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# “Never Again,” Again: Darfur, the Genocide Convention, and the Duty to Prevent Genocide

by Jamal Jafari

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**A**FTER EVERY 20TH CENTURY GENOCIDE, the world declared it would “never again” allow such a crime to occur. Now, with the situation in Sudan’s Darfur region steadily deteriorating, the international community is once again in danger of breaking its promise. The international community is no closer to actually preventing genocide in Darfur than it was in Rwanda in 1994, in Cambodia, or in Nazi Germany. The problem is not political will, for political will alone is insufficient to bring about the type of change necessary to stop genocide. The problem lies in the inability of the international community to set up permanent structures to prevent or limit the spread of genocide.

U.S. Secretary of State Colin Powell, when offering an interpretation of the Genocide Convention, placed the onus on the United Nations to take action. If individual states, however, want to give the UN greater responsibility to prevent genocide, the UN should be better equipped to do so. Ultimately, the lesson of Darfur could lead to the birth of multilateral institutions that are more immune to diplomatic delays and can deal with a crisis that demands early action.

The international community should examine Darfur closely and divine lessons to be applied to future conflicts. First, allegations of genocide in Darfur should be closely scrutinized in light of the Genocide Convention. Second, a debate should ensue surrounding the interpretation of the Genocide Convention’s ability to prevent genocide. Third, more effective methods for preventing genocide should be discussed and acted upon. Finally, the needs of Darfurians still at risk should be the world’s top priority. Genocide is an on-going process that can be stopped. But, if the international community fails to address the needs of Darfurians in internally displaced camps or refugee camps, this genocide may very well continue unchecked.

## BACKGROUND

THE ROOTS OF THE DARFUR CONFLICT lie in historic disagreements over land use. Black African farmers occupy land that nomadic Arabs want for grazing. Periodic skirmishes have emerged over the years but never to the level of a major conflict. In 2003, two rebel groups, the Justice and Equality Movement (JEM) and the Sudan Liberation Army (SLA), sought to gain a greater share of national resources for the black African population of the region.

Meanwhile, all of Sudan is waiting for a potential resolution of the 20-year civil war that pits the primarily Arab government in Khartoum against the Sudan People’s Liberation Army (SPLA), comprised primarily of black Africans in southern Sudan. A peace deal is on the table that gives southern Sudanese a greater share of their natural resources and the possibility of greater autonomy. The Darfuran rebel groups have seized on this opportunity to seek

more resources from Khartoum, although they have been careful to refrain from any claims of independence.

The Sudanese government has targeted civilians in this conflict, which has led to allegations of genocide. The government exploited the traditional tensions between the black African and Arab populations by arming the Arab-dominated Janjaweed militia and fighting alongside them in Darfur. Instead of focusing on rebel elements, they sought to eliminate black Africans from the region. Although the reasoning for targeting civilians is open to interpretation, the Sudanese government most likely wanted to warn potential rebel groups across Sudan not to oppose the government, as the SPLA has in southern Sudan.

## LEGAL EVIDENCE OF GENOCIDE IN DARFUR

THE ATROCITIES IN DARFUR CLEARLY CONSTITUTE GENOCIDE according to the legal standards set forth in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention). The Genocide Convention established a three-pronged test to determine genocide. First, Article II states that the acts in question must be perpetrated against a “national, racial, ethnical or religious group.” Second, the accused party must have committed one of five enumerated acts: killing, causing serious bodily or mental harm, imposing conditions on a group calculated to bring about their destruction in whole or in part, preventing births within the group, or forcibly transferring children from the group. Finally, the accused party must have perpetrated the acts in question with the intent to destroy the group, “in whole or in part.”

## GROUP DEFINITION

The non-Arab population of Darfur constitutes a “group” under the language of the Genocide Convention. In defining the term “group,” the International Criminal Tribunal for Rwanda (ICTR) has stated that the political, social, and cultural context of the targeted group should be taken into consideration. In this case, the group is primarily composed of members of the Zaghawa,



Adrienne Fricke

Irba Refugee Camp in Chad (August 2004).

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Massalit, and Fur ethnicities, and are all black African and non-Arab. They all have historical roots in the region and speak a Nilo-Saharan language distinct from Arabic. Finally, they are being exploited in a conflict which pits nomadic Arab herders against sedentary black African farmers. While this evidence clearly satisfies the “group” definition, the additional fact that there are hundreds of thousands of refugees at the United Nations High Commissioner for Refugees (UNHCR) camps in Chad who are all black African is damning evidence in and of itself.

#### ENUMERATED ACTS

It is clear that four of the five enumerated acts in the Genocide Convention are occurring in Darfur, although only one is necessary to satisfy the definition of genocide. First, it is apparent that killings have occurred in the affected group. The August 2004 State Department report states that, of the 1,136 refugees interviewed, 61% said they had seen a family member killed, 67% had seen a non-family member killed, and 44% had witnessed a death by shooting. Observers currently estimate at least 70,000 deaths in Darfur since the conflict began in 2003, most from malnutrition and disease.

Second, evidence collected by the UN, the U.S. State Department, the International Crisis Group, and Human Rights Watch, among others, indicates that the Sudanese government and the Janjaweed have perpetrated “serious bodily or mental harm.”

Finally, the affected group has experienced measures intended to prevent births. Both the ICTY and the ICTR have indicated that rape satisfies this definition. The fact that 16% of those interviewed in the State Department report claim to have witnessed or experienced a rape is a disturbingly high number for a crime that has a history of being underreported. There are also reports of perpetrators telling victims that they are being raped to create “light” babies—babies that appear Arab—so as to repopulate the area with Arabs instead of black Darfurians. In addition, there are numerous reports of men being targeted in Darfur, both to reduce the number of men of fighting age and to ensure they will not procreate, thereby reducing the non-Arab population.

#### INTENT TO DESTROY IN WHOLE OR IN PART

In considering genocide, it is most difficult to prove the element of intent. According to international standards, the Sudanese government and the Janjaweed have demonstrated the requisite intent to destroy the affected group in Darfur in whole or in part. The ICTR has ruled that the scale of the attacks, evidence of systematic planning, and statements of the perpetrators can all be taken into account when analyzing the intent element. In addition, the intent element can be satisfied by showing a desire to destroy the affected group in part. The ICTY and ICTR define “in part” as the intent to destroy a “considerable” or “substantial” number of the affected group.

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The ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY) have defined this term to mean actual harm that may or may not be permanent. In *Prosecutor v. Akayesu*, the ICTR defined “mental harm” to include rape. The evidence for these crimes in Darfur is highly incriminating. The State Department report indicated that 21% of the Darfurians interviewed experienced or witnessed a beating, 25% experienced or witnessed an abduction, 16% experienced or witnessed a rape, 67% experienced or witnessed an aerial bombing of a village, and 81% experienced or witnessed the destruction of a village. Numerous reports from human rights organizations, as well as interviews conducted by the author, confirm this point.

Third, the Sudanese government and the Janjaweed have inflicted conditions of life calculated to bring about the physical destruction of non-Arabs in Darfur. The *Akayesu* case defined this element as conditions which do not necessarily kill, but “ultimately seek the victim’s physical destruction.” The UN Preparatory Committee for the International Criminal Court has stated that deprivation of food or medical services fits the definition. The State Department report and numerous human rights and press reports indicate that villages in Darfur are routinely ransacked of all valuables, including food, and destroyed. Refugees have reported that aerial bombing raids preceded ground attacks and targeted wells and livestock. Many villagers reported that ground troops specifically targeted food stores for destruction. In the majority of cases, villages were completely burned to the ground.

The scale of the attacks clearly indicates the intent to destroy the affected population in Darfur, at least in part. The Sudanese government and Janjaweed militia were responsible for the deaths of 70,000 people and for driving 2.25 million from their villages. This means the majority of non-Arab residents of Darfur are either dead, in refugee camps in Chad, or in internally displaced person camps in other parts of Darfur.

There is also evidence of systematic planning based on the uniform nature of most attacks and statements overheard by victims. By and large, villages in Darfur were bombed by Sudanese government planes and helicopters. These bombings continued for days or months until a ground force, comprised usually of Janjaweed militia fighting alongside government troops, invaded the villages. Gunfire rained down onto civilians as they were chased from their homes. Afterwards, the villages were looted of valuables and often burned. This scenario played out time and time again across Darfur. In addition, 33% of the refugees interviewed for the State Department report indicated they heard their attackers use racial epithets. Often villagers were told, “This is no longer the home of the blacks” and “We will drive the blacks out of here,” among other racially motivated language.

The Sudanese government claims that the offensive attacks target rebels and are justifiable based on its need to defend against attack. The ICTR, however, ruled that the presence of a conflict between armed groups is not justification for genocide. In addition, the State Department report and interviews conducted by the

author confirm that the vast majority of village attacks occurred on villages with no rebel presence. In the few situations where rebels were present, they numbered only ten or twenty combatants facing a government and Janjaweed force of thousands.

Therefore, there can be little doubt that, based upon an application of the facts to international standards, the atrocities in Darfur amount to genocide.

### IMPLICATIONS OF THE OBLIGATION TO “PREVENT” GENOCIDE

ON SEPTEMBER 9, 2004, U.S. SECRETARY OF STATE Colin Powell broke new ground when he declared that the situation in Darfur constitutes genocide. Never before has a sovereign nation invoked the Genocide Convention to characterize another conflict. This was partially due to fears that the Convention required action to “prevent” genocide from all its signatories. Secretary Powell seized on language in Article 8 which states that contracting parties may call upon “competent organs” of the UN to take measures “which they consider appropriate” to prevent genocide. The specific action is not enumerated, nor is the exact mechanism for action. He went on to indicate that the United States was satisfying its obligations under the Genocide Convention by providing money for humanitarian assistance, engaging diplomatically, and working through the UN Security Council for a resolution.

In the end, the declaration shifted a great degree of the responsibility for preventing genocide from individual states to the UN. Secretary Powell’s testimony removed a roadblock that had not been discussed since the passage of the Convention—the obligation of sovereign states to use force to stop genocide. Contracting parties will not likely feel compelled to commit troops to prevent genocide merely due to vague Convention language compelling them to act. Now, the focus of genocide prevention should shift to the needs of competent multilateral institutions. Their response must mirror those to other humanitarian disasters such as disease or famine. The world community must react swiftly and avoid political delays in order to protect those who lack the means to defend themselves.

### THE FUTURE OF GENOCIDE PREVENTION

THE LEGACY OF THE WORLD RESPONSE to the Rwandan genocide was a chain of broken promises. The legacy of Darfur can and should be different. But if the international community is going to shift the burden of prevention, it should empower the UN with legitimate “competent organs” capable of meeting the challenge. The appointment of Juan Mendez as the newly created UN Special Adviser on the Prevention of Genocide is a welcome step, but it is not enough.

### A PERMANENT GENOCIDE COMMISSION SHOULD BE ESTABLISHED WITHIN THE UN

The world needs a permanent Genocide Commission with the authority to commit investigators, recommend a plan of action, and make determinations of genocide based on internationally recognized norms. The Commission, which, as a UN body, would carry the moral backing of world opinion, should be comprised of eminent scholars and independent experts with a mandate to receive requests from any party to the Genocide Convention.

A new Genocide Commission should be empowered to investigate before events on the ground reach the level of genocide. Such

a commission would be valuable in unifying an international response and issuing recommendations to UN bodies and member states regarding a response. If such a commission had been operational at the beginning of the Darfur conflict, it could have focused on a coordinated response much earlier.

### DISCUSSIONS SURROUNDING A STANDING RAPID REACTION FORCE MUST BEGIN

Ultimately, a troop presence will be the quickest and most effective mechanism for preventing genocide. Nearly insurmountable sovereignty issues arise when individual states are charged with the task of committing troops. A standing rapid reaction force under a UN commander could prove more acceptable. If the mandate was sufficiently limited to protecting civilians or a safe area for



New arrivals to UNHCR camps in eastern Chad make shelters of branches and blankets. The refugees must wait up to a month for a tent (Irba Refugee Camp, August 2004).

internally displaced persons, the decision to deploy could mirror other humanitarian interventions for disease or famine, instead of wasting precious months and even years waiting for a Security Council resolution providing a mandate for a multilateral force.

Regional organizations such as the African Union (AU) and the European Union (EU) have already taken steps towards a rapid reaction force, but they may prove insufficient alone to prevent genocide. The AU Charter requires active intervention in other member states, but deployment is predicated on a finding of genocide, war crimes, or crimes against humanity. The EU is on the verge of establishing a rapid response force with several units of 1,500 troops each that can be used worldwide pending unanimous consent of the European Council of Ministers. While these measures are a welcome approach to conflict prevention, the political elements of deployment may be insufficient to actually prevent genocide. An international approach coordinated with a central Genocide Commission is necessary.

In addition, discussions should begin regarding the discretion of the troop commander. The only way to truly prevent genocide is to empower the commander with the authority to act as he or she sees fit to prevent genocidal acts. This may be a very controversial measure, but it could allow for intervention only when civilians are unduly targeted, while remaining neutral in any underlying conflict between combatants.

The obstacles to a rapid reaction force are great, but so are the risks of not establishing adequate institutions in the wake of the

grams should emphasize that the residency requirement will not be used as a means of undermining the importance of an individual ethnic identity in Nigeria. Finally, the federal government should work with state officials and traditional rulers to encourage continued dialogue between ethnic communities in order to emphasize peacekeeping and prevent further violence.

### CONCLUSION

THE RECENT CONFLICT IN NIGERIA'S PLATEAU STATE signals a need for the government to address the indigene/settler dichotomy by implementing long-term legislative and policy changes. The Constitution should be amended so that citizenship is based on residency and not on indigene status. Predictably, the successful applica-

tion of any constitutional amendments hinges on the citizens' beliefs that the new laws will be applied fairly. The government must therefore demonstrate, at both the federal and state level, that government officials and individuals will be held accountable for using ethnic origin as a means of discriminating against and marginalizing other citizens. Furthermore, Constitutional reform should be coupled with locally implemented educational programs aimed at promoting inter-ethnic awareness and tolerance, and an understanding of the colonial origins of "them" versus "us" ethnic relations in Nigeria today. Ultimately, these changes are necessary in order for Nigerians to see themselves as equal citizens instead of ethnic groups pitted against each other in a struggle to secure land and political power. *HRB*

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second genocide in a decade. If this reaction model had existed in the early 90's, a rapid reaction force could have saved hundreds of thousands of lives in Rwanda and tens of thousands could have been saved in Darfur. The world demands at least a serious discussion of the merits of armed intervention.

### HUMANITARIAN INSTITUTIONS SHOULD BE FUNDED AT CRISIS LEVELS IN ADVANCE

The humanitarian reaction to Darfur has been hampered by the failure of many nations to fulfill their commitments. On the ground, refugees and internally displaced persons who have already experienced the horrors of genocide still lack adequate food, clean water and basic supplies. In the UNHCR camps in eastern Chad, new arrivals still must wait up to a month for a tent, living unprotected in areas where the temperature can soar above 110 degrees. Rains and a reliance on ground delivery of goods along poor roads hamper shipments of humanitarian aid.

It does not have to be this way. The world needs to fund humanitarian agencies at crisis levels and replenish those resources while a crisis is occurring. There should be no excuse for illness or death when the money to prevent it has been promised but not yet delivered.

### THE FUTURE OF DARFUR

THE WORLD MAY ACT TO PREVENT A FUTURE GENOCIDE, but what of Darfur? Concrete steps still need to be taken to halt the genocide and return the civilian population to pre-conflict conditions of life.

### IMMEDIATELY FULFILL HUMANITARIAN COMMITMENTS

Clearing barriers to aid delivery can save hundreds of thousands of lives. The UNHCR and other aid agencies badly need funds to ensure that aid can be provided and delivered to the 2.25 million Darfurians in need. The United States has largely fulfilled its commitments, but other major actors need to deliver on aid promises.

### ADEQUATELY SUPPORT THE AFRICAN UNION PROTECTION FORCE

The African Union has answered the call that the rest of the international community ignored in terms of committing troops and protecting monitors. Now that the AU force is projected to

reach a still-inadequate level of 3,000 troops, the United States and other major powers should support the force with financial and logistical support. Helicopters, transport planes, and vehicles are badly needed.

The United States and other world powers also should discuss planning and resources in anticipation of a larger AU force. While the increase to 3,000 troops is welcome and necessary, it is not sufficient to protect the 2.25 million Darfurians still at risk of direct conflict and a lack of humanitarian aid.

In addition, other multilateral organizations, such as the new EU rapid reaction force and NATO, should provide assistance to the AU force to establish a united international response to the security situation.

### SEPARATE GENOCIDE FROM THE ABUJA PEACE PROCESS

Many major powers, including the United States, have provided at least tacit support for the Abuja peace process between the Darfuran rebels and the Sudanese government. While the resolution of this conflict is essential to a return to normalcy for Darfur, the peace process should be treated as wholly separate from genocide and humanitarian needs. A response to genocide should not and cannot wait for a diplomatic resolution between the two parties.

### PRESS KHARTOUM FOR THE RIGHT OF RETURN

While the humanitarian crisis in Darfur is paramount, pressure must be placed by the UN and major powers on the Sudanese government to ensure the right of return for Darfuran civilians to their home areas with security. If the right of return is not secured early and enforced, the genocide will be a success.

### CONCLUSION

WITH GREAT CRISIS COMES GREAT OPPORTUNITY. The Rwandan genocide left a legacy of empty promises. The world again stands at a crossroads with genocide, but this time the world can establish permanent institutions that can adequately prevent a future crisis. In ten years, the legacy of Darfur should be seen as the point where the world stopped dispensing rhetoric and started acting to prevent its most heinous crime. After all, the focus should never be on what we can do, but rather on what must be done. *HRB*