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GENOCIDE AND ETHNIC CLEANSING: WHY THE DISTINCTION? A DISCUSSION IN THE CONTEXT OF ATROCITIES OCCURRING IN SUDAN

I. INTRODUCTION

> [W]hen Amina and [her son] Mohammed arrived at the wells [of her town in Darfur], they heard the sound of approaching planes . . . . [A]ircraft began bombing the area around the wells, where a group of [Amina's] neighbors had also gathered. She and Mohammed were separated, as she fled with a few of the family's donkeys, and he tried to assemble their panicked sheep . . . . [D]ozens of people and hundreds of animals were killed in the onslaught. In the wake of the planes came Sudanese soldiers...followed by hundreds of menacing [J]anjaweed on camelback and horseback . . . . By nightfall, the sounds of gunfire and screaming had faded, and Amina furtively returned to the wells. She discovered that they were stuffed with corpses, many of which had been dismembered. She was determined to find her son . . . . Suddenly, she spotted his face—but only his face. Mohammed had been beheaded.[1]

Why do some commentators distinguish between the crimes of genocide and ethnic cleansing? How does distinguishing genocide from ethnic cleansing affect the international community's response to atrocities in the Darfur region of the Republic of Sudan? The United States, the United Nations, the European Union, the African Union, Amnesty International, and Human Rights Watch cannot all agree on whether genocide or ethnic cleansing best describes the atrocities occurring in Darfur.[2] Defining a crime to be an act of genocide theoretically forces the international community to take action, while defining it as an act of ethnic cleansing may not.[3] The international legal

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1. Samantha Power, *Dying in Darfur*, THE NEW YORKER, Aug. 23, 2004, at 1-2, *available at* http://www.newyorker.com/printable/?fact/040830fa_fact1. Samantha Power, a Professor at Harvard University, won a Pulitzer Prize for her book *A Problem from Hell: America and the Age of Genocide* published by Basic Books in 2002. Faculty Index, Harvard University, John F. Kennedy School of Government Faculty, *at* http://ksgfaculty.harvard.edu/Samantha_Power (last visited Feb. 1, 2005).

2. Paul Richter & Maggie Farley, *U.S. Declares Darfur Crisis is Genocide*, L.A. TIMES, Aug. 10, 2004, at A3, *available at* 2004 WL 55936477.

3. *See infra* Part III.A (discussion on duty to prevent genocide); *see also* Robin Dixon, *Darfur Crisis Stokes Anti-U.S. Sentiment*, L.A. TIMES, Sept. 9, 2004, at A5, *available at* 2004 WL 55936323.

community needs to understand the possible ramifications of its decision before determining how to label the crimes occurring in Darfur.[4]

This Comment will examine the terms "genocide" and "ethnic cleansing," consider their similarities, differences and implications and interpret how each may apply to Sudan. The Comment will determine the significance of these two crimes under international criminal law in the "strict sense." "Strict sense" means "the law applicable in an international criminal court having the power to impose specific[] penal sanctions on offenders."[5] Though customary international law may provide national jurisdiction over certain crimes like ethnic cleansing, only genocide, crimes against humanity, and war crimes subject individuals to criminal responsibility in an international tribunal.[6] This Comment will focus specifically on the jurisdiction of

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4. In its most recent decision, on March 31, 2005, the U.N. Security Council adopted Resolution 1593 to refer the Darfur situation to the ICC Prosecutor for further investigation. Press Release, International Criminal Court, Security Council Refers Situation in Darfur to ICC Prosecutor (Apr. 1, 2005), *at* http://www.icc-cpi.int/press/pressreleases/98.html (last visited Apr. 4, 2005) [hereinafter ICC Prosecutor]. Chief Prosecutor Luis Moreno-Ocampo stated in response, "Before starting an investigation, I am required under the Statute to assess factors including crimes and admissibility." *Id.* Although this decision is a step forward to resolving the Darfur conflict, it has been over two years for the international community to begin to take action. *See* infra Part IIA. In the meantime, quibbling over how to term the Darfur conflict has led to dire consequences for the Sudanese. *Id.* For an update on current events regarding the ICC referral, visit the court's website at http://www.icc-cpi.int/home.html&l=en.

5. EDWARD M. WISE & ELLEN S. PODGER, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS § 1.01[C] (2000) (discussing the third category of international criminal law entitled, "Criminal Aspects of International Law: International Criminal Law *Stricto Sensu*"). International law *stricto sensu*, or in the strict sense, also means the "'true,' 'proper,' or 'material' sense" of international criminal law. *Id.*

6. *Id.*; *see also* Interview with Gwen Young, Esq., Humanitarian Affairs Advisor, Medecins Sans Frontieres-Holland (Oct. 29, 2004) (on file with author); *see also* Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte, [2000] 1 A.C. 147, 275-76 (2000), *available at* 1999 WL 250052 (Millett, L.J., dissenting). Article 5 of the Rome Statute lists only genocide, crimes against humanity, and war crimes as within the jurisdiction of the ICC, although aggression may become a fourth strict international crime. Rome Statute of the Int'l Crim. Ct., U.N. GAOR, 53d Sess., art. 5(1)(a)-(c), (2), U.N. Doc. A/CONF.183/9 (1998), *available at* http://www.un.org/law/icc/statute/romefra.htm (last visited Jan. 13, 2005) [hereinafter The Rome Statute]. Two other categories, besides international law in the strict sense, fall under the broad term international law. WISE & PODGER, *supra* note 5, § 1.01. This Comment will not discuss the other two categories termed "international aspects of national criminal law" or "international standards of criminal justice," which respectively concern national jurisdiction over extraterritorial crime (or customary international law) and "principles or rules of public international law that imposes obligations on states with respect to the content of their domestic criminal law." *Id.* §1.01[B]; *see also Regina*, [2000] 1 A. C. at 276 (Millett, L.J., dissenting) ("Every state has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria."). Crimes of universal jurisdiction fall under customary international law. WISE & PODGER, *supra* note 5, § 1.01[B].

the International Criminal Court (ICC).[7]

To accomplish this, the Comment will begin by providing a brief history of the conflicts in Sudan. Second, the crimes of genocide and ethnic cleansing will be considered to determine which crime best describes the events in Darfur. Third, this Comment will examine ICC jurisdiction over Sudan and its leaders. Fourth, using Rwanda as an example, this Comment will examine the effect of word choice on the Sudanese people. Finally, the author will propose some possible solutions to the problem of inaction.

Definitions of the crimes of genocide and ethnic cleansing critically influence whether and when states will intervene to stop mass-killings and attacks against innocent civilians. Imprecise definitions leave room for argument between states and may result in inaction, causing greater human suffering and devastation.[8] To prevent unnecessary human suffering, international institutions and lawyers must be meticulous in their use of terminology, bearing in mind the impact legal or non-legal terms have on the people the law purports to protect.

II. THE SUDAN CRISIS BACKGROUND

A. *History of the Sudan and Darfur Conflicts*

Sudan, Africa's largest country, was exposed to war, violence, and human suffering decades before the current Darfur catastrophe.[9] Since 1956, the country has been divided by a civil war between the Muslim-Arabic north and non-Muslim-African south.[10] In 1983, the

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7. This is relevant considering the U.N. has authorized the ICC Prosecutor to investigate these crimes. *See supra* note 4. When a member state, such as Sudan, is not a member of the ICC's Rome Statute, the Security Council must confer jurisdiction by referring the matter to the ICC. International Federation for Human Rights, *The Security Council Refers the Darfur Situation to the International Criminal Court*, (Apr. 4, 2005), *at* http://www.fidh.org/article.php3?id_article=2336 (last visited Apr. 4, 2005) [hereinafter *Darfur Situation*]. Similarly, with an ad hoc tribunal, the U.N. creates jurisdiction. Interview with Gwen Young, *supra* note 6; *see also* WISE & PODGER, *supra* note 5, § 1.01[C].

8. Power, *supra* note 1, at 12 ("In the meantime, the debate over semantics has only further distracted the international community from the more important debate about how to save lives.").

9. *See* DIRECTORATE OF INTELLIGENCE, CENTRAL INTELLIGENCE AGENCY, 2004 THE WORLD FACTBOOK, SUDAN, *at* http://www.cia.gov/cia/publications/factbook/print/su.html (last visited Feb. 15, 2005) [hereinafter WORLD FACTBOOK] (Sudan is about one fourth the size of the U.S.); *Sudan Needs Time, Arab League Says*, L.A. TIMES, Aug. 9, 2004, at A3, *available at* 2004 WL 55930129 [hereinafter *Sudan Needs Time*]; Power, *supra* note 1, at 2.

10. *See* WORLD FACTBOOK, *supra* note 9. Sudan's only peaceful period lasted from 1972 to 1982. *Id. See also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 297 (S.D.N.Y. 2003).

government of Sudan sought to convert Sudan to a Muslim Arab nation. To achieve this goal, the government adopted Islamic *Shari'a* law as the law of the land.[11]

Since 1989, the Sudanese government has been led by President Omar Hassan al-Bashir. al-Bashir's "Taliban-style Islamic fundamentalist" government has applied *Shari'a* law to persecute non-Muslims.[12] Christians, and other non-Muslims have been subjected to "extrajudicial killing, kidnapping, rape, enslavement, and confiscation of property."[13] Consequently, since 1983, an estimated two million Sudanese people have died and over four million have fled their homes.[14] This tumultuous setting has lead to the current conflict in Darfur, which erupted in February of 2003, amongst various promises of peace.[15]

The current conflict, described as "the world's greatest humanitarian crisis," began when the Sudan government responded to a rebel uprising in the Darfur region.[16] Arabic militia, referred to as the "Janjaweed," commissioned by Sudan's Arabic Khartoum government, began attacking African[17] rebel groups who objected to governmental

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11. *Presbyterian Church*, 244 F. Supp. 2d at 297.

12. *Id.* at 298. al-Bashir is the general who fought to replace the former regime from 1986. *Id.*

13. *Id.*; *see also Sudan, Oil, and Human Rights*, HUM. RTS. WATCH, 2003, at 41, 42, *available at* http:www.hrw.org/reports/2003/ sudan1103/sudanprint.pdf; *see also Famine in Sudan, 1998*, HUM. RTS. WATCH, 1999, *at* http://www.hrw.org/report/1999/sudan/SUDAWEB2-42.htm.

14. *Id.*; *see also* WORLD FACTBOOK, *supra* note 9.

15. *Sudan Needs Time, supra* note 9; *see also* WORLD FACTBOOK, *supra* note 9 (peace accords and a cease-fire agreement were signed in 2002 and 2003). Most recently, on January 9, 2005, a peace agreement between the government of Sudan and the Sudan People's Libertarian Movement/Army settled a twenty-one year conflict. *Targeting the Fur: Mass Killings in Darfur*, HUM. RTS. WATCH, Jan. 24, 2005, *at* http://hrw.org/backgrounder/africa/darfur0105/2.htm. [hereinafter *Targeting the Fur*]. However, this negotiation and agreement did not include the conflict in Darfur, since the conflict broke out after the commencement of the peace talks. *Id.*

16. Amnesty International, *Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences*, AI Index: AFR 54/076/2004, July 19, 2004, *available at* http://web.amnesty.org/library/eng-sdn/index (last visited Feb. 15, 2005) [hereinafter *Rape As a Weapon of War*] (quoting Mukesh Kapila, the United Nations Humanitarian Coordinator in Sudan).

17.

> Although the term "African" historically had little relevance in the Darfur context, many of the Fur, Zaghawa, and other victims of government-militia attacks have increasingly identified themselves as "African" in opposition to their "Arab" attackers. This is a troubling sign of the increasing polarizing effect of the conflict, in which many—but not all—ethnic groups have felt compelled to become involved along ethnic lines. Almost all the people of Darfur are Muslim and ethnic identity has previously been flexible, with intermarriage between ethnic groups, particularly in urban areas.

Targeting the Fur, supra note 15, n.8.

favoritism of the region's Arabs and its "policies of marginalization, racial discrimination, exclusion, exploitation, and divisiveness" toward the African majority.[18] Janjaweed means "armed men on horseback,"[19] though civilians call them "evil men."[20]

The Janjaweed are Arabic and comprised of native camel herders and migrants from neighboring African countries who moved to Darfur thirty years ago.[21] Musa Halil, top on the U.S. State Department's list of suspected war criminals heads the Janjaweed.[22] According to Amnesty International, the Janjaweed militia has merged into the government's paramilitary Popular Defence Forces, and the Sudanese army.[23] Fortified by the Janjaweed, the Popular Defence Forces and Sudanese Army have committed a full spectrum of crimes and human rights violations against civilians, including women and children.[24]

The events in Darfur have been described as a "widespread pattern of atrocities" resulting in the destruction of more than 400 villages.[25] Acts include attacking villages with aerial bombs, machine guns, and fire; destroying livestock, crops and other food sources; committing violent rapes; abducting and torturing civilians; mass execution-style killings[26] leading to over 100,000 deaths; and forcing around two million people to flee Darfur in a little over a year.[27] Re-

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18. Power, *supra* note 1, at 4-5 (quoting the "Sudanese Liberation Army's founding manifesto"). The rebels are mostly farmers consisting of the Fur, Masalit, and Zaghawa tribes, whereas the Arabs are nomadic camel herders. *Id.* at 3. Janjaweed is written as "Janjuweed," "Janjawid," or "Jingawiet." *See Janjaweed*, WIKIPEDIA, *at* http://en.wikipedia.org/wiki/Janjaweed (last visited Feb. 21, 2005) [hereinafter *Janjaweed*].

19. *Janjaweed*, *supra* note 18. Janjaweed may also "loosely mean[] 'devils on horseback.'" Simon Robinson, *The Tragedy of Sudan*, Time, Oct. 4, 2004, at 56.

20. Hilary Anderson, *Ethnic Cleansing Blights Sudan*, BBC NEWS, May 27, 2004, *available at* http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/3752871.stm (last visited Feb. 15, 2005).

21. Power, *supra* note 1, at 1.

22. Jeevan Vasagar, *Militia Chief Scorns Slaughter Charge*, THE GUARDIAN, July 16, 2004, *available at* http://www.guardian.co.uk/international/story/0,3604,1262348,00.html (last visited Feb. 4, 2005).

23. *Rape as a Weapon of War*, *supra* note 16.

24. *Darfur Destroyed, Ethnic Cleansing By Government and Militia Forces in Western Sudan*, HUM. RTS. WATCH, May 2004, at 1, *available at* http://hrw.org/reports/2004/sudan0504/ [hereinafter *Darfur Destroyed*].

25. *Suspend Sudan Now*, WASH. POST, Sept. 13, 2004, at A20, *available at* 2004 WL 93175824.

26. *Darfur Destroyed*, *supra* note 24, at 1, 2, 7, 8, 9; *Rape as a Weapon of War*, *supra* note 16, at 1.

27. Maggie Farley, *Security Council Votes to Provide Aid After End to Sudan Civil War; The U.N. Resolution is Aimed at Nudging the Nation's Warring Sides to Abide by a Newly Signed Pact and Finalize a Peace Agreement by Dec. 31*, L.A. TIMES, Nov. 20, 2004, at A5, *available at* 2004 WL 55950620; *see also Targeting the Fur*, *supra* note 15 (reporting the current estimated numbers of deaths and displaced civilians).

porters claim, "Hundreds of thousands have been penned into concentration camps, which are patrolled by government-supported [J]anjaweed militiamen who rape women nightly and murder men who try to leave to gather food for their families."[28] These crimes have all been done with "total impunity,"[29] since the government has guaranteed the Janjaweed they will not be punished for their actions.[30] Instead, investigators have found the government is falsely prosecuting criminals arrested before the Darfur attacks as Janjaweed.[31] Human Rights Watch reports, "The Janjaweed are not only persons whose criminal past is forgiven, they are also assured that they will not have to face local criminal prosecution for any of the crimes committed while pursuing and evicting, looting and pillaging, the ethnic groups allegedly aligned with the rebels."[32] Sudan's government, therefore, directly supports the Janjaweed in carrying out these horrific crimes.

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28. Samantha Power & John Prendergast, *Break Through to Darfur: Combine Leverage, Internationalism and Aid to Stop the Killing in Sudan*, L.A. TIMES, June 2, 2004, *available at* http://www.ksg.harvard.edu/news/opeds/index.html (last visited Feb. 21, 2005) (emphasis omitted).

29. *Rape As a Weapon of War*, *supra* note 16.

30. *Darfur Destroyed*, *supra* note 24, at 49. In August 2004, the U.N. reported that Sudan "has acknowledged it has 'control' over some [J]anjaweed fighters in the region." *Sudan Admits Ties with Militias the U.N. Says the African Government Concedes it Has "Control" Over Some Fighters*, ORLANDO SENTINEL, Aug. 21, 2004, *available at* 2004 WL 89084400.

31. Power, *supra* note 1, at 10.

> The government . . . pretended to arrest and prosecute war criminals . . . . When I met with Salah Gosh, on July 11th, he said that forty-six *janjaweed* had been arrested in Darfur. A week later, a government official upped the number to sixty-seven. The state-owned media reported that in Nyala, a town in South Darfur, ten *janjaweed* had been sentenced to amputation of their right hands and left feet for their role in recent assaults. To confirm this, I scheduled an appointment with Nyala's top judge and got his permission to visit the jail on July 21st. He presented me with files on the recently arrested. Seventeen *janjaweed* had been convicted so far, he said, and nineteen were awaiting trial. "This isn't just talk," he said, handing me the indictments. "This is proof." The documents were neatly filled out, and each listed the name of the prisoner and the section of the criminal code that had been violated. But when I looked more closely the papers seemed suspicious: every one of the nineteen new arrivals was said to have been processed on July 14th and was scheduled to begin trial on July 30th. I made my way into the prison courtyard, where sixty-three inmates were gathered. The men who had already been convicted were sitting cross-legged on the right side, wearing mud-brown prison uniforms, and those awaiting trial sat on the left, dressed in grimy white djellabahs. The prison director urged me to question them. I asked how many had been arrested in 2004. Only four men raised their hands. Who had been accused of rape? None. Had any of them arrived at the jail on July 14th? No. Had any of them even been arrested in the past three months? No. The Sudanese government was attempting to pass off criminals arrested several years ago as *janjaweed* but hadn't informed the prisoners of the ploy.

Id.

32. *Darfur Destroyed*, *supra* note 24, at 49.

Unlike Sudan's prior civil war and persecution of non-Muslims, this discrimination is aimed at many people who are Muslim, but are African, not ethnically Arab.[33] Sudan's present population of about thirty-nine million consists of fifty-two percent African and thirty-nine percent Arab.[34] Seventy percent of Sudan's population is Sunni Muslim.[35] Although Arabs are considered the minority, they derogatorily refer to the African majority as "zurga," signifying blacks.[36] A BBC News correspondent in Darfur asked different African civilians why this was happening, and always heard the same response, "It is because we are black."[37] One witness to a Janjaweed attack on three Bareh area villages, resulting in 111 deaths, reported, "The Arab nomads never came with cars and helicopters. . . . This is the government. . . . The government doesn't like black people."[38] Another witness to a similar occurrence described the government's "program" in Darfur: "They killed everything black—guns or no guns, cattle or no cattle. This is the program: they don't want African tribes in this place."[39] This "program," targeting one ethnic group without discerning between rebel and civilian, woman and child, is clearly more than a simple retaliation against governmental anarchy.[40] Yet, what exactly is it? This leads into the current debate between different international entities over what term best describes the conflict between Sudan's government and the non-Arabic African civilian population.

B. The Debate

Many influential nations and international institutions disagree on how to label atrocities occurring in Sudan.[41] A year before the conflicts in Darfur, in the Sudan Peace Act, the U.S. Congress had already declared acts occurring in Sudan to be genocide.[42] The U.S. Congress condemned Sudan's general record on human rights and its "policy of low-intensity ethnic cleansing."[43] In July of 2004, the U.S. Congress

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33. *See Targeting the Fur*, *supra* note 15, n.8.
34. WORLD FACTBOOK, *supra* note 9.
35. *Id.*
36. Power, *supra* note 1, at 3.
37. Anderson, *supra* note 20.
38. *Darfur Destroyed*, *supra* note 24, at 13.
39. *Id.* at 27.
40. *Id.* (referring to the government's "program."); *cf.* Power, *supra* note 1, at 11.
41. *See* Richter & Farley, *supra* note 2.
42. Sudan Peace Act of 2002, Pub. L. No. 107-245 § 2(10), 116 Stat 1504 (2002).
43. *Id.* §§ 4(1)(B), 4(2).

formed a resolution declaring genocide was taking place in Darfur.[44] Later, Secretary of State Colin L. Powell declared the same but qualified the designation by saying, "[N]o new action is dictated by this determination."[45] U.S. popular culture has likewise used the term in a new charity album entitled "Genocide in Sudan," featuring many well-known American artists.[46] Although the U.S. is somewhat alone in its designation, officials in England have said it *may* be genocide.[47]

In contrast, other institutions refrain from using the term genocide and some claim the events in Darfur constitute ethnic cleansing.[48] On July 30, 2004, the U.N. Security Council passed a resolution giving the government thirty days to disarm the Janjaweed,[49] however, the period expired and reports showed Sudan did not comply with the resolution.[50] Oil sanctions are the final consequence, according to U.N. envoy Jan Pronk.[51] The E.U. and countries, such as France, and Germany, have concluded evidence does not point to genocide at this time.[52] Human rights organizations, such as Human Rights Watch, are calling it ethnic cleansing.[53] Yet, Mustafa Osman Ismail, Sudan's foreign minister, stated in May of 2004, "What is happening in Darfur is neither ethnic cleansing nor genocide. It is a state of war, which resulted in a humanitarian situation."[54] The media have used both terms,

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44. Richter & Farley, *supra* note 2.

45. *Id.* Powell made this determination because he felt the July resolution had little effect on resolving the crisis and preventing Janjaweed attacks. *See* David S. Cloud, *Powell Cites Sudan for Genocide but Calls U.N. Sanctions Unlikely*, WALL ST. J., Sept. 10, 2004, at A6, *available at* 2004 WL-WSJ 56940250. Even though the U.S. is planning no military intervention, Powell's stated purpose in this designation was to increase political pressure on Sudan to stop these attacks. *Id.* Powell based his determination on an independent expert investigation collecting 1,136 first-person accounts, "a third [who] had heard racial epithets while being attacked, and three-quarters [who] had seen government insignia on the uniforms of their attackers." *Genocide*, WASH. POST, Sept. 12, 2004, at B06, *available at* 2004 WL 93175461.

46. Steve Hochman, *Pop Music; Pop Eye; Slick Rick Leaves Cell, Anger Behind*, L.A. TIMES, Sept. 5, 2004, at E41, *available at* 2004 WL 55935699.

47. William Maclean, *Sudan Accuses U.S. of Using Darfur Crisis as a Ploy*, NAT'L POST, Sept. 11, 2004, at A9, *available at* 2004 WL 90910774.

48. Richter & Farley, *supra* note 2.

49. *See* Omar Hassan al-Bashir & Andrew England, *The Ruthless Survivor: Man in the News Omar Hassan al-Bashir*, FIN. TIMES, Aug. 28, 2004, at 11, *available at* 2004 WL 90109763.

50. *See* Maggie Farley, *U.N. Sees Meager Progress in Darfur*, L.A. TIMES, Sept. 2, 2004, at A3, *available at* 2004 WL 55935001.

51. Maggie Farley, *Ambassador Tries to Spur U.N. to Act on Sudan*, L.A. TIMES, Sept. 9, 2004, at A3, *available at* 2004 WL 55936355.

52. *See* Richter & Farley, *supra* note 2; Maclean, *supra* note 47, at A9.

53. *See generally Darfur Destroyed*, *supra* note 24, at 39; Dixon, *supra* note 3, at A5.

54. Margaret Neighbor, *Ethnic Cleansing Shame of Sudan*, THE SCOTSMAN, May 8, 2004, *available at* 2004 WL 75527399.

apparently interchangeably.[55] Meanwhile, Sudanese victims, according to Irene Khan, Secretary General of Amnesty International, do not understand these words, but know unmistakably they are being persecuted and want justice.[56]

After two years of debate over the Darfur conflict, the U.N. finally passed a resolution in March 2005 to refer the situation in Darfur to the ICC Prosecutor to investigate these crimes.[57] England and France were vital in urging the U.N. Security Council to refer Darfur to the ICC and influencing the U.S. not to veto the resolution; however, the U.S. is still "the only council member to describe the killings in Darfur as genocide[.]"[58] International institutions debated for over two years before the U.N. passed this resolution, prolonging inaction and resulting in unnecessary violence.[59] Therefore, although the U.N. has taken a step in the right direction, without clear definitions and applications of the terms genocide and ethnic cleansing, similar debates leading to similar consequences will continue.

II. HOW INTERNATIONAL LAW OF GENOCIDE AND ETHNIC CLEANSING RELATE TO SUDAN

Genocide and ethnic cleansing are two different terms that may each be utilized to describe the events in Darfur. These terms maintain many similarities, making it difficult to distinguish between them. The following section will discuss the applicable definitions, the laws associated with each of these terms and the application of each term to the situation in Darfur to determine the disparate impact on international response and prevention.

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55. *See generally Genocide*, *supra* note 45.

56. Video tape: Darfur, Sudan (Irene Khan, Secretary General Amnesty International, Sept. 2004), *available at* http://news.amnesty.org/mavp/news.nsf/index_mi/ENGAFR541272004?open&index=6E98A929315D7D2980256F16003C707D&mediatype=video&publishdate=21-09-2004 (last visited Feb. 15, 2005) Irene Khan stated,

> The people do not understand the word "genocide," the people do not understand words like "war crimes." and "crimes against humanity." But they know very well what has happened to them and they know and they are asking for justice and that's what they deserve, that's what they are asking for.

Id.

57. *See ICC Prosecutor*, *supra* note 4.

58. James Bone, *U.S. Recognizes Global Tribunal*, CALGARY HERALD, Apr. 2, 2005 at A21, *available at* 2005 WLNR 5205672.

59. *See supra* note 4.

A. Genocide

The crime of genocide has been well-established since the middle of the twentieth century, when the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) took effect.[60] The definition of genocide is stated in Article 2 of the Genocide Convention:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[61]

Once an act is deemed genocide, state action in prevention and punishment is called for under Article 4 of the Genocide Convention.[62] There is both individual and state responsibility under international law for acts of genocide.[63]

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60. Convention on The Prevention and Punishment of The Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, *available at* http://www.unhchr.ch/html/menu3/b/p_genoci.htm (last visited Jan. 13, 2005) [hereinafter Genocide Convention].

61. *Id.* art. 2.

62. *Id.* art. 8. While involvement by the states is not expressly required under the Genocide Convention, it has been interpreted as "required" by scholars and politicians. *See* David Scheffer, *How to Bring Atrocity Criminals to Justice*, FIN. TIMES, Feb. 2, 2005, at 17, *available at* 2005 WL 71975860 (Scheffer, former U.S. Ambassador at Large for War Crimes Issues and George Washington University law professor, states, "The Genocide Convention requires parties 'to prevent and punish' the crime of genocide, but lays out no means by which to achieve prevention. No nation would have ratified the convention if it had forced them to use national militaries in foreign wars to stop genocide."); *see also* Nick Wadhams, *UN's Annan Urges Action to Stop Killing in Darfur; Panel Calls for International Trial for Those Behind Atrocities in Sudan*, THE HAMILTON SPECTATOR, Feb. 2, 2005, at A13, *available at* 2005 WL 61152583.

63. Genocide Convention, *supra* note 60, art. 4 (Article 4 states that "rulers, public officials or private individuals" are all responsible for genocide). The Rome Statute, which established the ICC on July 17, 1998, uses the Genocide Convention definition. The Rome Statute, *supra* note 6, art. 6. This is significant because it is the most recent document to codify international criminal law of genocide in the strict sense. WISE & PODGER, *supra* note 5, §1.101[C]. Note that the U.S. objects to the ICC for various reasons, one being the ICC's "theoretical power to prosecute Americans." *See* Kenneth Roth, *Bring the Darfur Killers to the World Court*, FIN. TIMES, Nov. 18, 2004, *available at* http://hrw.org/english/docs/2004/11/18/darfur9692.htm (last visited Feb. 21, 2005); *see also* Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out In Nuremberg, As Mirrored In the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 54 (2004) (discussing the United States' negative view toward the ICC versus the rest of the world's generally warm acceptance of the statute). In fact, the U.S. objected to the U.N. referral to the ICC, although ultimately choosing not to veto the resolution. Bone, *supra* note 58, at A21.

According to John Quigley, professor of law at Ohio State University, the Genocide Convention never specified a threshold number of deaths that must occur to constitute genocide, nor are "large numbers" necessary.[64] Furthermore, not every act listed in Article 2 involves death.[65] As explained by the Ad Hoc Tribunal for Rwanda (ICTR), in *Prosecutor v. Akayesu* the court interpreted acts constituting "conditions of life calculated to bring about [an ethnic group's] . . . physical destruction . . . [as] subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement."[66] Genocide is therefore not merely an act of massive killing and certain non-lethal acts may also constitute genocide.

Genocide is one of the "most serious crimes of concern to the international community as a whole."[67] Inasmuch, the prosecution must prove a particular *mens rea*, or mental state, accompanying the above acts.[68] According to the ICTR, this "specific intent" is a necessary element of genocide.[69] The court explains, "[S]pecific intent[] . . . demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.'"[70] Courts can infer genocidal intent "from the general context of the perpetration of other culpable acts systematically directed against that same group . . . ."[71]

This element of genocide is unique from crimes against humanity or war crimes,[72] and according to international attorney Gwen Young, the need to prove specific intent makes genocide a more difficult crime to prove than other international violations of human rights and humanitarian law.[73] As Young indicates, proving someone intended to wipe out an entire population is more difficult than proving the person

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64. John Quigley, *State Responsibility for Ethnic Cleansing*, 32 U.C. DAVIS L. REV. 341, 350 (1999).

65. *See* Genocide Convention, *supra* note 60, art. 2.

66. Prosecutor v. Akayesu, 1998 I.C.T.R. No. 96-4-T, ¶ 506 (Sept. 2, 1998), *available at* 1998 WL 1782077. This is an important comparison to make with ethnic cleansing, discussed in section III.B.

67. The Rome Statute, *supra* note 6, art. 5(1).

68. Prosecutor v. Akayesu, 1998 I.C.T.R. No. 96-4-T, ¶ 498.

69. *Id.*

70. *Id.*

71. *Id.* ¶ 523.

72. *Id.* ¶ 498. ("Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*.") (emphasis added).

73. Interview with Gwen Young, *supra* note 6.

merely intended to treat people badly and this horrible treatment unintentionally led to death.[74] In summary, genocide cannot take place without specific intent to destroy a certain ethnic group, through particular acts not necessarily amounting to death. However, there is no bright-line rule dictating how many people must be harmed before states may deem an act genocide.

B. Ethnic Cleansing

Unlike genocide, ethnic cleansing is not a "legal term of art."[75] In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the court explains ethnic cleansing is a literal translation of the Serbo-Croation term *etnicko cis cenje*, arising from atrocities in the former Yugoslavia.[76] The court understood ethnic cleansing to be "a euphemism for genocide."[77] Yet, opinions differ as to its meaning, which has no formal international law definition.[78] According to the Final Report of the Commission of Experts established by the United Nations under Security Council Resolution 780, ethnic cleansing is a fairly new concept.[79] The Commission of Experts defined ethnic cleansing as "rendering an area ethnically homogenous by using force or intimidation to remove from a given area persons from another ethnic or religious group."[80] According to scholar William A. Schabas, the drafters of

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74. *Id.*

75. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 296 n.2 (S.D.N.Y. 2003).

76. *Id.*

77. *Id. See generally* William A. Schabas, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287, 296 (2001) (citing William A. Schabas, *Genocide in International Law* 179-89 (2000)) ("The view that the two terms [genocide and ethnic cleansing] are equivalent or that they overlap is widely held within the diplomatic and academic communities.").

78. *Darfur Destroyed*, *supra* note 24, at 39.

79. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, U.N. SCOR, Part IIIB, at 28, U.N. Doc. S/1994/674 (1994), *available at* http://www.his.com/~twarrick/commxyu4.htm#par129 (quoting Interim Report of the Commission of Experts Pursuant to Security Council Resolution 780, U.N. SCOR, Annex I, at No. 55, U.N. Doc. S/25274 (1993)) (last visited Jan. 13, 2005) [hereinafter Part IIIB of Commission's Report]; *see also* Quigley, *supra* note 64, at 343 ("The term 'ethnic cleansing,' however, entered the vocabulary of diplomacy only in the 1990s, in connection with events in the former Yugoslavia.") (citing Interim Report of the Commission of Experts Pursuant to Security Council Resolution 780, U.N. SCOR, Annex I, at 16, U.N. Doc. S/25274 (1993)).

80. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, U.N. SCOR, Annex IV, at 1, S/1994/674/Add.2 (1994), *available at* http://www.ess.uwe.ac.uk/comexpert/ANX/IV.htm#Debut (last visited Feb. 21, 2005) [hereinafter The Commission of Expert's Report].

the Genocide Convention proposed to add "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" to the list of acts considered genocide.[81] This proposed addition is nearly identical in wording to the Commission of Expert's definition of ethnic cleansing.[82] Ultimately, the proposed addition resembling the crime of ethnic cleansing was not included in the Genocide Convention's definition of genocide because of U.N. members' concerns over already completed "forced transfers of minority groups" by the U.N. itself.[83] For example, the United States forced hundreds of thousands of Japanese Americans to leave their homes and move to internment camps during World War II, only several years before the drafting of the Genocide Convention.[84] Though others view ethnic cleansing as similar to genocide, in Schabas' opinion, ethnic cleansing and genocide are entirely distinct concepts.[85]

Unlike genocide, the term ethnic cleansing does not invoke strict international responsibility.[86] Instead, ethnic cleansing is widely applied to many different crimes, which taken separately would demand individual international responsibility as an international crime in the strict sense.[87] According to the Commission of Experts, the acts listed as ethnic cleansing encompass crimes against humanity and war

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81. Schabas, *supra* note 77, at 296 (quoting Genocide- Draft Convention (E/794) and Report of the Economic and Social Council, U.N. GAOR, 6th Comm., 3rd Sess., 234th mtg., U.N. Doc. A/C.6/234 (1948)) (internal quotation marks omitted).

82. *See* The Commission of Experts' Report, *supra* note 80, at 1 (stating the U.N. Security Council definition of ethnic cleansing). *See generally* Schabas, *supra* note 77, at 296.

83. Schabas, *supra* note 77, at 296 (quoting Comments by Governments on the Draft Convention prepared by the Secretariat, Communications from Non-Governmental Organizations, U.N. Doc. E/623 (1948)). This concern came from not only the "major powers" in the Genocide Convention but also from the United States' "concern that the proposed definition of the crime 'might be extended to embrace forced transfers of minority groups such as have already been carried out by members of the United Nations.'" *Id.* (quoting Comments by Governments on the Draft Convention prepared by the Secretariat, Communications from Non-Governmental Organizations, U.N. Doc. E/623 (1948)); *see also* Schabas, *supra* note 77, at 296 n.37.

84. *See generally Japanese American Internment*, WIKIPEDIA, *at* http://en.wikipedia.org/wiki/Japanese_internment (last visited Jan. 11, 2005). Other European nations were concerned over similar acts.

85. Schabas, *supra* note 77, at 295 ("The ultimate consequence [of the acts of genocide and ethnic cleansing] may be the same: the ethnically cleansed group, deprived of its linguistic, cultural, economic and political infrastructure may well cease to exist as a result of such forced migration. But this corresponds to acts of cultural genocide which are not, unfortunately, contemplated by the Convention definition."). Schabas claims the act may begin as ethnic cleansing and turn into genocide at some point. *Id.*

86. Quigley, *supra* note 64, at 346.

87. *Id.*

crimes, and can constitute genocide under the Genocide Convention, including: "murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property."[88] The International Criminal Tribunal for the Former Yugoslavia (ICTY), in *Prosecutor v. Tadic*, borrowed the term ethnic cleansing from the Security Council report describing the atrocities in the Former Yugoslavia, yet failed to define the term.[89] Instead, the court tried the defendant for crimes against humanity, which "implies that [ethnic cleansing] . . . too was a crime against humanity and not genocide."[90] Consequently, the underlying act constituting ethnic cleansing is the most important aspect to determine individual and state responsibility.

Another difference between genocide and ethnic cleansing is the element of intent. Because ethnic cleansing is not a legal term, the element of intent derives from the underlying acts. If ethnic cleansing is viewed as genocide, the acts would require specific intent.[91] Accordingly, "systematic expulsion from homes"[92] discussed by the ICTR would have to be premeditated and purposeful, which (as discussed) is difficult to prove.[93] Otherwise, as a crime against humanity, the acts must be accomplished "as part of a widespread or systematic

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88. Part IIIB of Commission's Report, *supra* note 79, at 28 (quoting Interim Report of the Commission of Experts Pursuant to Security Council Resolution 780, U.N. SCOR, Annex I, at No. 56, U.N. Doc. S/25274 (1993)). The Rome Statute, in Article 7, crimes against humanity, includes many of the same acts: "(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; . . . (f) Torture; (g) Rape . . . ; (h) Persecution against any identifiable group . . . racial, national, ethnic, cultural, religious . . . ; [and] (i) Enforced disappearance of persons . . . ." The Rome Statute, *supra* note 6, art. 7(1). War crimes against civilians must take place during "international armed conflict," under Article 8 of the Rome Statute. *Id.* art. 8(2)(b). Because scholars and international institutions debate over whether the conflict in Darfur is an international conflict, and therefore a war crime, this article will focus on crimes against humanity, which are committed during armed conflict "whether international or internal." Prosecutor v. Tadic, 1997 I.C.T.Y. No. IT-94-1-T, ¶ 626 (May 7, 1997), *available at* 1997 WL 33774656; *see also, infra* Part II.A (discussing how the conflict is between two groups of Sudanese, which is internal, and not international). *But see* Ray Murphy, *UN Must Refer Atrocities to International Court*, IRISH TIMES, Feb. 2, 2005, at 16, *available at* 2005 WL 59830454.

89. Prosecutor v. Tadic, 1997 I.C.T.Y. No. IT-94-1-T, ¶ 2.

90. Schabas, *supra* note 77, at 294.

91. *See* Prosecutor v. Akayesu, 1998 I.C.T.R. No. 96-4-T, ¶ 498 (Sept. 2, 1998), *available at* 1998 WL 1782077.

92. *Id.* ¶ 506.

93. *See* Interview with Gwen Young, *supra* note 6; *see also infra* Part III.A (discussing the crime of genocide, its acts and intent).

attack directed against any civilian population, with knowledge of the attack."[94] Therefore, the attack must be done as part of a premeditated policy[95] with knowledge the acts are being committed, which can be objectively and circumstantially implied.[96] To have knowledge, the perpetrator does not necessarily have to know he acted inhumanely,[97] but he "must know of the broader context in which his act occur[red]." Accordingly, the intent element stemming from underlying acts of ethnic cleansing is more general, whereas the intent required for genocide is specific. Both terms, however, require some sort of large-scale attack or policy to destroy a certain identifiable group.

C. How to Classify the Darfur Atrocities

Ethnic cleansing may not be the best term to describe the Darfur atrocities for several reasons. For instance, ethnic cleansing does not call for the international community to take action, in contrast to the crime of genocide.[98] The international crime of genocide carries with it a horrifying colloquial connotation today.[99] However, genocide did not even exist as a crime during the Nazi Nuremberg trials in 1945.[100] The Genocide Convention specifically criminalized acts like those committed in Nazi Germany.[101] Therefore, at the time of the Nuremberg trials, the Nazis were instead tried for crimes against humanity.[102]

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94. The Rome Statute, *supra* note 6, art. 7(1); *cf.* Schabas, *supra* note 77, at 295 (viewing the mental state for ethnic cleansing as the "intent to effect forced migration from a territory").

95. *See* Prosecutor v. Akayesu, 1998 I.C.T.R. No. 96-4-T, ¶¶ 569, 572.

96. Prosecutor v. Tadic, 1997 I.C.T.Y. No. IT-94-1-T, ¶¶ 656-57.

97. *Id.*

98. *See generally* Genocide Convention, *supra* note 60, art. 8 (Article 8 of the Genocide Convention places responsibility on states for prevention of genocide); Schabas, *supra* note 77, at 296; *see also The Power of a Word*, NAT'L POST, Sept. 13, 2004, at A11, *available at* 2004 WL 90911067 ("reports of 'humanitarian crises' are a dime a dozen in this age of mass communication, but genocide is still used rarely enough that, when cited, it can galvanize the world to act.").

99. *See* Schabas, *supra* note 77, at 301; *see also generally* Marc Lacey, *In Darfur, Appalling Atrocity, But is that Genocide?*, N.Y. TIMES, July 23, 2004, *available at* http://www.genocidewatch.org/SudanIsitgenocide.htm (last visited Feb. 15, 2005); *see also* Emily Wax, *U.S. Report Finds Sudan Promoted Killings; Use of Term 'Genocide' Debated Ahead of Powell Testimony on Darfur Atrocities*, WASH. POST, Sept. 8, 2004, at A17, *available at* 2004 WL 82781917 (quoting Jerry Fowler, "Just calling it a genocide does not open a magic book . . . [b]ut it raises the moral and political stakes").

100. Schabas, *supra* note 77, at 297 (citing RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (1944)) ("The term genocide was actually devised by Ralph Lemkin, an academic lawyer, in a book published in 1944.").

101. Genocide Convention, *supra* note 60. The legal reasoning for not prosecuting the Nazis for genocide is *nullum crimen sine lege*, or "no crime without preexisting law." *See*

Genocide and crimes against humanity now exist firmly as international crimes,[103] and the crime of genocide includes the duty to prevent and punish.[104] However, ethnic cleansing carries no legal obligation for states to prosecute under international criminal law in the strict sense; only the underlying acts include this obligation.[105] Therefore, a state's duty to prevent and to punish is not inherently connected to the term ethnic cleansing. Under international criminal law in the strict sense, labeling acts ethnic cleansing does not compel states to take action.

The Rome Statute does not specifically confer international jurisdiction over the crime of ethnic cleansing.[106] Therefore, the ICC or an *ad hoc* tribunal can only prosecute an act of ethnic cleansing as a war crime or crime against humanity if it can be shown that the crime was part of a pattern against a distinctive part of the population.is unlikely to prosecute an act of "ethnic cleansing."[107] Those responsible for the crimes in Darfur, therefore, will only be prosecuted if the international community agrees to label the Darfur crimes genocide.

In fact, states and international institutions label acts ethnic cleansing to avoid having to take action. Chris Landsberg, co-director of the South African Center for International relations, calls the quandary over what to call the atrocities in Darfur a "cheap alibi—just like finding African solutions for African problems has become an alibi for inaction."[108]

Schabas, *supra* note 77, at 297; *see also* Trial of German Major War Criminals 38 (2001) (Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Sept. 30 & Oct. 1, 1946 Cmd. 6964) [hereinafter Nuremberg Judgment]. In other words, no one should be tried for something not considered a crime at the time the person commits the act.

102. *See* Schabas, *supra* note 77, at 297. Although, arguably, crimes against humanity was also not a "pre-existing" law, the court tried them for it anyway. *Id.*; *see also* Nuremberg Judgment, *supra* note 101, at 44.

103. *See* The Rome Statute, *supra* note 6, art. 5(a), (b); *see also* Genocide Convention, *supra* note 60, art. 1.

104. Genocide Convention, *supra* note 60, art. 1.

105. *See* The Rome Statute, *supra* note 6, art. 5, 7; *see also* Part IIIB of Commission's Report, *supra* note 79, at 28; *supra* note 88 and accompanying text.

106. The Rome Statute, *supra* note 6, art. 5. For a discussion on jurisdiction under the Rome Statute, see *infra* § III.

107. According to Young, "The reality is it is not just the law—it is politics." Interview with Gwen Young, *supra* note 6. "International Institutions may use political remedies as opposed to legal ones when the legal basis for such crimes is too difficult to ascertain or prove." *Id.*

108. Terry Leonard, *West, U.N. Struggle for Sudan Solutions*, THE BRADENTON HERALD, Aug. 22, 2004, at 12, *available at* 2004 WL 82443920.

Tribunals, legislatures, and commentators have invented a new term, "low-intensity ethnic cleansing," in response to the events in Sudan prior to the Darfur conflict. [109] This term further contributes to the uncertainty. What is low-intensity ethnic cleansing? Is a label of low-intensity ethnic cleansing justified when more than two million Sudanese lost their lives and another four million lost their homes?[110] When does low-intensity ethnic cleansing become genocide? International institutions and countries can continue to avoid legal responsibility for the events such as those in Darfur by refusing to label the acts genocide or crimes against humanity.

III. HOW WORD CHOICE AFFECTS ACCOUNTABILITY OF SUDAN'S GOVERNMENT

Whether government officials of Sudan are held accountable for the Darfur atrocities depends upon the word choice of the international community.[111] Under Article 25(3)(b) of the Rome Statute, someone who "[o]rders, solicits or induces the commission of . . . a crime [within the ICC's jurisdiction] which in fact occurs or is attempted" is responsible for the crime.[112] The Rome Statute, under the jurisdiction of the ICC, punishes only genocide and crimes against humanity.[113] Article 27 clearly states the statute uniformly applies to all individuals, including Heads of State or government, and no political or pro-

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109. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 299 (S.D.N.Y. 2003) (citing Sudan Peace Act, § 4(2), 116 Stat 1504 (2002)) ("Sudan is systematically engaging in a policy of 'low-intensity ethnic cleansing' to destroy the societies, culture, and economies of the Dinka, Nuer, and Nuba peoples."). The court discusses the defendants' alleged conduct, stating, the "[g]overnment's 'protection' of oil operations entailed 'ethnic cleansing' or genocide, including the murder of substantial numbers of civilians (including women and children); the destruction of civilian residences and villages; and the capture and enslavement of civilians who survived the military attacks." *Id.* at 300-01. Although the court continually uses the term "ethnic cleansing" in quotes, which indicates it is "not a legal term of art[,]" it does not consider the term to be distinct from genocide. *Id.* at 296 n.2. *See also* Sudan Peace Act, § 4(2), 116 Stat 1504 (2002) ("The Congress hereby— . . . recognizes that . . . the Government of Sudan . . . systematic[ally] . . . destroy[ed] the societies, culture, and economies of the Dinka, Nuer, and Nuba peoples in a policy of low-intensity ethnic cleansing.") The Sudan Peace Act was enacted October 21, 2002, before the Darfur attacks took place, in response to years of civil war "[t]o facilitate famine relief efforts and a comprehensive solution[.]" *Id.* pmbl.; *see also infra* Part II.A (Sudan Crisis background).

110. *Presbyterian Church*, 244 F. Supp. at 298; *see also* WORLD FACTBOOK, *supra* note 9.

111. Even though head-of-state immunity is a complicated issue, this Comment assumes it will be resolved under the ICC. This discussion will only cover the ICC because of the explicit reference to "[i]rrelevance of official capacity" in the Rome Statute, but will not discuss this issue regarding *ad hoc* tribunals. *See* The Rome Statute, *supra* note 6, art. 27(1).

112. The Rome Statute, *supra* note 6, art. 25(3)(b).

113. *See id.* art. 5.

cedural immunities prevent ICC jurisdiction.[114] Yet, the Rome Statute does not specifically use the term ethnic cleansing—it only lists underlying acts, which commentators generally consider constitute ethnic cleansing.[115] Therefore, no ICC jurisdiction attaches to the crime of ethnic cleansing.[116] Jurisdiction attaches to acts listed under crimes against humanity, which include widespread forcible transfer of population,[117] similar to the Commission of Expert's definition.[118] Imposing international liability for ethnic cleansing is therefore quite difficult for the ICC.

Under the Rome Statute, the ICC has jurisdiction to prosecute someone like al-Bashir, though he is Sudan's president,[119] but only for crimes labeled genocide or crimes against humanity.[120] Notably, Sudan has yet to ratify the Rome Statute, although it initially participated in discussions.[121] In order for a Sudanese individual to be prosecuted for crimes under the Rome Statute, according to Article 12(3), Sudan must agree to the ICC's jurisdiction through an official declaration.[122] This is certainly more complicated when the President or the government is accused of committing such crimes. It is doubtful that Sudan would accept the exercise of jurisdiction in such a case.[123] According to Ted Dagne of the US Congressional Research Service, "[al-]Bashir is meticulous, calculating and decisive when his power is threatened.... He is also one of the luckiest politicians in Africa—not only has he

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114. *See id.* art. 27.

115. *See id.* art. 5, 7; *see also infra* Part II.B (discussing acts considered to constitute ethnic cleansing).

116. The Rome Statute, *supra* note 6, art. 5(1).

117. *Id.* art. 7(1)(d).

118. *See infra* Part III.B; *see also* Part IIIB of Commission's Report, *supra* note 79, at 28.

119. *See* The Rome Statute, *supra* note 6, art. 27.

120. *Id.* art. 5(1)(a)-(c), (2).

121. United Nations International Criminal Court, Rome Statute Signature and Ratification Chart, *at* http://www.ichrdd.ca/english/prog/IntHRadvocacy/countdownICC.html (last visited Jan. 9, 2005).

122. The Rome Statute, *supra* note 6, art. 12(3).

123. Early reports show Sudan is resisting ICC jurisdiction, claiming the U.N. has violated its sovereignty. *Darfur War-Crime Suspects Won't Go to ICC, Government Says*, REUTERS FOUND., Apr. 4, 2005, *at* http://www.alertnet.org/thenewsdesk/IRIN/fc3ae6eb97c33dc49a9abcb60110f900.htm (last visited Apr. 4, 2005). Some reports suggest the ICC has universal jurisdiction to prosecute regardless of Sudan's refusal. *See Darfur Situation*, *supra* note 7 ("[A]lthough the ICC is 'complementary' to national jurisdictions, the fact that the Security Council brought this matter to the ICC *implicitly* indicates that the ICC has primacy in prosecuting the suspects: the Sudanese authorities will thus have to abide by the resolution of the U.N. political body.") (emphasis added). Although the U.N. purports to have jurisdiction over Sudan, who is not a signatory to the ICC, America, likewise not a signatory, has signed an "impunity" agreement to prevent a similar fate to Sudan. *Id.* This has invoked harsh criticism. *Id.*

survived his enemies from within, he managed to survive three American administrations, years of international isolation and sanctions."[124] If the international community determines the acts in Darfur are ethnic cleansing, al-Bashir may continue to escape prosecution for these acts since ethnic cleansing is not currently a prosecutable crime under the ICC. The confusion over terms therefore affects the international community's ability to implement applicable international law and to bring relief to millions of Sudanese people.

IV. HOW WORD CHOICE AFFECTS THE SUDANESE: SIMILARITIES BETWEEN DARFUR AND RWANDA[125]

> [W]hen [Abdulkarim] . . . woke that last morning in her village [in Darfur] . . . two [Janjaweed] . . . grabbed her and forced her to the ground. With her husband's [dead] body a few yards away, the men took turns raping her.
>
> They called her a dog and a donkey. "This year, there's no God except us," Abdulkarim says they told her. "We are your god now." When they were finished, one of the men drew his knife and slashed deep across Abdulkarim's left thigh, a few inches above her knee. The scar . . . [branded] her as a slave . . . . By nightfall . . . more than 100 women in the town . . . had been raped and dozens of people killed[.][126]

Unfortunately, Abdulkarim's experience in Darfur is similar to the suffering previously experienced by many Rwandans years earlier.[127] Consequently, the history of the Rwandan genocide should be considered to explore how the use of particular terms will affect and has affected the Sudanese. Some commentators have compared the plight of the Sudanese in Darfur to the 1994 Rwandan genocide, which resulted in 800,000 deaths in 100 days before nations stopped the killing and other crimes.[128] Mukesh Kapila, the U.N.'s Humanitarian Coor-

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124. Hassan al-Bashir & England, *supra* note 48, at 11.

125. This section will primarily discuss genocide as it relates to the Sudanese by comparing Darfur with Rwanda, a clear case of genocide. As discussed previously, because ethnic cleansing is not an international crime in the "strict sense," there is no precedent to compare with the events in Darfur. *See infra* Part III.B. Therefore, this section will look at the consequences of labeling the events in Sudan as genocide, or as another humanitarian crime, such as ethnic cleansing.

126. Robinson, *supra* note 18, at 56.

127. *See generally* Alexandra A. Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 DICK. L. REV. 349, 351, 356-57 (2003) (discussing the rape of Tutsi women during the Rwandan genocide).

128. *Id.* at 350-51; *Rwanda: How the Genocide Happened*, BBC NEWS, Apr. 1, 2004, *available at* http://news.bbc.co.uk/1/hi/world/africa/1288230.stm (last visited Feb. 21, 2005);

dinator for Sudan stated, "The only difference between Rwanda and Darfur is the numbers involved of dead, tortured, and raped."[129] Both countries experienced a period of civil war before escalating to more vicious acts.[130] In both Rwanda and Darfur, "systematic elimination" of an ethnic group of civilians began as a result of a governmental "program."[131] As in Darfur, where the government enlisted the Janjaweed, Rwanda enlisted a "youth militia" called "Interahamwe" to "cleanse" a certain group of civilians.[132] Additionally, like in Darfur, the Rwandan situation involved many other crimes, including rape,[133] and two million civilians fled their homes due to persecutory acts.[134] Not only are the actions similar, but, in both cases, word choice played a role in international inaction.

Similar to the Darfur catastrophe, nations argued over what to label the atrocities in Rwanda.[135] Although in the first two months of the Rwanda genocide a civilian died every two seconds,[136] U.S. State Department spokesperson Christine Shelly claimed merely genocidal *acts* were taking place.[137] As in Darfur, where protective forces are limited, nations pleaded with the U.N. to send more troops to Rwanda, but the U.N. failed to respond.[138] Mohamed Hassan, vice-president of the Darfur Association of Canada claims, "We haven't learned the lesson of Rwanda . . . . This is going to be very bad."[139] Another com-

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see also UN Staff Prepare to Vote Against Annan, THE AUSTRALIAN, Nov. 20, 2004 at 14, *available at* 2004 WL 98613502.

129. Power, *supra* note 1, at 9.

130. Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 18 (2003); *see infra* Part II.A (discussing Sudan's civil war).

131. Miller, *supra* note 123, at 351 (citing Prosecutor v. Pauline Nyiramasuhuko & Shalom Ntahobali, No. ICTR-97-21-I (Jan. 3, 2001), *available at* http://www.ictr.org); *see also infra* Part II.A (discussing the government's "program" and evidence of Janjaweed support).

132. Miller, *supra* note 125, at 352-54 (discussing how the government targeted the Tutsi population of Rwanda, one of Rwanda's main ethnic groups).

133. *Id.* at 354-57 (discussing acts of Rape in Rwanda).

134. *Rwanda: How the Genocide Happened*, *supra* note 124.

135. *See* Samantha Power, *It's Not Enough to Call It Genocide*, TIME, Oct. 4, 2004 at 63 [hereinafter Power, *It's Not Enough*]; *see infra* Part II.B (discussing the debate over terms).

136. Miller, *supra* note 123, at 351 (citing SCOTT PETERSON, ME AGAINST MY BROTHER: AT WAR IN SOMALIA, SUDAN, AND RWANDA 247 (2001)).

137. Power, *It's Not Enough*, *supra* note 136, at 63; *see also* Schabas, *supra* note 77, at 302 ("Department of State spokeswoman Christine Shelley said that the United States was not prepared to declare that genocide was taking place in Rwanda because 'there are obligations which arise in connection with the use of the term.'").

138. Miller, *supra* note 123, at 351 (citing MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA 2 (2002)).

139. Carmela Fragomeni, *Sudan Rally at City Hall Today; Citizens Calling for Political Action*, THE HAMILTON SPECTATOR, Nov. 20, 2004, at A04, *available at* 2004 WL 97354730.

mentator cautions, "Ten years later, 'Never Again' is proving a hard promise to keep."[140] There are many factual similarities between Rwanda and Darfur, and people fear the death toll in Darfur may have to rise to a greater level and the specific intent to destroy echoed louder before the world will consider it serious enough to label the situation genocide under the authority of the Genocide Convention.[141]

Some commentators, who have compared the Darfur crisis to Rwanda, believe Darfur fails to "measure[] up."[142] This may be a result of the difficulty in proving specific intent required for the crime of genocide. As discussed, the intent element in crimes against humanity is much easier to prove than in the crime of genocide.[143] In Rwanda, the government used radio propaganda to promote the civilian massacre,[144] clear evidence of specific intent. In Darfur, Sudan's government claims it is merely quelling a rebel uprising.[145] Although Sudan's acts and not its words are the best evidence of intent, the element was more obviously satisfied in Rwanda.[146] Although, in theory, large numbers of deaths are supposedly unnecessary under the Genocide Convention, in practice as seen in Rwanda and Darfur, designation of a crime as genocide appears to require a much larger number of deaths or injuries than initially indicated.[147] According to scholar Samantha Power, Raphael Lemkin, who coined the term genocide, would find Darfur has met the threshold:

> Lemkin[] . . . did not define genocide as the attempted extermination of an entire group. Lemkin, who lost 49 members of his family, including his parents, to the [Holocaust's] Final Solution, knew that if extermination were the threshold for a response, action would inevitably come too late.
>
> The horrors in Darfur are just what Lemkin had in mind.[148]

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140. Robinson, *supra* note 18, at 57.

141. *See generally* Interview with Gwen Young, *supra* note 6.

142. Power, *It's Not Enough*, *supra* note 135, at 63.

143. *See infra* Part III (discussing both genocide and ethnic cleansing).

144. *Rwanda: How the Genocide Happened*, *supra* note 124.

145. Robinson, *supra* note 18, at 58; *see also* Power, *supra* note 1, at 5.

146. Courts deduce evidence of intent from the underlying acts. *See infra* Part III.A (discussing genocidal intent).

147. *See infra* Part III.A (discussing genocide); *see also* Power, *It's Not Enough*, *supra* note 135, at 63. Previously, the Holocaust marked the highest number of deaths resulting from a genocidal act or group of acts, however, the number of deaths per day in Rwanda was five times the amount that occurred in the Nazi concentration camps. Miller, *supra* note 123, at 351 (citing SCOTT PETERSON, ME AGAINST MY BROTHER: AT WAR IN SOMALIA, SUDAN, AND RWANDA 247 (2001)).

148. Power, *It's Not Enough*, *supra* note 135, at 63.

Requiring more evidence of genocidal intent in Darfur will result in more unnecessary suffering for the Sudanese. Human-rights activists claim, "unless the world moves rapidly . . . tens of thousands more [Sudanese] could die in a matter of months, either at the hands of the Janjaweed or from starvation and disease."[149] Using Rwanda as a threshold for state intervention and prevention leads to unacceptable delays of relief for persecuted civilians like the Sudanese.

Legally and politically, a determination of genocide, as seen in Rwanda, allows the U.N. to intervene and impose sanctions.[150] The U.N. and ICC may likewise prosecute for crimes against humanity;[151] however, intervention for these crimes is less likely because they are not considered as severe as genocide.[152] As in Rwanda, where mere *acts* of genocide were occurring, many states claim ethnic cleansing or *acts* of international crimes are occurring in Darfur, instead of using a term with more legal significance.[153] To aid the Sudanese, and civilians in similar conflicts, international institutions must consider more innovative solutions, rather than resolutions and sanctions, to prevent states from shielding themselves from responsibility with the use of non-legal terms..[154]

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149. Robinson, *supra* note 18, at 61. Genocide expert, Sam Totten, claims, "If the international community continues to waver and equivocate, . . . there is no doubt . . . that [ten] years from now the international community will (be apologizing) to the victims of Darfur (as it once did to) the Tutsis of Rwanda." Emily Wax, *World Watches Sudan Suffer*, TIMES UNION, Nov. 21, 2004, at A13, *available at* 2004 WL 88586823 [hereinafter Wax, *World Watches Sudan Suffer*].

150. Interview with Gwen Young, *supra* note 6.

151. The Rome Statute, *supra* note 6, art. 5(1)(b) (providing the ICC with jurisdiction over crimes against humanity); Prosecutor v. Tadic, 1997 I.C.T.Y. No. IT-94-1-T, at ¶ 138 (May 7, 1997), *available at* 1997 WL 33774656 (U.N. jurisdiction over crimes against humanity).

152. Interview with Gwen Young, *supra* note 6. *See generally* Morton Abramowitz & Samantha Power, *A Broken System*, WASH. POST, Sept. 13, 2004, at A21, *available at* 2004 WL 93175863 (discussing three reasons why nations have not intervened in Darfur: not enough deaths, humanitarian aid, and the complexity of the conflict).

153. *See* Power, *It's Not Enough*, *supra* note 135, at 63; *see also infra* Part III.C (discussing how the term ethnic cleansing may take the focus away from the true underlying crimes). As discussed, the only terms with more legal significance (in this situation) are genocide, crimes against humanity, and war crimes because those are international crimes in the strictest sense. *See infra* Parts I, III.

154. *See generally "If We Return We Will Be Killed" Consolidation of Ethnic Cleansing in Darfur, Sudan*, HUM. RTS. WATCH, Nov. 2004, *available at* http://hrw.org/ backgrounder/africa/darfur1104/ (last visited Feb. 24, 2005) (discussing U.N. response to the crisis in Darfur through sanctions and resolutions that have proven unsuccessful in deterring continued atrocities).

V. THE SOLUTION TO THE PROBLEM OF INTERNATIONAL INACTION

The events in Darfur show how the intersection between politics and law can make reaching a legal solution more difficult. As discussed previously, using precise terminology is important to prevent inaction by international institutions and to stop those responsible for grave civilian atrocities.[155] Yet, it becomes complicated when politics interfere.[156] This section will discuss some ideas to help overcome political barriers and ultimately enforce international criminal law.

A. Reform the U.N. Commission on Human Rights

One possible solution is to reform the U.N. Commission on Human Rights (U.N.C.H.R.). For example, Newt Gingrich, former U.S. House of Representatives speaker, criticizes the U.N.C.H.R., which has allowed Sudan to continue to hold a seat despite clear evidence that the government is funding Janjaweed attacks on civilians.[157] He explains:

> UN policy is that the human rights records of the 53 countries that sit on the commission may not be assessed as a prerequisite to serving on the panels.
>
> That means there is no mechanism to protect the commission from being manipulated by governments that routinely abuse human rights. As a result, over the years the commission has been corrupted by political games that have allowed some of the world's worst human rights abusers to sit in judgment of others—and to shield themselves from criticism. . . .
>
> The consequences are unmistakable: while the victims of abuse and torture suffer and die, the commission systematically ignores their plight and blocks efforts for intervention.[158]

To allow the U.N.C.H.R. to continue this practice is contrary to the goal of the Genocide Convention—essentially, the people in

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155. Interview with Gwen Young, *supra* note 6 ("Law should try to be as pure in legal procedure and effect as possible.").

156. *Id.* (When asked what a possible solution to this problem might be, Young responded, "It is always complicated because we are talking about independent nations and leaders.").

157. *See* Newt Gingrich, *A Deadly Test of the Integrity and Decency of the UN*, THE AGE, Oct. 20, 2004, at 15, *available at* 2004 WL 94762322.

158. *Id.* Gingrich goes on to explain that "Known human rights abusers such as Algeria, Cuba, Syria, Iran, Pakistan and Zimbabwe have all served on the commission. In 2003, Libya was elected to chair the panel." *Id.*

charge of prevention are also the perpetrators.[159] Allowing the world's most flagrant violators of human rights to judge atrocities in Sudan has caused the U.N.C.H.R. to espouse a meek position on the crimes in Darfur.[160] For instance, the U.N.C.H.R. conducted an investigation on human rights abuses in Darfur in April of 2004.[161] According to Human Rights Watch, the U.N.C.H.R.'s *unpublished* report fiercely denounced Sudan's treatment of African civilians through a "reign of terror," amounting to possible crimes against humanity.[162] Yet moments before the resolution's release, a diluted decision passed. Instead of condemning Sudan for human rights violations, the U.N. assigned an independent human rights expert to determine the severity of Sudan's abuses.[163] Allegedly, the E.U. was concerned about losing crucial African and Arab U.N. members' support, realizing these countries had "bowed to Sudanese pressure."[164] According to Human Rights Watch, "The world's preeminent human rights body failed to perform the role for which it was created, limiting itself to expressions of 'deep concern'—rather than condemnation[.]"[165] Gingrich calls for the U.N. to act more forcefully, by stripping Sudan of its seat on the U.N.C.H.R., which would ultimately lead to more qualified assessments of human rights violations by neutral countries and decision-makers.[166] This idea of detached decision-making should be a fundamental aspect of criminal law[167] and unfortunately the U.N., until recently, has failed to apply this principle to the situation in Sudan.[168]

B. Basic U.N. Restructuring

Institutions and countries may argue over terminology because they are ill-equipped to take action to prevent or punish international

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159. *Id.*; *see also* Genocide Convention, *supra* note 60, art. 8 (Article of the Genocide Convention on prevention).

160. Gingrich, *supra* note 154; *see also Darfur Destroyed*, *supra* note 24, at 39.

161. *Darfur Destroyed*, *supra* note 24, at 54.

162. *Id.* at 54-55 (internal footnote omitted).

163. *Id.* at 55.

164. *Id.*

165. *Id.* at 56 (internal footnote omitted).

166. Gingrich, *supra* note 154 (quoting U.S. senator Bill Frist, "If we are going to preserve the credibility of the UN and its separate commissions, advance the cause of human rights and protect oppressed people around the globe, then the UN must take more aggressive action.").

167. *See generally id.*

168. Two years of debating over how to handle the situation in Darfur is unacceptable. *See generally supra* note 4.

crimes in Sudan.[169] Although the U.S. designated the atrocities as genocide and called for prevention, it has since done very little.[170] Instead, President George W. Bush, when asked about the designation claimed, "[The U.S.] shouldn't be committing troops. We ought to be working with the African Union to do so . . . . My hope is that the African Union moves rapidly to help save lives."[171]

According to scholar Peter Langille, "[I]t's not helpful to argue that there must be an African solution to African conflict."[172] The African Union is unprepared and may not be ready to intervene with a significant number of forces for another five to seven years.[173] Even though there are some African Union soldiers and observers stationed in Sudan, a mandate prevents them from interfering with violence.[174] For the African Union troops to have any success in Darfur, the troops would have to increase by fifty times their current number to effectively patrol this region; an area the size of Texas.[175] Likewise, Langille claims the U.N. and the North Atlantic Treaty Organization (NATO) both lack resources because they are overextended in their missions and Western nations have been less than generous.[176] Some human rights supporters worry if the U.S. does not take action after labeling the atrocities genocide, the Genocide Convention will lose its significance.[177] Though a designation of genocide justifies U.N. sanctions and state intervention, poor resources make timely enforcement unlikely.[178]

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169. *See generally* Peter Langille, *Preventing Genocide: Time for a UN 911*, GLOBE AND MAIL, Oct. 19, 2004, *available at* 2004 WL 85797207.

170. Power, *It's Not Enough*, *supra* note 135, at 63; *see also* Robinson, *supra* note 18, at 56.

171. Commission on Presidential Debates, Debate Transcript, *The First Bush-Kerry Presidential Debate* (Sept. 30, 2004), *available at* http://www.debates.org/pages/trans2004a.html (last visited Feb. 24, 2005).

172. Langille, *supra* note 169.

173. *Id.*

174. Robinson, *supra* note 18, at 61. The African Union has placed "a small number of monitors in Darfur protected by a few hundred African soldiers." *African Leaders Reject Foreign Meddling in Darfur; Libyan Summit Mandates Gadhafi to Mediate Between Parties*, DAILY STAR, Oct. 19, 2004, *available at* 2004 WL 85329056.

175. *Id.*; Power, *supra* note 1, at 3.

176. Langille, *supra* note 169.

177. Robinson, *supra* note 18, at 61; *see also* Power, *It's Not Enough*, *supra* note 135, at 63 ("The U.S. use of the *G* word has done little more than set off a new round of bureaucratic shuffling.").

178. At present, the U.N. Security Council has declined to fund the ICC referral, shifting cost of the investigation on the Rome Statute's 98 member states. *See Darfur Situation*, *supra* note 7. Some commentators fear that if these member states "refuse to shoulder their obligations and to significantly increase the Court's present budget, this means that the whole inter-

Another possible solution concerns basic U.N. restructuring. Langille advocates creating "a multidimensional, multifunctional U.N. 911 [emergency service], composed of military, civilian and police volunteers, ready and willing to perform the diverse tasks essential in complex emergencies."[179] The service would include thousands of carefully trained experts who have ready access to necessary resources.[180] The operation would consist of one permanent and two mobile U.N. headquarters, allowing the U.N. force to control an emergency just two days after U.N. Security Council clearance.[181] A permanent, rapidly responding force, consisting of the world's finest volunteers, would circumvent U.N. members' reluctance to send their own troops, thereby increasing U.N. reliability and legitimacy.[182] As Langille states, a multifunctional U.N. emergency service "could provide a capacity to deter violence and provide immediate protection for those at risk, as well as a range of assistance for addressing critical human needs—a vital function not provided by any existing agency."[183] His suggestion, though not an immediate solution, is not unreasonable considering the growth of international law in recent years with *ad hoc* tribunals and the passing of the Rome Statute creating the ICC.[184] It makes sense to have an international permanent emergency response and prevention task force to protect human rights atrocities, instead of relying on U.N. members who are reluctant to deploy their own troops.[185]

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national community would, once again, abandon the victims of Darfur, thus increasing insecurity and the impunity enjoyed by the perpetrators of the most frightful crimes." *Id.*

179. Langille, *supra* note 169 (internal parenthesis omitted) (punctuation added).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*; *see also* Power, *It's Not Enough*, *supra* note 135, at 63 (discussing Darfur, she claims "The only hope for peace is an international protection force.").

184. *See UN Reform and Rapid Reaction*, IRISH TIMES, Nov. 1, 2004, *available at* 2004 WL 95717009 ("No one can doubt the validity of . . . an argument [for U.N. reform]. . . . [S]uch reform will be a prolonged and difficult process in the long term."); *see also* WISE & PODGER, *supra* note 5, § 1.01[C] (discussing *ad hoc* tribunals and a permanent ICC strengthening the validity of international criminal law).

185. Langille, *supra* note 169. Langille discusses the benefits of this emergency force noting,

> It would be permanent, based at a designated UN site, with two mobile field headquarters. [Therefore] [i]t . . . could move to quell an emergency within 48 hours after authorization from the UN Security Council . . . . With 14,000 personnel, carefully selected, expertly trained and well-equipped, it would not fail in its mission due to a lack of preparation, skills or enthusiasm to engage in robust operations.

Id.

C. *Redefine Terms and Lessen Ambiguity*

To aid the Sudanese, serious reconsideration of the definitions, distinctions and use of the terms genocide, crimes against humanity, and ethnic cleansing is necessary to prevent argument over which term to apply to various violent acts. Schabas calls for clarification of the Genocide Convention's currently ambiguous obligation to prevent genocide, but argues for retaining genocide's narrow definition.[186] Likewise, U.N. Secretary-General Kofi Annan advocates for clearer and more objective guidelines to officially recognize genocide so the U.N. will have no excuse to disregard those atrocities with a real threat of elevating to genocide.[187] In Annan's 2004 Action Plan to Prevent Genocide, he mentions the importance of a Special Advisor to not only report possible genocide, but also "other large-scale human rights violations, such as ethnic cleansing."[188] Before an advisor is able to recognize and report ethnic cleansing to the U.N. the definition and actual elements of the crime must be made clear.

Perhaps ethnic cleansing should be included under the broad umbrella of crimes against humanity. Or perhaps ethnic cleansing should instead stand alone as a separate strict international crime. A Convention on Ethnic Cleansing to determine a narrow definition of ethnic cleansing would be an appropriate means to answer these and many other questions, helping to resolve the ambiguity and to prevent suffering like that which is currently occurring in Darfur.[189]

Although these solutions may not be immediate, they are plausible, and should be considered by international institutions and the U.N. Law and politics are difficult to separate, particularly where

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186. Schabas, *supra* note 77, at 301-02.

187. Press Release, UN Secretary-General Kofi Annan's Action Plan to Prevent Genocide (July 4, 2004), *available at* http://www.preventgenocide.org/prevent/UNdocs/ KofiAnnansActionPlantoPreventGenocide7Apr2004.htm (last visited Feb. 24, 2005).

188. *Id.*

189. *See generally* Schabas, *supra* note 77, at 302 ("[States'] obligation[s] . . . when faced with genocide, . . . will never be achieved if they are unsure about the crime's parameters. Strict definition of the crime explains why, in 1948, the international community was able to achieve a Convention, something that proved elusive for the broader concept of crimes against humanity."). For example, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was enacted to better define the crime of torture, though, like ethnic cleansing, torture is not an enumerated crime within the jurisdiction of the ICC. *See* Richard P. Shafer, Annotation, *Construction and Application of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. FED. 385 (2004); *see also* The Rome Statute, *supra* note 6, art. 5(1). Yet, conventions can influence the ICC to adopt certain definitions of crimes, as it did with the Genocide Convention. *See infra* Part III.A (discussing how the Rome Statute has adopted the Genocide Convention's definition of genocide).

preventing human rights atrocities requires the U.N. to make a firm determination of whether these acts constitute genocide in order to be justified in interfering in affairs of a sovereign state.[190] How can the international legal community make it easier to interfere in these types of situations? According to Gwen Young, there will always be a political aspect, but the "[l]aw should try to be as pure as possible—be [as] de-politicized as possible. This would help."[191] Distinguishing the appropriate legal term is one way to help clarify the situation and make it easier to interfere in politically sensitive situations.

VI. CONCLUSION

Genocide and ethnic cleansing are two terms often used interchangeably to define atrocities occurring in Sudan, and international institutions consistently disagree on which term is more appropriate.[192] The choice of terminology influences when prevention and punishment is warranted—making it possible for the international community to intervene and stop the killings and other human rights violations in a timely manner. Thus, it is important for states and international institutions to be meticulous when defining these crimes to prevent political inaction.

There is no easy solution to this problem. Unquestionably these atrocities constitute crimes against humanity, punishable under international criminal law in the strict sense.[193] It would be more beneficial to define the atrocities occurring in Sudan as crimes against humanity, genocide or both, because these terms have legal significance. Lawyers and members of the international community should be more precise when using terminology. In addition it is important to be precise in formulating, interpreting, and applying the law.[194] Disagreement over what term to use makes finding a solution more difficult, allowing states to debate over terminology and remain inactive.[195] A broad and legally indefinite term like ethnic cleansing does not call for ICC intervention and prevention.[196]

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190. *See* Interview with Gwen Young, *supra* note 6.

191. *Id.*

192. *See* Richter & Farley, *supra* note 2.

193. *See supra* Part III.B (discussing how ethnic cleansing is really made up of acts constituting crimes against humanity).

194. *See generally* Interview with Gwen Young, *supra* note 6.

195. Leonard, *supra* note 105. Two years of inaction and debate over terms has lead to needless suffering, whereas initial clear application of these terms may have allowed earlier intervention; *see also* sources cited *supra* note 4.

196. *See* Quigley, *supra* note 64, at 346.

When international organizations and states debate over terms, people die unnecessarily.[197] People have been dying unnecessarily in Sudan for over two years.[198] Yet, the debate over appropriate terminology continues.[199] The Sudanese relied on the international community to overcome "global paralysis" and avoid another Rwanda.[200] The victims of Darfur suffered while the world debated.[201] Firm international laws which clearly define appropriate terms and appropriate interventions must be created and enforced because without them, Sudan's President al-Bashir and his followers, and others like them, can use the current ambiguity in terms to their advantage to continue committing atrocities with impunity.[202] "Despite the U.N.'s stirring, the abuses in Darfur go on."[203]

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197. Leonard, *supra* note 105; *see also* Power, *supra* note 1, at 12.

198. *See Targeting the Fur*, *supra* note 15.

199. *See infra* Part II.B.

200. Robinson, *supra* note 18, at 57; *see also* Wax, *World Watches Sudan Suffer*, *supra* note 146.

201. *See* Wax, *World Watches Sudan Suffer*, *supra* note 146.

202. *See* Hassan al-Bashir & England, *supra* note 48, at 11.

203. *After 300,000 Deaths, a Modicum of Justice*, THE ECONOMIST, Apr. 1, 2005, *at* http://www.economist.com/agenda/displayStory.cfm?story_id=3829702 (last visited Apr. 5, 2005).

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