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## GENOCIDE, CRIMES AGAINST HUMANITY, AND DARFUR: THE COMMISSION OF INQUIRY'S FINDINGS ON GENOCIDE

*William A. Schabas\**

The Outcome Document, adopted at the United Nations summit in September 2005, affirms that “each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” Recognition of this duty to protect at a gathering of such significance confirms important progress with respect to general international law, and expands upon the obligation to prevent, set out in one of the most important human rights treaties, the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. It is uncontroversial to maintain that the duty to prevent genocide is one of customary law, applicable even to States that have not signed or ratified the 1948 Convention. The September 2005 Outcome Document extends this so as to cover a range of atrocities that do not constitute genocide, according to the definition of the crime in the Genocide Convention, including the relatively recent concept of “ethnic cleansing.”

Perhaps the Outcome Document will help lay to rest a controversy that has been simmering in the international community for more than a year, namely, whether or not the “ethnic cleansing” that has been an ugly feature of the civil war in Darfur constitutes the crime of genocide, as defined in the 1948 Convention and reaffirmed in such instruments as the Rome Statute of the International Criminal Court. The debate was launched by United States Secretary of State Colin Powell, in a September 9, 2004 statement to the Senate Foreign Relations Committee:

And, Mr. Chairman, there is, finally, the continuing question of whether what is happening in Darfur should be called genocide. Since the United States became aware of atrocities occurring in Sudan, we have been reviewing the Genocide Convention and the obligations it places on the Government of Sudan and on the international community and on the state parties to the genocide convention. In July, we launched a limited investigation by sending

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\* Professor of Human Rights Law, National University of Ireland, Galway, and Director, Irish Centre for Human Rights.

a team to visit the refugee camps in Chad to talk to refugees and displaced personnel. The team worked closely with the American Bar Association and the Coalition for International Justice, and were [sic] able to interview 1136 of the 2.2 million people the UN estimates have been affected by this horrible situation, this horrible violence. Those interviews indicated: first, a consistent and widespread pattern of atrocities: Killings, rapes, burning of villages committed by Jingaweit and government forces against non-Arab villagers; three-fourths of those interviewed reported that the Sudanese military forces were involved in the attacks; third, villagers often experienced multiple attacks over a prolonged period before they were destroyed by burning, shelling or bombing, making it impossible for the villagers to return to their villages. This was a coordinated effort, not just random violence. When we reviewed the evidence compiled by our team, and then put it beside other information available to the State Department and widely known throughout the international community, widely reported upon by the media and by others, we concluded, I concluded, that genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit bear responsibility—and that genocide may still be occurring. . . . We believe in order to confirm the true nature, scope and totality of the crimes our evidence reveals, a full-blown and unfettered investigation needs to occur. Sudan is a contracting party to the Genocide Convention and is obliged under the Convention to prevent and to punish acts of genocide. To us, at this time, it appears that Sudan has failed to do so.<sup>1</sup>

Powell's remarks put Sudan's treaty obligation to "prevent and punish genocide" at the center of the debate. He explicitly invoked Article 8 of the 1948 Convention, which authorizes State parties to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."<sup>2</sup> Incidentally, this appears to constitute the only formal reference to Article 8 of the Convention since it was adopted, more than half a century ago.

Colin Powell's call for accountability with respect to alleged

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<sup>1</sup> *The Crisis in Darfur: Hearing Before the Sen. Foreign Relations Comm.*, 108th Cong. (2004) (statement of Sec'y Colin L. Powell, U.S. Sec'y of State) available at <http://www.state.gov/secretary/former/powell/remarks/36042.htm>. A Department of State report on Darfur issued in September 2004 did not use the term genocide, but said: "The non-Arab population of Darfur continues to suffer from crimes against humanity. A review of 1,136 interviews shows a consistent pattern of atrocities, suggesting close coordination between GOS forces and Arab militia elements, commonly known as the Jingaweit (Janjaweed)." See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR AND THE BUREAU OF INTELLIGENCE AND RESEARCH, DOCUMENTING ATROCITIES IN DARFUR, Department of State Publication 11182 (Sept. 2004).

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. 8, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277.

atrocities committed in Darfur could have proceeded along two related but somewhat different trajectories. One approach—the one that the United States and some human rights non-government organisations insisted upon—was that the debate be framed in terms of Sudan’s conventional or treaty obligations. Accordingly, it became necessary to make the case that the crime of genocide, as defined in the Convention, had indeed been committed. The other approach, and one consistent with the position subsequently confirmed by the September 2005 Outcome Document, was to invoke a broader customary law obligation upon each State “to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” Squabbling about whether acts perpetrated in Darfur were “real” genocide or one of its cognates, such as crimes against humanity, becomes of little or no significance in such a context.

The Security Council acted pursuant to Powell’s appeal, in accordance with Article 8 of the Genocide Convention. By Resolution 1564 of September 18, 2004, it mandated the establishment of

an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.<sup>3</sup>

The Commission of Inquiry called for in the Security Council Resolution was promptly created by the United Nations Secretary-General. Chaired by the eminent international legal scholar Antonio Cassese, who among other distinctions had served as the first president of the International Criminal Tribunal for the former Yugoslavia, the Commission reported back to the Secretary-General on January 25, 2005. It disagreed with Powell, concluding that the atrocities that had been committed in the Darfur region of Sudan were not acts of genocide but rather crimes against humanity. Answering the question “was there a genocidal intent?”, the Commission said, “the Government of Sudan has not pursued a policy of genocide.” Explaining its position, the Commission said:

Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are: first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led to

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<sup>3</sup> S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

the perception and self-perception of members of African tribes and members of Arab tribes as making up two distinct ethnic groups. However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. 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>4</sup>

The Commission of Inquiry never absolved the Sudanese regime of responsibility for gross abuses of human rights and serious violations of international humanitarian law. It characterized the behaviour of the pro-government *Janjaweed* paramilitaries as “crimes against humanity”:

However, as pointed out above, the Government also entertained the intent to drive a particular group out of an area on persecutory and discriminatory grounds for political reasons. In the case of Darfur this discriminatory and persecutory intent may be found, on many occasions, in some Arab militias, as well as in the central Government: the systematic attacks on villages inhabited by civilians (or mostly by civilians) belonging to some “African” tribes (Fur, Masaalit and Zaghawa), the systematic destruction and burning down of these villages, as well as the forced displacement of civilians from those villages attest to a manifestly persecutory intent. In this respect, in addition to *murder* as a crime against humanity, the Government may be held responsible for *persecution as a crime against humanity*. This would not affect the conclusion of the Commission that the Government of Sudan has not pursued the policy of genocide in Darfur.<sup>5</sup>

Moreover, the Commission called for prosecution by the International Criminal Court.<sup>6</sup> Because Sudan is not a party to the Rome Statute of the International Criminal Court, Security Council referral, in accordance with Article 13(b) of the Rome Statute,<sup>7</sup> is the appropriate mechanism. Several weeks after the Darfur Commission issued its report, the United Nations Security Council responded to the report by referring “the situation in Darfur since 1 July 2002” to the International Criminal Court.<sup>8</sup>

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<sup>4</sup> The Secretary-General, *Report of the International Commission of Inquiry on Violations of International Law and Humanitarian Law and Human Rights Law in Darfur*, ¶ 518, delivered to the Security Council, U.N. Doc S/2005/60 (Jan. 31, 2005) [hereinafter *Darfur Report*].

<sup>5</sup> *Id.* ¶ 519 (emphasis in the original).

<sup>6</sup> *Id.* ¶ 569.

<sup>7</sup> Rome Statute of the International Criminal Court, June 15-17, 1998, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, art. 13(b), U.N. Doc A/CONF.183/9.

<sup>8</sup> S.C. Res. 1593, ¶ 1, U.N. Doc. S/Res/1593 (Mar. 21, 2005).

The findings of the Commission have infuriated some United States-based NGOs, who view the failure to use the label of genocide to describe the atrocities being committed as some sort of perfidy. The term “denial” has been regularly bandied about in debates on the question, as if there is some equivalence between the hate-mongering of so-called historians like Jacques Faurisson or David Irving and the thoughtful analysis of prominent international human rights experts. This sort of demagoguery has not helped advance the campaign for accountability in Darfur. The distinction between genocide and crimes against humanity or ethnic cleansing has shown itself to be insignificant in terms of both a duty to prevent and an obligation to punish. Indeed, the insistence by the United States on a genocide determination probably delayed the Security Council by several months. The investigative work conducted by the Commission of Inquiry might well have been undertaken by the Prosecutor of the International Criminal Court from the outset, in September 2004. Precious time was wasted establishing a commission of inquiry and debating its findings when this proved to be a totally unnecessary and superfluous step. The United States waited until the end of March 2005 before agreeing—in the form of an abstention—to refer the Darfur case to the International Criminal Court. This wasted precious time and arguably delayed, by six months or so, the threat that perpetrators would be held accountable internationally. In other words, the sterile debate about whether the Darfur atrocities are genocide or “merely” crimes against humanity did not enhance justice, it did the opposite.

This is not to say that the work of the Commission is insignificant in a legal sense. The enigmatic definition of genocide in the 1948 Convention has eluded consensus, and continues to challenge those who interpret it, be they scholars, activists, or members of international tribunals and commissions. Over the year prior to the issuance of the Report of the Commission of Inquiry, there were several important judgments of the international criminal tribunals dealing with genocide. Unquestionably the most significant was *Krstić*, issued on April 19, 2004, in which the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed that the Srebrenica massacre, in July 1995, was an act of genocide. The judgment probably enlarged the meaning of genocide to the extent that it contemplated the partial destruction of a relatively small community. The accused, General Krstić, was himself acquitted of genocide, the Appeals Chamber concluding that he lacked the specific intent to destroy the Bosnian Muslims. Instead, it convicted Krstić of aiding and abetting in genocide because he provided assistance to others, including

General Mladić, knowing that a genocidal plan was underway.<sup>9</sup>

Subsequent judgments of different trial chambers of the ICTY have taken the law in opposite directions. One ruling takes the rather extreme view that “forcible transfer of a population” (as opposed to its physical destruction) can constitute genocide,<sup>10</sup> while the other has reaffirmed that “[t]he [Genocide Convention], and customary international law in general, prohibit only the physical or biological destruction of a human group.”<sup>11</sup> In other words, the ICTY Appeals Chamber’s ruling in *Krstić* has left a fundamental issue unclear, at least in the eyes of the judges who are subordinate to it: are atrocities associated with the expulsion of an ethnic group from its historic abode (“ethnic cleansing”) equivalent to genocide? The Darfur Commission’s report seems to side with the somewhat more conservative construction of the ICTY Trial Chamber expressed in *Brđanin*.

### I. GENOCIDE OR SIMPLY “ETHNIC CLEANSING”?

The debate about whether “ethnic cleansing” constitutes genocide has been raging for more than a decade, since the expression first emerged as a term to describe the forced displacement of national minority groups during the wars in the former Yugoslavia.<sup>12</sup> Acting as an International Court of Justice *ad hoc* judge named by Bosnia and Herzegovina in the application against Yugoslavia, Elihu Lauterpacht defined ethnic cleansing as “the forced migration of civilians.”<sup>13</sup> Judge Lauterpacht declared that he was prepared to order, pursuant to the 1948 Genocide Convention,

a prohibition of ‘ethnic cleansing’ or conduct contributing thereto such as attacks and firing upon, sniping at and killing of non-combatants, and bombardment and blockade of areas of civilian occupation and other conduct having as its effect the terrorization of

<sup>9</sup> Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, (Apr. 19, 2004).

<sup>10</sup> Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶¶ 665-66 (Jan. 17, 2005). The Trial Chamber in *Blagojević* takes the lead from Judge Shahabuddeen’s opinion in *Krstić*. Prosecutor v. Krstić, Case No. IT-98-33-A, Partial Dissenting Opinion of Judge Shahabuddeen (Apr. 19, 2004). Judge Shahabuddeen noted that while the five punishable acts of genocide involve physical or biological destruction, this does not limit the scope of the words “intent to destroy” in the *chapeau* of the provision. Thus, even an intent to destroy a group in a cultural sense—i.e., “ethnic cleansing”—could fit squarely within the parameters of the definition. But to the extent this interpretation is set out in an individual opinion but not echoed in the views of the majority, it is not unfair to say that the approach is implicitly rejected by the Appeals Chamber.

<sup>11</sup> Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 694 (Sept. 9, 2004).

<sup>12</sup> Nathan Lerner, *Ethnic Cleansing*, 24 ISRAEL YB HUMAN RIGHTS 103 (1994); Drazen Petrovic, *Ethnic Cleansing - An Attempt at Methodology*, 5 EUROPEAN J. INT’L L. 342 (1994).

<sup>13</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 325, 431 (Sept. 1993) (separate opinion of Judge Lauterpacht).

civilians in such a manner as to lead them to abandon their homes.”<sup>14</sup>

These individual views did not, however, resonate with the majority.

In the very first judicial application of the 1948 Genocide Convention, the District Court of Jerusalem acquitted Adolph Eichmann of genocide with respect to Nazi crimes committed prior to August 1941. Until 1941, Nazi anti-Semitic policies were directed towards convincing Jews in Germany to leave the country. Hitler, apparently, even entertained the idea that they might all be deported to Madagascar.<sup>15</sup> Jews were incited to leave by various forms of persecution, including discriminatory laws and periodic outbursts of violence such as the *kristalnacht* of November 9 and 10, 1938. But only after the war against the Soviet Union was underway did the Nazi policy develop into one of destruction of the Jews of Europe, in whole or in part. At this point, Nazi policy became genocidal. The District Court of Jerusalem noted this evolution in Nazi policy, commenting that “[t]he implementation of the ‘Final Solution,’ in the sense of total extermination, is to a certain extent connected with the cessation of emigration of Jews from territories under German influence.”<sup>16</sup> Until mid-1941, when the “final solution” emerged, the Israeli court said “a doubt remains in our minds whether there was here that specific intention to exterminate,” as required by the definition of genocide. The Court said it would treat such inhumane acts as crimes against humanity rather than genocide. Eichmann was acquitted of genocide for acts prior to August 1941.<sup>17</sup>

The term “genocide” has been widely employed to describe atrocities committed during the wars in the former Yugoslavia, even in resolutions of the United Nations General Assembly.<sup>18</sup> Nevertheless, international criminal lawyers, aware of the *Eichmann* precedent as well as of such other authorities as the *travaux préparatoires* of the 1948 Convention, have shown caution. A mere handful of the initial indictments before the ICTY included the charge of genocide. A sign of the Prosecutor’s ambivalence on such prosecutions was the decision to accept a plea bargain from one of the Bosnian Serb leaders that involved withdrawing the genocide charges.<sup>19</sup> Of the six cases that have

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<sup>14</sup> *Id.* at 447.

<sup>15</sup> CHRISTOPHER BROWNING, *THE ORIGINS OF THE FINAL SOLUTION: THE EVOLUTION OF NAZI JEWISH POLICY, SEPTEMBER 1939-MARCH 1942* (2004).

<sup>16</sup> A.G. Israel v. Eichmann, 36 I.L.R. 5, 104 (Jerusalem Dist. Ct. 1961).

<sup>17</sup> *Id.* at 230-31, 272-76.

<sup>18</sup> G.A. Res. 47/147, U.N. Doc. A/RES/47/121 (Apr. 26, 1993); G.A. Res. 47/121, at 2, U.N. Doc. A/RES/47/147 (Apr. 7, 1993). Probably not too much legal significance should be attached to use of the term “genocide” by the General Assembly in these two resolutions. At the same session, the General Assembly also adopted a resolution entitled “‘Ethnic cleansing’ and racial hatred,” that did not so much as mention the word ‘genocide’ or refer to the 1948 Convention. G.A. Res. 47/80, U.N. Doc. A/RES/47/80 (Mar. 15, 1993).

<sup>19</sup> Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1-S, Sentencing Judgment, (Feb. 27, 2003).

been adjudicated to date,<sup>20</sup> only two have led to convictions, and not for genocide but rather for aiding and abetting in the crime.<sup>21</sup> Current uncertainty flows from the ambiguities inherent in the leading case of the Appeals Chamber, finding General Krstić guilty with respect to the Srebrenica massacre and sentencing him to thirty-five years of detention. Krstić did not participate actively in any of the killings, and had himself organized the deportation of Muslim women and children from the Srebrenica area. For those who see forced deportation as a form of genocide, this only confirms his genocidal intent. But to others, this proves precisely the opposite: in evacuating the women and children, Krstić demonstrated that he had no intent to destroy the Muslims of Srebrenica in whole or in part. In an enigmatic compromise—clearly the product of a divided bench—the ICTY Appeals Chamber held that Krstić lacked genocidal intent, but that he could be convicted for aiding and abetting others, to the extent that he knew they possessed genocidal intent.<sup>22</sup>

Consistent with case law of the ICTY, which holds that an individual, acting alone, may commit genocide,<sup>23</sup> the Darfur Commission does not exclude the possibility that genocide convictions might eventually result from the acts in question.<sup>24</sup> However, it holds that there is no evidence of a State plan or policy intended at the physical destruction of the groups in question. This finding is helpful, for it affirms the centrality of a State plan or policy in the crime of genocide, even if this is not a formal element of the offence. In effect, in asking the Darfur Commission whether genocidal acts were being committed in Sudan, the Security Council wanted to know whether genocide was being committed pursuant to a plan or policy of the State. Of course, the Security Council did not make this explicit, but the whole point was

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<sup>20</sup> Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, (Jul. 5, 2001); Prosecutor v. Sikirica Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, (Sept. 3, 2001); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, (Jul. 31, 2003); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, (Apr. 19, 2004); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, (Sept. 1, 2004); Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, (Jan. 17, 2005).

<sup>21</sup> Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, (Apr. 19, 2004); Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, (Jan. 17, 2005).

<sup>22</sup> Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 134, 140 (Apr. 19, 2004); see also Prosecutor v. Ntakirutimana, Cases Nos. ICTR-96-10-A & ICTR-96-17-A, Judgment, ¶ 500 (Dec. 13, 2004).

<sup>23</sup> Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 100 (Dec. 14, 1999); Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 48 (Jul. 5, 2001); see also Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶ 98, at n.114 (Jun. 12, 2002) (discussing crimes against humanity). The law has evolved so far in recent years that even mere serial killers, not to mention groups such as the Hells Angels and the Mafia, now fit within the parameters of crimes against humanity as interpreted by the ICTY Appeals Chamber. The Darfur Commission cites the famous pronouncement in *Kunarac*, noting, with respect to its discussion of crimes against humanity, that “[i]t is not necessary, but it may be relevant, to prove the attack is ‘the result of the existence of a policy or plan.’” *Darfur Report*, *supra* note 4, ¶ 179.

<sup>24</sup> *Darfur Report*, *supra* note 4, ¶ 520.

obvious enough.

Does anybody really care whether a single individual, acting alone and independently of involvement or complicity of the Sudanese government, had the intent to destroy an ethnic group? Surely this question never interested the Security Council, or Colin Powell, for that matter. Nor could an individual *génocidaire* acting alone without a State plan or policy provide a pretext for Security Council action, or for the intervention of United Nations bodies pursuant to Article 8 of the Genocide Convention, or give a basis for jurisdiction of the International Court of Justice in accordance with Article 9 of the Convention. The Darfur Commission implicitly understood this and answered accordingly. Although there is no shortage of authority claiming that a State plan or policy is not an element of the crime of genocide, the behaviour of the Security Council and the Darfur Commission shows that state plan or policy is not only an essential ingredient of the crime, it is the question that lies at the very heart of the debate. The theory that an individual, acting alone, may commit genocide is little more than a sophomoric *hypothèse d'école*, and a distraction for international judicial institutions.

## II. ARE THE VICTIMS A PROTECTED GROUP?

The Report of the Darfur Commission of Inquiry devotes considerable time to considering whether the victims of the attacks by *Janjaweed* fall within the rubric of “national, ethnical racial or religious groups,” the well-accepted formulation that first appeared in the 1948 Genocide Convention and that has been copied in subsequent instruments.<sup>25</sup> The Commission notes that the principal victims belong to three main tribes, the Fur, the Massalit and the Zaghawa, and that these tribes

do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim). In addition, also due to the high measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them.

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<sup>25</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277; Rome Statute of the International Criminal Court, June 15-17, 1998, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, art. 6, U.N. Doc A/CONF.183/9; Statute of the International Criminal Tribunal for Rwanda, art. 2, *adopted* Nov. 8 1994, *annexed to* S.C. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Tribunal for the Former Yugoslavia, art. 4, *adopted* May 25, 1993, *annexed to* S.C. 827, U.N. Doc. S/RES/827 (May 25, 1993), *available at* <http://www.un.org/icty/basic/statut/statute.htm>.

Furthermore, inter-marriage and coexistence in both social and economic terms, have over the years tended to blur the distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them.<sup>26</sup>

As the Commission points out, there are analogies with the situation in Rwanda, where an International Criminal Tribunal for Rwanda (ICTR) Trial Chamber struggled with defining the Tutsi as an ethnic group. In *Akayesu*, the Trial Chamber concluded that the scope of the terms “national, ethnical, racial and religious group” can be expanded to include all “stable and permanent groups,”<sup>27</sup> an approach that the Darfur Commission endorses.<sup>28</sup> It explains:

What matters from a legal point of view is the fact that the interpretative expansion of one of the elements of the notion of genocide (the concept of protected group) by the two International Criminal Tribunals is in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules). In addition, this expansive interpretation does not substantially depart from the text of the Genocide Convention and the corresponding customary rules, because it too hinges on four categories of groups which, however, are no longer identified only by their objective connotations but also on the basis of the subjective perceptions of members of groups. Finally, and perhaps more importantly, this broad interpretation has not been challenged by States. It may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law.<sup>29</sup>

The Commission’s suggestion that the “permanent and stable groups” hypothesis has been well-accepted in the case law of the international tribunals is surely overstating the case. The theory first appeared in *Akayesu*, and was reaffirmed by the same ICTR Trial Chamber in some subsequent judgments.<sup>30</sup> But later rulings by other ICTR Trial Chambers make no reference to the “permanent and stable groups” concept, and generally satisfy themselves by taking judicial notice of the fact that in Rwanda in 1994 the Tutsi were recognised as

<sup>26</sup> *Darfur Report*, *supra* note 4, ¶ 508.

<sup>27</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 510, 516 (Sept. 2, 1998).

<sup>28</sup> *Darfur Report*, *supra* note 4, ¶ 498.

<sup>29</sup> *Id.* ¶ 501.

<sup>30</sup> *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 57 (Dec. 6, 1999); *Prosecutor v. Musema*, ICTR-96-13-T, Judgment, ¶ 162 (Jan. 27, 2000). According to Guénaél Mettraux, in his recent study, “[a]lthough the meritorious agenda behind such a position is obvious, this proposition would appear to be, unfortunately, unsupported in law and at the time of its exposition in fact constitute purely judicial law-making.” GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 230 (2005).

an ethnic group.<sup>31</sup> The *Akayesu* Trial Chamber's approach has never been affirmed by the ICTR Appeals Chamber. Moreover, the "permanent and stable groups" hypothesis finds no echo in any of the ICTY judgments. In *Krstić*, an ICTY Trial Chamber concluded that the victims were members of the "national group" of Bosnian Muslims.<sup>32</sup> The ICTY Trial Chambers have noted that that the crime of genocide in many respects fits within the historical framework of the international legal protection of national minorities, and that the concept of "national, ethnic, racial or religious" groups should be interpreted in this context.<sup>33</sup> This approach indicates a quite different view of the philosophical basis for the crime of genocide than the "stable and permanent groups" theory of genocide initially advanced in the ICTR. The Darfur Commission went too far in suggesting that the interpretative expansion of the four groups enumerated in the Genocide Convention "has become part and parcel of international customary law." The Commission says this can be "safely held," but the opposite is the better view.<sup>34</sup>

Indeed, the "interpretative expansion" of the groups enumerated in the *Convention* is totally unnecessary and seems to work at cross purposes with the real reasoning of the Darfur Commission. The Commission concludes that the persecuted tribes are subsumed within the scope of the crime of genocide to the extent that victim and persecutor "perceive each other and themselves as constituting distinct groups."<sup>35</sup> This essentially subjective approach to the identification of groups contemplated by the definition of genocide has gained increasing acceptance in the case law of the international tribunals.<sup>36</sup> The point here is that the victims were being persecuted not because the *Janjaweed* saw them as a "permanent and stable group," but rather because they considered them to be a "national, ethnical, racial or religious group." The same can be said of the persecution of the Tutsi in Rwanda. 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. Once the subjective approach, which relies

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<sup>31</sup> Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 817 (Dec. 1, 2003).

<sup>32</sup> Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 599 (Aug. 2, 2001).

<sup>33</sup> Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 555-56 (Aug. 2, 2001); *see also* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 682 (Sept. 1, 2004).

<sup>34</sup> Moreover, the Commission seems to confound treaty law and customary law. When the *Akeyesu* trial chamber said the 1948 *Genocide Convention* protected all "permanent and stable groups," it was interpreting a treaty text, not making a pronouncement on customary law. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 516 (Sept. 2, 1998).

<sup>35</sup> *Id.* ¶ 509.

<sup>36</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 317 (May 15, 2003); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 811 (Dec. 1, 2003).

essentially on the perpetrator's perception of the victim group, is adopted, there is no longer a need to enlarge, by interpretation, the accepted definition of the crime of genocide. The only real utility of the "permanent and stable groups" hypothesis resides when an objective approach to defining groups protected by the *Convention* is followed, and this is rejected by the Commission in favour of a subjective approach.

The Commission's report is clear in its reliance on this subjective test. The Commission notes that "[t]he various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim)."<sup>37</sup> Nevertheless, although "objectively the two sets of persons at issue do not make up two distinct protected groups,"<sup>38</sup> over recent years "a self-perception of two distinct groups" has emerged.<sup>39</sup> According to the Darfur Commission, the rebel tribes are viewed as "African" and their opponents as "Arab," even if this distinction may lack a genuinely objective basis.

Perhaps the point is that with racism, there is not always an "objective basis." It is all reminiscent of the famous Dr. Seuss children's book that attempts to explain racism based on virtually imagined distinctions rather than genuine ones.<sup>40</sup> Doesn't the wisdom of this fable make great sense in its explanation about the utter "subjectivity" of racism?

### III. INTERPRETING INHUMANE ACTS

The most difficult issue lies in interpreting the brutal and inhumane behaviour of the pro-government militias. The Report of the Commission of Inquiry concludes:

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

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<sup>37</sup> *Darfur Report*, *supra* note 4, ¶ 508.

<sup>38</sup> *Id.* ¶ 509.

<sup>39</sup> *Id.* ¶ 511.

<sup>40</sup> "Now the Star-Belly Sneetches/Had bellies with stars./The Plain-Belly Sneetches/Had none upon thars." DR. SEUSS, *THE SNEETCHES AND OTHER STORIES* (1961).

of counter-insurgency warfare.<sup>41</sup>

As an example, the Darfur Commission describes an attack on January 22, 2004 on Wadi Saleh, which is a group of twenty-five villages inhabited by about 11,000 people. Eyewitnesses told the Commission that the Government Commissioner and the leader of the Arab militias that had participated in attacking and burning the villages gathered all those who had survived or had not managed to escape into a large area:

Using a microphone they selected 15 persons (whose name they read from a written list), as well as 7 *omdas* (local leaders), and executed them on the spot. They then sent many men, including all elderly men, all boys, many men and all women to a nearby village, where they held them for some time, whereas they executed 205 young villagers, who they asserted were rebels (*Torabora*). According to male survivors interviewed by the Commission, about 800 persons were not killed (most of the young men spared by the attackers were detained for some time in the Mukjar prison).<sup>42</sup>

For the Commission, “[t]his case clearly shows that the intent of the attackers was not to destroy an ethnic group as such or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among or getting support from the local population.”<sup>43</sup>

The Commission’s Report also notes that persons forcibly dislodged from their villages have been collected in IDP (internally displaced persons) camps. It explains:

In other words, the populations surviving attacks on villages are not killed outright in an effort to eradicate the group; rather, they are forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Government of Sudan may be held to be in breach of international legal standards on human rights and rules of international criminal law, it is not indicative of any intent to annihilate the group.<sup>44</sup>

The parallels with the ICTY’s Srebrenica cases are most striking. The evidence in *Krstić* showed that men of military age were targeted for extermination, while others were evacuated.<sup>45</sup> Arguably, this is a wider net than the example of targeting “rebels” that is given by the Darfur Commission. But is the distinction significant enough to make the difference between genocide and, say, the crime against humanity of

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<sup>41</sup> *Darfur Report*, *supra* note 4, ¶ 518.

<sup>42</sup> *Id.* ¶ 513.

<sup>43</sup> *Id.* ¶ 514.

<sup>44</sup> *Id.* ¶ 515.

<sup>45</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶¶ 85-87 (Aug. 2, 2001).

extermination?<sup>46</sup> Moreover, at Srebrenica the women and children were bussed from the area to sanctuary; General Krstić procured the buses and the fuel.<sup>47</sup> The Darfur Commission's finding that summary execution of military-aged men accompanied by evacuation of women and children to camps does not establish genocidal intent is rather more convincing than the reasoning of the ICTY Trial Chamber, which seemed to suggest that without adult males, a society is doomed.<sup>48</sup> Because it considered that extermination of men of military age was tantamount to genocide, the ICTY Trial Chamber wrote: "In a patriarchal society, such as the one in which the Bosnian Muslims of Srebrenica lived, the elimination of virtually all the men has made it almost impossible for the Bosnian Muslim women who survived the take-over of Srebrenica to successfully re-establish their lives."<sup>49</sup> To its credit, the Darfur Commission does not indulge in such patronizing speculation. Quite wisely, it refuses to make the quantum leap from the extermination of rival combatants to the intentional destruction of an ethnic group.

#### IV. WHY DO BUSH AND POWELL INSIST SO MUCH?

Why did the United States insist so much on describing the acts as genocide? Several factors help to explain this.

Despite the efforts of the Darfur Commission to explain that labelling the acts as crimes against humanity was hardly trivialising them, there remains a popular perception that genocide is the "crime of crimes," and any description that falls short of genocide amounts to betrayal of the victims. Certainly, there is a legal debate about the relative gravity of genocide and crimes against humanity. The argument that genocide is more serious than crimes against humanity, in the same sense that premeditated murder is more serious than intentional murder, has been widely accepted over the years. Genocide requires proof of intent to destroy an ethnic group, and recent authority suggests that in addition this must be on racist or discriminatory grounds.<sup>50</sup> Crimes against humanity can be used to describe a much broader range of atrocities, involving violence against the person and persecution, that fall short of physical destruction of a group. Moreover, a discriminatory intent or motive is only required for the

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<sup>46</sup> *Id.* ¶ 49; Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 227 (Nov. 29, 2002); Prosecutor v. Musema, ICTR-96-13-A, Judgment, ¶¶ 366-67 (Nov. 16, 2001).

<sup>47</sup> Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 142 (Aug. 2, 2001).

<sup>48</sup> *Id.* ¶¶ 90-94.

<sup>49</sup> *Id.* ¶ 91.

<sup>50</sup> Prosecutor v. Niyitegaka, Case No. ICTR-96-14-A, Judgment, ¶ 53 (Jul. 9, 2004).

crime against humanity of persecution, whereas it informs the whole concept of specific intent that is an element of the crime of genocide.

Professor Cassese himself participated in early decisions of the ICTY that acknowledged a hierarchy in the categories of crimes within the jurisdiction of the Tribunal.<sup>51</sup> Eventually, this view was rejected by a majority of the Appeals Chamber, which found nothing in the ICTY Statute to justify any such hierarchy.<sup>52</sup> But while that might be true, there are recent indications in the case law to suggest that judges still consider genocide to sit at the apex of evil.<sup>53</sup> The *Rome Statute* provides at least a hint of this hierarchy, reserving the crime of “direct and public incitement” for genocide, but not for crimes against humanity and war crimes.<sup>54</sup> As for war crimes themselves, there are several indications in the *Rome Statute* that they are not in principle as serious as genocide and crimes against humanity, starting with the possibility for a State to ratify or accede to the treaty yet not accept jurisdiction over war crimes.<sup>55</sup> The Darfur Commission was examining violations of international humanitarian law from the perspective of the *Rome Statute*, although it was guided by the jurisprudence of the *ad hoc* tribunals. But on this point, there may be a significant divergence between the applicable positive law provisions. In other words, there is an explicit hierarchy of crimes in the *Rome Statute*. Perhaps out of concern that its finding of crimes against humanity may seem inadequate, the Commission took pains to state that “genocide is not necessarily the most serious international crime,”<sup>56</sup> a gratuitous observation that it had no need to make.

Legal arguments aside, describing acts as genocide has the consequence of stigmatisation to an extent that simply does not work in the same way with respect to crimes against humanity. For Colin Powell and the Bush administration, it is surely an appealing proposition to tarnish Sudan, which must be on its short list for the vacant Iraqi seat as a member of the “axis of evil,” with the odium of

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<sup>51</sup> Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment, ¶ 10 (Oct. 7, 1997); Prosecutor v. Tadić, Case No. IT-94-1-*Abis*, Separate and Dissenting Opinion of Judge Cassese (Jan. 26, 2000).

<sup>52</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 247 (Jul. 21, 2000); Prosecutor v. Tadić, Case No. IT-94-1-*Abis*, Judgment in Sentencing Appeals, ¶ 69 (Jan. 26, 2000).

<sup>53</sup> Recently, the Appeals Chamber of the International Criminal Tribunal for Rwanda endorsed the view that genocide was the “crime of crimes.” Prosecutor v. Niyitegaka, Case No. ICTR-96-14-A, Judgment, ¶ 53 (Jul. 9, 2004); see also Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 502 (Jul. 31, 2003).

<sup>54</sup> Rome Statute of the International Criminal Court, June 15-17, 1998, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, art. 25(3)(e), U.N. Doc A/CONF.183/9.

<sup>55</sup> *Id.* art. 124; see also *id.* art. 31(1)(c), 33(2) (suggesting that genocide and crimes against humanity are more serious than war crimes).

<sup>56</sup> *Darfur Report*, *supra* note 4, ¶ 522.

“genocide.” Fundamentalist evangelical Christians in the United States who see Sudan as a contemporary battleground for the crusade against Islam are without doubt making their influence felt on United States policy too. That the debate took place in the midst of a fiercely contested presidential election cannot have been irrelevant, and the Republicans may well have calculated that an apparently inflexible position on genocide would garner votes among Christian religious extremists.

There is an important school of thought within the United States government that considers a finding of genocide to authorize “humanitarian intervention,” even in the absence of Security Council authorisation. The argument is built upon the assertion that the prohibition of genocide is a norm of *jus cogens*, and that therefore the duty to prevent even takes precedence over the Charter of the United Nations. The case law of the International Court of Justice is usually invoked in this respect, although it is a misconception to claim that the ICJ has ever made the assertion that the prohibition of genocide is a peremptory norm of international law.<sup>57</sup> More logical is a reading of the Genocide Convention by which it fits within the four corners of the Charter of the United Nations. After all, the Convention was adopted by the General Assembly, and it seems implausible that it would have intended to override the Charter by mere implication. Accordingly, any duty to prevent genocide that may involve the use of force must receive the imprimatur of the Security Council. But the idea that branding an act genocide may relieve the United States from respect for the Charter’s prohibition on the use of force must appeal to some policy people in Washington, as it did in 1998 and 1999, when the arguments justifying intervention in Kosovo were being cooked up. Nor should the effect on Sudan be gainsaid. A declaration from Washington that genocide is being committed is humanitarian sabre-rattling.

And finally, there is oil in Sudan. Lots of it. Why does United States humanitarianism always seem to coincide with major petroleum resources?

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<sup>57</sup> In the 1951 *Advisory Opinion*, the ICJ said “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.” Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *Advisory Opinion*, 1951 I.C.J. 15, 16 (May 28). The ICJ has also described the prohibition of genocide as an *erga omnes* norm. *Case Concerning the Barcelona Traction, Light and Power Company (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5); *Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, 1996 I.C.J. 595, 615 (Jul. 11).

## V. GENOCIDE OR CRIMES AGAINST HUMANITY?

Critics of the Darfur Commission are preoccupied with its determination that genocide is an inappropriate term to describe the atrocities. This presents itself as yet another example of an insistence among both academics and NGO activists that “genocide” be used when “crimes against humanity” is actually a much better fit. At a recent conference in New York City to commemorate the Nuremberg judgment, I was given the impression that some consider the Darfur Commission’s rejection of the term “genocide” as tantamount to Holocaust denial. How quickly people forget that the term “crimes against humanity” was itself coined to describe the massacres of the Armenians,<sup>58</sup> in May 1915, and was subsequently codified as international law’s nomenclature for the perverse acts of the Nazi regime.

There are obvious historical reasons for the concern that acts be described as genocide rather than crimes against humanity. Since 1948, we have had a relatively robust treaty dealing with genocide, whereas crimes against humanity essentially lingered in the fog of customary law, aside from its appearance at Nuremberg and in a few national prosecutions, until codification in the *Rome Statute* in 1998. But there is no longer any need for such sharp distinctions between genocide and crimes against humanity, and it is the genius of the Darfur Commission to help us understand this point.

The Commission provides a helpful nudge for the evolving law of genocide in two other respects. It largely dismisses the rather preposterous hypothesis of a lone genocidal maniac and returns the focus to where it belongs, a crime committed in pursuit of a plan or policy of a State or state-like entity. Too much jurisprudential ink has been wasted by the ICTY on the theoretical case of the lone genocidal maniac, one that belongs more to psychiatry than it does to law. The Commission also navigates the law of genocide away from a tendency to describe all acts of ethnic persecution as genocide. Such crimes are better defined as crimes against humanity, as the Commission concludes.

Since the 1940s, genocide and crimes against humanity have endured somewhat of an awkward relationship, a result of the complex environment of their genesis in the post-Second World War attempts to criminalize the atrocities of the Nazi regime. Crimes against humanity were initially defined rather broadly to include a range of acts of persecution of minorities and vulnerable groups. However, their scope

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<sup>58</sup> UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 35 (1948).

was limited by the notorious *nexus* with armed conflict. Genocide was conceived of as a crime that could be committed in time of peace. Its elevation to the status of international crime, by General Assembly Resolution 96(I) of 1946, was driven by a frustration with the Nuremberg Tribunal's refusal to condemn Nazis for acts committed prior to the outbreak of the war. But genocide's rejection of the *nexus* had its own price, in a narrow definition of the crime.

Genocide and crimes against humanity were both conceived of to describe the same horrible acts, the destruction of Europe's Jewish population, and the persecution of other vulnerable groups. But for half a century the two categories of international crime lived in tension, essentially because of the perceived *nexus* between crimes against humanity and armed conflict. Genocide's narrow definition also meant that it was possible to provide for a conventional regime comporting various obligations, including the mandatory jurisdiction of the International Court of Justice, in accordance with Article 9 of the Convention. The scope of crimes against humanity covered most gross violations of human rights, but the lack of a treaty meant the concept was virtually impotent in a legal sense. Frustrated by a legal reality that in essence did nothing more than reflect the underdeveloped state of the law with respect to the protection of human rights, critics called for an enlargement of the definition of genocide or, alternatively, elastic interpretations of the existing treaty.

But since adoption of the *Rome Statute*, the rationale for such distinctions has been largely eliminated. The two categories of crime can now coexist in a complementary relationship, where genocide is reserved for the arguably most heinous crime against humanity, namely the intentional physical destruction of an ethnic group. The Darfur Commission's Report very usefully points the law in this direction.

Now the initiative lies with the International Criminal Court. Darfur is a daunting challenge, but it was exactly for such cases that the ICC was created. Since the Prosecutor took office, investigations have focused on cases involving a cooperative relationship with States in the prosecution of rebel bands, a scenario that was not, to say the least, what drove efforts to establish the Court. The Darfur Commission's preliminary work will no doubt be of assistance to the Prosecutor. Its wise and balanced report must certainly have contributed to the willingness of the Security Council to refer the case to the International Criminal Court. And if the Commission was wrong, and genocide was in fact committed, then the International Criminal Court is the right place for this issue to be considered. According to the report submitted by the Prosecutor to the Security Council on June 29, 2005,

There is a significant amount of credible information disclosing the commission of grave crimes within the jurisdiction of the Court

having taken place in Darfur. These crimes include the killing of thousands of civilians and the widespread destruction and looting of villages, leading to the displacement of approximately 1.9 million civilians. The conditions of life resulting from this violence have led to the deaths of thousands from disease and starvation, particularly affecting vulnerable groups such as children, the sick and the elderly. Information also suggests a pervasive pattern of rape and sexual violence taking place throughout Darfur, including allegations of gang rape, as well as attacks on children and young girls.<sup>59</sup>

After assessing the Sudanese justice system, the Prosecutor has already determined that some cases would be admissible before the Court, in accordance with Article 17 of the *Rome Statute*.<sup>60</sup> He has also concluded that there is a “reasonable basis” for an investigation.<sup>61</sup> One way or another, whether it is for genocide or crimes against humanity, the perpetrators now stand a reasonable chance of being brought to justice, and they know it.

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<sup>59</sup> LUIS MORENO OCAMPO, REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, MR. LUIS MORENO OCAMPO, TO THE SECURITY COUNCIL PURSUANT TO UNSCR 1593, 2 (2005).

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.* at 5.