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Introduction

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Introduction*

Justice Richard J. Goldstone

Abstract

Given the violence in Darfur and the ensuing international reaction, the Fordham International Law Journal decided to publish a special issue on Darfur. It is timely in light of the continuing violence in the Darfur region. This article serves as the Introduction to the special issue.

*After graduating from the University of the Witwatersrand with a BA LLB cum laude in 1962, Justice Goldstone practised as an Advocate at the Johannesburg Bar. In 1976 he was appointed Senior Counsel and in 1980 was made Judge of the Transvaal Supreme Court. In 1989 he was appointed Judge of the Appellate Division of the Supreme Court. From July 1994 to October 2003, he was a Justice of the Constitutional Court of South Africa. He is presently a Global Visiting Professor at NYU Law School and from August 2003 will occupy the Mulligan Chair at Fordham Law School in New York City. From 1991 to 1994, he served as Chairperson of the Commission of Inquiry regarding Public Violence and Intimidation which came to be known as the Goldstone Commission. He is also Chairperson of the Standing Advisory Committee of Company Law. From 15 August 1994 to September 1996 he served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. During 1998 he was the chairperson of a high level group of international experts which met in Valencia, Spain, and drafted a Declaration of Human Duties and Responsibilities for the Director General of UNESCO (the Valencia Declaration). From August 1999 until December 2001 he was the chairperson of the International Independent Inquiry on Kosovo. In December 2001 he was appointed as the chairperson of the International Task Force on Terrorism that was established by the International Bar Association. From 1985 to 2000, Justice Goldstone was National President of the National Institute of Crime Prevention and the Rehabilitation of Offenders (NICRO). He is chairperson of the Bradlow Foundation, a charitable educational trust, and heads the board of the Human Rights Institute of South Africa (HURISA). The many awards he has received locally and internationally include the International Human Rights Award of the American Bar Association (1994) and Honorary Doctorates of Law from universities in Canada, the Netherlands, South Africa, the United Kingdom, and the United States. He is an Honorary Bencher of the Inner Temple, London, an Honorary Fellow of St Johns College, Cambridge, an Honorary Member of the Association of the Bar of New York, and a Fellow of the Weatherhead Centre for International Affairs of Harvard University. He is a Foreign Member of the American Academy of Arts and Sciences. Since 1996, he has been a regular member of the faculty of the Salzburg Seminar.

INTRODUCTION

*Justice Richard J. Goldstone**

The International Commission of Inquiry on Darfur (the “Commission”) was established by United Nations (“U.N.”) Secretary-General Kofi Annan in October 2004.¹ The Commission reported to the U.N. in January 2005 that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur and recommended that the situation be referred to the International Criminal Court (“ICC”).² On March 31, 2005, the Security Council referred the situation in Darfur to the International Criminal Court.³ The Prosecutor received the document archive of the International Commission of Inquiry on Darfur. Over the months that followed, the Prosecutor investigated the situation in Darfur and on June 6, 2005, he concluded that the statutory requirements for initiating an investigation were satisfied. On April 27, 2007, the ICC issued warrants of arrest against Ahmad Muhammad Harun and Ali Muhammad al Abd-Al-Rahman (“Ali Kushayb”).⁴ Neither of the arrest warrants has been executed.

Notwithstanding the referral of the situation by the Security Council, the government of Sudan has refused to recognize the jurisdiction of the ICC or cooperate with the investigation in any way.⁵ Not only is the government of Sudan protecting the two

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1. See S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004) (requesting Secretary-General to establish an international commission of inquiry into situation in Darfur); Press Release, Secretary-General, Secretary-General Establishes International Commission of Inquiry for Darfur, U.N. Doc. SG/A/890 (Oct. 7, 2004); Letter from Secretary-General to President of the Security Council, U.N. Doc. S/2004/812 (Oct. 11, 2004) (setting out structure and purpose of international commission of inquiry).

2. International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, (Jan 25, 2005) (prepared by Antonio Cassese).

3. See S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

4. Warrant of Arrest for Ali Muhammed Ali Abd-Al Rahman, ICC-02/05-01/07-3 (Apr. 27, 2007); Warrant of Arrest for Ahmad Muhammad Harun, ICC-02/05-01/07-2 (Apr. 27, 2002).

5. See Editorial, *Delay, Obstruction and Darfur*, N.Y. TIMES, Dec. 10, 2007, at A22; Marlise Simons, *2 Face Trials at The Hague Over Atrocities in Darfur*, N.Y. TIMES, Feb. 28, 2007, at A3.

persons whose arrest is being sought, but Harun has been promoted to a more senior position in the Cabinet of President Omar Hassan al-Bashir of Sudan.⁶ More recently, one of the leading Janjaweed warlords, Musa Hilal, has been appointed as a leading officer in the Sudanese Security Services.⁷

Politically, the government of Sudan is in a position to thwart the will of the Security Council for a number of reasons. The first is the support it receives from China. Sudan is an oil producer and its most important customer is China.⁸ The Chinese have threatened to veto any serious Security Council action against Sudan and have succeeded in watering down resolutions proposed by the Western members of the Council.⁹

The second reason is the ambivalence of the United States. In July 2004, both chambers of the U.S. Congress adopted concurrent resolutions condemning the continuing atrocities in the Darfur region of western Sudan as "genocide" and asking the international community to join with the United States to help bring an end to the humanitarian catastrophe that is under way there.¹⁰ In September 2004, U.S. Secretary of State Colin Powell also stated on behalf of the Administration that the killings in Darfur constituted genocide.¹¹ The legal basis for the conclusion that genocide has indeed been committed in Sudan is provided in a thorough and careful analysis by Jennifer Trahan, a leading New York civil liberties attorney, author and teacher.¹²

On the other hand, the present U.S. Administration is not a

6. See *Delay, Obstruction and Darfur*, *supra* note 5; Simons, *supra* note 5.

7. See Sabrina Tavernise, *Sudan Leader Rebuffs Critics Over Choice of Advisor*, *N.Y. TIMES*, Jan 22, 2008, at A3.

8. See F. William Engdahl, *Darfur: Forget Genocide, There's Oil*, *ASIA TIMES ONLINE*, May 25, 2007, available at <http://www.globalpolicy.org/security/issues/sudan/2007/0525forget.htm> (describing scope of China's investment in Sudan's oil sector).

9. See Patrick Goodenough, *China Accused of Prolonging Sudan Bloodshed Because of Oil*, *CNSNEWS.COM*, Apr. 11, 2006, <http://www.cnsnews.com/ViewForeignBureaus.asp?Page=/ForeignBureaus/archive/200604/INT20060411c.html> (taking note of criticism that China's support for Sudanese government in Khartoum has prevented Security Council from taking measures that could bring end to violence in Sudan); Kristina Nwazota, *China-Sudan Trade Relations Complicate Darfur Crisis*, *ONLINE NEWSHOUR*, Apr. 25, 2006, http://www.pbs.org/newshour/updates/china-darfur_04-25-06.html.

10. H.R. Con. Res. 467, 108th Cong. (2004); S. Con. Res. 133, 108th Cong. (2004).

11. The Crisis in Darfur, Testimony Before the Senate Foreign Relations Committee, Washington, D.C. (Sept. 9, 2004) (statement of Secretary Colin L. Powell), available at <http://www.state.gov/secretary/former/powell/remarks/36042.htm>.

12. Jennifer Trahan, *Why the Killing in Darfur is Genocide*, 31 *FORDHAM INT'L L.J.* 990 (2008).

supporter of the ICC and is not prepared to give it any assistance.¹³ Of importance, it has been unprepared to place any pressure on Sudan to execute the arrest warrants for Harun and Kushayb. The Court is entirely dependant on government support for the implementation of its orders and requests, and the absence of pressure from the United States is critical. In the meantime the killings and ethnic cleansing in Sudan continues.

Against that background, the *Fordham International Law Journal* decided to publish this special issue on Darfur. It is timely in light of the continuing violence in the Darfur region.

The question of state responsibility for genocide was recently the subject of a judgment of the International Court of Justice in the case of *Bosnia v. Serbia*.¹⁴ The findings made by the Court are relevant to the analysis of the crimes committed in Darfur and they are the subject of two thoughtful analyses by Professor Ademola Abass¹⁵ and Senior Trial Attorney in the International Criminal Tribunal for the former Yugoslavia's Office of the Prosecutor, Dermot Groome.¹⁶

I have already referred to the role played by China. In this context, the article by Mr. Chin-Hao Huang is of particular importance. Mr. Chin-Hao provides details of the Chinese economic interests in Sudan. He makes the point that Sudan's contribution to China's total energy needs "is important but not strategic" and that "Sudan accounts for five to seven percent of China's total oil imports, and less than one percent of China's total energy consumption."¹⁷ I would suggest, however, that having regard to China's growing consumption of oil, it would not be easy for it to find a substitute supplier. And, the projected decline of Sudan's oil production over the next decade does not

13. See Nicholas D. Kristof, Op-Ed., *Why Should We Shield the Killers?*, N.Y. TIMES, Feb. 2, 2005, at A21.

14. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*) (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (last visited Apr. 29, 2008).

15. Ademola Abbass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Herzegovina and the International Commission of Inquiry for Darfur*, 31 FORDHAM INT'L L.J. 871 (2008).

16. Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 FORDHAM INT'L L.J. 911 (2008).

17. Chin-Hao Huang, *U.S.-China Relations and Darfur*, 31 FORDHAM INT'L L.J. 829 (2008).

reduce the present usefulness of this present supplier of oil. At the same time, Mr. Chin-Hao draws attention to the fact that China is Sudan's largest export market and biggest source of foreign investment. He states further that "[a]ggregate sunken investment as of late 2005 stood at an estimated US\$15 billion, making China the largest foreign investor in Sudan."¹⁸ He also points out that it is estimated that 8100 Chinese are employed in Sudan.¹⁹ It is clear that Sudan plays a central role in the currently expanding Chinese Africa policy. The Chinese base their policy with regard to Darfur on the "principle of non-interference." Mr. Chin-Hao's conclusion is that Chinese policy in this regard is not inflexible and that Washington should be more understanding of the "subtleties behind China's evolving perspective."²⁰

The contribution by Mr. Chin-Hao sets the context for an impressive note by Russell P. McAleavey on an oil-for-food program for Sudan.²¹ His starting point is an Op-Ed I published in the *International Herald Tribune* on June 13, 2007 calling for such a program.²² The idea is that Sudan should be prevented by such a program from using any proceeds from its oil sales for the purchase of military equipment. Mr. McAleavey's conclusion is that notwithstanding the maladministration of the U.N.'s Oil-for-Food Program in Iraq, it "was successful in achieving two of its main aims: preventing Saddam Hussein from reviving Iraq's development of weapons of mass destruction and improving the standard of living for the civilians of Iraq."²³ The appeal of such a program is that it would in no way impede oil sales to China or any other purchaser. Mr. McAleavey's conclusion is that "such a program could be the step that finally forces Khartoum to cooperate with the international community."²⁴ I need hardly say that I fully agree.

Finally, there are two essays that highlight the important contributions that have been made by non-governmental organi-

18. *Id.* at 830.

19. *Id.*

20. *Id.* at 842.

21. Russell P. McAleavey, Note, *Pressuring Sudan: The Prospects for an Oil-for-Food Program for Darfur*, 31 *FORDHAM INT'L L.J.* 1058 (2008).

22. Richard Goldstone, *An "Oil-for-Food" Program for Darfur*, *INT'L HERALD TRIB.*, June 13, 2007, at 4.

23. McAleavey, *supra* note 21, at 1095.

24. *Id.* at 1096.

zations. Genevieve Cox, a San Francisco litigator, and Jerome C. Roth describe the important perspective of Sudanese human rights lawyers who participated in the Darfur Legal Training Program.²⁵ A training session was held in London under the auspices of the American Bar Association's Litigation Section, with funding from the MacArthur Foundation.²⁶ These Sudanese lawyers had never traveled outside of Africa and had little contact with international human rights law or training in trial advocacy skills. The Program allowed them to meet and interact not only with American lawyers, but also a former International Criminal Tribunal for Yugoslavia prosecutor, a federal judge, and representatives from the ICC.

Colin Thomas-Jensen and Julia Spiegel describe the impressive movement that has arisen in the United States and around the world in response to the violence in the Darfur region of Sudan and the extent to which they have helped mould public opinion and pressured some governments to take stronger action against Khartoum.²⁷

Finally, this issue contains a photo essay by Olivier Bercault of Human Rights Watch.²⁸ This is yet another illustration of the powerful message that photographs can portray.

In the end, the response of the global community and especially the powerful members of the U.N. has been a tremendous disappointment. One would have hoped that the abject failure to protect the people of Rwanda would have driven the members of the U.N. to adopt strong measures in the face of the dreadful crimes committed and being committed against innocent children, women and men in Darfur. If that still does not happen, more untold thousands of people will be slaughtered and many more driven from their homes. The ball is very much in the court of the powerful global players. If the political will can be mustered the slaughter can be stopped.

25. Genevieve Cox & Jerome C. Roth, *Seeking Justice for Victims in Darfur: The Darfur Legal Training Program*, 31 FORDHAM INT'L L.J. 816 (2008).

26. *See id.*

27. Colin Thomas-Jensen & Julia Spiegel, *Activism and Darfur: Slowly Driving Policy Change*, 31 FORDHAM INT'L L.J. 843 (2008).

28. Olivier Bercault, Photo Essay, *The Crisis in Darfur*, 31 FORDHAM INT'L L.J. 859 (2008).