

ANNEX 1

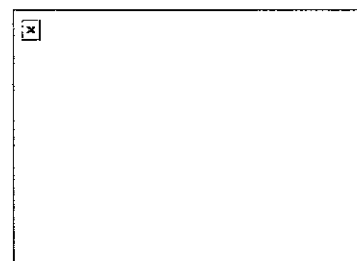
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Spring 2009

Case Closed: A Prosecutor Without Borders

Julie Flint and Alex de Waal



Cutting Corners

Eleven years ago, celebrating the creation of the world's first permanent International Criminal Court, UN Secretary General Kofi Annan spoke of "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law." Reflecting on the birth of the United Nations amidst the struggle against genocide, war crimes, and aggression half a century earlier, Annan noted how the idea of a world criminal court had been stillborn, strangled by the superpower rivalry of the Cold War. Only with the triumph of Western liberalism, and the horrors in former Yugoslavia and Rwanda, had this changed. The International Criminal Court (ICC), Annan said, "is an achievement which, only a few years ago, nobody would have thought possible."

Inevitably, much in the Rome Statute that established the ICC was diplomatic compromise. As finally agreed, the statute gives jurisdiction over genocide, crimes against humanity, and war crimes. The Court, however, can act only if a country is unwilling or genuinely unable to investigate or prosecute, and the UN Security Council has the power to suspend any case for a renewable twelve-month period. Nonetheless, the ICC is an independent court with a prosecutor elected for a single nine-year term, accountable only to his own conscience and an Assembly of States Parties (ASP) consisting of the countries that have ratified the statute.

Nine months after the Rome Statute came into effect, in April 2003, the Argentinian lawyer Luis Moreno Ocampo was elected as the Court's first Prosecutor. He promised a "sexy court" that would dispense swift and telegenic justice comprehensible to faraway and often uneducated victims. Three countries referred themselves to the ICC over the next two years—Uganda, the Democratic Republic of Congo, and the Central African Republic—and in March 2005 the Security Council referred the case of Darfur. But it was not until March 2006 that the ICC took its first suspect into custody, a hitherto obscure Congolese militia leader named Thomas Lubanga Dyilo.

Kofi Annan spoke for many when he said, "Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful no earthly court could judge them." The Nuremberg trials were victors' justice—the prosecution of those already fallen from power. The ICC is different: it promised to be a turning point in the struggle for human rights and against impunity, a landmark in the advance of global ethics. Some of the world's most committed lawyers and investigators converged on The Hague, relishing the challenges that lay ahead. The ICC's mandate was not only to identify the perpetrators of the worst crimes ever codified in international law; it was to arrest and prosecute them. Yet the Court had no police force, three of the Permanent Five at the Security Council did not support it, and the UN Department of Peacekeeping Operations didn't want its overstretched and vulnerable peacekeepers conscripted as ICC enforcers. It also had Luis Moreno Ocampo as its lead prosecutor.

Despite the challenge of building and operating an institution in an uncertain and evolving field of law, Moreno Ocampo had a strong wave to ride—the goodwill of publics across the globe, including a powerful American human rights constituency, and some of the ablest legal minds in the business. But three years into his tenure, many in the Office of the Prosecutor (OTP) were questioning his ability to do the job. A further three years on, and the Court is in trouble—a trickle of resignations has turned into a hemorrhage, and cases under prosecution and investigation are at risk of going calamitously wrong. The Lubanga trial has come to court under a cloud of controversy over the Prosecutor's handling of evidence and charges, and an arrest warrant issued for Sudan's president, Omar al-Bashir, has set in motion a chain of events that threatens a humanitarian disaster for the victims of the war in Darfur.

The first public signal of dissatisfaction with the Prosecutor was registered in July 2006 when the Court invited Antonio Cassese, the first president of the International Criminal Tribunal for the former Yugoslavia (ICTY), and Louise Arbour, the UN High Commissioner for Human Rights, to submit *amicus curiae* briefs, a kind of peer review. Both challenged Moreno Ocampo's performance. Addressing the Prosecutor like a teacher dressing down a particularly inept student, Cassese assailed every aspect of Moreno Ocampo's investigations but especially his failure to undertake even "targeted and brief interviews" in Darfur.² Moreno Ocampo argued that Darfur was too dangerous for investigations and that victims and witnesses couldn't be protected from the wrath of the Sudan government. Cassese disagreed. He had led a UN Commission of Inquiry into Darfur in 2004 and had vigorously sought out and interviewed numerous witnesses in Darfur and Khartoum.³ Unlike Cassese, who mentioned Moreno Ocampo 36 times, Arbour made no personal reference to the Prosecutor.⁴ But she too told him how to do his job. She called for "an increased visible presence of the ICC in Sudan" and made clear her belief that Moreno Ocampo was proceeding down the wrong track. Speaking with the authority of experience, she said, "It is possible to conduct serious investigations of human rights during an armed conflict in general, and Darfur in particular, without putting victims at unreasonable risk."

Colleagues said Moreno Ocampo was enraged. He asserted that he was already "successfully carrying out an investigation" based entirely on evidence that could be gathered in safety outside Sudan.⁵ The Prosecutor dug in. From then on, senior staff said, it was "utter lunacy."

Although the Sudan government's minimal cooperation with the ICC ground to a halt in early 2007, court sources say that in 2006 an ICC delegation visiting Khartoum was invited to travel to Darfur. The invitation, like so many of the government's promises, may well have come to nothing. But Moreno Ocampo didn't call Khartoum's bluff. He didn't push at the door. The ICTY had made a point of opening branch offices in precisely the areas most hostile to it. Cassese's experience was that, with due care and courage, witnesses could be protected and evidence assembled. But Moreno Ocampo insisted that investigations inside Sudan were neither safe nor necessary. The OTP's original senior trial attorney for Darfur, Andrew Cayley, described the difference with the UN inquiry: "Cassese went personally to Kober prison and interviewed very sensitive witnesses. He demanded access with nothing more than a Security Council resolution. The OTP got no further than the Hilton Hotel."⁶ By the end of 2008, the Court had granted victim participation rights to just eleven Sudanese, as opposed to 171 Congolese and 57 Ugandans, and not a single case for witness protection on behalf of Darfurians had been presented to the judges.⁷

The Prosecutor's next step was to issue a summons for two Sudanese whom he alleged were responsible for massacres. On February 27, 2007, he demanded that Ahmed Harun, minister of state for the interior and head of the "Darfur desk" that coordinated military and security operations in the region, and Ali Kushayb, a militia commander, present themselves in The Hague. Unlike in a domestic court, the ICC has a "Pre-Trial Chamber" of three judges who decide whether cases meet a relatively low threshold of reasonable grounds to conclude that a crime has been committed within the Court's jurisdiction. The Prosecutor has the option of public or sealed applications, with the latter offering the possibility of surprise arrests. A summons is the most modest step of all. The Pre-Trial Chamber considered the Prosecutor's request and, deciding that the men would never turn up of their own accord, issued arrest warrants.

Cassese damned the prosecutor's initiative with faint praise, saying "Better tiny steps than total inertia."⁸ Many in the OTP were dumbfounded by what several called Moreno Ocampo's "idiotic" insistence on summonses. The ICTY had shown how effective sealed warrants could be, and the ICC professionals believed that secrecy was their best, and possibly their only, chance of having Harun arrested—when he traveled abroad, as indeed he did in the very month the summons was issued.

Was Moreno Ocampo still trying to win some cooperation from Khartoum? Colleagues find that hard to believe. Said one, "By the time Harun and Kushayb were named there had been several visits to Khartoum"—although not by Moreno Ocampo, who has yet to set foot in Sudan—"and it was abundantly clear that the Sudanese are masters at stonewalling, world-class prevaricators. It was obvious that the only way to get people delivered was a sealed warrant—unless you wanted to be seen to be doing something but not actually to be doing anything."

The role of ICC Prosecutor was always going to be extraordinarily difficult, under competing pressures from supporters and powerful detractors like the United States. Moreno Ocampo's greatest asset was an exemplary cadre of professional staff for whom working at the ICC was more than a career—it was a vocation. "I loved this job," an early recruit to the OTP told us. "It was my life." The Prosecutor had the opportunity to draw upon the accumulated expertise of existing international tribunals and some of the world's finest lawyers and investigators. This asset was rapidly squandered. Increasingly, Moreno Ocampo's staff found it difficult to agree with their own

Prosecutor, whose penchant for publicity and extravagant claims rather than fine detail was the polar opposite of their own work ethic.

As the pressures on him mounted, Moreno Ocampo, in the opinion of many of his colleagues, began to “cut corners.” They were incredulous when he announced publicly that he planned to intercept a plane on which Harun was scheduled to fly to Saudi Arabia for the Hajj.⁹ If he really sought to arrest Harun, why advertise his own plan? The Prosecutor’s harshest critics accused him of grandstanding: he knew, they said, that if the cases he was building ever came to court, and proved to be flawed, it wouldn’t be on his watch. Some wondered if he was “making peace with the fact that he is never going to get these people arrested.” Others suggested he was taking a maximalist position, very publicly, as the only way of showing the impact of the crimes committed.

As internal criticism grew louder, Moreno Ocampo listened less and took closer personal charge than ever. Many in the Investigations Division felt sidelined; in the Prosecutions Division, insufficiently consulted. A senior team member said the Prosecutor was “the most complicated and difficult” manager he had ever worked for, emotionally volatile and obsessed with micromanaging. Some tried to raise concerns, privately deploring the absence of “a culture in which objectivity and a critical review of the evidence with all its shades drives the institution.” A key member of the OTP left, saying privately that he was fearful of having to defend an indefensible position a few years down the line. A second followed, saying the Prosecutor ran the OTP like a medieval kingdom. A third told us the OTP was run “like a police state,” with a “culture of fear” that was “very real,” and “sapping.” He quit too.

Senior ICC staff who had worried over Moreno Ocampo’s earlier caution were now puzzled by his zealous pursuit of the biggest culprits he could identify—and especially his determination to charge President Bashir with genocide, including for his policies toward the displaced camps in Darfur. Their concern was not so much that the Prosecutor was aiming too high, but the cavalier way in which he went about it. “The Prosecutor doesn’t have the reflexes of a prosecutor, bringing to bear a sound judgement as to what is legally doable,” one told us. Another said: “He cut corners in the Court’s core business.” Several felt he would have been better advised to confine his charges to the events of 2003-04, when, according to the Court’s own crime base data, about 90 percent of the killings took place.

Non-attributable criticism became a feature of ICC culture, to the extent that the “Hague Justice Portal” Web site published, for the first and only time, an anonymous critique by a legal scholar who, from internal clues, had probably been a member of the Prosecutor’s staff.¹⁰ Using words like “inept,” “pernicious,” and “unrealistic” to describe Moreno Ocampo’s strategy, the author deplored “a crisis of maturity within the Prosecutor’s own office” and called for urgent attention to the crisis, including by the ASP, the only body with the power to remove the prosecutor.

The most strenuous public advocates of the Court also began to express their worries, albeit mainly in private. In September 2008, Human Rights Watch (HRW) wrote to the Executive Committee of the ICC to express serious concern over poor management practices in the OTP and about the effect this was having on the Court’s investigations (and to criticize the prosecutor’s “due process violations” in a matter relating to his own behavior, of which more later). HRW said the departure of senior staff in the OTP was having “a direct impact on the efficiency of investigations, and is particularly regrettable where due at least in part to the failure to develop a sufficiently supportive work environment.” “Many experienced investigators have left the ICC since 2005,” it said, for two reasons: “burn out” caused by the fact that there were “simply not enough of them to handle the rigorous demands for conducting investigations,” and the “perception that the input of investigators is not sufficiently valued within the OTP, leading to dissatisfaction.” Despite the attention the Prosecutor lavished on NGOs, there is no sign that he took this criticism seriously.¹¹

The HRW letter does not tell the whole story. It was not only investigators who were leaving. Those who left included Silvia Fernandez de Gurmendi, the first cabinet chief of the OTP; senior legal adviser Morten Bergsmo; legal adviser Gilbert Bitti; DRC team leader Bernard Lavigne; Uganda team leader Martin Witteveen; Andrew Cayley—in the opinion of a former ICTY colleague, “the most effective lawyer I have ever seen”; chief analyst Paul Seils; and Deputy Prosecutor Serge Brammertz, now Prosecutor of the Yugoslavia tribunal.

Argentines would have been less surprised at the controversies swirling around Moreno Ocampo. His international face is that of the man who helped put the Argentine junta behind bars, a fearless prosecutor who followed the chain of command to its zenith. As a young man aged just 32, he had been assistant to chief prosecutor Julio César Strassera in the trial of nine senior figures of the military dictatorship that ruled Argentina from 1976 to 1983. It was the first prosecution of senior government officials for the mass killing of civilians since the Nuremberg trials, and it resulted in five convictions. But even in those heady days of the mid-eighties, Moreno Ocampo had his critics. Strassera disliked his love of the media spotlight; many prosecution witnesses, victims of some of the worst human rights abuses on the continent, shied away from him.

“No survivor wanted to talk to him,” says Miriam Lewin, a distinguished investigative journalist who is herself a survivor of the Naval Mechanics School, the most brutal of the dictatorship’s torture centers. (Of the more than 5,000 people interrogated there, only 150 survived.) “It was only a year after democracy came to Argentina after a long and cruel dictatorship. We were all afraid because nobody knew if the military were going to come back. Many of us carried our passports in our pocketbooks. We wanted guarantees we were not going to be taken and tortured again. Moreno Ocampo didn’t understand how difficult it was to come back to the country after being tortured and held in a concentration camp. We felt he didn’t respect us at all. We found him distant and

unaware of what was going on. He was never supportive. He never accompanied us as victims.”

The weekly news magazine *Noticias* has described the 1980s as Moreno Ocampo’s “human rights period” and quotes him as saying he finished it “without a peso.”¹² It was then, he told the magazine, that he said to himself: “I want to work for worthy causes, but I also want to make money.” As a young man, Moreno Ocampo had funded his legal studies by working as a carpenter, his family having fallen on hard times two generations earlier. Now he made a fortune, according to *Noticias*, by continually seeking “new commercial niches.” First, he took on corruption in business and public administration, making extensive use of secret cameras; then what a colleague called “gender discrimination” cases, representing some of Argentina’s wealthiest women in family disputes; until finally, in the new millennium, twice married and with four children, he became “the lawyer of the powerful,” representing some of Argentina’s most controversial public figures, including the former Economy Minister Domingo Cavallo, on whose watch the Argentine economy collapsed,¹³ and a Catholic priest, Julio Grassi, charged with 17 counts of sexual abuse of young boys in his care.

The Grassi case has been characterized by threats, violence, attempted bribery, and severe criticism of Moreno Ocampo’s comportment.

“I was disgusted by Moreno Ocampo’s behavior in the months he worked for Grassi,” says psychiatrist Enrique Stola, who treats two of the boys who accused Grassi. “My patients, ‘Ezequiel’ and ‘Gabriel,’ were attacked on radio and television, threatened, and beaten, and Moreno Ocampo did not say a single word.” Stola said he was “deeply ashamed and saddened that a homeless child who had dared to accuse a powerful priest like Grassi should be afraid of a man who claimed to defend human rights.”

More than six years after Moreno Ocampo’s involvement with the Grassi case ended, prosecuting attorney Juan Pablo Gallego continues to speak out against the methods he used while on the priest’s high-powered legal team. “Without any evidence whatsoever, Moreno Ocampo falsely accused Gabriel of attempting to blackmail Grassi and of bearing false witness,” he told us. “He also provided Grassi with secret cameras. One of these cameras was used to identify the place where Gabriel was staying, and soon after he was brutally attacked there by persons unknown.”

From his earliest days in the public eye, Moreno Ocampo has massaged his public image and since moving to the ICC has done his best to ensure that internal controversies do not get outside airing. Court sources say that several former colleagues have received letters from his legal adviser threatening legal action if they speak to the media. Despite this, there has been a growing chorus of criticism of the Prosecutor’s handling of cases. The first to come to trial has been that of Thomas Lubanga, leader of the Congolese Patriotic Union (UPC) accused of widespread rape and killing in northeast Congo. Lubanga was arrested in his own country and charged with genocide and crimes against humanity. But the Congolese authorities made no serious effort to investigate the case and, when it became clear that he was likely to be released, the ICC pounced. In March 2006, Lubanga was taken from prison under UN armed escort in the dead of night and flown to The Hague in a French military plane.

The ICC had something to celebrate: a suspect in custody at last. Congolese human rights groups and women’s groups joined in the celebrations. But when the charges against Lubanga were restricted to recruiting and deploying child soldiers, they expressed surprise at “the limited charges brought” and warned that “these charges risk offending the victims and strengthening the growing mistrust in the work of the International Criminal Court in the DRC and in the work of the Prosecutor specifically.”¹⁴

The Lubanga case quickly became an embarrassment. When the ICC opened its Congo investigation, the UN Mission in Congo (MONUC) provided thousands of documents—such as weekly situation reports and child protection reports—to the OTP. Because they were mostly routine first-line reporting, MONUC officials expected the Prosecutor to use them as “lead evidence” only—signposts of what had happened, where and when, so that ICC investigators could follow up. Files like these are not the product of rigorous criminal investigations and none of those who compile them would expect them to stand up to courtroom scrutiny. But because they contained sensitive information including named sources, MONUC insisted that they stay confidential.

Moreno Ocampo’s investigative strategy relies on a “small team” approach—defended by the Prosecutor on grounds of economy, but criticized by investigators, governments, and victims. Thus the Prosecutor relied heavily on the MONUC reports for his case against Lubanga. In November 2007, the judges demanded that these confidential reports be shared with the defense—obliging the OTP to go back to the UN to ask it to revisit the confidentiality agreement. MONUC duly set staff members to work screening each and every document to see if it contained sensitive information. After seven months and three missed deadlines, Judge Sir Adrian Fulford ran out of patience and halted all proceedings, ruling that “the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.” He ordered Lubanga’s release. Moreno Ocampo appealed, seeking a compromise under which the judges—not the defense—would see the confidential documents. The UN agreed, the Appeal Court conceded, and Lubanga stayed in prison.

Moreno Ocampo had scraped through. But the drama revealed a recurrent weakness: the Prosecutor had cut corners. He had orchestrated a drumbeat of public expectation, and had set trial dates before his case was ready. Moreno Ocampo was preoccupied with the wrong court—that of public opinion.

Listening to Moreno Ocampo’s opening statement on January 26, 2009—“Lubanga’s group

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recruited, trained and used hundreds of children to kill, pillage and rape”—one might have been forgiven for thinking that killing, pillage, and rape were on the charge sheet. They weren't. The charges were still recruiting and deploying child soldiers. Moreno Ocampo's presentation reminded one observer of "a student who hadn't prepared properly for his final exam."¹⁵ More importantly, it raised expectations among victims that would never be addressed in court. To the dismay of many ICC staff, Moreno Ocampo had removed the chief trial attorney for the case—Ekkehard Withopf, an experienced trial lawyer—a month before the trial opened. Now he left The Hague without listening to the defense's opening statement and headed for the World Economic Forum in Davos, where he made headlines by reversing an earlier position and announcing that he was examining the possibility of prosecuting Israeli commanders over alleged war crimes committed in Gaza.¹⁶

Like all human rights activists, women's rights groups are reluctant to do anything that might undermine the ICC. Their determination to prosecute crimes against women makes them especially determined to see the Court succeed. The Court has an excellent record in gender equality in its hiring practices and the Prosecutor goes out of his way to emphasize the importance of prosecuting and deterring rape. But gender activists have their own special reasons for mixed feelings about Moreno Ocampo. Their worries are not pedophile priests in Argentina, but the Prosecutor's personal conduct at the Lord Charles Hotel, in the verdant hills of South Africa's wine country.

The scandal came to light on October 20, 2006 when the Prosecutor's Public Information Adviser, Christian Palme, filed an internal complaint alleging that Moreno Ocampo had "committed serious misconduct . . . by committing the crime of rape, or sexual assault, or sexual coercion, or sexual abuse" against a South African journalist nineteen months earlier.¹⁷ Palme argued that the Prosecutor's conduct had caused serious harm to the reputation of the Court and called on the States Parties to remove him.

The full story of what happened in the Lord Charles Hotel, three days before the Security Council referred the conflict in Darfur to the ICC, is unlikely ever to be known. Moreno Ocampo has denied committing rape. But there is no evidence that he has denied the veracity of a recording which suggests that his behavior in the hotel fell far short of the "high moral character" demanded by the Rome Statute.¹⁸

For Yves Soroboki, Moreno Ocampo's spokesperson, March 28, 2005, began with a phone call from the journalist, thanking him for having arranged an interview with Moreno Ocampo but saying the Prosecutor was making her "a little nervous." "I have a problem because he doesn't want to leave," she told Soroboki, who later reported the conversation to Palme. "I'm trying to leave and go to the beach but the Prosecutor wants to come with me, so what should I do? . . . I think he has ulterior motives." Later that day, the journalist called Sorokobi again and told him that the Prosecutor had, in Sorokobi's words, "forced himself on her." Two days later, the two spoke for a third time and Sorokobi recorded the conversation. Although the journalist is weeping, and often unintelligible, she can be heard saying: "He took my [house and car] keys . . . Had to do that to get out of this . . ." Sorokobi told Palme, who recorded their conversation: "She said that was the only way he would let her go."

In December 2006, after interviewing the Prosecutor and the journalist, a panel of ICC judges found Palme's complaint "manifestly unfounded" and asked him "to obtain all copies of taped conversations between Ms [...] and Mr Sorokobi and hand them to the President for destruction." Soon after, Moreno Ocampo dismissed Palme, summarily and immediately, for "serious misconduct." Palme appealed to the Court's internal Disciplinary Advisory Board, which recommended that he be reinstated. Moreno Ocampo ignored the recommendation. Palme then appealed to the Administrative Tribunal of the International Labor Organisation (ILOAT), which has jurisdiction to settle labor disputes in many international organizations.¹⁹ The ILOAT judgment,²⁰ made public on July 9, 2008, was harshly critical of the Prosecutor and fully exonerated Palme, quashing his dismissal. It found that his complaint was neither made falsely nor with malicious intent. Rather, the Tribunal said, Palme had "reasonable grounds" for believing sexual misconduct by Moreno Ocampo: the journalist, it said, had "indicated unambiguously that the prosecutor 'took [her] keys' and she had consented to sexual intercourse 'to get out of [the situation].'" Sorokobi's evidence was "secondary evidence but, depending on the circumstances, it may have been probative in criminal proceedings."

The ILOAT found that Moreno Ocampo had committed a "breach of due process" in firing Palme and ordered the ICC, on behalf of the Prosecutor, to pay Palme 248,000 euros. Human Rights Watch's letter of September 2008 drew attention to the ILOAT ruling, the economic costs to the court—"already under strain to account responsibly for its budget to states parties"—and the impact on staff morale. The rights group said it was "disturbed" that the Prosecutor had ignored the recommendation of the Court's own Disciplinary Advisory Board.

UN High Commissioner for Refugees Ruud Lubbers had resigned in February 2005 following allegations of sexual harassment less grave than those against Moreno Ocampo—and many in The Hague believed the Prosecutor ought to follow his example. Details of the affair had emerged just as the OTP was drafting a code of conduct for investigators, and some were dismayed when Moreno Ocampo made clear he intended to fight on. But the Palme case was obscured, the day after the ILOAT judgement was made public, by Moreno Ocampo telling the *Washington Post* of his most ambitious application yet: to have the Sudanese president arrested on charges of genocide, crimes against humanity, and war crimes. We have been told, by several sources, that Moreno

human capital invested in his office is draining away.
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Ocampo at first ruled out pursuing the Sudanese leadership. By the autumn of 2007, however, he had his sights on the president. In the words of one former colleague, "He jumped to the very top. He did not wish to have advice from attorneys." In addition, investigations into the Darfur case had diminished rather than expanded, and the Prosecutor was continuing to rely heavily on secondary material, including the 2005 Cassese Commission's sources—many of whom were unnamed and could therefore never be produced in a courtroom.

In December 2007, Moreno Ocampo signaled his direction publicly in a briefing to the Security Council. Before going to New York, he had drafted a presentation outlining his theory that Bashir had designed a "two-stage" genocide—massacres in the villages in 2003-04, and then the "slow death" of the Fur, Masalit, and Zaghawa tribes in displaced camps. Colleagues had expressed concern, questioning the strength of his argument for genocide in the camps, and Moreno Ocampo reluctantly accepted a revised text. To their dismay, he repeated his original claims when he spoke in New York. "This is typical Moreno Ocampo," says Palme. "He would constantly tear up and destroy texts, forcing sometimes all night sessions working and re-working texts. The worst times were before the ASP and before the UNSC Darfur reports."

There is much speculation, inside and outside the ICC, at how Moreno Ocampo arrives at his figures for death rates in Darfur. Unpublished UN monitoring figures for 2008 range from 60 to 350 violent fatalities a month, for an average of about 130. The activist group Genocide Intervention Network has a similar number, of around 150 a month.²¹ Moreno Ocampo has a very different figure. Speaking at a conference at Yale University on February 6, this year, the Prosecutor claimed that "as of today, 5,000 people are dying each month in Darfur," including through "slow death" by hunger and disease.²² The OTP itself possesses no specialist epidemiologists or demographers who might generate such figures, and no one working in Darfur proposes figures even remotely close to these. While some estimates for mortality during the peak of the crisis in 2004 generated figures this high, a specialist review of mortality data undertaken by the U.S. General Accountability Office²³ wrote off high-end estimates as unreliable. In the last two years, relief agencies have warned of increasing malnutrition whenever the World Food Program cuts its rations or fighting erupts, but there is no evidence of a generalized famine on the scale that the Prosecutor insists is underway. Moreno Ocampo's arithmetic is simply fantastical.

Most of the controversy over the Bashir case has focused on the prudence of indicting a head of state in a fragile country prone to conflict. After a decade of attempts to coerce or overthrow the regime, the U.S. and European governments decided in 2001 to pursue the path of negotiation, leading in January 2005 to a peace agreement that brought a commitment to democratic elections and an end to twenty-one years of war between north and south. Slowly and painfully, with many setbacks and much resistance from the Sudan government, the key provisions of the "Comprehensive Peace Agreement" are now being implemented. There are serious problems still, especially over delineation of the north-south border, but a ceasefire has held most of the time, the northern army has withdrawn from almost all parts of the south, and a power-sharing government is functioning. Elections have been scheduled for this year and a referendum on self-determination for South Sudan for 2011. In Darfur, international efforts have focused on sustaining humanitarian access and deploying an international peacekeeping force, now approaching its mandated size of 26,000 men.

All this could be endangered by targeting Bashir directly. Many Sudanese fear that an arrest warrant could make things significantly worse, perhaps bringing about the very sorts of atrocities that the ICC is meant to deter. Moreno Ocampo disagrees. "For people in Darfur, nothing could be worse," he told *Foreign Policy* magazine.²⁴ "We need negotiations, but if Bashir is indicted, he is not the person to negotiate with." Not even Darfur's rebel Justice and Equality Movement (JEM) has a position as militant as this—in Doha, Qatar, on February 17, JEM signed a "Declaration of Intent" with the government for a peaceful settlement of the conflict.

During the seven months that the ICC judges deliberated, Bashir made his position perfectly clear: "We are not looking for problems, but if they come to us we will teach them a lesson they won't forget." Moreno Ocampo dismissed this and other warnings in his speech to the Security Council in December: "The facts are that victims of crimes committed in Darfur are 3 million African citizens, that justice will promote peace . . . Threats against victims, peacekeepers, and aid workers should be seen for what they are—criminal intent—and not rewarded with promises of impunity."²⁵ Although the Prosecutor is obliged to consider the interests of victims when bringing a prosecution, this section of his report ran to just four lines and failed to consider that the three million had a very obvious interest in a humanitarian operation that was keeping them alive. Minutes after the arrest warrant was issued, Khartoum began expelling relief agencies, threatening at least 70 percent of humanitarian aid to 4.7 million people.

Less attention has been paid to the substance of the arrest warrant and the fact that the Pre-Trial Chamber threw out the genocide charges. Moreno Ocampo's principal reason for prosecuting despite the obvious risks. The judges wrote that "the Prosecution acknowledges that it (i) does not have any direct evidence in relation to Omar Al Bashir's alleged responsibility for the crime of genocide and (ii) its allegations concerning genocide are solely based on certain inferences that, according to the Prosecution, can be drawn from the facts of the case."²⁶ In a remarkable humiliation for Moreno Ocampo, they proceeded (with one dissenting opinion) to dismiss those inferences.²⁷

This will not have come as a surprise to the Prosecutor's most informed critic, his former senior trial attorney for Darfur. "Serious disagreement remains as to whether Al Bashir and the Sudanese government intended actually to destroy, in part, the Fur, Masalit and Zaghawa peoples of Darfur," Andrew Cayley wrote beforehand in a commentary on the genocide charges.²⁸ "It is difficult to cry government-led genocide in one breath and then explain in the next why 2 million Darfuris

have sought refuge around the principal army garrisons of their province. One million Darfuris live in Khartoum where they have never been bothered during the entire course of the war.” Rony Brauman, a founder and former president of Médecins Sans Frontières—which has teams on the ground in Darfur—heaped scorn on the Prosecutor. “Can one seriously imagine Tutsis seeking refuge in areas controlled by the Rwandan army in 1994?” he asked. “Or Jews seeking refuge with the Wehrmacht in 1943?”²⁹

For Western nations committed to the ICC, and with interests in political stability and cooperation, Moreno Ocampo looks a lot less attractive than he once did. The political efforts required to halt ICC activity at the Security Council would be great, and few Western governments wish to risk the wrath of domestic human rights constituencies by appearing to wobble on an abusive regime. The effort needed to convince States Parties to remove the Prosecutor would be even greater, requiring them to admit that they appointed the wrong man to begin with.

Africans were once the most passionate supporters of the ICC: half of the countries that first ratified the Rome Statute were African, and three of the first four cases were referred by African governments. Now they, too, are having second thoughts. They don’t see the Court dealing with cases outside Africa. They worry that warrants like those against Bashir and the Congolese opposition leader Jean-Pierre Bemba (seized in Belgium with a sealed warrant in May 2008) may be turning criminal prosecution into a selective political instrument. Many who struggle for human rights fear that abusive governments have been handed exactly the pretext they need for refusing any international cooperation. Sudanese whose vocation is human rights find themselves torn: they want to see Moreno Ocampo pursue the highest ranking suspects and establish the principle that there can be no impunity for the most horrific crimes, but they remain fearful of a backlash in which ordinary Sudanese will once again find themselves in the firing line. They also fear that their hopes for a relaxation of Sudan’s security laws and expectations for moderately free elections will be dashed when Bashir concludes that the Republican Palace is his safest, and perhaps only, safe house.

Moreno Ocampo is a man who diminishes with proximity. Six years after he became Prosecutor, the priceless human capital invested in his office is draining away. Lawyers and investigators who served in the OTP, and who count among the brightest and the best of their profession, say they believe the Court’s reputation, and perhaps even its life, is at risk. Their desire to make a success of the court remains as strong as ever it was—but not under the current Prosecutor. “My time in the ICC was a mixture of a fascinating time and a terrible time,” one of these exiles said shortly before Moreno Ocampo demanded Bashir’s arrest. “The Prosecutor was erratic, so irrational sometimes that you felt despair. He uses his charisma in a negative way. Everyone in the OTP felt disrespected. But I still have a dream that one day—along with some other good people—I will be able to return.”

1. Jess Bravin, ‘For Global Court, Ugandan Rebels Prove Tough Test,’ Wall Street Journal, June 8, 2006.
2. Antonio Cassese, ‘Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC,’ ICC-2/05, August 25, 2006.
3. Cassese compiled a list of 51 individuals he considered should be investigated for crimes. But he held back from genocide, ‘the crime of crimes’, and later said Moreno Ocampo should have done the same, ‘filing charges that are more appropriate and easier to prosecute, such as war crimes and crimes against humanity.’ Antonio Cassese, ‘Flawed International Justice for Sudan,’ The Daily Star, July 16, 2008.
4. Louise Arbour, ‘Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence,’ ICC-02/05, October 10, 2006.
5. ‘Prosecutor’s Response to Arbour’s Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence,’ ICC-02/05, October 19, 2006.
6. Andrew Cayley, ‘Witness Proofing—The Experience of a Prosecutor,’ Journal of International Criminal Justice, 6, 2008, p. 780.
7. Women’s Initiative for Gender Justice, ‘Gender Report Card of the International Criminal Court 2008,’ The Hague, 31 December 2008, pp. 54 and 76.
8. ‘Ma i massacri continuano con la complicità del Sudan,’ La Repubblica, February 28, 2007.
9. Harun somehow got wind of the plan—it is believed through an Ocampo aide was who being less than discreet in New York—and cancelled his flight.
10. The Controversial Actions of the Prosecutor of the International Criminal Court: a ‘Crisis of Maturity’? The Hague Justice Portal, September 15, 2008.
11. The Prosecutor did not respond to letters written by others, including one of us (Alex de Waal) in June 2008.
12. ‘Los Veraderos Negocios de Moreno Ocampo’ (The Real Business of Moreno Ocampo), Noticias, December 7, 2002.
13. Like Moreno Ocampo himself, Cavallo was never as popular in Argentina as he was abroad. As minister, he presided over a crippling recession and 66% devaluation of the peso. After resigning in 2001, he was accused of approving more than \$100 million in illegal arms sales while in office.
14. Beni Declaration by women’s rights and human rights NGOs from the Democratic Republic of the Congo on the Prosecutions by the ICC, Beni, North Kivu, DRC, September 16, 2007.
15. Lisa Clifford, ‘Ocampo Underwhelms in Landmark Trial,’ Institute for War and Peace Reporting, January 29, 2009, http://www.iwpr.net/?p=acr&s=f&o=349621&ape_state=heniacr2009
16. Israel is not a party to the Rome Statute and most lawyers say the ICC could only become

involved if someone with dual nationality was responsible for crimes and his other nationality made him subject to ICC jurisdiction. Moreno Ocampo himself ruled out ICC involvement just two weeks earlier. <http://www.rnw.nl/internationaljustice/icc/theicc/090115-icc-gaza>

17. Christian Palme, 'Complaint against ICC Prosecutor Luis Moreno Ocampo Concerning Serious Misconduct,' October 20, 2006. www.innerecitypress.com/ocampocomplaint.pdf

18. Article 42.3 of the Rome Statute: "The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court."

19. The ICC response to the ILOAT is remarkably intemperate, accusing Palme of 'pernicious and self-serving misappraisal of his own "evidence",' and 'bewildering arrogance'. It also claims that 'the alleged rape victim denied unambiguously that she had been raped by the Prosecutor.'

20. See <http://www.ilo.org/public/english/tribunal/fulltext/2757.htm>

21. Genocide Intervention Network, 'GI-Net End of 2008 Summary,' February 2009, http://www.genocideintervention.net/files/u1/GINET_-_Year_End_Review_-_2008.pdf. The GI-Net figure includes deaths in JEM's attack on Omdurman, which are excluded from the UN data because they did not occur in Darfur.

22. Possibly Moreno Ocampo has taken the UN's headline figure of 300,000 death and divided it by 60 months of crisis to arrive at 5,000 per month—but this would not be a credible approach given that all data indicate that the vast majority of those deaths occurred between 2003 and early 2005. The ICC's own investigators produced a figure of 35,000 violent deaths in 2003-04 and many fewer since.

23. General Accountability Office, 'Darfur Crisis: Death Estimates Demonstrates Severity of Crisis, but Their Accuracy and Credibility Could Be Enhanced,' GAO-07-24, November 9, 2006.

24. 'Seven Questions: Luis Moreno-Ocampo,' Foreign Policy, February 2009.

<http://www.foreign>

policy.com/story/cms.php?story_id=4698&page=0

25. Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), December 2008, para 85.

26. ICC, Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir," March 4, 2008, Para 111.

27. It was followed the very next day with Pre-Trial Chamber III comprehensively revising the charges laid against Jean-Pierre Bemba. Each of Moreno Ocampo's three highest-profile cases has been savaged by the respective judges.

28. Andrew Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide,' Journal of International Criminal Justice, Vol. 6, 2008, 829-840.

29. Rony Brauman, 'The ICC's Bashir Indictment: Law Against Peace,' World Politics Review, July 23, 2008, <http://www.worldpoliticsreview.com/article.aspx?id=2471>.

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An Oxford Transitional Justice Research Project

Article I. ICC Observers Exclusive Interview: William Schabas, Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland, Galway

March 26, 2009 by [iccobservers](#)



ICC Observers Project-Oxford Transitional Justice Research
Exclusive Interview: William Schabas, Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland, Galway



*Professor William A. Schabas is director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he also holds the chair in human rights law. William Schabas is an Officer of the Order of Canada. Professor Schabas is the author of eighteen monographs dealing in whole or in part with international human rights law, including *Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2007, 3rd ed.), and *Genocide in International Law* (Cambridge: Cambridge University Press, 2009, 2nd ed.). Schabas has often participated in international human rights missions on behalf of non-governmental organizations such as Amnesty International (International Secretariat), the International Federation of Human Rights, and the International Centre for Human Rights and Democratic Development to Rwanda, Burundi, South Africa, Kenya, Uganda, Sudan, Cambodia and Guyana. He is legal counsel to Amnesty International Ireland. In May 2002, the President of Sierra Leone appointed Professor Schabas to the country's Truth and Reconciliation Commission, upon the recommendation of Mary Robinson, the United Nations High Commissioner for Human Rights.*

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Q: In a recent article, you wrote that the UN Commission of Inquiry's report on Darfur, while finding that "the Government of Sudan has not pursued a policy of genocide," left room for the possibility of individual actors having committed genocidal acts. Does the ICC ruling change your opinion about this possibility? What is the distinction in customary international law between "acts of genocide" and an organized state "policy of genocide"?

A: There is case law from the Yugoslavia tribunal that holds that the crime of genocide as defined internationally doesn't require any contextual element such as a state plan or policy. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that an individual

acting alone can commit genocide. That view was endorsed, in a sense, by the Commission of Inquiry that was presided over by Professor Cassese, but in a purely theoretical sense, because the Commission did not find any individual with a genocidal intent in Darfur on which to hang that accusation. I have personally never found this to be a particularly helpful proposition because I do not think the problem of an individual with a genocidal intent should be of any concern to international criminal law. The problem of an individual acting in isolation with a genocidal intent should be a concern for psychiatry. I have argued this position since the 1999 decision of the ICTY, I've written about this, and I reiterate my position in the second edition of my book on genocide, which is that a state policy element is essential for a determination of genocide. In the article you are referring to, I took the view that the Commission of Inquiry on Darfur had confirmed the importance of a state policy because it had in effect responded to a question from the Security Council – was genocide being committed in Darfur? – with the answer, “No, we don't see any genocide in Darfur because we do not observe a state policy of genocide.” So I took the report of the Commission of Inquiry as confirmation of my position, although I have to acknowledge that the Commission says that they cannot exclude the possibility that an individual acting alone could have genocidal intent. I know this to be the view of Professor Cassese, but I don't agree with that position.

Now, in the recent decision on the Bashir arrest warrant, the majority of judges hold the view that genocide requires the policy element, in effect deriving this standard from the Elements of Crimes. It is important to understand that the Elements of Crimes, which were negotiated in late 1999 and early 2000, took place in context of the ICTY and the cases involving the lone genocidal perpetrator. It is well known that the requirement of a contextual element for genocide, which is in the Elements of Crimes, was a response to the decision of the ICTY. The majority of the Pre-Trial Chamber has insisted on applying the Elements of Crimes for the purposes of applying the law of the Rome Statute. They distinguish it from the position taken by the ICTY but without making any observation as to what it might constitute for international criminal law. The judges of the ICTY would no doubt say that the Pre-Trial Chamber's decision is a particular interpretation of the provisions of the law applicable to the ICC rather than a statement of customary law; this is only because they think what they are pronouncing on is customary law. I have noticed that the judges of the ICTY refer to the Rome Statute as authority of customary law when they agree with it, and when they do not agree with it they say it is not representative of customary international law. This suggests that customary international law is what the five judges of the Appeals Chamber of the ICTY think it is. I do not think that's the correct position.

I think that the Elements of Crimes, which represent a consensus of the states involved in the ICC, is more authoritative of what customary international law is than what the judges of the Appeals Chamber of the ICTY think it is. However, no one can answer that question definitively – we now have a situation where we have one interpretation from the Yugoslavia Tribunal, which is based on the judges' own interpretation of treaty law, namely Article 2 of the Genocide Convention as repeated in Article 4 of the Yugoslavia Statute. The ICTY judges are relying on a literal interpretation of that provision, because they argue that there is nothing in the text that says that in order to commit genocide there needs to be a contextual element or state policy element, so they conclude that you do not need a state policy element. That is, unfortunately, the extent of their analysis. To say that this view is customary international law is pretty superficial, because there is no attempt to identify what customary international law is in this case, but rather their opinion is based only on a literal interpretation of the treaty provision.

What the ICC has in its favour is that when you combine its text - which is the same text in Article 2 of the Genocide Convention, Article 4 of the ICTY Statute, and Article 6 of the Rome Statute - with the Elements of Crimes, and a dose of common sense, you end up with a contextual element to

the crime of genocide. What we do not know now is whether people will look to the Pre-Trial Chamber's decision in the future and say this is a useful correction that helps us to clarify customary law or whether people are going to interpret it as a particular decision dictated by the specific terms of the Elements of Crimes.

We have to bear in mind that there is a dissenting opinion in this case that tends to dismiss the significance of the Elements of Crimes. There is also Article 10 of the Rome Statute that reminds us that the Rome Statute is not necessarily a codification of international law. Those are all the pieces of the puzzle and where things will go from here I cannot say, but I am pleased with the arrest warrant decision.

Q: How does the Pre-Trial Chamber's ruling in the Bashir case relate to the 2005 UN Commission of Inquiry's findings? Does the Court's refusal to grant the genocide charges support the findings of the Commission? Are we reaching a consensus that the violence in Darfur is not appropriately classified as genocide? How will this influence the future development of international criminal law?

A: Yes, it is clear that there is a growing authority for the view that the events of Darfur do not constitute the crime of genocide: the Commission of Inquiry, the Pre-Trial Chamber, and the major human rights NGOs – Human Rights Watch and Amnesty International – have not used the term genocide. I think it is clear that when one gives an interpretation based on the definition of the Genocide Convention, we get the result that this is not a case of genocide. When one looks at something like the document produced by Madeline Albright entitled Preventing Genocide, from her Genocide Task Force in 2008, we see it adopts a definition by which genocide means all forms of mass killings. That is not a particularly legal determination and she and her co-authors tend to dismiss objections to their view as legal pedantry. I, however, do not know that it is proper to dismiss the Genocide Convention and the Rome Statute as merely legalistic pedantry. These are significant and recognized distinctions in international criminal law between genocide and other forms of mass killing, which would constitute crimes against humanity or war crimes.

The definition of genocide and the answer to the question of whether genocide is taking place in Darfur depends on whom you are talking to. If you are talking to an international lawyer, then it is not genocide. If you are talking to an American politician or sociology professor, then they might say it is genocide. It just depends how you use the word. The Oxford English Dictionary adopts the definition from the Genocide Convention. However, people are free to use words as they want. For example, sometimes people will use rape to describe violent sexual assault, while some merely use the word to describe something unpleasant. So when we debate whether 'genocide' is taking place in Darfur, we need to know what people mean by genocide. There are a lot of different meanings floating around out there.

For international law, it means that there is growing support for the feeling that Darfur is best not characterized as genocide, and there is also growing authority for the view that the definition of genocide in the Convention and Rome Statute should be interpreted in a relatively strict and narrow manner. We now have a great deal of authority for this view: the decision of Pre-Trial Chamber, the ICJ ruling in Bosnia v. Serbia, and the Yugoslavia Tribunal in the Krstic ruling, and we have the report of the Commission of Inquiry. Against that, you have a few dissenting judges, and you have a few national court decisions that weigh on the other side, but on balance, the authority is clearly in favour of a narrower interpretation. That is why so many thought that the actions of the Prosecutor in attempting to get the arrest warrant for genocide given the indications of the law were not very productive. I am not talking about the demagoguery or extravagant use of the term genocide in this case. The consensus among international lawyers and from the UN Commission was that the

prosecutor could not get an arrest warrant on the grounds of genocide. So in terms of international law, the Pre-Trial Chamber's decision is just further evidence of a trend towards a narrow interpretation of the crime of genocide.

Q: What do you make of the possibility that Moreno-Ocampo might appeal the judges' decision or bring future charges of genocide against Bashir and other Sudanese officials?

A: I do not see that as a serious possibility. He has filed an application for leave to appeal, and it will have to be determined by the judges of the Pre-Trial Chamber who issued the arrest warrant. There is no appeal of right of a decision denying issuance of an arrest warrant. He has to demonstrate that the ruling would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate determination of the question by the Appeals Chamber is required. He would have an argument if the warrant itself had been denied. But he has his warrant, and he now can proceed to trial, and he lead all of the evidence he requires. If he succeeds in establishing genocide, the judges at trial can amend the charges. So all of this can be addressed according to the normal procedure. No useful purpose is served by an appeal at this point. This suggests to me that it is unlikely the Pre-Trial Chamber judges would give him leave to appeal this.

As for him producing new evidence—and people have made a lot of the fact that the judges included a paragraph to this effect—you can say that about anything. There is no need to put that in the judgment; it is obvious. If he produces new evidence, he can get a new arrest warrant. If new evidence comes to light, he does not even have to get the arrest warrant amended. The judges themselves can propose that the charges be amended to include genocide. The introduction of new evidence has always been a possibility. I do not know if it is particularly productive to insist that there is something significant about the fact that the judges reserved his right to come back with new evidence, since the prosecutor had this right anyway. On one occasion in the past the judges even asked for new evidence, and I assume Moreno Ocampo gave it his best shot. This is not like Srebrenica where there was a mystery about whether they could get secret communications from the Serbs ordering the massacre. Here the facts are pretty straightforward and well known. A lot has been written about this issue documenting the statistics similar to the arguments of the prosecutor.

If someone were to come forward and say that the prosecutor made a mistake because there is a whole lot of evidence that was not presented with regard to the case of Darfur, then we might have a more compelling argument that the Pre-Trial Chamber ruling could be revised or that there will be another bite at the apple. I have not heard that, and I assume the prosecutor has presented the best evidence that he has, and it is widely available evidence, including the UN Commission's report and all the NGO material. I do not think it is likely that he will get leave to appeal, and I question whether the judges will even agree that they can give him leave to appeal such a decision. If they do grant him leave to appeal, well, then we are into the question of fact and of law. Mainly, however, we are not debating the facts here, we are debating the application of the legal definition to the facts. No one quarrels with the facts Moreno Ocampo presented and I do not think he has additional facts that could provide him with stronger arguments for a genocide charge.

Q: Does the Court's refusal to grant the genocide charge amount to a failure in any way for the prosecutor? Some have argued, in Sudan, that this shows the weakness of all the charges. Others think that it shows that the Pre-Trial Chamber is a credible body and not merely a rubber-stamp for the prosecutor. What do you think?

A: I think this shows one more bad exercise of discretion by the prosecutor, one more bad call by Moreno Ocampo. He was chastened last year because of his decisions on gathering evidence that he could not then disclose to the defense and that led to a terrible and unnecessary delay in the

Lubanga proceedings for more than six months. This was an error in judgment and I think seeking a warrant for genocide charges in Darfur was also an error in judgment. I think he should have confined himself to the clearly established charges of crimes against humanity and war crimes. The same Pre-Trial Chamber has already granted two arrest warrants for those charges; the judges had already concluded that the events in Darfur justify those two charges, as in the Ali Kushyab and Ahmad Harun arrest warrants. Presumably they would have done the same thing in the blink of an eye should that have been all they were asked to do. Then the only question would be: does the evidence link the dots between Bashir and those crimes. Had this been Moreno Ocampo's strategy, we probably would have had an arrest warrant in August instead of February. The delay of six months in issuing the arrest warrant was due to the prosecutor insisting on trying to get a genocide charge, which was doomed to fail as shown by the Pre-Trial Chamber's ruling. These actions show a lack of good judgment on the prosecutor's part; it is a mistake, and not the first he's made.

As for showing weakness or strength of the Court, it just shows it is a Court that functions properly. When the prosecutor asks for something, the judges look at it seriously and come to a decision that is based on an accurate, intelligent and well-reasoned assessment of the law; people should be satisfied that what we have here is a serious, functioning institution capable of issuing judgments of high quality. What more could you ask for?

Q: In one of your articles you mention that some human rights activists considered the UN Commission's report a betrayal because it failed to find genocide charges. What will be the reaction of human rights activists to the Court's findings? How will the Court's ruling influence the actions of human rights activities on Darfur in the future?

A: Well, I cannot predict how they all will react. As I've mentioned, two of the leading international NGOs, Amnesty International and Human Rights Watch, have not labeled the conflict in Darfur a genocide. I haven't checked what the International Federation of Human Rights or International Commission of Jurists have said on the matter, but I imagine they've taken the same cautious approach. The big international human rights organizations have not bought into the idea that the violence in Darfur should be labeled as genocide, and everything from these organizations I have read indicates great satisfaction that a head of state was charged with serious atrocities and this is being addressed by the ICC. I think there must be a considerable amount of jubilation, at least among the major international NGOs.

There is, of course, another community, a specialized community of NGOs focused on Darfur, and some of the academics who write about Darfur as well, and they may find this ruling to be a repudiation of their views. Some of them are not singing from the same hymn sheet as the rest of us because they adopt a definition of genocide that is simply their own. I work from the Genocide Convention, the Yugoslavia Statute, the Rome Statute, and so on, but some of the people involved in these debates have their own definition of genocide. All that these actors can say is that the narrow definition of genocide, which they do not endorse, has been applied by the Court.

I have always thought that there was a bit of an obsession with trying to label Darfur as genocide. This is not the only case where we see this obsession: there are people who want to label speeches by Iranian President Ahmadinejad as genocidal, people who want to label the war in Gaza as genocide, etc. There are many examples of what I call the 'extravagant' use of the term genocide. For people who indulge in that, they can keep doing it, but if they want to be part of the legal debate, they should just get over it.

Q: What kind of outcomes will we need to see from the Court in order to ensure its legitimacy? What about the Lubanga and Bemba trials: do you think the Bashir case has taken too much attention away from these cases? What will be the outcome for the Court if

these two cases are tried successfully, but Bashir remains at large? What do we need to see overall from the Court in order to establish it as a legitimate actor on the international stage?

A: The Court is doing that right now. It is becoming more and more of a legitimate actor on the international stage. It had a slow start. The first phase in the history of the Court was the adoption of the Rome Statute and that was from the early 1990s until 1998. This was an exhilarating period in terms of the development of international criminal law and particularly because the more hesitant or conservative models of what an international criminal court might look like, which were the ones advanced by the International Law Commission in 1994, were totally set aside in favour of a much more robust and innovative, radical if you will, international criminal court, with an independent prosecutor separate from the UN, and many features that I won't go into. But what resulted was the Rome Statute. So that was a very exciting period. And then there was a period of about four years for entry into force, which was like a continuation of the first period. Achieving 67 ratifications within less than four years was something nobody had ever dreamed would take place. Most people on the night of July 17, 1998 when the Statute was adopted thought it would take at least a decade to get to 60 and maybe longer. So things went very quickly. And then when the Court started, when all the officials were elected and the Court became operational in mid- 2003, it went through a difficult period when things didn't seem to work. There were plans that it would hold its first trial in 2005, the budget set aside money for the first trial, but there was no trial until 2009. That's four years behind schedule, and pretty much everything has seemed to take much longer [in this period]. I don't know what the explanation is for that, but whatever it is, it's taking longer than expected and perhaps it is simply that that's how long things should take. We'd been through a previous period that had gone exceedingly quickly and that led us to think that it would always be like that and it hasn't been. But now the Court is operating and it is addressing the big conflicts of our time, like Darfur. It wasn't insignificant that a little over a month ago the Palestinian Authority attempted to engage the Court with regard to Gaza. Whether that will or can take place is a matter of some debate, but the idea that the Court was appearing to engage with or be relevant to the conflict in the Middle East is a big step; it shows the Court is on the big stage now. It's moving forward, it's just taken a little longer than we thought. Now we have a trial going, we're going to have more trials. This is great. I don't have any magic formula for what it should do now. I think it should just do more of what it's doing. The prosecutor ought to reflect upon some of his mistakes and try to correct them. That would make his office more productive and more efficient.

Q. Does the ICC have an implicitly political role to fulfill in conflict situations? If so, what should that role be? Should the Court strive to remain politically neutral?

A. I'm glad you asked that question. I have strong opinions on this. I would have held to the view in the 1990s that the Court should be totally separate from political debates and that there should be no possibility of political involvement in the work of the Court. As you know, in the final Statute, there's a bit of a compromise there, mainly with respect to Article 16, which allows the Security Council to temporarily halt the proceedings of the Court. The other places where you have quite a clear political involvement of the Court are the triggering mechanisms where you allow both the Security Council and states to trigger the Court. This is politics. These are political bodies that make their decisions politically. I'm increasingly of the view that politics is actually a part of international criminal law and that it's unavoidable.

I see this increasingly in decisions about whom to prosecute: decisions about individuals who are prosecuted and also about the organizations that are targeted. In Uganda, for example, the prosecution has targeted the rebels and not the government. I think that's a political decision. The prosecutor has couched it in a strange and ultimately unconvincing theory about prosecuting the most serious crimes, but he defines this in a purely quantitative way. So if the rebels kill more

people than the government, then the rebels should be the focus. But the problem with that is you need a more qualitative approach when deciding who your targets should be. Most of us living in an orderly society would find it far more threatening that the government is committing crimes, even if the outlaws are committing more, because outlaws are supposed to commit crimes and governments aren't. So the prosecutor's decision to go after rebels rather than the government has a whiff of the political to it. If it is purely based on this mathematical calculation, then it's a mistaken one.

I think there's politics going on already. The Darfur prosecution, the decision to prosecute a head of state, is a profoundly political decision. There can hardly be anything more political. You're calling for regime change; that's the consequence of what you're doing. When the prosecutor explained this last July, he said: "I investigate the facts, I'm just an apolitical prosecutor who investigates the facts and goes where they lead me," as if he were Colombo or Sherlock Holmes.. But that's not what he's doing. It's a political decision: he goes to the Security Council and asks them to intervene. I'm increasingly of the view that there is politics in this.

I think that our debates in the 1990s when the Rome Statute was being adopted were a bit distorted. What we didn't like about politics in the 1990s was the idea that the Security Council would be the political guardian. That was the extent of our vision. So the way we rejected the Security Council's engagement with the Court and the Security Council's possible control over the Court was with the argument that there should be no politics in the Court. I think in retrospect that maybe we went too far with that. I actually think that those prosecutions often, perhaps not always, involve political determinations.

I've asked people about this at the Court and some people say no, there should be no politics, like what the prosecutor said. Others have said to me, actually the prosecutor has political advisors around him, which kind of confirms my own intuition, which is that there is politics involved and it is quite conscious. But that being said, I think part of the problem is, the idea that political decisions will be taken by the prosecutor suggests a prosecutor who has a different skill set than the man in the job right now. He's a criminal law prosecutor. Once you acknowledge that the role of the prosecutor has a strong political dimension, then you either solve it by getting a prosecutor who is recruited for political expertise and judgment, or you provide some other mechanism to provide political oversight for the prosecutor. These are my preliminary reflections.

I go back and look at events like Nuremberg, where you could say it was political forces who set up the tribunal and they decided politically that the Nazis needed to be prosecuted. One of the critiques of Nuremberg that you often hear was that it was one-sided. That's obviously true, but my question to people is: what should they have done then? Should they have had a second trial of the tribunal that tried 24 British leaders and 24 American leaders? Everyone seems to acknowledge that that's an absurd suggestion, but say maybe they should have prosecuted a few of the allied war crimes for balance. We get this debate at the Yugoslavia tribunal with choosing the ethnicity of the defendants, we get into claims at the Rwanda tribunal that the RPF and not just the Hutu extremists should be prosecuted, we've had it at the Sierra Leone Special Court where they submitted arguments about which faction should be prosecuted and how harshly, how relevant it was that one side was good guys and one bad guys, and all of this involves politics. And I'm more and more of the view that rather than being in denial about the politics we should acknowledge it and then confront it. We should recognize that it is part of these decisions and then find ways to address it in an appropriate and transparent and convincing way, rather than saying as the prosecutor sometimes does that this isn't about politics. It is about politics.

Q. Could you speculate on the future of the Court five or ten years from now? What are the best- and worst-case scenarios for the Court and what can international actors do to improve the Court's standing and legitimacy in the next few years?

A: I really don't know. It is extremely difficult to predict the future in this case.

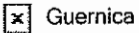
I think, when you say best and worst case, certainly people shouldn't exclude the possibility that the Court will be a failure, that it will collapse and won't work. I think that people are naïve to just think that this just moves ahead. The idea that the Court is just going to move ahead and keep progressing and everything, which we would all like, I don't see that as being guaranteed, and we certainly have historical examples of institutions created way ahead of their time. The League of Nations, for example, was ahead of its time. It collapsed and a new institution had to be created. I can't rule that out for the ICC. I heard James Crawford, who was involved in the International Law Commission in the early 1990s and one of the key architects of the Rome Statute, speculating about this at a conference last May. He said we had a conservative draft at the International Law Commission in 1994 because we didn't think the international community was ready for more than that. It wasn't because we were conservative, he said; we were giving the international community what we thought it was ready for. But of course what happened between the draft in 1994 and the Rome Statute in 1998 was the radical reconfiguration of the Statute and a new conception of what the Court should be. That happened very quickly and maybe we moved too quickly. Maybe we created an institution that's ahead of its time. I'm not arguing that position, but it is just one of the possible scenarios. That was Professor Crawford's explanation of maybe why we're having such a hard time now, why we had such a hard time getting the Court going. I can't rule that possibility out.

The other scenario is that the Court moves forward, solves its problem, and becomes a more dynamic and more universal institution. Here the difficulties are, as I've mentioned, the role of politics in the Court. And I do think we need to find a solution to this one or face continuing difficulties or problems. In terms of participation in the Court, we're now up to 108 state parties and likely there will be some more.. But we still don't have the biggest countries or some of the most powerful countries, including India, China, or the US, and we don't have three of the five permanent members of the Security Council: China, the US, and the Russian Federation. We don't have India, Pakistan, or Iran. These are big pieces and it's a question, a big question mark, of whether the Court will become more universal by engaging with those pieces. The other part of it is that the Court is right now not dominated by the permanent members of the Security Council. So the absence of three of the permanent members is perhaps a weakness but it is also a blessing because it's enabled this institution to develop and grow without the overwhelming role and participation and presence of the permanent members of the Security Council and the Security Council acting as the Security Council, which is what would happen if you got 3 or 4 of them. I'm told now that at the Assemblies of States Parties they talk about the P4, which describes the permanent members excluding the US, because it has been boycotting the Assembly of States Parties for the last several years. If the big players are brought in, it will change the dynamics of the Court and it may make the smaller players less enthusiastic and less keen on it. So that's maybe a development too that we have to keep an eye on.

I'm also seriously concerned about recent developments around the Bashir arrest warrant. African states were keen supporters of the Court in the early years. Now, they seem to be turning against the Court. This is not a good development. At the same time, the United States is warming up to the Court. Personally, I like the court better when it had the support of African States and was disliked by the US. I prefer that to a Court that the US likes but that African States are uncomfortable with.

But you know, if one looked at the last 15 years or so, that is, the point when what we might call the international justice accountability movement began in earnest, it now shows no signs of stopping. It reflects some kind of idea in the human rights movement and a thirst that people have in countries around the world to see that the perpetrators of serious human rights violations are brought to justice in one form or another. That field generally continues to grow. I would assume that the ICC is in a way the centerpiece of this, and the movement that surrounds the ICC keeps growing in so many other ways, that even if the ICC would falter a little bit, the movement would keep pulling the Court along with it. I would bet my money on the ICC being a much more significant and meaningful and relevant institution ten years from now than it is at present. But I'm prepared to acknowledge the caveat, because it focuses our mind to accept the danger that the Court could fail. We shouldn't be overconfident; we have to keep addressing the shortcomings and the problems.

Interview conducted by Zachary Manfredi and Julie Veroff.



May 2009

The Genocide Myth

An interview with Mahmood Mamdani

In his latest book, Mamdani attacks the Save Darfur Coalition as ahistorical and dishonest, and argues that the conflict in Darfur is more about land, power, and the environment than it is directly about race.



“The Save Darfur movement claims to have learned from Rwanda,” writes Mahmood Mamdani in his new book, Saviors and Survivors: Darfur, Politics, and the War on Terror. “But what is the lesson of Rwanda? For many of those mobilized to save Darfur, the lesson is to rescue before it is too late, to act before seeking to understand.” His book is an argument “against those who substitute moral certainty for knowledge, and who feel virtuous even when acting on the basis of total ignorance.” Americans think Darfur is a tragic genocide. Mamdani thinks the reality is more complex. His ideas should be taken seriously for a number of reasons, especially because he provides a road map to a workable peace settlement.

Mamdani rewrites the crisis by putting it in context. He notes that violent deaths in Iraq during the U.S. invasion and occupation far surpass death rates in Darfur. If death rates are higher, why all the attention on Darfur, rather than Iraq? he wondered. Is the killing racially motivated? To answer that, he examines the history of Sudan.

The people of Darfur have long treated “racial” identities as fairly fluid, he writes, welcoming intermarriage as a means of transferring between groups. Why does this matter? The designation of “Arab” versus “African” upon which the genocide claim is based was given a particularly virulent, and unprecedented, authority under a land system set up by the colonial British—but never before that. After the British, land previously shared was now assigned a more rigid “native” group who oversaw its use, and non-native groups who had to pay tribute. This was one potential source of conflict; it will have to be dealt with to forge a lasting peace in Darfur, Mamdani insists.

Then a decades-long drought turned fertile lands in the north of Darfur into desert (in a process known as desertification). This made land use and land rights much more contentious. In his attempt to “contain” Libya during the Cold War, U.S. President Ronald Reagan armed rebel groups from Chad. This meant that, along with the Soviets and Libya on one side, and Israel and France on the other, Reagan helped arm a region already on the verge of erupting.

What resulted was a civil war; the first phase, in the late nineteen eighties, began with savvy opponents who accused each other of atrocities in a somewhat sophisticated PR war. Phase two began with a 2003 insurgency that met with a fierce response from the government. An ongoing massacre? Massacres occurred early in the conflict, admits Mamdani. But starting in 2005, death rates dropped drastically. Save Darfur had no interest in this decline in direct killings, having staked their campaign on the story of ongoing genocide. Arabs hoping to wipe out Africans? Not really. Rather, a land war amidst the throes of desertification. According to Mamdani, this is an ecological disaster amidst a

land divided on paper by colonial rulers, and militarized by the Cold War, not a crisis directly about race. In fact, Mamdani argues, the language of genocide further exacerbates the conflict. It keeps key groups out of peace talks by demonizing them. This is exactly what happened during peace talks in Abuja in 2005, he says.

I spoke with Professor Mamdani in his office at Columbia University in New York City. Named by *Foreign Policy* magazine as one of the top one hundred public intellectuals, he wore a blazer, a bright red polo shirt with a Nehru collar, round-rimmed glasses, and a five-o'clock shadow; his eyes showed a tired face—from the end of a semester and the middle of a book tour. A handsome man born in Uganda to parents with roots in India, he spoke quietly, breaking his sentences with long pauses. Sitting atop his coffee table, incidentally, amidst a slew of other books and journals was The Crisis of Islamic Civilization by Ali Allawi (who made a similar charge against the U.S. acting before understanding, in The Occupation of Iraq: Winning the War, Losing the Peace). In addition to teaching in the anthropology department at Columbia, Mamdani served for a year as consultant for the Darfur-Darfur Dialogue and Consultation (DDDC) of the African Union. He is married to the filmmaker Mira Nair; they live in New York and Uganda and have a son, Zohran.

—Joel Whitney for *Guernica*

Guernica: Here in the United States, what is the story that has come down to the public about Darfur?

Mahmood Mamdani: I think the core of the argument is very ahistorical. It's about Darfur as a site of evil; the narrative is structured around a documentation of atrocities, around a graphic description of atrocities, which you can see on the Save Darfur website—killings, rape, burnings of villages. I think the striking thing about the narrative is there is no attempt to explain what leads to these atrocities.

Guernica: You write how one problem is the word “genocide.” Of course, policy people know that the word genocide has legal ramifications. But you say it's not a genocide in Darfur at all.

I mean you have an insurgency and a counter-insurgency. The assumption is that all those were killed by one side.

Mahmood Mamdani: I'm saying two things, that there's no attempt to eliminate a people here. This has been a conflict over land. In the way it originated and the way it developed in its latest phase, in 2003, it has been a conflict over power. These have been the two dimensions of the conflict. The second thing I would say is that in a very early phase of the conflict, in 1987-1989, which was that of a civil war, one side of the civil war was already using the language of genocide; the word used was “holocaust.” And the other side was talking of being at the receiving end of ethnic cleansing. The genocide narrative is simply repeating one version of events.

Guernica: In your book, you seriously challenge the numbers of dead cited widely by the media. I think there's a pretty widely held consensus that in 2003-2004 there are, let's say, emergency numbers of dead. But what about the beginning of 2005?

Mahmood Mamdani: Well, 2003-2004, there's a mass slaughter.

Guernica: By?

Mahmood Mamdani: Well, good question. Let's first begin with the easier question, numbers. Because there we have some hard figures, and a debate on it, and sort of an experts' report from the Government Accountability Office, and a pinpointing of which are the most reliable figures by WHO/Europe CRED (Centre for Research on the Epidemiology of Disasters), which says that

something like one hundred and twelve thousand people died excess deaths in this period. And it says there are multiple causes; there's violence, there's disease, there's starvation, desertification; it says thirty-five thousand roughly are the product of direct violence. The debate is over the rest. How much of it is violence-related? Babies [who] died of dysentery or diarrhea? If there had been no conflict, [would] help have arrived in time? That's the debate. But keep in mind that the desertification preceded the violence. So it has to be treated as a separate cause—related but separate. So of those who died by conflict-related causes, who were they killed by? The participants in the conflict? I mean you have an insurgency and a counter-insurgency. The assumption is that all those were killed by one side.

Guernica: But you write that the killing slowed starting in 2005.

Mahmood Mamdani: In September 2004, the rates start coming down dramatically.

Guernica: I've even heard you credit Save Darfur for drawing some attention to the killing and getting Sudanese President al-Bashir to pull back. So that's remarkable. Your book's being seen as an attack on Save Darfur...

So there was a dramatic decline in killings. But these guys [in Save Darfur] kept on telling us that mortality was increasing, a continuing genocide. They were unwilling to let go of this genocide narrative and were unwilling to let go of their solution, an external intervention.

Mahmood Mamdani: It *is* an attack. I have very serious criticisms of Save Darfur.

Guernica: But you do credit them with that first decline in killing.

Mahmood Mamdani: I credit them not with the decline; I credit them with the publicity.

Guernica: ...that helped lead to the decline?

Mahmood Mamdani: Yes. That's what I mean. Having achieved that, ironically, they seem to have no interest in the decline. None whatsoever. So they've never acknowledged the decline in public. They never saw the decline as an opportunity for a political settlement.

Guernica: And death rates coming how low?

Mahmood Mamdani: Below two hundred a month since January 2005. And the sources are UN figures gathered by Julie Flint in *The Independent*. Then below one hundred and fifty a month from January 2008. That source is the commander of the UNAMID forces, and [a report] the Security Council's envoy just gave to the Security Council last week. So there was a dramatic decline. But these guys [in Save Darfur] kept on telling us that the mortality was increasing, a continuing genocide. They somehow were unwilling to let go of this genocide narrative and they were unwilling to let go of their solution, which was an external intervention. Basically, my point is that there was an opportunity for an internal solution. The external influences should have brought to bear their influence on this internal solution instead.

Guernica: You have written that the racial component, of Arabs trying to eliminate Africans in Darfur, is false.

Mahmood Mamdani: [When I looked into this] I began to run into micro-histories, and into folklore and into anthropological studies which clearly showed that there wasn't a single history of Arabs. That actually there were many histories of many groups becoming Arabs at different times, for different reasons. Kings claimed to be Arab because they claimed a connection with the Holy Land.

Merchants became Arabs hundreds of years later with the explosion of a mercantile civilization in central, northern Sudan, around the Nile, eighteenth century. Former slaves became Arab. They took on the identity of their slave masters. So this Arab/settler business made no sense, and this business of a single Arab history made no sense. But the business that the riverine Arabs (around the Nile region of Sudan) were the same as the Darfuri Arabs made no sense, because riverine Arabs are identified with privilege and power, and the Darfuri Arabs are identified with the absence of privilege. What I realized is that these are African Arabs. These are not Arabs who came from anywhere else. But the media were raising this narrative of Africans and Arabs, linked with slavery, and I just thought I had to write about this.

Guernica: What needs to be better understood about the Janjaweed?

Mahmood Mamdani: These fellows were there from the mid-nineteen eighties onward, when the crisis of desertification hit its high point. Janjaweed referred to bands of youth, not centralized in their control of the organization, [who were] initially the product of an acute crisis of marginal peripheral lands in the throes of desertification. [It was] a crisis of youth, which was much broader than simply Darfur or even Chad. You can even find it in Congo or different places. The interesting work that the narrative on Janjaweed has [done has been to] justify the exclusion of the Arab tribes from the Abuja peace talks. The Abuja peace talks were between rebels and the government. And rebels were one side of the civil war who had grown from being tribal militia into rebel movements. And the other side of the civil war, which had remained tribal militias—and some of whom had joined the government, and were the Janjaweed that you're talking about—got left out. You can find another example of it in the war on terror language, whether Hamas should be included in talks or should not be included.

Guernica: So the story of the Janjaweed as hired mercenaries paid in loot at the behest of the government to ransack villages of innocent people, sometimes following air raids with government planes—that story is not accurate?

Mahmood Mamdani: Part of it is accurate, but part of it is not. If you understand them as just mercenaries for an end determined by the government, that's the part that is not quite right. Because if that were true, then the government would have had no problems with them. The problem that developed between these nomadic militias and the government was that these militias had their own objectives. And these objectives in fact preceded the beginning of the insurgency beginning in 2003, and they included land. So no matter what the political consequences for the government, that's the objective which drove them, and the government realized it didn't really have control over them. And the [nomadic militias] realize that the government would have no trouble dropping them if it served the government's interests, and [some of them] try to turn into rebel groups, and so out of these you get so-called Arab rebel groups.

Guernica: And what role did the colonial British play?

Mahmood Mamdani: The British engineered the grand narrative. The British inscribed it in the census. The census had three categories: tribe, groups of tribes, and race. The groups of tribes are basically what the anthropologists understand as ethnicity, which is a language group—tribes that speak the same language. Then there was this thing called race. And they had five races there: Hamites, Nilotics, Arabs, Negroes, and then Negroid Westerners. Negroid Westerners were Negroes in Darfur and Kordofan. So the Arabs were classed as a single group whether they came from Darfur, Kordofan, or anywhere in Sudan. To what extent did the categories in the census translate into public policy? Here it is the category of tribe which was the fulcrum of public policy. So Darfur was divided into tribal homelands. The tribe that was considered the "native" tribe had customary rights to the land. And anyone considered to be an outsider would have to pay tribute. Tribe became the basis of systematic discrimination. So you got settler and native as a tribal distinction. When does this become a racial distinction between Arab and African? I think it becomes that with the civil war in the mid-nineteen eighties and it grows.

Guernica: And what role do Ronald Reagan and the Cold War play here?

Mahmood Mamdani: There are three causes of the civil war, what I just described about customary land rights for native tribes. Overlaid on this comes the climate change, the Sahara advancing one hundred kilometers over four decades. By the mid-nineteen eighties, you have no water, and the place is awash with guns and those guns are an effect of the Cold War. When Reagan comes into power, the U.S. one day declares Libya to be a terrorist state. From there, Chad, Darfur's neighbor, becomes part of the Cold War. On one side, you have the alliance of Reaganite America, France, and Israel, and on the other, Libya and the Soviet Union. They arm different sides in the Chadian civil war. One group is in power in N'Djamena and the other group crosses the border into Darfur. Darfur becomes militarized. And the present government in Sudan was not even in power at that time. The big powers get involved way before the government of Sudan gets involved.

If Iraq was seen through a political lens, Darfur was seen through a moral lens. The language of genocide did that work very effectively.

Guernica: With their Reagan-Republican/Cold War beginnings, maybe that now brings us back to how Iraq parallels Darfur. In the *London Review of Books*, you write, "The similarities between Iraq and Darfur are remarkable. The estimate of the number of civilians killed over the past three years is roughly similar. The killers are mostly paramilitaries, closely linked to the official military, which is said to be their main source of arms. The victims too are by and large identified as members of groups, rather than targeted as individuals. But the violence in the two places is named differently. In Iraq, it is said to be a cycle of insurgency and counter-insurgency; in Darfur, it is called genocide. Why the difference? Who does the naming?" What's the link between Iraq and Darfur?

Mahmood Mamdani: Well, I was actually wrong on those numbers. The numbers in Iraq are much higher, if you go by any estimate.

Guernica: The rate of violent deaths in Iraq from the American invasion and occupation is higher than in Darfur?

Mahmood Mamdani: Much, much higher.

Guernica: What do you draw from that?

Mahmood Mamdani: If you look at the course that Iraq took, it's very different from the course that Darfur took. The violence in Darfur reached those high levels precisely when the government looked for a proxy through which to confront the rebel movements, and hit on the nomadic militias as the proxy. Iraq didn't begin as an insurgency; it began as an invasion from the outside, and [then came] the resistance. And the solution to the resistance was supposed to be—El Salvador-style—a civil war. And the civil war did undercut the resistance but at a huge cost. Numbers of the dead multiplied. Whereas the understanding of Iraq was much more political, Darfur was different. If Iraq was seen through a political lens, Darfur was seen through a moral lens. The language of genocide did that work very effectively.

Guernica: You start your book by remarking how odd it was that there was no mass mobilization to stop the war in Iraq. And we could debate whether that's true or not, whether it turned rather into a political movement to defeat Bush instead. There clearly was a huge movement in February 2003. Millions around the world—in unprecedented numbers—marched to stop the Iraq war. Is it your contention that that energy became the Save Darfur movement?

Here the world was not a classroom, it was an advertising campaign.

Mahmood Mamdani: The links are complicated. The media of course was wholly sympathetic to the

Save Darfur Coalition, not particularly sympathetic to the mobilization around Iraq. Here on the West side (of Manhattan) in local Jewish communities, resolutions were passed on the Iraq war, which required the leadership to communicate them to the White House, but which were never communicated. In fact, all the energies being invested in mobilization around Darfur—of course what really struck me was that the Darfur mobilization...

Guernica: Are you saying that the Darfur mobilization stole the thunder, stole the energy of the Iraq anti-war mobilization?

Mahmood Mamdani: It became like a shelter. And the constituency began to change. These people reached even lower than the universities, down to high school students. The antiwar movement against the Vietnam war, of which I was a part in the sixties, saw the world as a classroom. Its signature activity was the teach-in, putting students face to face with scholars, to learn about the place, learn about history, learn about politics. There was something called colonialism, anti-colonialism, the ways in which the struggle in Vietnam is linked to this. These were the issues, big issues of the day.

Guernica: And you're not seeing that...

Mahmood Mamdani: Here the world was not a classroom, it was an advertising campaign.

Guernica: A web page.

Mahmood Mamdani: A web page [with] an advertising campaign. There was no attempt to mobilize scholars, but instead media personalities, show biz personalities, name recognition; no interest in teaching anybody anything, but almost like the Pied Piper and the train of high school children who were supposed to follow.

Guernica: And Samantha Power's *A Problem from Hell* reminded us that we Americans were forty years late signing the Genocide Convention and that no president used the word "genocide" while in office. The notable thing about the Bush administration was that he did use "genocide," but then did nothing. You add a twist when you say it was rather a civil war, or counter-insurgency, that he was calling a genocide.

Mahmood Mamdani: There are two problems with that book. One was the assumption that America would go around the world and carry out a series of humanitarian military interventions, this assumption that the problems of the world are internal and the solutions are external. And the second problem is the assumption that the world is a simple place—you don't have to think of what causes these problems. Leaving politics aside when it's genocide [is problematic]. So everything is about this word "genocide." The word is politicized, instrumentalized.

Guernica: Well, it's a law. And she's saying that the law has not been enforced. Isn't that a valid thing to point out?

Does Moreno Ocampo think that the ICC has a special mandate for protecting "African victims of African crimes" but not Iraqi or Afghani victims of American crimes or for that matter only some African victims of some African crimes?

Mahmood Mamdani: It is a valid thing to point out. But if you asked yourself why... The most likely candidate for having carried out large-scale killings which may be characterized as genocide would have been the U.S. In the Vietnam period, how come no American president talked of genocide? Well, how can you expect an American president to talk of genocide when there's a whole politics around genocide—which is absent from the book?

Guernica: Okay, earlier you spoke of mass killings in Darfur in 2003 and 2004. From what I've read and what you write in your last chapter, it sounds like you oppose the ICC investigating them. Does this mean that the rapes, the mass atrocities which have so clearly been committed, and which have continued in the refugee camps, and which you've acknowledged, should go totally uninvestigated and unpunished?

Mahmood Mamdani: I argue that faced with ongoing conflicts mainly fueled by demands for political justice, political reforms should take priority over criminal trials of individual leaders. The precedent has already been set in the post-apartheid transition in South Africa, the end of the civil war in Mozambique, and then in South Sudan. Why not Darfur? For rule of law to take hold, we need both to hold accountable not only perpetrators but also enforcers of law. If there is not an adequate political arrangement to hold enforcers of law accountable, law will turn into a private affair. This was the essence of the Indian government's reason for refusing to sign the Rome Statute that set up the ICC: since the ICC's formal accountability was only to the Security Council, the Indian government contended, the ICC would never bring any permanent member of the Security Council to justice. The experience of special prosecutors in the U.S. also shows that when there is inadequate political accountability such persons can turn into rogue prosecutors pursuing a private agenda.

Guernica: On what basis do you see the court as a western court, as you wrote in *The Nation*?

Mahmood Mamdani: The fact that the court is answerable to the Security Council means that it will create a regime of impunity for its permanent members and their close allies or clients. Anyone following the practice of the court since its creation will find these fears warranted. At the same time, the attempt to turn justice into a turnkey import from the outside cannot possibly enhance the rule of law inside Sudan. As I wrote in *The Nation*, when Africans realize that the four arrest warrants the prosecutor has applied for are all of African leaders without strong patrons in the West, it confirms their fears that this is a Western court created to hold accountable those African leaders branded as heading "rogue states."

Guernica: When I cited your charge to him, ICC lead Prosecutor Luis Moreno Ocampo bristled at the idea, insisting first, by the way, that he himself is not "Western;" as an Argentine, he sees himself as Southern. He also pointed out that in the three African cases he is working on apart from Sudan/Darfur, the African leaders of those countries themselves invited him. While the Sudan case was referred by the Security Council, the pre-trial judges that awarded him his warrant were Akua Kuenyehia from Ghana, Sylvia Steiner from Brazil and Anita Usacka from Latvia. Hardly a Western Court. Not to mention that he was looking into initial investigations in places like Israel/Gaza too, at the time we spoke. But within Africa he insists he is protecting African victims of African crimes. Do disputes over Vietnam-era colonialism negate the need to protect African victims today?

Mahmood Mamdani: Does Moreno Ocampo think that the ICC has a special mandate for protecting "African victims of African crimes" but not Iraqi or Afghani victims of American crimes or for that matter only some African victims of some African crimes? We have been through an era known as "the war on terror," where a global war set an example for so many little wars on terror regionally. In all instances, state terror was unleashed on civilians with impunity. How shall we look at a court claiming to be an International Court of Justice—with its personnel as internationally recruited as that of any World Bank or IMF team, or any Wall Street bank for that matter—but steadfastly refusing to bring to justice the perpetrators of the larger war on terror and several regional ones in its tow, instead focusing only on state terror unleashed by those without American protection? Does it not begin to look more like street protection guaranteed by street gangs or war lords than a rule of law? I suggest you take your clues from the actual performance of the ICC rather than the stated intentions of its prosecutor.

Guernica: Howard French wrote of your book, in an otherwise very positive review in the *New York Times*, "This important book reveals much on all of these themes, yet still may be judged by some as not saying enough about recent violence in Darfur." Given how active some of the Save Darfur

Coalition has been in visiting the internally displaced people (IDP) and refugee camps, I wonder, how many survivors of attacks did you interview for your book? How many of the refugee and IDP camps have you visited?

Mahmood Mamdani: I was a consultant for the Darfur-Darfur Dialogue and Consultation (DDDC) of the African Union for a year. The DDDC held consultations with different sections of Darfuri society in the three states of Darfur. Typically, day one would be a meeting with traditional leaders (chiefs, etc.); day two with representatives of political parties, government and opposition; day three with community-based organizations; day four with representatives of women's groups and intellectuals based in each of three universities in the three states of Darfur; and day five with representatives of IDPs in the camps. My job was to read the submissions of different groups, to listen to the discussions in each consultation, and to point out which issue needed more attention and which point of view was left out of the discussion. It was an ideal job for a researcher.

Guernica: But it's still not clear: how many refugee and IDP camps did you visit directly?

Mahmood Mamdani: I have not been to an IDP camp in Darfur but I have had intensive discussions with IDPs in Darfur. I am also no stranger to refugee/IDP camps, having lived as a refugee in one for months following Idi Amin's expulsion of (Asians from Uganda in) 1972 and having done numerous interviews in IDP camps in northern Uganda.

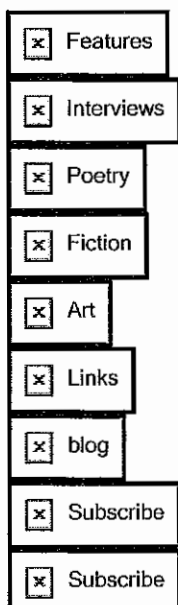
Guernica: You mentioned that you wanted to start a debate with the Save Darfur Coalition. Have they engaged you at all?


Mahmood Mamdani: The only contact since the publication of the book has been the debate with John Prendergast at Columbia.


Guernica: What's next for you? I understand you're back on book tour soon. And do you plan on doing more debates with anyone from the Save Darfur Coalition?


Mahmood Mamdani: [I next go to] Toronto and Chicago talking about the book. I have a week-long commitment in early June in the UK starting with the Guardian Hay Festival and then 10 days in South Africa starting with the Cape Town Book Festival. I have no idea as to whether there will be future encounters with Save Darfur.

To contact *Guernica* or Mahmood Mamdani, please write [here](#).



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When former South African president Thabo Mbeki makes the African case for a postponement of the International Criminal Court's (ICC) indictment of President Omar al-Bashir of Sudan, what can he say with dignity and foresight?

To begin with, he should remind his audience that nowhere in the world have rights existed outside an enabling political context. No democracy enforces a fixed standard of rights regardless of the country's political context. Few can forget how the Bush administration diluted the Bill of Rights in the interest of pursuing Homeland Security. In the relation between law and politics, politics is always paramount. Precisely because the struggle for rights is a political struggle, enforcers of rights -- and not just its violators -- need to be held politically accountable lest they turn rights enforcement into a private vendetta.

Mbeki can then share with his audience the lessons Africans have learned in the struggle for peace and justice over the past several decades. Contrary to what many think, this lesson is not that there needs to be a trade-off between peace and justice. The real trade-off is between different forms of justice. This became evident with the settlement to end apartheid. That settlement was possible because the political leadership of the anti-apartheid struggle prioritised political justice over criminal justice. The rationale was simple: where there was no

victor, one would need the cooperation of the very leaders who would otherwise be charged with war crimes to end the fighting and initiate political reforms. The essence of Kempton Park can be summed up in a single phrase: forgive but do not forget. Forgive all past crimes -- in plain words, immunity from prosecution -- provided both sides agree to change the rules to assure political justice for the living.

The South African lesson has guided African practice in other difficult situations. In Mozambique Renamo sits in Parliament instead of in jail or in the dock. In South Sudan, too, there would have been neither peace nor a reform of the political system without an agreement not to pursue criminal justice. Why not in Darfur?

Mbeki would also be well advised to keep in mind that in the court of public opinion -- unlike in a court of law -- the accused is considered guilty until proven innocent.

The public needs to be reminded that when the justices of the ICC granted the prosecutor's application for a warrant to arrest the president of Sudan, they were not issuing a verdict of guilty. The justices were not meant to assess the facts put before them by the prosecutor, but to ask a different question: if those facts were assumed to be true, would the president of Sudan have a case to answer? Unlike court, which took the facts for granted at the pre-trial stage, we need to ask: to what extent are these facts true? And, to the extent they are true, are they the whole truth?

The prosecutor's case

The prosecutor's application charged President al-Bashir with (a) polarising Darfuri tribes into two races (Arab and *Zurga* or Black), (b) waging a violent conflict (2003-2005) leading to the ethnic cleansing of *Zurga* ethnic groups from their traditional tribal lands, and (c) and planning the malnutrition, rape and torture of internally displaced persons (IDPs) so as to "slow death" in the camps -- a process that the prosecutor claimed went on from 2003 to the time the application was submitted in 2008.

The racialisation of identities in Darfur had its roots in the British colonial period. As early as the late 1920s, the British tried to organise two confederations in Darfur: one "Arab", the other "*Zurga*" or black. Racialised identities were incorporated in the census and provided the frame for government policy and administration. In spite of official policy, Arabs never constituted a single racial group. Contemporary scholarship has shown that the Arab tribes of Sudan were not migrants from the Middle East but indigenous groups that became Arabs starting in the 18th century. This is why there can be no single history of Arab tribes of Sudan. Little unites privileged sedentary tribes of riverine Sudan and impoverished nomads of Western Sudan. Unlike the Arabs of riverine north, who have tended to identify with power, the Arabs of Darfur are the most marginalised group in a marginalised province.

The largest of the Arab tribes in Darfur, the cattle nomads of the south, were never involved in the government-organised counterinsurgency. Those involved -- the camel nomads of the north and refugees from Chad -- were from among the poorest of the poor. The idea that the Arabs of Darfur were part of a single cohesive "Arab" bloc facing "black Africans" is a recent invention driven mainly by an external media, and now by the ICC. Its main effect has been to demonise "Arabs" and to obscure the real causes of the conflict.

▼ CONTINUES BELOW ▼

Who, then, has been fighting whom in Darfur, and why? The short answer is that this has been a conflict over land, triggered by four different but related causes: the land system, environmental degradation, the spillover of the four decade-long civil war in Chad and the brutal counterinsurgency waged by the al-Bashir government in 2003 and 2004.

- The deep cause was the colonial system, which reorganised Darfur as a discriminatory patchwork of tribal homeland where settled peasant tribes were granted large homelands in which they were considered natives. In contrast, camel nomads with no settled villages found themselves without a homeland and so were not acknowledged as natives anywhere. When it came to granting access to land, participating in local administration and the resolution of local disputes, homeland administrations favoured so-called native over non-native tribes.
- The second cause of the conflict was desertification. Studies from the United Nations Environment Programme show that the Sahara expanded by 100km in four decades, and that this process reached its high point in the mid-1980s, pushing all tribes of North Darfur to more fertile lands further south. The resulting land conflict was not between races, Arab and *Zurga*, but between tribes with homelands and those without. Contemporary observers such as the Darfuri anthropologist Sharif Harir traced the unprecedented brutality of the violence in the 1987-1989 war to the fact that sheer survival was at stake.
- The third was the Cold War, with its two sides -- the tripartite alliance of Reaganite United States, France and Israel on the one hand, and Libya backed up by the Soviet Union on the other -- arming different factions in neighbouring Chad. As successive

armed groups took turns ruling Chad, opposition groups took shelter in Darfur, where they mobilised and armed. The easy availability of arms rapidly militarised the inter-tribal conflict in Darfur. Regional and international powers got involved in the Darfur conflict long before the Khartoum government did, but no one reading the prosecutor's application would be aware of this fact.

- The final cause that aggravated the land conflict in Darfur was the brutal counterinsurgency unleashed by the al-Bashir regime in 2003 to 2004 in response to an insurgency led by three major tribes in the region: the Fur, the Masalit and the Zaghawa.

Four wrong assumptions

The prosecutor's application makes four erroneous assumptions, all of them so he can pin the full blame of the violence on al-Bashir. This is how the prosecutor put it to journalists at The Hague: "What happened in Darfur is a consequence of al-Bashir's will."

The first error is to identify the duration of the conflict in Darfur with the presidency of al-Bashir. Yet, the conflict in Darfur began as a civil war in 1987, before al-Bashir and his group came to power, and long before the cycle of insurgency and counterinsurgency that began in 2003. The civil war has become entangled with the counterinsurgency, though they have separate causes. Whereas the insurgency was a rebel challenge to power in Khartoum, the civil war was triggered by the effects of drought and desertification, and intensified by two factors, one internal, the other external, one the failure to reform the system of tribal homelands and the other an effect of the ongoing civil war in Chad.

The second error is to assume that excess deaths in Darfur are the result of a single cause: violence. But the fact is that there have been two separate if interconnected causes: drought and desertification on the one hand, and direct violence on the other. World Health Organisation sources -- considered the most reliable source of mortality statistics by the US Government Accountability Office in its 2006 evaluation -- trace these deaths to two major causes: about 70% to 80% to drought-related diarrhoea and 20% to 30% to direct violence.

The third error is to assume a single author of violent deaths and rape. In his eagerness to make the prosecution's case, Moreno-Ocampo not only obscured the origins of the violence in Darfur, he also went on to portray life in the internally displaced persons camps in Darfur as a contemporary version of life in Nazi concentration camps in Europe, with al-Bashir cast in the role of the *Führer*. At the press conference announcing the case against the president of Sudan, the prosecutor said: "Al-Bashir organised the destitution, insecurity and harassment of the survivors. He did not need bullets. He used other weapons: rape, hunger and fear. As efficient, but silent."

To be sure, there were ongoing incidents of rape in Darfur, as there are indeed in most conflict situations where armed young men confront unarmed young women. This much was recognised by the US special envoy to Sudan, Andrew S Natsios, in his testimony before the Senate Foreign Relations Committee on April 11 2007: "The government has lost control of large parts of the province now. And some of the rapes, by the way, that are going on are by rebels raping women in their own tribes. We know in one of the refugee camps, it's now controlled by the rebels, formally. There have been terrible atrocities committed by the rebels against the people in the camps."

Rebels, like government soldiers and the paramilitary *Janjaweed*, have authored both rape and the killing of civilians. Take figures newly released by the United Nations-African Union Mission in Darfur (UNAMID) in Khartoum. UNAMID, which keeps a count of each individual death, including its circumstance, calculates the total number of conflict-related civilian deaths in the year 2008 at 1 520. Of these, 600 are said to be the result of conflicts over grazing lands among Arab tribes. When it comes to the remaining 920, UNAMID says that more civilians were killed by rebel movements than by government-organised counterinsurgency forces.

The fourth erroneous assumption is that the situation has not changed in Darfur since the onset of the counterinsurgency in 2003. In Moreno-Ocampo's own words: "In April 2008, the United Nations estimated the total number of deaths since 2003 at 300 000." This estimate came from John Holmes, UN under-secretary general for humanitarian affairs. This is how Holmes put it in the first place: "A study in 2006 suggested that 200 000 had lost their lives from the combined effect of the conflict. That figure must be much higher now, perhaps half as much again." There are two qualifications here, and Moreno-Ocampo glossed over both. The first was that these mortality figures were said to be the result of "a combined effect", referring to direct violence and drought. The second qualification was explained by Reuters: "United Nations cautioned reporters that the number was not a scientific estimate but a 'reasonable extrapolation'." The assumption underlying the extrapolation -- that the level of mortality has not changed in Darfur from 2003 on -- was contradicted by the UN's own technical staff in Sudan. As Julie Flint explained in the *New York Times* of July 6 2007 and the *Independent* (London) of July 31 2007, UN sources spoke of a sharp drop in mortality rates in Darfur from early 2005, so much so that these sources report mortality estimates had dipped to as low as below 200 per month, lower than the number that would constitute an emergency.

That the ICC has politicised the issue of justice is no reason to sidestep the question of accountability. The kernel of truth in the prosecutor's application concerns 2003-04, when Darfur was the site of mass deaths. This was mass murder, but not genocide. Its authors were several, not just the government of Sudan. There is no doubt that the perpetrators of violence should be held accountable, but when and how is a political decision that cannot belong to the ICC prosecutor. More than the innocence or guilt of the president of Sudan, it is the relationship between law and politics -- including the politicisation of the ICC -- that poses an issue of greater concern to Africa.

The debate has hitherto focused on the need to have the same rules for all war criminals, regardless of national origin or political orientation. Only then can the rules claim to be just, so that justice may act as deterrence. If, however, justice masquerades as selective punishment, only to those who dare transgress American power, critics have pointed out that the exercise will not be a deterrent to potential war criminals, but only to those who dare challenge American power.

I have suggested that the more important question is that of the larger political consequences of a fundamentalist pursuit of criminal justice by those determined to enforce criminal justice regardless of its political context or consequence. Take one example. If the ICC were to have the political will and courage to try war criminals in the US War on Terror, we can say with confidence that the American political system is strong enough to contain its political fallout. There is little chance of "red states" going to war against "blue states". But can one say with any confidence that the price of single-mindedly pursuing criminal justice in Sudan will not be a renewed civil war? Such a fundamentalist pursuit should be named vengeance, not justice. This is why we need to subordinate criminal accountability to a larger pursuit, that for

political reform.

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DARFUR, THE ICC AND AMERICAN POLITICS

Peter K. Bechtold

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During the past half-decade, those Americans following international affairs have been inundated by media accounts of genocide in Darfur, supplemented by full-page advertisements in the major newspapers, sponsored mostly by the Save Darfur Coalition. During the first half of 2008, activists tried to link the Beijing Olympic Games to Darfur by labeling them the “genocide Olympics.” They even enlisted some prominent American athletes in a lobbying effort via “Team Darfur.”

Just prior to the games in July 2008, the activists scored an apparent victory when the prosecutor for the International Criminal Court (ICC) filed a petition against the sitting Sudanese president, Omar H. A. al-Bashir, charging him with 10 war crimes and crimes against humanity and responsibility for genocide in Darfur. The application was acted upon by a pre-trial chamber of three justices, who issued an arrest warrant for Bashir on March 4, 2009, in The Hague.¹

Bashir responded by publicly ridiculing the ICC actions and setting off on an extended tour of the three provinces in

Darfur, where he was met with wild acclaim by mostly very large audiences. His government ordered 16 non-governmental organizations (NGOs) to leave Sudan forthwith, accusing some of their members of political interference in Sudan’s domestic affairs, especially in Darfur, and also of providing “tainted evidence” to the ICC abroad. (The chief prosecutor, Professor Luis Moreno Ocampo, had not been in Darfur or Sudan as yet.) In late March 2009, President Bashir defied the arrest warrant by traveling to Eritrea, Egypt, Libya and an Arab League meeting in Qatar — where he was lionized, to the chagrin of Western media and governments.

As of this writing, those outsiders concerned about Darfur can be grouped into three categories. First, there are the overwhelmingly Western activists who insist that “justice for the victims” must prevail in Darfur regardless of political consequences, and that “impunity for war crimes can no longer be tolerated” as a “signal to tyrants the world over.”² Second, there are the “realists” among political actors and observers, who admit that justice is a most worthwhile principle but “should not take

precedence over peace.” Third, there are the academic experts on Sudan in Europe and the United States who reject the genocide charges out of hand and are relatively sanguine about human-rights violations in Darfur, pointing to shared responsibility among rebels, government forces and proxies. They also provide a historical context that rebuts charges of genocide by the activist community. One is tempted to add a fourth category solely for the ICC prosecutor, who has engaged in a virtual crusade against Bashir and Khartoum in a lecture tour, using highly incendiary language seemingly at odds with the responsibilities of a senior official on an international court.³

To unravel this confusing situation, especially in view of the new Obama administration’s commitment to make Darfur and Sudan a “high foreign-policy priority,” this article will examine in summary form the multilayered issues. At least six layers can be identified: the situation on the ground in Darfur, at present and in historical context; the internal politics of Darfur; the politics of Khartoum; the politics of Sudan, especially the relationship between the Comprehensive Peace Agreement of 2005 and the Darfur crisis; the role of regional actors; and what might be called “the politics of Washington.”

Most Western media accounts of the crisis in Darfur describe deliberate attacks by the Sudan Armed Forces on orders of the “Arab” or “Arab-dominated” government in Khartoum or their “Janjaweed” proxies against innocent and defenseless “African” villagers. They include stories of massive atrocities such as large-scale murder, rape used as a weapon, the burning of villages, and forced dislocation from homes to refugee camps for internally displaced persons. Some insinuate that Khartoum is implementing a policy of Arabization through the “ethnic cleansing” of existing “African”

populations in Darfur. The leader of the Sudanese Liberation Movement (SLM), Abd al-Wahid Muhammad Nur, goes further and charges forced Islamization by the “Islamofascist” regime in Khartoum.⁴

Such descriptions are highly misleading; they distort realities on the ground and, sadly, contribute to prolonging the very real conflict and add to the suffering of many people in Darfur. To set the record straight, there follows some historical, demographic and political context for this very real humanitarian crisis.

THE GEOGRAPHICAL SETTING

More than four decades of studying Sudan intensively have persuaded me that understanding this fascinating country requires, at a minimum, full awareness of its size, its human and ecological diversity, and its inadequate infrastructure. The tenth-largest country on earth and the largest in Africa at almost one million square miles (2.5 million square kilometers), Sudan contains fewer all-weather roads than most American counties, much less states, at least prior to the year 2000. When I was first in Darfur in 1972, there were fewer than five kilometers of pavement in a territory the size of France.

Given the extensive rainy season as one moves southward and the debilitating sandstorms (*haboob*) in the north, transportation over land is haphazard at best, in Darfur as in the entire country. Added to this, the Nile River is not navigable for transport except for short distances and by small craft in limited stretches; and the narrow-gauge, single-track railroad built by the British military more than a century ago is as antiquated as it is inadequate. The result is a recipe for classical underdevelopment. Indeed, since Sudan acquired its modern identity in the 1820s under Otto-

man rule, no government has been able to exercise adequate control beyond a modest perimeter of perhaps 250-300 km from the capital. Hence, distribution of food from producing to consuming areas, provision of educational and health services, tax collection, and even the recruitment of soldiers have been limited and haphazard.

As a result, groups in outlying areas have been left to their own devices. They expect little from Khartoum and have minimal loyalty to the central authority. I have heard constant complaints from residents in the west, south, east and even the north of the country about the lack of services. These conditions have been well-documented in numerous studies and are unchallenged by government officials and politicians. When feelings of marginalization have escalated — for understandable reasons or, perhaps, due to local politicians agitating their populations — conflict has erupted. The more remote the region, the more severe the problem. The two most remote regions have been southern Sudan, especially the Sudd area, and Darfur.⁵

In the absence of effective government, conflict resolution has been based on customary law (*sulh*), arbitration and negotiations among local chiefs. Many anthropological studies as well as Sudan archives, including from colonial times, document the high success rate of these traditional methods. When negotiations failed, armed conflict might return for awhile, until the next round of *sulh*, under different auspices perhaps. It is noteworthy in this context that international intervention, with or without the ICC, is unlikely to be accepted and more likely to be resisted, as happened when the British tried to intervene during World War I and the French in neighboring territories, as well as the Libyans, in the 1980s and 1990s.

DEMOGRAPHIC DIVERSITY

This situation would be challenging enough if the country and its people were homogeneous. Unfortunately, Sudan is one of the world's most heterogeneous nations. Serious anthropological research has identified almost 600 different tribal groupings speaking up to 400 different languages and dialects. Most northern Sudanese are Muslims, but they tend to divide into more than a dozen rival sects (*tariqah*); there are several million Christians as well.

Meanwhile, in the southern region, up to 200 religious identities have been documented. Most of these are referred to as "animist" or African traditions, with minorities of Christians (10-15 percent) and Muslims (about 5 percent). Significantly, all indigenous Darfuris are Muslim, and most belong to the Mahdiyyah/Ansar tariqah. Religious diversity in Darfur is not an issue, notwithstanding early reports in the American media. This is not to say that religion plays no role in the modern conflict. In fact, Khalil Ibrahim, a leader of arguably the largest rebel group, the Justice and Equality Movement (JEM), has been reported to be a strong Islamist, and his theological orientation has been cited as one reason for the factions within the group.

GOVERNMENTS

Given the bewildering demographic diversity and the topography and dimensions of the country, it is not surprising that loyalty has been localized to family, clan, tribe and village. Political organizations since the 1920s and especially after World War II have centered on religious and tribal identities, and the country's body politic has been a rich kaleidoscope reflecting these diverse yet unequal groupings. Not surprisingly, it has been extremely difficult to produce a "national" consensus on any-

thing, and all Sudanese governments have suffered from severe instability. Three times the nation was ruled by democratically elected parliaments, multi-party and Western-style democracies, all of them coalition governments, as no party or faction could come close to gaining a majority of seats in parliament. And three times these parliamentary democracies were aborted by military coups whose leaders promised more effective government than the hapless civilians.⁶ Each coup was followed by purges of political elites putatively responsible for the mess. The last such coup occurred on June 30, 1989, when military officers led by Major General Omar H.A. al-Bashir seized power from Prime Minister Sadiq al-Mahdi and established rule by the Revolution for National Salvation (RNS), presumably to overcome all the mistakes of the past. It punished members of the former regime more drastically than any earlier government since independence. This led to accusations of massive human-rights violations and a significant exodus of political refugees to Egypt, Ethiopia, Kenya, Libya, Saudi Arabia, Europe, Canada and the United States. Most of these exiles and victims of human-rights abuses were northern Muslims. Many of them have come together to oppose the RNS regime and have formed various coalitions, such as the National Democratic Alliance (NDA), and the Sudan Peoples' Liberation Movement (SPLM), led for many years by John Garang and now by Salva Kiir. It is apparently a model for at least one major Darfuri rebel group, the SLM.

REGIONAL REBELLIONS

For the above-stated reasons of ethnic heterogeneity, geographic diversity and distance from the center, regional rebellions, whether large or small, brief or

protracted, have dominated Sudan's political history since independence in 1956. The better known are the North-South civil wars of 1955-72 and 1983-2004, concluded by comprehensive peace agreements in Addis Ababa (March 1972) and Naivasha, Kenya (January 2005). Yet, throughout these decades, lower-intensity fighting occurred in Darfur, South Kordofan, and the eastern region of the Red Sea Hills. Local politicians had formed the Darfur Liberation Front, the Nuba Mountains Federation and the Beja Congress as political movements with purely regional agendas. During parliamentary rule, these groups were represented in the national assembly, but during periods of military rule, they frequently resorted to armed revolts.

One key event for all these movements was the formation of the Kutla al-Souda, the Black Bloc, in the 1950s during the transitional period prior to independence, when embittered southerners aligned with indigenous African groups in the north, e.g., the Fur and Nuba in the west and some Beja from the northeast. This rather loose alliance of some educated "blacks" was revived in 2002-03 just as pressure for resolving the South vs. Khartoum conflict was mounting dramatically under international auspices. One additional source of inspiration may have been the publication in 2000 of the *Black Book*, whose authorship is attributed to the JEM leader Khalil Ibrahim. It documented that over 80 percent of all government jobs since independence, from those of cabinet ministers to ministerial drivers, had been allocated to "Arabs" from the Danaqla, Shaigiyya and Jaaliyyin tribes and that westerners had been "systematically excluded."

Ironically, when the SPLM agreed to a comprehensive settlement with Khartoum, the SLM leadership in Darfur took notice

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and began to agitate for a similar result. With Khartoum completely focused on negotiations in Kenya, especially under substantial American pressure, the SLM apparently saw an opening for a surprise attack on government outposts in February 2003 and launched what is now known as the Darfur crisis.

THE DARFUR CONFLICT

The Darfur region was one province at independence; it is now divided into three: North Darfur with El-Fasher as its capital, South Darfur with Nyala as its capital and West Darfur with Geneina as its capital. Scholars count as few as 80 and as many as 123 different tribes. In population size and tribal diversity, Darfur ranks first among Sudan's regions, although at least one million Darfuris — some claim two — have been living in the metropolitan Khartoum province.

Contrary to many journalistic oversimplifications, all Darfuris are African and Muslim. When traveling through the region, outsiders, i.e., non-Darfuris, find it almost impossible to tell one ethnic group from another. The only obvious difference is in the lifestyles of the different ecological zones. The northern third is sheer uninhabited desert; the central third is mostly pastoral except in the higher elevations around Jebel Marra (the highest elevation in Sudan), which allows for some cultivation; and the southern third receives relatively more rainfall, permitting limited agricultural activities.

The two lifestyles then are a function of ecological conditions: semi-nomadic pastoralists further north, mostly herding camels and goats, and agricultural villagers further south growing vegetables and maintaining cattle rather than camels. In journalistic reports, the former have been labeled "Arab" and the latter "African"

even though that distinction is rather trivial. All are African, indistinguishable in skin pigmentation (except to anthropological experts), and they all speak one of several versions of Arabic. In my research going back to the 1920s, it is evident that accommodation was worked out between the agriculturalists and the pastoralists with generally acceptable definitions of *Dar* (homelands) and the provision of cordoned-off passageways for herds to access water. The only trouble occurred whenever droughts lasted two to three years and encroachment by camels and goats into vegetable gardens brought out stick-wielding youths (now wielding guns).

Historical records going back at least to the mid-seventeenth century reveal an unending series of tribal contests over limited resources. Because there are no rivers in all of Darfur, not even one perennial creek, human habitation mostly centers around baobab trees, which function as water holes. Control of these "oases" makes life possible, and fighting over scarce resources becomes existential. Robert Collins has described the rise and fall of local kingdoms and other dynasties over some 350 years.⁷ More often than not, the smaller tribes aligned themselves with larger federations, such as Fur, Zaghawa, Rizaigat, Berti, Taaisha, and Habaniyya.

The region was virtually untouched by the rest of the world prior to World War I, when the British colonial authorities decided to rein in the ruling sultan of Darfur. They destroyed his military, killed him and annexed Darfur to Sudan in 1916-17. With their erstwhile European rival France in control to the west in Chad and beyond, the Darfur-Chad border gained some significance, but no detailed demarcation. Many tribes lived on both sides of the border and moved freely within their

Dar (traditionally recognized homeland), so that the Dar Fur would about the Dar Masalit and the Dar Beni Halba, and so on.

As it turned out, major "Darfurian" tribes, for example the Masalit and especially the Zaghawa, straddle both sides of what has suddenly become an "international" border. Their members are ruled from Khartoum and N'Djamena, thousands of miles apart and totally irrelevant to these tribesmen. Irony abounds: how can a Masalit live in the Land of the Fur (Darfur) but the "bi-national" Zaghawa also live partly in the Land of the Fur? They also provide Chad with its president, Idriss Deby.

This approaches tragicomedy when Western journalists like Nicholas Kristof of *The New York Times*, foremost among crusaders for "action" against the *genocidaires* in Khartoum, encounters a Zaghawa translator in a Chadian refugee camp, hires him to accompany him into Zaghawa land in Western Darfur and then generalizes his singular experience to describe what has been going on in all Darfur. Kristof is later followed by Hollywood actors such as George Clooney and Mia Farrow, whose entire experience and subsequent lectures before mass audiences in the United States are based on these Chadian/Zaghawa narratives.

As indicated above, the ICC prosecutor, Professor Moreno-Ocampo, has never been in Darfur either (as of July, when he submitted his indictment brief) but only in Chad. His evidence is second-hand at best and derives from dubious sources: one major party to the conflict, the overwhelmingly Zaghawa-based Justice and Equality Movement (JEM), and those Masalit who similarly straddle the Chad-Darfur border.

Several scholars have documented that serious fighting raged in Darfur throughout the 1980s and 1990s, including battles involving Fur, Rizaigat, Masalit, Abbala,

Zaghawa and Baqqara tribes. Often these battles pitted landless tribes, usually "Arab," against those with recognized Dars. In addition, during the 1990s, many Chadian refugees streamed into western Darfur as a result of the latest chapter in the decades-long Chadian civil war. One must add to this toxic brew the meddling and outright interference of Libya's Muammar Qadhafi. The colonel had ambitions for a Saharan federation but minimally wanted to absorb the Aouzou strip of northern Chad, which the Europeans had "wrongfully" assigned to Chad rather than Libya. Qadhafi had even positioned an "Arab Legion" in the northern parts of Darfur. (The Libyan units did not undertake military operations, but their presence added to the general destabilization.)

By summer 2001, the security situation was precarious once again. A group of Fur and Zaghawa activists met on July 21 at Abu Gamra in Jebel Marra and swore an oath on the Koran to cooperate in their opposition to the perceived Arabization of Darfur.⁸ The chief Fur activist was Abd al-Wahid M. Nur, a native of Zalingei and a communist lawyer who had earlier formed the SLM. It followed most of the script of the SPLM and, according to some sources, had received some logistical support as well. Abdalla Abakkar represented the Zaghawa faction, and Mansur Arbab the Masalit.

In short, the SLM launched the current Darfur crisis on February 26, 2003, by attacking Gulu near Jebel Marra, killing dozens (CIA estimate, hundreds) of uniformed personnel. The JEM went into action a few weeks later and attacked government outposts in their region. On one occasion, in April 2003, in what was perhaps a joint operation, several hundred government personnel were taken prisoner and about 200 were killed in prison with their hands tied. The barracks near El-Fasher were burnt

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and six small aircraft were destroyed on the ground. The Darfur rebellion was on.

Khartoum and its military were completely focused on negotiations with the SPLM in the south and were in no position to respond directly in Darfur. As many have pointed out, a very large proportion of Sudanese Armed Forces (SAF) are actually recruited from the impoverished region of Darfur and "could not be trusted to shoot at their cousins." What to do? The regime decided to revive an old tactic used in parts of the southern campaign, i.e., arm tribes with historic animosities against the current rebels and let them do the fighting.

Throughout 2003 and the first half of 2004, this became the war scenario, and the resultant killings of guerrillas in their home villages and the accompanying destruction (like the "collateral damage" suffered by Iraqis, Gazans and others) have become the narrative for Darfur activists in the United States and parts of Western Europe. On the positive side, the clamor received the world's attention, and international organizations responded with massive humanitarian aid. On the negative side, the stabilized situation, beginning in 2005, produced only a partial peace agreement. It was concluded in Abuja, Nigeria, in May 2006 with one rebel faction (led by Minni Minnawi, who was appointed vice-president and special adviser on Darfur). Two other factions refused to sign, despite considerable pressure from international mediators. Since then, those who rejected the Darfur Peace Agreement (DPA) have been fighting the "traitors" who signed it. When I visited Darfur in spring 2008, there were at least 19 separate rebel groups fighting each other and occasionally raiding trucks belonging to relief organizations.

The JEM and SLM leadership continue to refuse to participate in peace negotiations, while the government in Khartoum

has committed to take part. Time and again, the government has gone to peace conferences, but the rebels have refused to negotiate, most recently in late March 2009 following the ICC warrant. Abd al-Wahid has been quoted as saying, "Why should I accept the peace offerings of Khartoum when the American people are behind me, and we can get a better deal, like our southern brothers in their CPA at Naivasha?" It is noteworthy that both Abd al-Wahid and his JEM counterpart live in European hotels and use these bases for lobbying receptive journalists and some parliamentarians. So far, the UN and other foreign leaders have failed in their efforts to bring about unity among the rebels so that they could negotiate with one voice. Given the record of these rebel leaders, it is not clear that negotiation ranks high among their priorities. Do they want peace? If so, what kind and with what sorts of guarantees? Do they want to resurrect the Sultanate of Ali Dinar or the ancient Zaghawa kingdom that used to rule the Chad Basin, Waddai and "Darfur" in medieval times? They won't say. What they will say is that they want to bring down the rule of General Bashir and his regime. Evidently, toward that end, they play along with the Western activists and provide fodder for Professor Ocampo, hoping that he will deliver, if the United States will not.

POLITICS OF DARFUR

Like other geographically distinct areas, Darfur has its own political and economic competition. Whereas the latter centers mostly on land ownership and the provision of services in an ecologically dismal region, the former follows the familiar pattern of primordial loyalties: family, clan, tribe, village and/or region, spiced with some elements of generational and ideological conflicts.

Not surprisingly, political alliances of a more lasting nature have been grounded in tribal identities and are reinforced by the divide between landholding and landless tribes. In this regard, most of the fighting in recent decades has involved competition over scarce resources of land and water, often to the detriment of the (smaller) "Arab" tribes, who tend to be relatively poorer in Darfur than the more settled "Africans." Several studies have shown a long list of such skirmishes since independence in 1956, well-chronicled in academic research and government archives.

Similarly, interest aggregation along these lines has led to the formation of political movements such as the Zaghawa-based JEM and the more Fur- and Masalit-based SLM, the latter evidently styled after the Southern SPLM.

As described above, these two groupings launched the current Darfur crisis in early 2003 by attacking government outposts and killing hundreds of uniformed police, but their joint operations were not to be sustained for long. Instead, both SLM and JEM suffered internal splits and also disagreed on tactics and strategy vis-à-vis the Khartoum government. By 2008, the rebel movements had fragmented into roughly 20 distinct groupings.

Observers and mediators from the United Nations and the African Union, along with other special envoys from the international community, have failed to persuade these splinter groups to coalesce so as to speak with one voice. This failure to come together has been a major hindrance to peace negotiations and continues to this day to frustrate those seeking a political solution. It may also explain why the Bush/Rice administration backed off from its confrontation with Khartoum after 2005.

Well-informed researchers have described the JEM base as drawing heavily from the Kobe branch of the Zaghawa confederation centered around Tine (Tina) on the Chad border. Some have gone further and suggest that the majority of JEM's rank and file hail from the Chadian side rather than the Darfurian. Add to this the image of Zaghawa aloofness, perhaps harking back to the days when the region was ruled by a Zaghawa kingdom. The Zaghawa are also better off; they traditionally controlled regional trade as merchants. In sum, one can see why JEM had limited appeal for other tribes. A final complicating factor has been the close identification of JEM leader Khalil Ibrahim with his erstwhile mentor, the national Islamist leader Hassan Turabi, who has been an opponent of the ruling Congress Party and has been arrested repeatedly since falling out with the top leadership in 1999.

Because Chad's current president, Idriss Deby, is himself Zaghawa and owes his success to a Chadian civil uprising launched from Darfurian territory, relations between the two countries have been heavily affected by internal Zaghawa politics. Mis- and disinformation on this has been spread by writers like Nicholas Kristof, who blamed Khartoum for "exporting its genocidal campaign into Chad." To the contrary, it was JEM that launched an attack on Sudan's capital in May 2008, employing some heavy armor but also a substantial number of child soldiers.

Just as a great many residents of Darfur do not support the rebels, not all Zaghawa support the JEM. Even the Kobe sultan has been reported to oppose the movement, as is generally true in Darfur. The overwhelming proportion of rebels are quite young, whereas many elders seem to support President Bashir and want to work with Khartoum.

Another split results from the fact that the JEM leadership has been based in Europe and is seen as too ideological by many in Zaghawa land. A manifestation of this divide occurred in 2004, when Gabriel Abdul Karim Badri and Nourane Manawi Bartcham led a break-away faction, the National Movement for Reform and Development (NMRD), ostensibly in opposition to the influence of Dr. Turabi and his Popular Congress.

The SLM/SLA grouping is more difficult to identify and characterize, if only because it has shrunk in numbers and split into numerous factions. Beginning as a coalition of Fur and Masalit, with a sprinkling of others from the central Jebel Marra massif, it early on espoused the strategy and tactics of the southern-based SPLM/A. It called for a "new Sudan" devoid of Islamist rule and for wealth-sharing on behalf of long-marginalized areas. It attracted some younger fighters but not tribal elders. It soon lost local support due to tactics such as raiding neighboring villages and UN relief convoys. But its first major crisis occurred in May 2006, when the "secretary-general," Minni Minnawi, agreed to a peace agreement in Abuja, Nigeria, and joined the Khartoum government as one of several vice-presidents and as special adviser on Darfur. From that period on, his followers and those of the exiled leader Abdal-Wahid Muhammad Nur have engaged in almost endless fighting, causing death, destruction and displacement within their local communities, even attacking some UN convoys and NGO relief activists.

In fact, most fighting in Darfur during the past three years has been rebel-on-rebel, both within the old SLA and also against the JEM. This has been duly noted by many international observers but ignored in the Western media, which continues to report sensational news from Darfur,

often in the passive voice — "villages and aid workers have been attacked and many killed" — without attributing these acts to the perpetrators. This leaves the impression that the assailants must have been Bashir and his henchmen. This is not to suggest that government forces have been inactive or blameless, but UN observers and others agree that the preponderance of killing and destruction is due to rebel action. They also agree that the widely used term "Janjaweed" has lost its meaning. It now refers to any group of bandits, who are as likely to attack "Arab" communities as "Africans" or each other.

As of this writing, it is difficult to imagine how Darfur's Humpty Dumpty can be put back together again. Some observers have floated the name of the former all-Darfur governor, Ibrahim Ahmed Direige, as an elder who might be able to bridge ethnic divides, but he has been away from Darfur and Sudan too long. It is doubtful that the much younger rebels will submit to a symbol of what they consider to be the flawed "old Sudan."

What will become of the one-to-two million Darfuris who have settled in the capital region and are considered by many to be the largest ethnic community in Khartoum?

THE POLITICS OF KHARTOUM

When outsiders write or speak about Khartoum, they conjure up images of a homogeneous Arab-ruled capital, politically unified and imposing its will upon the peripheral parts of Sudan, at least the southern region and Darfur. Nothing could be more misleading. Neither the political class nor the population at large have ever been united or achieved consensus on political, economic, social or religious issues. Rather, Khartoum has been a microcosm of this very large and diverse country with residents from all its regions, although the largest propor-

tion have been natives of the central Nile area. Rich and poor, Muslim and Christian, educated and illiterate live side by side there. And they live freely; the informed observer does not sense the presence of the sort of police state that is more evident in Sudan's neighbors to the north, south and west.

Similarly, in Khartoum's political culture, one does not encounter the usual hallmarks of the one-party state, where citizens are afraid to speak publicly. This has even been true during periods when all regular political parties have been outlawed, as during the Numayri regime (1969-85) or the early years of Bashir's "Revolution of National Salvation." If this observation seems at odds with popular images in the Western media, often fed by dire comments from Sudanese exiles, Sudanese are notorious for complaining about all their country's rulers, going back to independence, and in exaggerating the hardships back home. This should not imply that there have not been serious violations of political and human rights, as well as some incidents of torture in the early years of the Revolution of National Salvation (RNS), but any informed comparison with neighboring states would reveal Khartoum's political culture to be more liberal and the associated atmosphere more lenient than in Egypt, Libya, Ethiopia or Saudi Arabia. Others might add Uganda, Kenya, Chad and Congo to the list of countries where political freedom is more proscribed than in Sudan. Political refugees tend to come home sooner or later, and one hardly ever hears of any exile who would prefer citizenship in neighboring Arab or African states.

Today in Khartoum, the political kaleidoscope is as rich as ever. The RNS has split into two factions: the current rulers around the pragmatic vice-president, Ali Osman Taha, and the more "ideological" wing headed by his former mentor, Hassan

Turabi. Both are recalculating their positions in light of the arrest warrant for the titular leader, President Bashir.

The same can be said for the opposition parties, many of which have joined together in the National Democratic Alliance (NDA). Yet they all suffer internal splits as well: The Umma party, the Democratic Unionists, even the Baathists and the Communists, all have at least two rival organizations each. The same holds for regional groupings. The SPLM represents many but not all southerners and enjoys the support of most Dinka but hardly any among the dozens of smaller southern tribes, especially in the Equatorial region. As in Darfur, their members are divided between those who desire national unity under a confederal structure and those who clearly prefer secession and independent statehood.

All of these groups had been looking forward to the national elections scheduled for June 2009 (now probably rescheduled for February 2010), and many had hoped to be able to vote the ruling party out of office. The actions by the ICC in July 2008 have had several negative consequences. One was to throw into doubt the timely holding of elections; another was to generate almost unnatural enthusiasm for President Bashir. Even his staunchest opponents have closed ranks and rushed to his defense; in such an atmosphere, fair and open elections as in 1958, 1965, 1968 and 1986 have become more elusive.

Similarly endangered is the Comprehensive Peace Agreement (CPA) of 2005, which ended more than 22 years of civil war between the SPLM/A-led southern rebels and the national government. The SPLM and much of the wider world had been anxious to see the CPA process through its scheduled stages — updated census, national elections and referendum

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on self-determination — while monitoring the peace and wealth-sharing provisions in the interim. All this has been jeopardized by the relentless pressure of outside activists, mostly in the United States, who know little about the balance of political forces in all parts of Sudan. (In mid-May the president of South Sudan and head of the SPLM, Salva Kiir, rejected the census results.)

Outstanding issues such as the border demarcations around Abyei in southernmost Kordofan and transparency in the disbursement of oil revenues — while significant and worth pursuing — have been used in one-sided attacks on Khartoum instead of more evenhanded analysis. Washington seems predisposed to think ill of Khartoum, and the ongoing demonization by Western publics of Bashir and his government threatens to undermine the spirit of cooperation and the very real progress that has been made in recent years by the parties on the road to national reconciliation.

REGIONAL ACTORS

Geographically enormous, Sudan shares borders with nine states and lies only a short distance across the Red Sea from Saudi Arabia. All 10 neighbors have a vested interest in Sudan's stability, none more than Egypt, which depends on the Nile for survival, and Saudi Arabia, whose holy cities lie across from Eastern Sudan, the historic transit area for Muslim pilgrims from the entire African Sahel. Chad, the Central African Republic, the Democratic Republic of the Congo, Uganda, Ethiopia and Eritrea and Sudan all share tribes that straddle their respective borders and whose loyalties are to local rather than to their national leaders. Not surprisingly, regional insurgencies along these borders have flared up intermittently since independence and have been a familiar feature

for most African states. There have been skirmishes with Eritrea, Ethiopia, Uganda, Congo/Zaire, Chad and even Egypt (Halaib Triangle). One expects periodic conflicts to occur. Unfortunately, this phenomenon has been exploited by Western activists in a way that exacerbates the problem instead of contributing to a peaceful resolution.

All scholars of Sudan are familiar with alternating episodes of cooperation and conflict between any given pair of neighboring governments. Usually these events occur in cycles and are managed through traditional methods, such as *sulh* (customary mediation and law). Thus, Eritrea has supported Darfur rebels materially but has also played peacemaker; the same is true for Libya, Ethiopia and Uganda. One major reason for the insistence in recent years by the Bashir government on having African Union monitors stationed in Darfur is the belief that Africans would be much more likely to relate to and understand tribal identities, conflicts and movements across borders. After all, these borders were designed by West European powers more interested in their own strategic advantages than in the needs of local populations.

In early 2009, the government of Qatar hosted a meeting on Darfur that was attended by representatives of JEM and Khartoum. They agreed to resume talks leading toward reconciliation, but after the ICC warrant was handed down on March 4, the JEM representatives announced that they were "no longer interested in talking with a criminal" (Bashir). Toward the end of the month, Qatar hosted a previously scheduled meeting of Arab League heads of state, who warmly welcomed President Bashir. Foreign news services reported that "the only thing the Arab leaders agreed upon was to back Bashir in his conflict with the ICC." The Arab

League's now-formal position was echoed more informally by numerous statements of African leaders who also criticized the ICC action. Some African states indicated their intention to review membership in the ICC; others called for mass resignations if that court continued to act with "an evident double standard." How will Washington respond to these new developments?

DARFUR AND WASHINGTON POLITICS

In September 2004, the American government went on record in referring to the violence in Darfur as "genocide." First, Secretary of State Colin Powell, on orders from the White House, then President George W. Bush himself, stated publicly that genocide was occurring. Neither suggested, however, that this designation would lead to concrete U.S. action in the near term beyond diplomatic activity in concert with the United Nations. A closer look shows that the trail of U.S. government pronouncements actually originated on Capitol Hill in July 2004 with a resolution calling the fighting in Darfur a "genocide" and holding the Sudanese government culpable. As often happens, resolutions find their way into reporters' questions at press briefings, and the White House eventually had to decide whether or not to go along with Congress. Revealingly, one year later, the special envoy on Sudan, former Senator John Danforth, admitted during an interview with BBC's *Panorama* that "the White House described Darfur as 'genocide' to please the Christian right." (This was reported by both *The Independent* on July 2 and BBC News on July 3, 2005)

It is noteworthy that no other country in the world has followed the American lead. Neither has a single American or European scholar of Sudan known to me

ever agreed that a genocide has occurred in Darfur. Mass killings, yes; crimes against humanity, yes; forced dislocation of large numbers of innocent civilians, yes — but genocide, no. On at least one occasion, in a public debate in 2004, a fellow panelist and Darfur activist replied to a question, "The world has gotten disaster fatigue because there have been so many; but if we speak of genocide, that gets attention." If true, then talking about genocide is a tactic. But at what cost is it being used?

Although there have been news reports of mass killings — up to 450,000 by some claims — not a single mass grave has been located in Darfur despite careful monitoring by space satellites and ground patrols. The Sudanese government admits to about 10,000 killed as a result of war; reputable neutral observers place the figure at around 40,000. No one can be sure because no actual count exists. The "working" numbers of UN Special Envoy John Holmes are admitted extrapolations from estimates in one of 20 districts in Darfur early on in the conflict. In a recent article, Professor Mahmood Mamdani of Columbia University explains the discrepancies as resulting from groups counting the numbers who "died" instead of those "killed."⁹ Yet, these bloated numbers have been employed again and again to justify calls for even military action against Sudan. How to explain the activist campaigns, and the government's response?

I encountered reports of Darfur killings first in a 2004 *New York Times* op-ed by Nicholas Kristof, who described the gruesome brutalization of an African woman whose relatives he had met in a camp (of Zaghawas, as it turned out later). Other stories followed, and Kristof acquired notoriety as a journalistic Darfur activist by keeping the heat on the White House and repeatedly challenging President Bush to

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act to prevent the slaughter of "hundreds of thousands" allegedly planned by Khartoum.

Other, mostly American, journalists arrived in the region and filed stories about malnourished children, their mothers too frightened to leave camps to collect firewood, and tales of rape and murder. These stories may have been the impetus for world action as NGOs and aid missions arrived under international auspices. Two European scholars with 46 years of combined experience in Darfur referred to these writers derisively as "helicopter journalists." By contrast, a few thoughtful analyses by authors who spent several weeks on the ground produced a much more nuanced picture.¹⁰

Yet, with the passage of time, a humanitarian crisis that had been stabilized by late 2004 and seemed under control from mid-2005 onward except for sporadic fighting in isolated areas, somehow morphed into a morality tale of good versus evil, with roles clearly assigned by the growing activist community in the United States. Journalists who wrote about alleged Arab savagery were given print and air time, while those who actually spent weeks rather than days in the area and reported a more complex situation were bypassed in the major media and had to resort to the blogosphere for publication.

These developments coincided with the growth of an activist campaign that was to capture the attention of media, academia, and national and state legislatures. Most important has been the aforementioned Save Darfur Coalition, cofounded in July 2004 by the American Jewish World Service and the U.S. Holocaust Memorial Commission. Over time, it attracted roughly 170 other groups, collected large sums of money through a well-organized national campaign and persuaded a number of state legislatures to divest from Sudan.

Its most effective tactic initially may have been the purchase of full-page ads in major news publications. Complete with heart-rending pictures of suffering women and children, the ads challenged viewers with a question posed on behalf of their own grandchildren: "What did *you* do about preventing the genocide in Darfur?"

Rallies were scheduled in major cities (but usually without any Darfurians participating); highly tendentious "documentaries" and other materials were distributed across college campuses; Hollywood personalities (George Clooney, Mia Farrow, Don Cheadle) were recruited to the cause. In the run-up to the Beijing Olympics, pressure was put on China to use its influence in Khartoum to force the regime to be more "forthcoming."

China appointed a special envoy who actually succeeded in persuading Bashir to permit UN peacekeepers into Darfur, but the coalition wanted more. At the time of student riots in and about Chinese-occupied Tibet, the coalition pressed for public action against China because of its Sudan policy. Even though China was not occupying Darfur, U.S. athletes were requested to take a public stance against their Olympic hosts on behalf of Darfur, an act that would have amounted to a violation of the Olympic oath. When this move backfired and the co-chair of "Team Darfur" was refused a visa for China, relentless pressure on clearly confused athletes produced a comical vignette: A naturalized Sudanese 1500-meter runner was chosen to carry the U.S. flag at the opening ceremonies. He was hailed as a refugee who "escaped the horrors of Darfur" and had become a "symbol of American values." In fact, the runner escaped from *rebel* attacks in his native village near the Kenya border and had never been in Darfur.

The excesses of Save Darfur became costly. A favorable article by *The Washington Post's* foremost writer on lobbies and PACs, Jeffery Birnbaum, revealed (on July 1, 2007) that none of the large sums collected by Save Darfur had made it to that region but financed a large full-time staff and expensive political action. The organization's printed claims about events in Darfur and America were vastly exaggerated and had become an embarrassment. The leadership was replaced, and work was transferred mostly to a daughter organization, the Enough! Project. In the interim, however, Save Darfur had spawned a French branch, Urgence Darfour, and coordinated closely with the British Aegis Trust. Politicians in these three countries have become outspoken activists on Darfur. In the United States, some student-activist groups have also formed, especially Stand (Students Taking Action Now: Darfur) and the Genocide Intervention Network (GI-net).

There can be no doubt that the Darfur activists have created an atmosphere conducive to demonizing Sudan's leadership in the United States and, evidently, also among staff of the ICC, at least the chief prosecutor. President Bashir has *de facto* been convicted in the American court of public opinion, and American leaders are under pressure to respond to the images still in our media. Thus, every major candidate for president in 2008 felt compelled to comment publicly about the "horrors" of Darfur.

Meanwhile, Khartoum, the Arab world and most of Africa see the Darfur crisis quite differently: a humanitarian catastrophe resulting from increased desertification, coupled with population growth in an already marginalized area, leading local insurgents to mount the sort of regional rebellion that has happened periodically throughout recorded history. One can certainly debate

the appropriateness of the government's retaliation against the insurgents, but the latter did not merely "take up arms against the central government," as endlessly repeated by Western media. They killed hundreds of uniformed officials, burnt their barracks and destroyed small aircraft on the ground — details usually left out of these reports. At what point are countermeasures proportional or not? Israel in Gaza? The United States in Iraq and Afghanistan? Clearly, honest observers can debate these matters.

But the question arises as to why American activists, including some high officials (e.g. U.S. ambassador to the United Nations), continue to claim an "ongoing genocide" as recently as early 2009, while UN officials estimate that "only" around 100 persons per month have lost their lives in the past four years (and most of them from rebel-on-rebel attacks). Yet the ICC prosecutor claims that figure to be 5,000. And why has there been virtually no attention given to the infinitely greater loss of life in northeastern Congo or in the continuing humanitarian catastrophe in Somalia, both cases easily worse than Darfur ever was.

Omar al-Bashir is on record as believing that the campaign against his regime has been orchestrated by Washington, which supported anti-Khartoum rebels throughout the 1990s, and that he has been on the short list for regime change. His conclusions are based on (1) the overt military and political support for the rebel SPLM, especially during the second Clinton administration; (2) American newspaper reports alleging slavery supposedly condoned by Bashir's regime, complete with stories of "slave redemptions" (unmasked as fabrications several years later); (3) the missile attack on the Shifa pharmaceutical factory falsely identified as a chemical-weapons site; (4) media campaigns labeling him the "world's

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worst dictator" (*Parade Magazine*); (5) the ratcheting up of sanctions to affect the northern provinces only. All these measures convinced Bashir that he and his regime had been singled out by Washington because they were "Islamist." This perception has stiffened his resolve to resist cooperation with any groups even vaguely associated with Washington, such as NATO and certain NGOs.¹¹ It has simultaneously led him to discount reports of human suffering as part of Western propaganda, to everybody's loss.

During the past year, some isolated voices challenging these Darfur narratives so popular in a few Western countries have increased, yet they still are refused access to major media. It is instructive that the Save Darfur Coalition, the Enough! Project and their European allies refuse to enter into public debates with scholars of Sudan. It remains a mystery why the alleged "free press" will not give space to those challenging the activist Darfur narrative, and why many colleges and Washington-based think tanks do not invite speakers with alternative and academically rooted perspectives.

The Obama administration has pledged an atmosphere of open-mindedness and dialogue with various "countries of concern." The newly appointed special envoy to Sudan, Major General Jonathan Gration (U.S. Air Force, retired), has stated his willingness to listen and learn. Will he do that? And if he does, will President Obama be able to deflect the heat from all the vested domestic interests that have accumulated during the past half-decade and made Darfur their "project"? What about the role of the Obama campaign's foreign-policy adviser, Susan Rice, now U.S. ambassador to the United Nations, a long-time anti-Khartoum hawk? She seems determined to push a policy of confrontation with Khartoum, as against General Gration's efforts to seek open dialogue and common ground? Which side will the president choose?

Sudan and America have much in common, as will become clear if we are allowed to get to know each other as we really are and not as others, uninformed at that, would wish to paint us.

¹ Charges of genocide were dismissed, but five crimes against humanity (murder, extermination, forcible transfer, torture and rape) were upheld, as were two war crimes (pillaging and directing attacks on civilian populations).

² Notable examples are Andrew Natsios, the former Special Sudan envoy, and Alex DeWaal, Harvard University and SSRC and a specialist on Western Sudan, who have been frequent critics of Khartoum but disagree with the ICC ruling as counterproductive. See Andrew Natsios, "Waltz with Bashir," *Foreign Affairs*, March 23, 2009; also Alex DeWaal on his SSRC blog *Making Sense of Darfur*.

³ See also, Julie Flint and Alex DeWaal, "Case Closed: A Prosecutor Without Borders," *World Affairs Journal*, Spring 2009.

⁴ *Wall Street Journal*, June 18, 2008.

⁵ One of Europe's foremost experts on Darfur, R.S. O'Fahey, reported that while crisscrossing Darfur on camelback in 1978 for six weeks, he never once encountered a government official.

⁶ The juntas were led by, respectively, Ibrahim Abboud, November 1958-October 1964; Jafar Numayri, May 1969-April 1985; and Omar H.A. al-Bashir, June 1989 to present.

⁷ Robert O. Collins, *A History of Modern Sudan* (Cambridge, 2008), ch.10.

⁸ Collins, *op.cit.*, p.286.

⁹ Mahmood Mamdani, "Beware Human Rights Fundamentalism," *Mail and Guardian Online*, March 20, 2009.

¹⁰ See Tim Judah, "The Stakes in Darfur," *New York Review of Books*, January 13, 2005.

¹¹ General Gration's conciliatory statements — as reported — during his first visit to Khartoum in early April seemed to have changed the atmospherics between official Washington and Sudan.