Have Done Nothing in Darfur: ICC Prosecution Needed; Government Must Hand Over Suspects (June 11, 2007), <http://www.hrw.org/english/docs/2007/06/11/sudan16110.htm>; HUMAN RIGHTS WATCH, LACK OF CONVICTION: THE SPECIAL CRIMINAL COURT ON THE EVENTS IN DARFUR (2006) (the briefing paper examines the operations of the court, which was purportedly established by the Sudanese government to address the crimes in Darfur).

356. The Security Council has authorized a January 1, 2008 deployment of 26,000 peacekeepers to replace the 7000 African Union peacekeepers (“AMIS”) that have been in Sudan. See *Delay, Obstruction and Darfur*, *supra* note 35.

357. See *supra* note 5 and accompanying text.

358. “Russia and China have often supported the Sudanese government [at the Security Council] because of ideological commitments (non-interference in internal

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The world must start to act forcefully in the face of genocide, and take seriously the “responsibility to protect.” How can one keep saying “never again,” after the Holocaust occurs, *and* Rwanda’s genocide occurs *and* Darfur’s genocide occurs?

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affairs of member states) and both have economic interests in Sudan.” HUMAN RIGHTS WATCH, *supra* note 3.