
**BEYOND “DE-NILE”
THE UNITED NATIONS’ GENOCIDE PROBLEM IN DARFUR**

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As the vast humanitarian crisis continues to ravage Darfur, all law students and legal practitioners should be asking: Why does international law continue to fail the victims in Sudan? This Comment addresses that difficult question by exploring the legal theories available for enforcing the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

First, this Comment explains why the crimes being committed in Darfur meet the international legal test for genocide found in the Genocide Convention. After discussing the Genocide Convention generally, as well as the inherent drawbacks of prosecuting genocide at the International Criminal Court, this Comment describes the emerging scholarly theory of universal jurisdiction for violations of jus cogens norms. Jus cogens norms—the most fundamental norms of international law—are non-derogable and include crimes such as genocide, torture, and slavery. The emerging trend that links jus cogens crimes with universal jurisdiction has found support from courts and commentators as a means to punish the most despicable crimes against humanity.

Finally, this Comment uses this emerging trend as a starting point to argue that the international community may use humanitarian intervention as a means to stop ongoing violations of jus cogens norms. Although prosecution through universal jurisdiction is a viable option to punish genocide, it cannot stop or prevent genocide. The same logic that underlies the call for universal jurisdiction over violations of jus cogens norms should also trigger the consideration of humanitarian intervention.

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In conclusion, this Comment suggests that the current situation in Darfur meets the test for allowing humanitarian intervention. Thus, the use of military force in Darfur is both legally justified and morally necessary to enforce the Genocide Convention and stop the killing.

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**BEYOND “DE-NILE”
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INTRODUCTION

On September 21, 2006, hundreds of survivors gathered in Kigali, Rwanda,¹ to remember the savage civil war that tore apart their tiny country in 1994.² They met to honor the nearly 1 million men, women, and children who were slaughtered when Hutu-led mobs sought to cleanse Rwanda of its Tutsi minority.³ But the crowd also met for other, perhaps more important, reasons: to tell the world that genocide is occurring in Africa again, this time in Sudan, and to call on the United Nations and the developed world to stop it.⁴ Freddy Umutanguha, a survivor of the Rwandan war and the organizer of the rally expressed the sentiment of the crowd: “[T]he world left Rwandans to their fate and a million people were murdered. Today, the world must stop genocide in Darfur.”⁵

The United Nations (“U.N.”) and the world hesitated to label

¹ PEOPLE BUILDING PEACE, A DAY OF PEACE IN RWANDA 2006 (2006), http://www.peoplebuildingpeace.org/index.php?option=com_content&task=view&id=43; Austin Bay, *From Rwanda to Darfur*, TOWN HALL, Sept. 27, 2006, http://www.townhall.com/columnists/AustinBay/2006/09/27/from_rwanda_to_darfur. See also GENOCIDE IN RWANDA: A COLLECTIVE MEMORY 2-8 (John A. Berry & Carol Pott Berry eds., 1999) (discussing the factors that led to the Rwandan genocide of 1994). In Rwanda’s short civil war, lasting roughly 100 days, radical groups of the ethnic majority Hutu tribe sought to rid the country of the minority Tutsi. *Id.* at 5. Hundreds of thousands were killed in this short war, yet the world refused to intervene. *Id.* at 6.

² See Peter Beinart, *How to Save Darfur*, TIME, Oct. 2, 2006, at 48.

³ See *id.*; see also Paul Majendie, *Global Protests Call for U.N. Intervention in Darfur*, WASH. POST, Sep. 18, 2006, at A12.

⁴ See Majendie, *supra* note 3.

⁵ See *id.*; see also Beinart, *supra* note 2, at 48.

the obvious atrocities in Rwanda genocide⁶ and through inaction permitted one of the greatest humanitarian tragedies in modern history. Inexplicably, though, while obvious genocide is taking place in Africa again, the U.N. remains hesitant to say so or do anything to stop it.

Since 2003, violence has ravaged the Darfur province in western Sudan.⁷ The U.N. estimates that over 400,000 civilians have been killed as a result of the conflict between government-sponsored militias and two rebel groups.⁸ Although the world has decried the carnage for almost three years, the U.N. has refused to call it genocide and use the legal methods that are designed to prevent and punish it.⁹ Questions remain about what is really happening in Darfur and what can be done about it. Is the Sudanese government committing crimes in Darfur? Why does the U.N. fail to call it genocide? What options exist to resolve the crisis?

This Comment answers these questions by analyzing the relevant international law and the options available to the international

⁶ See William Schabas, *The Genocide Convention at Fifty*, U.S. INST. OF PEACE (1999) at 6, available at <http://www.usip.org/pubs/specialreports/sr990107.pdf>. Former Secretary General of the U.N. Boutros Boutros-Ghali has said that the reason why the U.N. refused to label the crimes in Rwanda genocide was because of fear that the U.N. might be compelled to intervene militarily. *Id.* Former U.S. President William Clinton, speaking in Rwanda in 1998, apologized to Rwandans for failing to call the crimes "by their rightful name: genocide." *Id.*

⁷ See Editorial, *Optimism Gap*, NEW REPUBLIC, Oct. 30, 2006, at 7; see also *Darfur's Aid Operations in Jeopardy, Warns Annan in Latest Report on Troubled Region*, UN NEWS CENTRE, Oct. 5, 2006, <http://www.un.org/apps/news/story.asp?NewsID=20150&Cr1> [hereinafter *Darfur's Aid Operations*].

⁸ See *Darfur's Aid Operations*, *supra* note 7.

⁹ See INT'L COMM'N OF INQUIRY ON DARFUR, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL 160-61 (2005), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf [hereinafter U.N. COMM'N REPORT]. Currently, the official U.N. position is that genocide is *not* occurring in Sudan. *Id.*

community to stop the crimes that are occurring in Sudan. This Comment does two things: (1) shows why the crimes in Darfur should be termed “genocide” under the United Nations’ Genocide Convention, and (2) explains the options that could be used to enforce the U.N.’s Genocide Convention and abate the violence.

Part I briefly discusses the history of genocide and the evolution of the modern international legal definition, found in the U.N.’s Genocide Convention. Part II introduces the horrific humanitarian crisis in Darfur and attempts to explain the complex political situation that is motivating the violence. Part III applies the U.N.’s definition of genocide to the Darfur conflict to show that the atrocities in Sudan should be termed genocide and receive all the protections of the Convention. Part IV explains the options that exist to prosecute the genocide once genocide has been found. Additionally, Part IV argues that the *jus cogens* nature of the crimes triggers universal jurisdiction and allows targeted humanitarian intervention in Darfur.

When Freddy Umutanguha spoke in Kigali, he begged the international community to help the people of Sudan: “If you don’t protect the people of Darfur today,” he said, “never again will we believe you when you visit Rwanda’s mass graves, look us in the eye and say ‘Never again.’”¹⁰ Genocide is occurring in Africa, and respect for the most fundamental international human rights should ensure the world does not, once again, abdicate its responsibility to prevent and punish it.

¹⁰ See Beinart, *supra* note 2, at 48.

I. GENOCIDE DEFINED

Genocide is a twentieth-century term for crimes as old as civilization. The word is frequently used to refer to mass killings or exterminations of a race of people, but the modern international definition is much broader. This section begins by discussing the origin and development of the term genocide, and concludes by explaining the modern international meaning that is codified by the United Nations' Genocide Convention.

A. "Crimes Without a Name"

Originating from the Greek word for race ("gens"), and a Latin word for killing ("caedo"), genocide literally means the killing of a race of people.¹¹ Although mass killing has existed throughout the history of civilization, the term genocide was not coined until 1944, when a Polish lawyer, Raphael Lemkin, used the word to describe the Nazi extermination of Jews during the Holocaust.¹² Lemkin developed the term to describe Nazi war crimes, which both he and Winston Churchill thought of as "crime[s] without a name."¹³ The crimes committed

¹¹ See, e.g., OXFORD ENGLISH DICTIONARY 445 (2d ed. 1989); MERRIAM-WEBSTER COLLEGIATE DICTIONARY 486 (10th ed. 1998); LATIN DICTIONARY AND GRAMMAR AID, UNIVERSITY OF NOTRE DAME, <http://www.archives.nd.edu/cgi-bin/lookup.pl?stem=caedo&ending=> (last visited Sept. 18, 2007).

¹² ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE 3 (Alexander Laban Hinton ed., 2002). Almost any discussion of genocide and the history of the term will include a description of Lemkin. See, e.g., *id.*; David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 CORNELL INT'L L.J. 293, 296-98 (2003).

¹³ See James T. Fussell, *A Crime Without a Name*, <http://www.preventgenocide.org/genocide/crimewithoutaname.htm> (last visited July 18, 2007). Following WWII, Churchill is quoted as calling the Nazi invasion and occupation of Soviet Russia "a crime without a name." *Id.* Lemkin is said to have listened to Churchill's speech and later coined the term genocide. *Id.*

by Germany, Lemkin felt, went beyond and were different than normal war crimes.¹⁴ To Lemkin, the German extermination constituted a reversion to an inhuman barbarism; the Holocaust was a crime against a people—or more broadly, humanity—as opposed to a crime against a state.¹⁵ Lemkin was the first and remains the most notable philosopher of genocide, and he was vital in the development of the modern international definition of genocide.¹⁶

B. An Emerging International Definition

Largely in response to Lemkin's advocacy for the recognition of Churchill's "crime without a name," the U.N. began working on a definition of genocide following World War II. In 1946, the U.N. passed a preliminary resolution stating that genocide occurs "when racial, religious, political and other groups have been destroyed, entirely or in part."¹⁷ This definition was refined and expanded in 1948 when the U.N. ratified the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").¹⁸

The new, broader definition of genocide is encompassed in Article II of the Genocide Convention:

In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national,

¹⁴ See Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 147 (1947).

¹⁵ See *id.* at 146-48.

¹⁶ Lemkin urged the U.N. to finally define the crimes that he called genocide. See ANNIHILATING DIFFERENCE, *supra* note 12, at 3-4.

¹⁷ G.A. Res. 96 (I), U.N. Doc. A/63/Add.1 (Dec. 11, 1946).

¹⁸ Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, available at <http://www.unhcr.ch/index> (follow "Treaties" hyperlink; then follow "Convention on the Prevention and Punishment of Genocide" hyperlink) [hereinafter Genocide Convention].

ethnic, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.¹⁹

Both the 1946 and 1948 definitions require that crimes must be committed against a protected group in order to qualify as genocide. It is important to note that the 1946 definition includes the broad category of "other groups," and the 1948 Convention does not. Under the 1946 understanding of genocide, seemingly any political, tribal, social, or economic group would qualify as a protected group under the U.N. definition. The 1948 Convention also broadened the definition of genocidal acts to include other crimes beyond simply the "destruction" of a group. Ironically, the 1948 definition had the effect of both restricting and broadening the potential application of the Convention. By removing "other groups," the Convention limited the situations in which genocide can occur, yet the definition expands the number of genocidal crimes.

C. The United Nations' Genocide Convention

Any evaluation of a humanitarian crisis must begin with a read-

¹⁹ Genocide Convention, *supra* note 18, at art. II.

ing of the Genocide Convention. Article I of the Convention states that acts constituting genocide under Article II are international crimes, which all parties agree to prevent and punish: “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.”²⁰ The language of Article I, and indeed the Convention as a whole, reflects an intent to apply the Convention wherever and whenever possible.²¹

Article III imposes criminal liability to five acts: (1) “Genocide;” (2) “Conspiracy to commit genocide;” (3) “Direct and public incitement of genocide;” (4) “Attempted genocide;” [and] (5) “Complicity in genocide.”²² Article IV states that “[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”²³ Further, Article VI provides that those charged with genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed”²⁴

In Article V, the Convention further states that each signatory must enact “the necessary legislation to give effect to the . . . Convention”²⁵ The United States, for example, ratified the Convention in 1988 and that year enacted the Proxmire Act, which included a defini-

²⁰ Genocide Convention, *supra* note 18, at art. I.

²¹ *Id.*; *see also* Nersessian, *supra* note 12, at 298. Nersessian describes Article I as “contemplat[ing] worldwide application of the [Genocide Convention] in all possible circumstances” Nersessian, *supra* note 12, at 298.

²² Genocide Convention, *supra* note 18, at art. III.

²³ *Id.* at art. IV.

²⁴ *Id.* at art. VI.

²⁵ *Id.* at art. V.

tion of genocide almost identical to that of the Convention’s.²⁶ Currently, more than 130 nations are parties to the Convention.²⁷ It remains the major international definition of genocide.

1. *The Problem of Enforcement*

As seen in greater detail in Part IV, actually enforcing the Convention is often difficult. The call to “prevent and punish” the crime of genocide is not feasible under the current framework of the Convention. The legal mechanisms the Convention envisions will be used to prosecute genocide and enforce the Convention—either the International Criminal Court (“ICC”) or ad hoc tribunals—are inherently unable to prevent or punish the crime.

First, the ICC only has jurisdiction over individuals from states who are parties to the ICC or who voluntarily consent to their own prosecution—an unlikely scenario when states are either directly involved in or complicit in genocidal campaigns.²⁸ Ad hoc tribunals suffer from the same jurisdictional problem.²⁹ Second, a more fun-

²⁶ Proxmire Act, 18 U.S.C.A. § 1091 (West 2006 & Supp. 2007).

²⁷ OFFICE OF THE UNITED NATIONS HIGH COMM’R OF HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, <http://www.ohchr.org/english/countries/ratification/1.htm#N2> (last visited Sept. 18, 2007).

²⁸ See William W. Burke-White, *The International Criminal Court and the Future of Legal Accountability*, 10 ILSA J. INT’L & COMP. L. 195, 198 (2003), noting:

[W]ar criminals don’t generally hand themselves over to courts. They are often in hiding or in places beyond the reach of law enforcement authorities. Despite requirements for national cooperation in the apprehension of suspects, the ICC has no police or military force at its disposal to secure the arrest of indictees.

See also *infra* Part IV (discussing the problem with enforcement of the Convention in greater detail).

²⁹ See Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 198 n.101 (2006) (citing the failure of ad hoc tribunals to apprehend indictees).

damental problem is that it is almost inconceivable that an international tribunal could indict, prosecute, and convict a state or an individual with the speed necessary to prevent genocide.³⁰ International tribunals often take years to decide cases, making it unlikely that genocide could be prevented or halted by such trials.³¹

Part IV explains more fully the legal options available to enforce the Convention, and their inherent drawbacks, and will propose the use of targeted humanitarian intervention to support the Convention's call to "prevent and punish" the crime of genocide.

II. THE DARFUR CRISIS

The crisis in Darfur results from a complex fusion of political instability, poverty, and racial and ethnic tensions within Sudan. This section discusses how fighting between two Sudanese rebel groups and government-sponsored fighters has created unconscionable suffering in Darfur.

A. Rebel Uprisings, Government Collusion, and Civilian Death

The violence in western Sudan has been called the "worst humanitarian crisis in the world today."³² Meanwhile, the Sudanese gov-

³⁰ For example, the International Criminal Tribunal for Rwanda ("ICTR"), the ad hoc court established by the U.N. to try Rwandan war criminals, did not render its first judgment until four years after the war, and the tribunal is still prosecuting war criminals today, thirteen years after the genocide. *See* ICTR Cases, <http://www.ictt.org> (follow "Cases" hyperlink). The International Criminal Court ("ICC"), moreover, has yet to render a decision, and has only begun preliminary steps with regard to Darfur. *See* ICC Situations and Cases, <http://www.icc-cpi.int/cases.html>.

³¹ *See, e.g.*, ICTR Cases, *supra* note 30.

³² Kristina Nwazota, *The Darfur Crisis*, ONLINE NEWSHOUR, Apr. 6, 2006, http://www.pbs.org/newshour/indepth_coverage/africa/darfur/origins.html.

ernment has been described as a “Taliban-style Islamic fundamentalist” regime.³³ Since 2003, the government has organized and funded Arab militias called “Janjaweed” to suppress rebel uprisings in Darfur.³⁴ Two main rebel groups, the Sudanese Liberation Army/Movement (“SLA/M”) and the Justice and Equality Movement (“JEM”), began organizing to resist President Omar al-Bashir and the Khartoum government in 2001.³⁵

The SLA/M and the JEM seek a redistribution of wealth and political equality for Darfuris.³⁶ Despite being a minority in Darfur, Arabs are often rewarded with government jobs over ethnic Africans, and one of the SLA/M’s chief goals, outlined in its founding manifesto, is to end government-sponsored “racial discrimination.”³⁷ The Janjaweed, moreover, target non-Arab and darker-skinned Africans, leaving lighter-skinned Arabs unharmed.³⁸

The greatest tragedy in Sudan is not that a savage civil war is raging, but that civilians unconnected to the resistance movement are being murdered, tortured, and displaced in great numbers. The SLA/M and the JEM are well-armed rebel groups with a political agenda to drastically alter, or overthrow, the Khartoum government.³⁹ However,

³³ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 298 (S.D.N.Y. 2003) (denying defendant energy company’s motion to dismiss in a class action brought by current and former residents of Sudan who alleged defendant’s complicity in ethnic cleansing).

³⁴ *See* U.N. COMM’N REPORT, *supra* note 9, at 24.

³⁵ *Id.* at 22-23.

³⁶ *Id.* at 38, 39.

³⁷ *Id.* at 37-38; *see* Samantha Power, *Dying in Darfur*, NEW YORKER, Aug. 30, 2004, at 58.

³⁸ *See* Lydia Polgreen, *Grim New Turn Likely to Harden Darfur Conflict*, N.Y. TIMES, Oct. 23, 2006, at A1.

³⁹ *See generally*, U.N. COMM’N REPORT, *supra* note 9, at 22-23.

because the SLA/M and the JEM draw their members from local tribes, the rebels and non-rebels are often indistinguishable, resulting in the Janjaweed ravaging entire villages indiscriminately.⁴⁰ Three Darfuri tribes—Fur, Masaalit, and Zaghawa—are the primary victims of the attacks.⁴¹ Journalist Mark Leon Goldberg describes the situation sardonically but truthfully, writing that the government's strategy in supporting the Janjaweed is "principally aimed at wiping out the ethnic groups from which the rebels came. . . . [by] systematically clear[ing] out 'rebel strongholds' (otherwise known as towns and villages), to brutal effect."⁴²

Most estimates indicate that close to 400,000 Sudanese civilians have been killed in the government's efforts to suppress the resistance groups.⁴³ Hundreds of thousands more have been tortured, gang-raped, subjected to sexual servitude or displaced by the Janjaweed.⁴⁴ While the government claims that it has no control over the actions of the Janjaweed,⁴⁵ the connection between the Sudanese government and the nomadic killers is anything but tenuous: Khartoum has recruited, clothed, fed, and housed the Janjaweed, and the military has worked

⁴⁰ See *id.* at 25.

⁴¹ See HUMAN RIGHTS WATCH, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, 16 HUM. RTS. WATCH 26-28 (2004), available at <http://hrw.org/reports/2004/sudan0504/sudan0504full.pdf> [hereinafter *Darfur Destroyed*]; Alexis Masciarelli & Ilona Eveleens, *Sudanese Tell of Mass Rape*, BBC NEWS, Jun. 10, 2004, <http://news.bbc.co.uk/1/hi/world/africa/3791713.stm>.

⁴² Mark Leon Goldberg, *While Thousands Die*, AMERICAN PROSPECT, Nov. 19, 2006, at 13-14, available at http://www.prospect.org/cs/articles?article=while_thousands_die.

⁴³ See Editorial, *Optimism Gap*, NEW REPUBLIC, Oct. 30, 2006 at 7.

⁴⁴ See Masciarelli & Eveleens, *supra* note 41.

⁴⁵ Glenn Kessler & Craig Timberg, *Sudan Says No as U.N. Backs Force For Darfur*, WASH. POST, Sept. 1, 2006, at A1. A senior advisor to Sudan's Information Minister, Rabie Abdul Atti, has stated: "The government has taken no part in the fighting at all[.]" *Id.*

with the militias to kill thousands.⁴⁶ The Sudanese Air Force has also carried out bombing attacks to aid the Janjaweed.⁴⁷ One Janjaweed fighter says that “[t]he Janjaweed don’t make decisions. The orders always come from the government[.]”⁴⁸ Although al-Bashir hopes to appear as if he has no control over the actions of the Janjaweed, the fighters act as simple proxies for the Khartoum government and the Sudanese military, often working alongside government soldiers.⁴⁹

B. Khartoum’s Defiance

The world’s opprobrium has had little effect on al-Bashir. Despite repeated calls to stop the genocide coming from the United States, the United Nations, and numerous other states and human rights organizations, the Sudanese president continues to do nothing.⁵⁰ He has refused to allow almost all U.N. and international peacekeepers and aid workers to operate within his country.⁵¹ A paltry African Union (“A.U.”) peacekeeping force has been stationed in Darfur since 2004, but the soldiers are often unarmed and prohibited from using

⁴⁶ See *Darfur Destroyed*, *supra* note 41, at 42-47; see also *The Crisis in Darfur: Testimony Before the S. Foreign Relations Comm.*, 108th Cong. (2004) (Statement of Secretary of State Colin Powell) [hereinafter Powell Statement], available at <http://www.state.gov/secretary/former/powell/remarks/36042.htm>.

⁴⁷ See Kessler & Timberg, *supra* note 45.

⁴⁸ *Sudan ‘Backs’ Janjaweed Fighters*, BBC NEWS, Oct. 18, 2006, <http://news.bbc.co.uk/2/hi/africa/6060976.stm>.

⁴⁹ See *id.*; see also United States Department of State, Background Note: Sudan, <http://www.state.gov/r/pa/ei/bgn/5424.htm> (last visited Sept. 10, 2007) (describing collusion between the Khartoum government and Janjaweed militias); see also Goldberg, *supra* note 42, at 13.

⁵⁰ Kessler & Timberg, *supra* note 45. Al-Bashir denies that his government bears any responsibility for the violence, and he has also been hesitant to allow any international peacekeeping forces in his country. *Id.*

⁵¹ *Id.*

their weapons or engaging the Janjaweed.⁵²

Some commentators have suggested that al-Bashir's defiance stems in part because he knows that many of the world's powers have significant economic interests in Sudan's natural resources and will be unlikely to challenge the Khartoum government.⁵³ China and Russia, two permanent members of the U.N. Security Council ("S.C.")—the group of powerful countries who largely direct the action of the U.N.⁵⁴—have significant interests in Sudanese oil and both have been unwilling to confront Khartoum.⁵⁵ It is without a doubt that al-Bashir does not fear the U.N., the Genocide Convention, or any U.N. action that might be designed to punish his government for its role in the killings.⁵⁶

In short, the situation in Sudan is that a defiant, outlaw government is sponsoring soldiers who are ostensibly waging war against a militant uprising, but in reality are decimating populations of darker-skinned, non-Arab Africans in Sudan's sparsely populated and improv-

⁵² Lydia Polgreen, *Obstacles Test African Force in Grim Darfur*, N.Y. TIMES, May 17, 2006, at A1 [hereinafter Polgreen, *Obstacles*]. Though the force has grown, it is still ineffective. "Since its deployment . . . the 7,000-member force has been hamstrung by inadequate equipment, a smattering of troops that translates to about one soldier for every 28 square miles and, above all, a very limited mandate that often prevents it from engaging the combatants and stopping the bloodshed." *Id.*

⁵³ See, e.g., Robert I. Rotberg, Op-Ed., *Why Wait on Darfur?* BOSTON GLOBE, Oct. 24, 2005, at A15 (suggesting that China and Russia oppose U.N. action on Darfur because they have significant oil interests in Sudan).

⁵⁴ The S.C. consists of 15 nations, with five countries—the United States, the United Kingdom, France, Russian Federation, and China—being permanent members. U.N. Charter art. 23, para. 1, available at <http://www.un.org/aboutun/charter.htm>. Each of the permanent members has the ability to "veto" any of the S.C.'s proposed action. See *id.* at art. 27, para. 3.

⁵⁵ See Rotberg, *supra* note 53.

⁵⁶ See *Ending Sudan's Impunity*, ECONOMIST, Mar. 3-9, 2007, at 53. President al-Bashir has repeatedly said that he will not cooperate with an ICC prosecution, with his government calling the prosecutor's evidence "lies." *Id.* at 54.

erished West. As of yet, the U.N. and the international community have not seriously challenged al-Bashir.

III. GENOCIDE IN DARFUR

The violence and death in Darfur are obvious, yet to date the world has not agreed on how to label the situation. Some have been quick to use the word genocide to describe the crimes, while others have refused to do so. Thus far the U.N., which effectively controls the enforcement of the Genocide Convention, has not labeled the crisis as genocide, and therefore the preventative and punitive provisions of the Convention have not been triggered. This section refutes the U.N.'s rationale for its decision and argue that genocide, as defined by the terms of the Convention, is occurring today in Darfur.

A. The United Nations' Non-finding of Genocide

Despite the obvious atrocities, the U.N. has refused to label the crisis as genocide, finding that the requirements for a prima facie case of genocide, as set forth in Article II of the Convention, are not met in Darfur.⁵⁷ The Convention requires that any of the genocidal acts must be done with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group"⁵⁸ Though the Arab Janjaweed are killing members of three large, non-Arab African tribes, the U.N. has determined that the non-Arab victims as a whole do not appear to make up a clearly distinct national, ethnic, racial, or religious group.⁵⁹

⁵⁷ U.N. COMM'N REPORT, *supra* note 9, at 4.

⁵⁸ Genocide Convention, *supra* note 18, at art. II.

⁵⁹ U.N. COMM'N REPORT, *supra* note 9, at 132; *see generally* Power, *supra* note 37 (de-

The U.N. Commission of Inquiry, charged with assessing the situation in Darfur, concluded that the Convention requires both an *actus reus* and *mens rea*—physical genocidal acts coupled with a subjective intent to target a protected group—for a finding of genocide.⁶⁰ With hundreds of thousands killed, the *actus reus* requirement is clearly met. However, in Darfur, the U.N. determined the *mens rea* requirement has not been satisfied.⁶¹ The Commission found that Janjaweed fighters are not targeting a clearly defined group that would qualify as a protected group under Article II.⁶² Instead, the Commission maintains that the Janjaweed are simply engaging in normal “counter-insurgency warfare,” without the required intent to attack a protected group.⁶³ Nonetheless, the Commission does admit that thousands of civilians have been raped and murdered, with millions more displaced, and that the people of Darfur “need protection.”⁶⁴ Moreover, the U.N. admits the crimes in Darfur are “no less serious and heinous” than crimes of genocide.⁶⁵

B. Findings of Genocide

While the U.N. Commission has failed to label the atrocities in Darfur as genocide *per se*, others have not hesitated to do so. The United States, for one, has examined the evidence and determined that

scribing the three largest tribes in Darfur—Fur, Zaghawa, and Masaaleit—and the threats they face from the Janjaweed).

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 132.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ U.N. COMM’N REPORT, *supra* note 9, at 158.

⁶⁵ *Id.* at 4.

genocide is occurring in Sudan. Former Secretary of State Colin Powell testified before the Senate’s Foreign Relations Committee on September 9, 2004, and declared the acts committed in Sudan to be genocidal under the Convention and that “the Government of Sudan and the [Janjaweed] bear responsibility”⁶⁶ The U.S. State Department reiterated this position on March 6, 2007.⁶⁷

1. *Protected Groups*

Unlike the U.N., the United States has determined that non-Arab civilians constitute a distinct group under Article II. The U.S. position, articulated by former Secretary Powell, is that non-Arabs constitute “members of a national, ethnic, racial or religious group”⁶⁸ The Janjaweed’s campaign of “rape and physical assaults on non-Arab individuals,” who are the primary victims, satisfies the mens rea requirement under Article II.⁶⁹ In 2006, Congress passed the Darfur Accountability Act, which restates the U.S. position that genocide is occurring, echoing former Secretary Powell’s analysis.⁷⁰

⁶⁶ Powell Statement, *supra* note 46.

⁶⁷ See U.S. Dep’t of State, Sudan: Country Reports on Human Rights Practices - 2006 (Mar. 6, 2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm> [hereinafter SUDAN COUNTRY REPORT]. “The [Sudanese] government’s human rights record remained poor, and there were numerous serious problems, including evidence of continuing genocide in Darfur, for which the government and janjaweed continued to bear responsibility.” *Id.* The report further proceeds to outline a litany of egregious human rights violations by both the Sudanese government and the Janjaweed. See *id.*; see also Glenn Kessler, *Sudanese Leader’s Long Letter Gets Brief Response from Bush*, WASH. POST, Mar. 8, 2007, at A21.

⁶⁸ Powell Statement, *supra* note 46.

⁶⁹ *Id.* Powell states that the crimes committed qualify as genocide as “the evidence corroborates the specific intent of the perpetrators to destroy ‘a group in whole or in part,’ [which are] the words of the Convention. This intent may be inferred from their deliberate conduct.” Powell Statement, *supra* note 46.

⁷⁰ Darfur Accountability Act of 2005, S. 495, 109th Cong. § 3(3) (2005).

a. Language as an Ethnic Difference

The non-Arab Africans in Sudan, primarily members of the Fur, Masaalit, and Zaghawa tribes, who are the victims of Janjaweed attacks, were not identified as specific ethnic groups by the U.N. Commission of Inquiry, but rather “political” groups “in the context of the counter-insurgency policy of the Government.”⁷¹ The easiest way to qualify non-Arabs (non-Arabic speakers), as a distinct ethnic group under Article II is to qualify language as an ethnic characteristic. There is precedent for this beyond the U.S. decision, coming from the U.N.-sponsored court convened to prosecute crimes of genocide committed in Rwanda in 1994. The International Criminal Tribunal for Rwanda (“ICTR”), an ad hoc tribunal set up by the U.N. after the Rwandan civil war to prosecute those Hutu responsible for genocide, defined an ethnic group “as a group whose members share a common language or culture”⁷²

b. Racial Differences

Ethnicity aside, Powell’s finding relied on other characteristics, such as race, that would qualify the victims as a specific ethnic group under Article II.⁷³ Preceding Powell’s testimony was a joint

⁷¹ U.N. COMM’N REPORT, *supra* note 9, at 160. Political groups are absent from the list of groups protected by Article II of the Genocide Convention. See Genocide Convention, *supra* note 18.

⁷² Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgment, at ¶ 98 (May 21, 1999). However, it appears that a similar identification of non-Arabs in general as a distinct ethnic group has yet to take place. See Toby N. Jack, Comment, *Sudan’s Genocide: Punishment Before Prevention*, 24 PENN ST. INT’L L. REV. 707, 714 (2006). Jack, noting the divergent opinions in the matter, observes that there is likely to be “a ‘battle of the experts’ [that] will entertain future Sudanese tribunals regarding this issue.” *Id.*

⁷³ See Powell Statement, *supra* note 46 (“[O]ther elements of the convention have been met as well.”).

study from Senator Sam Brownback and Representative Frank Wolf.⁷⁴ Brownback and Wolf traveled to Darfur and labeled the atrocities committed as genocide,⁷⁵ suggesting in their report that the violence is racially motivated. “It is clearly the intent of the Janjaweed,” their report states, “to purge the region of darker-skinned Africans”⁷⁶ Darfuris, Brownback and Wolf assert, are “in mortal danger of being wiped out simply because of the darker shade of their skin color.”⁷⁷ Brownback and Wolf suggest that the Article II intent requirement could be maintained on racial grounds by the fact that the Janjaweed are targeting a racial group.

C. Arbitrariness in Finding a Protected Group: Rwanda v. Sudan

The U.N. Commission of Inquiry failed to characterize the Fur, Masaalit, and Zaghawa tribes as distinct ethnic groups and for this reason did not find genocide in Sudan. In Rwanda, however, the Hutu and Tutsi tribes were determined to be separate ethnic groups by the U.N. tribunal,⁷⁸ even though they all share the same territory, speak the same language, and have the same racial background.⁷⁹ Examining

⁷⁴ See SENATOR SAM BROWNBACK & CONGRESSMAN FRANK WOLF, TRIP REPORT 1 (2004), available at <http://wolf.house.gov/uploads/Sudan%202004%20Trip%20Report.pdf> [hereinafter Trip Report].

⁷⁵ *Id.* at 1-2.

⁷⁶ *Id.* at 2.

⁷⁷ *Id.* at 8. Additionally, the two Congressmen reported that several women who were raped by the Janjaweed were told by the soldiers that “they were slaves and that their skin was too dark;” that they were trying to make “lighter-skinned babies.” *Id.* See also Jack, *supra* note 72, at 713 (“International observers have found that while non-Arab African Sudanese civilians have been specifically targeted by the ongoing conflicts, the Arab Sudanese populations have been left untouched.”).

⁷⁸ Kayishema, ICTR-95-1-T at ¶ 34.

⁷⁹ *Id.*

Rwanda's history, furthermore, shows that this finding was wholly arbitrary. In 1931, the groups were separated by their Belgian occupiers and given identification cards.⁸⁰ It was primarily this separation and identification, not significant racial or cultural differences, which allowed the ICTR to determine that the Tutsis were a distinct ethnic group and thus that genocide had occurred. It is perhaps because no formal division has occurred in Sudan that the Arab and non-Arab people are not considered separate ethnic groups.⁸¹ In Rwanda, it was only an arbitrary division of the native population and the issuance of identification cards by an occupying power that allowed the ICTR to find three separate groups and conclude that genocide had occurred.

The non-Arab Africans who are the primary victims of the Janjaweed do not have identification cards to separate them from other Sudanese people, but they possess characteristics that make them a distinct ethnic group under the Genocide Convention. Though both the attackers and the victims are often Muslim, the Janjaweed are Arab, while the villagers in Western Sudan, who are targeted by the Janjaweed, are non-Arab Africans; the differentiation between the two groups generally being the Arabic language.⁸² Following the ICTR's decision, language can qualify as an ethnic identifier, establishing a prima facie case of genocide and meaning that genocide per se is occurring today in Darfur.

⁸⁰ *Id.* at ¶ 35. See also, Jack, *supra* note 72, at 714 (“[T]he Hutus, Tutsis, and Twas have been manually separated into ethnic groups through identification cards.”).

⁸¹ Jack, *supra* note 72, at 714.

⁸² See *id.* at 713; see also *Sudan's Shadowy Arab Militia*, BBC NEWS, Apr. 10, 2004, <http://news.bbc.co.uk/2/hi/africa/3613953.stm>; Nicholas D. Kristof, *Genocide in Slow Motion*, NEW YORK REVIEW OF BOOKS, Feb. 9, 2006, at 1, available at <http://www.nybooks.com/articles/18674>.

There is strong evidence that genocide has indeed occurred in Darfur. That the actus reus criteria listed in the Convention—found in Article II, subsections (a) through (e)—are met in Darfur is not disputed by the U.N. or other observers. Despite the U.N. commission’s findings to the contrary, the mens rea requirement is also met because members of racial and ethnic groups have been intentionally targeted by the Sudanese government and the Janjaweed. Non-Arab and darker-skinned African civilians in Darfur have been targeted by the Janjaweed. Meanwhile, the lighter-skinned Arab civilians have been left largely unharmed by the violence. It is this kind of subjective targeting of a specific group that satisfies the mens rea requirement of Article II of the U.N.’s Genocide Convention.

IV. POSSIBLE SOLUTIONS: INTERNATIONAL PROSECUTION, *JUS COGENS*, AND FORCE

Once the criteria in the Convention are met, the next question is how to stop the killing and hold the killers responsible. The Convention was created to “liberate mankind from [the] odious scourge” of genocide, and Article I states that all contracting parties are obligated to “prevent and . . . punish” the crime.⁸³ The problem is that there are no clearly effective ways to enforce the Genocide Convention and prevent genocide. The Convention provides that those accused of genocide will be tried by a competent “penal tribunal[.]”⁸⁴ However, all of the legal options allow prosecution only after genocide has already occurred. Furthermore, conviction has been rare: It was 50 years before

⁸³ See Genocide Convention, supra note 18, at pmb., art. I.

⁸⁴ *Id.* at art. VI.

a defendant was first convicted of violating the Convention.⁸⁵

This section will discuss several options that can be used to enforce the Genocide Convention, including trial at the ICC and domestic court prosecution through universal jurisdiction. This section will conclude by proposing the use of a targeted humanitarian intervention as the most viable option to stop the genocide in Sudan.

A. Prosecuting Genocide

Prosecuting the crime of genocide is possible in both international and domestic courts. Members of the Janjaweed or the Sudanese government who have helped carry out attacks on civilian populations could be tried and convicted for their crimes. However, as this section will describe, prosecuting genocide is ultimately an inadequate solution because prosecution alone cannot prevent or stop the ongoing crimes in Darfur.

1. *The International Criminal Court*

The Convention provides that those accused of genocide will be tried by a competent “penal tribunal.”⁸⁶ The ICC is the most logical international body in which to prosecute genocide, and it is the international court that is intended to prosecute the crime.⁸⁷ There are currently about 100 state parties to the ICC.⁸⁸ The ICC was formed

⁸⁵ In 1998, fifty years after the Convention was ratified, the ICTR convicted Jean-Paul Akayesu under the Convention. *See* Prosecutor v. Akayesu, Judgment, Case No. ICTR 96-4-T, Judgment, ¶ 8 (Sept. 2, 1998).

⁸⁶ *See* Genocide Convention, *supra* note 18, at art. VI.

⁸⁷ *See* Rome Statute of the International Criminal Court art. V, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁸⁸ *See* INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES, <http://www.icc->

in 1998 upon the passing of the Rome Statute in order to prosecute criminal offenses that cannot be addressed by domestic courts,⁸⁹ while the International Court of Justice (“ICJ”) remains primarily to settle disputes between states.⁹⁰ The ICC consists of eighteen judges chosen from the one hundred and four member countries.⁹¹ Article V of the Rome Statute states that the ICC has jurisdiction over the “most serious crimes of concern to the international community as a whole.”⁹² Article V grants the ICC jurisdiction over four crimes: genocide, war crimes, crimes against humanity, and the crime of aggression.⁹³

Articles XII and XIII of the Rome Statute grant jurisdiction to the ICC in only a few circumstances: (1) when the accused is a citizen of a country that is a member of the court; (2) when the alleged crime takes place in a member state; (3) when a non-member state voluntarily accepts ICC jurisdiction over one of its citizens or over crimes committed in the state; and (4) when a case is referred to the ICC by the U.N. Security Council.⁹⁴

In the case of Sudan, which is not a member of the ICC,⁹⁵ the

[cpi.int/statesparties.html](http://www.icc-cpi.int/statesparties.html) (last visited Sept. 17, 2007).

⁸⁹ “The Court has jurisdiction over individuals accused of [the enumerated] crimes.” INTERNATIONAL CRIMINAL COURT, JURISDICTION AND ADMISSIBILITY, http://www.icc-cpi.int/about/ataglance/jurisdiction_admissibility.html.

⁹⁰ The ICJ settles disputes between states, and “[o]nly states are eligible to appear before the [ICJ]” International Court of Justice, Frequently Asked Questions, <http://www.icj-cij.org/information/index.php?p1=7&p2=2&PHPSESSID=96907ddd10f9e95b6bb609b6f224021b>.

⁹¹ INTERNATIONAL CRIMINAL COURT, STRUCTURE OF THE COURT, <http://www.icc-cpi.int/about/ataglance/structure.html>; *see also supra* note 88.

⁹² Rome Statute art. V.

⁹³ *Id.*

⁹⁴ *Id.*, at art. XII-XIII.

⁹⁵ *See* INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES, *supra* note 88.

only way the court could obtain jurisdiction is through a referral of the case from the U.N. Security Council.⁹⁶ In March 2005, influenced in part by Powell's proclamation that genocide is occurring in Darfur, the Security Council referred the case to the ICC's prosecutor. Since 2005, Chief Prosecutor, Luis Moreno-Ocampo of Argentina, has been gathering evidence for a case against specific individuals for crimes in Sudan including crimes against humanity, rape, torture, and murder. Since the case was referred to the prosecutor, Moreno-Ocampo and his team have made numerous trips to Sudan⁹⁷ and interviewed hundreds of witnesses worldwide.⁹⁸

Moreno-Ocampo presented the first evidence on February 27, 2007, against one former Sudanese government official and one Janjaweed member, for crimes against humanity—but not genocide.⁹⁹ However, there are still several steps before charges are actually filed and a trial is commenced. First, a “pre-trial chamber” of judges will review the charges to determine whether the case is admissible and whether there are reasonable grounds to believe that the indicted men are guilty.¹⁰⁰ The judges will then decide if the case should proceed, and if the judge so orders, a trial could begin. After the prosecution concludes, assuming that the judges convict an individual for crimes in Sudan, and following a probable and lengthy appeals process, the

⁹⁶ Rome Statute art. XIII (explaining the ICC's methods for obtaining jurisdiction).

⁹⁷ See *Ending Sudan's Impunity*, *supra* note 56, at 54. However, Moreno-Ocampo's investigators have not been allowed to collect evidence in the Darfur province. *Id.*

⁹⁸ *Id.*

⁹⁹ The Prosecutor stated that “there are reasonable grounds to believe that” the two indicted men conspired to commit crimes against civilian populations. Press Release, INTERNATIONAL CRIMINAL COURT, ICC PROSECUTOR PRESENTS EVIDENCE ON DARFUR CRIMES (Feb. 27, 2007), available at <http://www.icc-cpi.int/press/pressreleases/230.html>.

¹⁰⁰ *Id.*

ICC will seek to enforce its decision.¹⁰¹

Article 89 of the Rome Statute states that member states must cooperate in an effort to enforce a decision,¹⁰² but an ICC conviction does not guarantee punishment or even that the individual will be apprehended. A country that is not a signatory (like Sudan) is not obligated to turn over an individual convicted in an ICC trial. Al-Bashir has stated that he will not cooperate with any ICC prosecution of his citizens.¹⁰³ If a Sudanese citizen, such as a Janjaweed member or even al-Bashir himself, were convicted for complicity in the crime of genocide by the ICC, the conviction would merely serve as an international condemnation.¹⁰⁴

Although there is wide international support for the court,¹⁰⁵ the ICC is largely an untested institution. It has yet to render a conviction, and it has been appallingly slow in considering the cases it has already undertaken.¹⁰⁶ The ICC has the potential to be a valuable

¹⁰¹ It is impossible to know how long a trial would take because the ICC has not completed a trial during its short history. See INTERNATIONAL CRIMINAL COURT, THE COURT TODAY, <http://www.icc-cpi.int/about/ataglance/today.html>. However, using the ICTY and ICTR as guides, it is possible that the prosecution could take years. See ICTY Cases, <http://www.un.org/icty/cases-e/index-e.htm>; See also INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: STATUS OF CASES, <http://icttr.org> (follow "Cases" hyperlink; then follow "Status of Cases" hyperlink).

¹⁰² Rome Statute art. LXXXIX.

¹⁰³ *Ending Sudan's Impunity*, *supra* note 56, at 54. Al-Bashir "has repeatedly sworn never to hand over any Sudanese citizen indicted by the [ICC]." *Id.*

¹⁰⁴ See generally Burke-White, *supra* note 28, at 196-99 (discussing the ICC's jurisdictional and enforcement challenges).

¹⁰⁵ Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 420 (1998) (stating that "the ICC has broad support within the international community" to prosecute genocide and other crimes against humanity).

¹⁰⁶ Since the Rome Statute became effective in 2002, the Prosecutor has begun investigating situations in Uganda, Darfur, and Democratic Republic of the Congo. To date, he has not filed any charges in Darfur. See INTERNATIONAL CRIMINAL COURT, THE COURT TODAY, *supra* note 101.

international court, but subjecting an urgent and ongoing case of genocide, as in Darfur, to a slow and unproven court is not sufficient to enforce the Convention. Further, the U.N.'s decision to take almost no action respecting Darfur—beyond referral of the case to the ICC—is both irresponsible and an abdication of its responsibility to foster world peace.

2. *Domestic Court Prosecution and Universal Jurisdiction*

The second major option for prosecuting the genocide in Sudan is through a finding of a *jus cogens* violation that triggers universal jurisdiction. With universal jurisdiction, domestic courts around the world could have the ability to prosecute those responsible for the genocide. A finding of universal jurisdiction would allow many more prosecutions to occur simultaneously.

Raphael Lemkin recognized that genocide and other crimes, such as torture, piracy, and slavery, are universally condemned as crimes against “the common good of mankind”¹⁰⁷ Lemkin’s idea of crimes against the “common good of mankind” is similar in spirit to the international legal principle of *jus cogens*. A *jus cogens* norm is a fundamental principle of law that is so widely accepted in the international community that it becomes a legal obligation.¹⁰⁸ As opposed to

¹⁰⁷ Raphael Lemkin, *Genocide*, 15 AMERICAN SCHOLAR 227, 229 (1946), available at <http://www.preventgenocide.org/lemkin/americanscholar1946.htm>.

¹⁰⁸ For an introduction to the theory of *jus cogens*, see MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62-64 (3d ed. 1999).

Jus cogens is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom Functionally, a rule of jus cogens is, by its nature and utility, a rule so fundamental to the international community of states as a whole that the rule constitutes a

customary international law, *jus cogens* norms can never be derogated from. Genocide, torture, piracy, and slavery are generally recognized as violations of *jus cogens* norms.¹⁰⁹

There is an emerging theory posited by several courts and international legal scholars that when states violate a *jus cogens* norm—for example, by carrying out torture or genocide—their sovereign immunities dissolve, and they can be tried in domestic or international tribunals without their consent. For example, Mark R. von Sternberg argues that a violation of a *jus cogens* norm gives rise to universal jurisdiction, punishable by any state, because the violator becomes a *hostes humani generis*, a common enemy of all mankind.¹¹⁰ Meanwhile, Kenneth C. Randall argues that genocide “remains a crime giving rise to universal jurisdiction under customary international law.”¹¹¹ Recognizing this emerging theory of *jus cogens* violations and universal jurisdiction would allow criminals in Darfur to be prosecuted around the world.

a. United States Courts and *Jus Cogens*

In *Princz v. Federal Republic of Germany*, Hugo Princz, a

basis for the community’s legal system.

Id. at 62-64.

¹⁰⁹ See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996).

¹¹⁰ Mark R. von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the ‘Elementary Dictates of Humanity,’* 22 BROOK. J. INT’L L. 111, 134 (1996). See generally INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENSES 2 (2000), <http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf>. (“Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes.”)

¹¹¹ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 835 (1988) (citation omitted).

Holocaust survivor, brought suit in United States district court against Germany, alleging that sovereign immunity is abrogated when there is a violation of a *jus cogens* norm.¹¹² The district court agreed with *Princz*, holding that a U.S. federal court had subject matter jurisdiction, notwithstanding the Foreign Sovereign Immunities Act of 1976 (“FSIA”), which codified the theory of sovereign immunity.¹¹³ Writing for the district court, Judge Stanley Sporkin found that the FSIA “has no role to play where the claims alleged involve undisputed acts of barbarism”¹¹⁴ However, The United States Court of Appeals, District of Columbia Circuit, reversed, holding that the FSIA precludes a U.S. national from suing a foreign sovereign.¹¹⁵

The FSIA does not preclude such cases and leaves open the possibility that *jus cogens* violations are intended to supersede sovereign immunity and grant universal jurisdiction. Section 1605(a)(1) of the FSIA provides an exception to the general rule of immunity when a country “waive[s] its immunity, either explicitly or by implication”¹¹⁶ An explicit waiver would occur when a sovereign nation consents to foreign jurisdiction. However, neither the act itself nor its legislative history provides a definition of what would constitute an implicit waiver. Judge Patricia Wald’s dissenting opinion in *Princz* argued that even in light of the FSIA, “a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against

¹¹² See *Princz v. Federal Republic of Germany*, 813 F. Supp. 22, 27 (D.D.C. 1992).

¹¹³ *Id.* at 26-28; see also Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605(a) (West 2006).

¹¹⁴ *Princz*, 813 F. Supp. at 26.

¹¹⁵ See *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994).

¹¹⁶ 28 U.S.C.A. § 1605(a)(1) (West 2006).

whom that act was perpetrated” and that “Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide.”¹¹⁷ Further, Judge Wald argued that “[g]ranted a foreign sovereign immunity from jurisdiction has always been a matter of grace and comity, and is not required by the United States Constitution.”¹¹⁸ Other commentators have agreed with Judge Sporkin and Wald that section 1605(a)(1) is intended to provide for a *jus cogens* exception to the rule of sovereign immunity.¹¹⁹

b. Foreign Courts and *Jus Cogens*

The history of *jus cogens* and universal jurisdiction in foreign and international courts is even longer. The war crimes trials following World War II (“WWII”) are the most famous examples of a court asserting jurisdiction by virtue of *jus cogens* violations. In the Nuremberg Trials, the international community determined that violations of *jus cogens* norms were sufficient to abrogate sovereign immunity.¹²⁰ In the trials, the four victorious allies—the United States, Britain, France, and the Soviet Union—prosecuted prominent Germans for the atrocities committed during WWII.¹²¹ The London Agreement, which outlined the rules for the tribunals, was an ad hoc

¹¹⁷ *Princz*, 26 F.3d at 1179 (Wald, J., dissenting).

¹¹⁸ *Id.* at 1181.

¹¹⁹ See, e.g., Joseph G. Bergen, *Princz v. The Federal Republic of Germany: Why the Courts Should Find that Violating Jus Cogen Norms Constitutes an Implied Waiver of Sovereign Immunity*, 14 CONN. J. INT’L L. 169 (1999); see also Jack Alan Levy, *As Between Princz and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators*, 86 GEO. L.J. 2703 (1998).

¹²⁰ See JANIS, *supra* note 108, at 253-57 (discussing the Nuremberg Trials and human rights law in general).

¹²¹ See *id.* 108, at 254.

document, and it cited no legal authority to try the Germans other than stating that their “abominable deeds” deserve punishment.¹²² As an ad hoc tribunal, “the Nuremburg trials based their legitimacy not on the consent of Nazi Germany, but rather on the inhuman nature of Germany’s official acts.”¹²³ The Nuremburg trials illustrate how violations of *jus cogens* norms allow for an offending individual or state to be prosecuted without its consent.

In the trial of Anto Furundzija, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) also linked *jus cogens* with the idea of universal jurisdiction:

[O]ne of the consequences of . . . *jus cogens* . . . is that every State is entitled to investigate, prosecute and punish . . . individuals accused of torture Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.¹²⁴

The ICTY was established by the U.N. in 1991 to prosecute war crimes, crimes against humanity, and genocide.¹²⁵ Although the ICTY does not have jurisdiction to try governments, it has used its au-

¹²² Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

¹²³ Levy, *supra* note 119, at 2708; *see also* *Princz*, 26 F.3d at 1181 (Wald, J., dissenting) (“The international consensus endorsing the existence and force of *jus cogens* norms [was] solidified in the aftermath of World War II.”).

¹²⁴ Prosecutor v. Furundzija, Case No. IT-95-17, Judgment, ¶ 156 (Dec. 10, 1998) *available at* <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>.

¹²⁵ *See* International Criminal Tribunal for the Former Yugoslavia (ICTY), <http://www.un.org/icty/> (discussing the ICTY and other tribunals established by the United Nations).

thority to indict over 160 individuals involved in the Balkan wars of the 1990s.¹²⁶ Those indicted against their will by the tribunal include soldiers, military commanders, and Slobodan Milosevic, the former President of Serbia.¹²⁷

Belgian and Spanish courts, likewise, have concluded that domestic courts can exercise jurisdiction over foreigners after a *jus cogens* violation. In the late 1990s, Spanish lawyers sued Arturo Pinochet for acts of genocide allegedly occurring in Chile between 1973 and 1990.¹²⁸ A Spanish judge, despite Chile's strong objections, ruled that Spain could in fact exercise jurisdiction over Pinochet for crimes of genocide and that the country could begin prosecuting the former dictator under the Genocide Convention.¹²⁹ A Belgian court, trying Pinochet for the murder of its own citizens, found that "as a matter of customary international law, or even more strongly as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, and authorizes national judicial authorities to prosecute and punish the perpetrators in all situations."¹³⁰

The foregoing cases and commentaries represent the emerging theory of *jus cogens* and universal jurisdiction. Applying this theory to the genocide in Sudan would allow prosecution in domestic courts as

¹²⁶ *See id.*

¹²⁷ *See id.*; see also Press Release, International Criminal Tribunal for the Former Yugoslavia, Court of Bosnia and Herzegovina Renders First Judgment in a Case Transferred by the Tribunal (Nov. 14, 2006), <http://www.un.org/icty/pressreal/2006/p1126-e.htm> (describing the efforts made by the ICTY).

¹²⁸ See generally Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 318-27 (2003) (discussing the proceedings brought against Pinochet in Spain and Chile).

¹²⁹ *See id.* at 321-24.

¹³⁰ *Id.* at 329.

an option for punishing the crimes in Darfur. Domestic court prosecution, however, suffers from the same challenges as ICC prosecution: undue delay and enforcement. Domestic court prosecution could be faster than ICC prosecution, but still would not be fast enough to stop the ongoing genocide. A conviction in a domestic court could require years of litigation and would culminate in nothing more than international censure.¹³¹ Moreover, the inherent flaw with prosecuting genocide in any court is that it is unlikely to be able to successfully enforce the Convention's goal of preventing and punishing the crime of genocide.¹³²

B. Military Intervention

The most viable option to stop Sudan's genocide and enforce the Convention is also the most controversial. A strong and targeted military intervention¹³³ in Sudan could easily outnumber and overwhelm any resistance from the Sudanese military or the Janjaweed, and the force's presence could help stabilize Darfur.¹³⁴ However, the use of military force is usually, but not always prohibited by international law. Although some oppose military intervention in a sover-

¹³¹ This statement is not intended to diminish the importance of prosecuting violations of *jus cogens* norms, but prosecution will usually be unable to stop ongoing genocide like that in Darfur. See 28 U.S.C.A. § 1605(a)(1) (West 2006) (mandating that domestic court convictions are enforceable only if the foreign state or individual consents to be bound by the court's decision).

¹³² See Editorial, *Taking Genocide to Court*, N.Y. TIMES, Mar. 5, 2007, at A18 ("Court rulings can never compensate the survivors of these horrors. But by strengthening the reach and authority of international law, these cases should give pause to those tempted to unleash future genocides - - and to those who stand by.").

¹³³ While "intervention" and "the use of force" can take many forms, in this section, intervention and force will mean the use of military force in a country without that country's permission. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 489, 655 (11th ed. 2003).

¹³⁴ See, e.g., Beinart, *supra* note 2, at 48 (advocating NATO intervention in Darfur).

eign nation in all circumstances, there are several compelling arguments for why intervention is justified in Darfur.

1. *The Noninterventionist Model*

The debate over the legality of intervention can be described as centering around two competing philosophies. One is that the rule of law—specifically the U.N. Charter—prohibits the use of force in all circumstances.¹³⁵ This noninterventionist philosophy¹³⁶ posits that law and morality must be separate in international decision-making. The other philosophy suggests that states have the right, and perhaps the obligation, to intervene with egregious violations of human rights. This latter view suggests that moral considerations are not always irrelevant in legal decision-making and that there are some instances in which the use of force can be justified.

The argument against military intervention is simple enough: it is flatly prohibited by the U.N. Charter, which is a contract binding all members of the U.N. to its terms. Subsection four of Article 2 of the U.N. Charter states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”¹³⁷ The U.N. Charter only allows the use of force in self-defense and in response to acts of “aggression.” Further, subsection seven of Article two prohibits the U.N. from intervening in matters which “are essentially

¹³⁵ U.N. Charter *supra* note 54, at art. 2, para. 4.

¹³⁶ See FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 23-54 (2d ed. 1997) (explaining the philosophy of noninterventionism).

¹³⁷ U.N. Charter *supra* note 54, at art. 2, para. 4.

within the domestic jurisdiction of any state”¹³⁸

Sovereignty, to noninterventionists, must be respected above all other humanitarian considerations.¹³⁹ The theory suggests that what goes on within one state is never the business of the rest of the world. The noninterventionist model, which draws its support from a literal reading of the text of the U.N. Charter, provides no role for military intervention by individual states or by the U.N. itself.

2. *The Case for Intervention in Darfur*

Contrary to noninterventionists, many others argue that international law both allows and, in some cases, obligates states to use force against a sovereign nation which has not attacked another country. The ICJ has stated that intervention is prohibited when it is aimed at thwarting choices by the target state that must remain free under international law.¹⁴⁰ The legality of forcible intervention, however, is more complicated when the intervention is aimed at thwarting choices that are not sanctioned by international law. Strict adherence to noninterventionism would categorically prohibit any military force in Darfur. However, if humanitarian intervention can ever be justified, it certainly would be justified in Darfur.

a. **United Nations Authorized Intervention**

The ideal case for intervention would be if the U.N. approved

¹³⁸ *Id.* at art. 2, para. 7.

¹³⁹ Nonintervention posits that “[s]tates must refrain from interfering in the domestic affairs of other states” and that “states may not question other states’ legitimacy on humanitarian grounds.” TESÓN, *supra* note 136, at 26.

¹⁴⁰ *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 15 (June 27).

a multinational force to intervene in Darfur. Subsection seven of Article 2 states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”¹⁴¹ However, genocide and other crimes against humanity and *jus cogens* violations are considered international crimes.¹⁴² If determined to be an international crime and a breach of international peace, the S.C. can authorize intervention notwithstanding subsections four and seven of Article 2.¹⁴³

The multilateral effort in 1990 to expel Iraq from Kuwait—the first “Gulf War”—is an example of a legal, U.N.-sanctioned intervention.¹⁴⁴ Iraq’s action was deemed a breach of “international peace and security,” and the S.C. voted to authorize the U.S.-led invasion under Chapter VII.¹⁴⁵ The U.S.-led humanitarian intervention in Somalia in 1992-93 was also authorized after the S.C. determined that all peaceful options had been exhausted.¹⁴⁶ Following the S.C.

¹⁴¹ U.N. Charter, *supra* note 54, at art. 2, para. 7.

¹⁴² See Nadia A. Deans, Comment, *Tragedy of Humanity: The Issue of Intervention in the Darfur Crisis*, 19 EMORY INT’L L. REV. 1653, 1669 (2005) (“Violations such as genocide and other crimes against humanity are considered international matters and may be distinguished as ‘international breaches of the peace.’”). This Comment uses the term “international crime” to refer to “acts for which individuals can be held liable for violations of international law, whether by virtue of customary international law or international agreement.” *Id.* See also Erik S. Kobrick, Note, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COLUM. L. REV. 1515, 1521 n.44 (1987).

¹⁴³ U.N. Charter, *supra* note 54, at art. 41-42. The S.C. has the power to authorize the use of force under Chapter VII. Providing that non-military options are not viable, the S.C. can authorize “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” *Id.*

¹⁴⁴ See Deans, *supra* note 142, at 1677.

¹⁴⁵ See *id.*

¹⁴⁶ U.S. and U.N. troops were dispatched during the Somali civil war in hopes of restoring peace and avoiding the widespread famine that occurred. For a summary of the intervention, see UNITED NATIONS OPERATION IN SOMALIA I (UNOSOM I), http://www.un.org/Depts/dpko/dpko/co_mission/unsom1backgr1.html (last visited Sept. 10,

vote, the Secretary-General called on all member states that were able to contribute troops and cash for the operation.¹⁴⁷ Another such authorization to use force in Sudan would garner troops, financial support, and advanced weaponry from many Western nations, including the United States, and could crush any Janjaweed resistance and coerce al-Bashir to stop the violence.

It is improbable that the U.N. would support any humanitarian intervention in Darfur. Although the Security Council could authorize the use of force in Sudan, there is little chance that the five permanent members of the S.C. could agree to use force in Darfur. Each of the five permanent members of the S.C.—China, Russian Federation, the United Kingdom, France, and the United States—has the ability to veto a proposed intervention.¹⁴⁸ It was viewed as a major and surprising move when the S.C. voted to refer the case to the ICC prosecutor,¹⁴⁹ and it is unlikely that the S.C. will go farther on Darfur. Permanent members China and Russia have indicated that they would not be willing to authorize the use of force in Sudan and would stall a use of force authorization by the Security Council.¹⁵⁰

2007).

¹⁴⁷ *See id.*

¹⁴⁸ *See* U.N. Charter, *supra* note 54, at art. 27, para. 3; *see also* Membership of the Security Council, *supra* note 54 (“Decisions on substantive matters require nine votes, including the concurring votes of all five permanent members. This is the rule of ‘great power unanimity’ often referred to as the ‘veto’ power.”).

¹⁴⁹ *See* Lipscomb, *supra* note 29, at 193 (stating that the Security Council “shocked the international community by referring the Darfur crisis to the ICC”).

¹⁵⁰ The two nations, along with Qatar, were the only members of the S.C. to refuse to support sending a U.N. peacekeeping force to Darfur. *See* Kessler & Timberg, *supra* note 45, at A01. Moreover, economic interests play a role in S.C. decision making: “China is the single largest investor in Sudan’s oil industry. Russia supplies weapons and other military equipment to the Khartoum regime. Neither Russia nor China wanted to antagonize the Sudanese government because of their economic interests in Sudan.” Deans, *supra* note 142, at 1691.

Finally, even if the S.C. were to authorize the use of force in Sudan, the U.N. does not have a good record on intervention. The debacle in Rwanda is a prominent example in which the U.N. intervention was late, under-funded, under-equipped, and completely ineffective. At its height during the war, the U.N. force in Rwanda numbered in the thousands, but the soldiers were prohibited from engaging in combat.¹⁵¹ Nearly one million Rwandans were slaughtered despite U.N. troop presence in the country.¹⁵² The leader of the U.N. peacekeeping force in Rwanda in 1994, General Romeo Dallaire, has criticized that U.N. and the permanent members of the S.C. for not taking more decisive action in Rwanda.¹⁵³ Dallaire has said that with only 5,000 troops and a mandate allowing the use of force, he could have prevented the genocide.¹⁵⁴

b. Humanitarian Intervention not Authorized by the United Nations

The way to affect change in Sudan is not to wait for the U.N.—which may never act, take years to do so, or be wholly ineffective on the ground—but to use a multinational force such as NATO or another alliance of powerful and willing countries.¹⁵⁵ Humanitarian intervention denotes a military intervention that is without the consent of the U.N. or of the violating country and is done to pro-

¹⁵¹ The U.N.'s mandate during the war did not allow the peacekeepers to use force to maintain the cease-fire. See UNITED NATIONS ASSISTANCE MISSION FOR RWANDA, http://www.un.org/Depts/dpko/dpko/co_mission/unamirM.htm.

¹⁵² Dallaire, and the impotence of his force, was made famous by actor Nick Nolte in the movie *Hotel Rwanda*. See Schabas, *supra* note 6, at 5.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ Beinart, *supra* note 2, at 32 (advocating the use of NATO forces in Darfur).

tect human rights within the country.¹⁵⁶ Genocide is a violation of a *jus cogens* norm and of universal human rights law, therefore humanitarian intervention in Sudan can be justified, even if the U.N. does not sanction it.

A number of commentators suggest that humanitarian intervention can be either legal under international law or at least morally justifiable. The following three scholars animate that sentiment.

First, Michael Walzer, in *Just and Unjust Wars*, writes that absent an attack on or threat to the intervening state, there are only three circumstances that justify military intervention.¹⁵⁷ One such circumstance is humanitarian intervention: “when the violation of human rights . . . is so terrible that it makes talk of community or self-determination or ‘arduous struggle’ seem cynical and irrelevant, that is, in cases of enslavement or massacre.”¹⁵⁸ Walzer argues that in some cases in which the victims are powerless, and the social contract has been broken, the absolute respect for sovereignty espoused by the noninterventionists is cruel and unworkable.¹⁵⁹

Second, Ian Brownlie, one of the world’s most imminent international legal scholars, has also suggested that when humanitarian intervention is implemented to stop mass atrocities, though not legal per se, may be morally defensible nonetheless.¹⁶⁰ The following idea

¹⁵⁶ While the U.N. can sanction humanitarian intervention, as in Somalia, this section discusses unsanctioned humanitarian intervention. Humanitarian intervention denotes “the forcible transboundary action undertaken for the purpose of protecting the rights of individuals against violations by their own governments.” TESÓN, *supra* note 136, at 5.

¹⁵⁷ MICHAEL WALZER, *JUST AND UNJUST WARS* 90 (1977).

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See* Ian Brownlie, *Humanitarian Intervention: Permissible Forms*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 226 (John Norton Moore ed., 1974); *see also* Johan D. van der

underscores that proposition: while the use of force may be prohibited by the U.N. Charter, a more fundamental human law obligates intervention following a *jus cogens* violation.¹⁶¹

Finally, Sheldon M. Cohen also suggests that humanitarian invasions can be justified by gross violations of human rights.¹⁶² Cohen uses the example of the U.S.-led invasion of Grenada, which most scholars condemned as an illegal use of force. Cohen speculates that the invasion of the island and the toppling of its government could have been justified if couched as a humanitarian mission.¹⁶³ The primary arguments used by the Reagan administration to justify the invasion—such as the need to rescue U.S. citizens, to stifle Cuba’s communist influence, or to protect the U.S. from an armed invasion—were insufficient.¹⁶⁴ However, the legality of the invasion becomes “plausible . . . when we add that not only had Grenada become Cuba’s ally, but it has also introduced another innovation—the execution of the opposition.”¹⁶⁵

3. *Fonteyne Test Applied to Darfur*

The foregoing philosophies support the use of force can be justified in Darfur. A comprehensive summary of the use of humanitarian force came from Australian scholar Jean-Pierre Fonteyne, who developed both substantive and procedural analyses for determining

Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 462 (2003).

¹⁶¹ Although Brownlie is a noninterventionalist, he understands that morality is sometimes in conflict with law. *See generally* Brownlie, *supra* note 160, at 226.

¹⁶² SHELDON M. COHEN, *ARMS AND JUDGMENT: LAW, MORALITY, AND THE CONDUCT OF WAR IN THE TWENTIETH CENTURY* 81-84 (1989).

¹⁶³ *Id.* at 82.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

whether intervention is justified.¹⁶⁶ Fonteyne's criteria are outlined in his influential 1974 article, which was published long after the U.N. Charter was adopted.

Fonteyne's substantive test consists of three criteria. First, only "ongoing or imminent large-scale deprivations of the most fundamental human rights" warrant humanitarian intervention.¹⁶⁷ As detailed in Parts II¹⁶⁸ and III¹⁶⁹ of this Comment, the situation in Sudan meets this first criterion. By all accounts, the murders, rapes, torture, and displacements are ongoing and large-scale. Genocide, as a violation of a *jus cogens* norm and a crime against humanity, is certainly a violation of the "most fundamental human rights." Second, "[t]he intervening state must be 'relatively' disinterested."¹⁷⁰ An often-cited criticism of humanitarian intervention is that the invading country is motivated by self-interest as opposed to a genuine concern for human rights. Of course, as Fonteyne admits, absolute disinterest may be impossible, but it is important that the use of force is primarily driven by a concern for human rights.¹⁷¹ A multinational intervention in Sudan could alleviate fears that the intervention was motivated by the

¹⁶⁶ Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 258 (1974).

¹⁶⁷ Patricia Y. Reyhan, *Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?*, 60 ALB. L. REV. 771, 787 (1997) (citing Fonteyne, *supra* note 166, at 258-59).

¹⁶⁸ See *supra* Part II.

¹⁶⁹ See *supra* Part III.

¹⁷⁰ Reyhan, *supra* note 167, at 787 (citing Fonteyne, *supra* note 166, at 261).

¹⁷¹ *Id.* at 788 ("As Fonteyne and others have noted, a requirement of absolute disinterest is unrealistic and probably unnecessary. The fact that secondary motives exist should not alone invalidate the resort to forcible self-help, if the overriding motive is the protection of human rights.") (citing Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 350 (1967)).

selfish desires of a single state. Third, the intervention may neither be unnecessarily long, nor involve unnecessary force.¹⁷² Similar to the idea of proportionality,¹⁷³ this requirement ensures that the harm caused by the intervention is outweighed by the need for intervention. To reiterate, a large multinational force with a limited purpose would command worldwide attention; such attention would safeguard against improprieties, such as the use of excessive force or the multinational force maintaining an unnecessarily protracted presence in Darfur.

Fonteyne's procedural test to determine if humanitarian intervention is justified also consists of three criteria.¹⁷⁴ First, all peaceful dispute resolution options must be exhausted.¹⁷⁵ Second, there must be no "reasonable prospect of timely action by an international organization."¹⁷⁶ Finally, an immediate report must be made available to the U.N. or to another regional organization.¹⁷⁷ This procedural test can also be met in Darfur. Al-Bashir has received numerous pleas from the international community to stop the violence,¹⁷⁸ yet he has refused to control the Janjaweed.¹⁷⁹ In light of the U.N.'s record and the African Union's lack of success, there is no reasonable prospect for timely action by an international organization that can stop

¹⁷² Fonteyne, *supra* note 166, at 262-63.

¹⁷³ In the context of international law, proportionality generally implies that the use of force is not excessive. Specifically, proportionality refers to "the balance to be struck between the achievement of a military goal and the cost in terms of lives." Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L. L. 391, 391 (1993).

¹⁷⁴ Fonteyne, *supra* note 166, at 264-65.

¹⁷⁵ *Id.* at 264.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 265-66.

¹⁷⁸ See Kessler & Timberg, *supra* note 45, at A01.

¹⁷⁹ See *id.*

the genocide.

Fonteyne's seminal analysis has been praised by other legal commentators.¹⁸⁰ However, two notable critiques of Fonteyne's test are that it is too cautious and that his analysis would severely limit the use of humanitarian intervention.¹⁸¹ However, those criticisms do not preclude intervention in Sudan. Application of Fonteyne's framework illustrates that humanitarian intervention is justified in Darfur. Because the U.N. refuses to characterize the crimes as genocide and take the steps necessary to enforce its Genocide Convention, the international community must take action. The literature makes clear that humanitarian intervention can be justified. In fact, the situation in Darfur satisfies every test outlined for justifiable humanitarian intervention. The genocide in Sudan provides an opportunity to apply sound legal theory to a dire, real-life situation.

V. CONCLUSION

Darfur tragically illustrates that the international legal mechanisms in place are incapable of stopping horrific crimes—crimes those mechanisms are designed to address. Hopefully, Darfur is not remembered as another Rwanda—an example of worldwide indifference to genocide.

¹⁸⁰ Professor Patricia Reyhan of Albany Law School asserts: "The most comprehensive summary, and thus the one that provides the best framework for transposing the law of humanitarian intervention to the evaluation of the legal claim of those . . . with the express goal of ending genocide, is offered by Jean-Pierre Fonteyne . . ." Reyhan, *supra* note 167, at 787.

¹⁸¹ One commentator explained Fonteyne's test as "an extremely difficult one to apply due to its highly subjective character. . . [and] it could also lead to callous decisions against intervention in desperately needed situations." T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1, 46-47 (2002).

The situation satisfies the international definition of genocide, therefore extraordinary responses and remedies are available to the international community. Given the practical limitations on the U.N. Security Council actions, as well as the African Union's relative ineffectiveness, the situation requires a more forceful response. The theoretical justifications for humanitarian intervention provide the basis for a practical solution that must be implemented in Sudan. This Comment concludes by advocating humanitarian intervention—the use of military force that is not authorized by the U.N.—as a permissible and viable means to enforce the Genocide Convention and stop the killing in Darfur.

As a whole, this Comment is a critique of the U.N., Genocide Convention, and the inability of both to confront international crimes. Not only has the U.N. abdicated its responsibility to characterize the crimes occurring in the Sudan as genocide, but it has also failed to provide for legitimate means to enforce the Convention when and if genocide is found.

Nicholas Kristof of the *New York Times* has written that “the most extraordinary aspect of Darfur is not that gunmen on the Sudanese payroll heave babies into bonfires as they shout epithets against blacks. It’s that the rest of us are responding only with averted eyes and polite tut-tutting.”¹⁸² The world can no longer ignore the crisis in Sudan. Attending to Darfur requires inquiring into the U.N.’s denials and decision not to act. We must realize that when gross violations of the most fundamental human rights are occurring, the U.N.’s decision

¹⁸² Nicholas D. Kristof, Editorial, *Darfur: If Not Now, When?*, N.Y. TIMES, Oct. 29, 2006, at A13.

to avert its eyes should not end the inquiry. Realizing this today is the first step to confronting the affront to humanity that is Darfur.