

The Disturbing Case of the British Advertising Standards Authority, the *New York Times*, and the State Department's Low Estimate of the Death Toll in Darfur

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This is an article about genocide and the efforts of some, including those in the United States government, to obscure the severity of the death toll in Darfur.

I. THE COMPLAINT AND THE CORRECTION

The advocacy group Save Darfur has focused international attention with its full-page newspaper advertisements stating that 400,000 persons have died in what the United States Congress, President, and United States State Department have determined is a genocide in Darfur. The European Sudanese Public Affairs Council, a London based group which acts on behalf of the Government of Sudan, brought a complaint to the British Advertising Standards Authority [ASA] against Save Darfur about this advertisement. In a *New York Times* op-ed column, Sam Dealey, writing "above the fold" in the Sunday "Week in Review" section, claimed that the ASA had found Save Darfur to have "breached standards of truthfulness" in its publication of the 400,000 figure.

Dealey's allegation of untruthfulness appeared in a provocatively titled op-ed article, "An Atrocity that Needs No Exaggeration."¹ While Save Darfur was the direct target of this claim, we were the indirect target, since Dealey attributed the source of the 400,000 death toll to an estimate we placed in April, 2005, on the web site of the Coalition for International Justice [CIJ]. However, Dealey's claim was false.

The ASA considered whether Save Darfur breached the Association's Code Clauses 3.2 (Division of opinion), 7.1 (Truthfulness) and 8.1 (Matters of opinion). The ASA adjudication held that Save Darfur breached clauses 3.2 and 8.1. ASA

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¹ Sam Dealey, *An Atrocity that Needs No Exaggeration*, N.Y. TIMES, Aug. 12, 2007, at 10.

conspicuously omitted a determination on clause 7.1 regarding truthfulness. Thus, ASA explicitly did not render a decision about “breached standards of truthfulness.”² A finding of the ASA that there are divisions of opinion and matters of opinion about the death toll in Darfur is not newsworthy, while a claim about untruthfulness could have been highly consequential. This distinction was not lost on the ASA. It clearly was not defensible for Sam Dealey in the *New York Times* to revise or reinterpret the decision that the ASA made. It was disingenuous for Sam Dealey to explicitly claim that the ASA held that this alleged and defined standard was violated when the plain text of the adjudication did not come to this conclusion. At a minimum, the specific invocation of a defined term in this context was misleading to the public and warranted correction. Not only were reputations impugned, the public was misled about what is often called “the crime of crime,” in this case the genocide in Darfur.

One of us wrote the Public Editor of the *New York Times* to expose Dealey’s false claim on the day it appeared. Five days later the copy-editor of Dealey’s op-ed piece wrote back that our protest was unfounded. The same day I received this response, a second protest was made with the *Times*. Ten days after Dealey’s offending op-ed column appeared, the *New York Times* published the following response:

Correction

A recent Op-Ed article about the death toll in Darfur incorrectly characterized a ruling by the British Advertising Standards Authority on Save Darfur Coalition advertisements. The authority did not find that the ads, which put the number of dead at 400,000, “breached standards of truthfulness.” Rather, it told Save Darfur to present the figure as opinion, not fact.³

The correction, as well as Dealey’s op-ed article, does not illuminate the differences or the sources of differences in opinion about the Darfur death toll.

We intend to explain in this article how the United States Department of State has been a key source of uncertainty about the scale of mortality in Darfur. The State Department has vacillated in its public statements about Darfur in ways that we characterize as flip-flopping. In doing so, the State Department has inappropriately applied concepts and methods from a population health paradigm. The result is an underestimation of the scale of the genocide in Darfur. A seriously misleading characterization of the Darfur genocide has resulted from the combination of the State Department’s flip-flop policy, Sam Dealey’s false statements about the adjudication of the British Advertising Standards Authority, and the *New York Times* faulty fact-checking.

² See ASA Adjudication: Save Darfur Coalition (Aug. 8 2007), http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_42993.htm.

³ Sam Dealey, *Correction*, N.Y. TIMES, Aug. 22, 2007, at 10, available at <http://www.nytimes.com/2007/08/12/opinion/12dealey.html>.

II. THE ATROCITIES DOCUMENTATION SURVEY

In September of 2004, the United States Department of State published an eight-page report, *Documenting Atrocities in Darfur*, whose chillingly cogent tables, charts, maps, and pictures spoke volumes.⁴ The report was based on survey interviews in 1136 refugee households in Chad and is the empirical foundation for much of the further analysis presented in this article. The Atrocities Documentation Survey [ADS] on which the report was based enumerated more than 12,000 deaths and many more rapes and other atrocities that the respondents personally had seen or heard about before fleeing from attacks on their farms and villages over the previous year and a half in Darfur. The report began with a chart revealing the following findings from the 1136 refugee interviews:

- 81 percent reported their village was destroyed.
- 80 percent reported their livestock was stolen.
- 67 percent reported witnessing or experiencing aerial bombing.
- 61 percent reported the killing of a family member.
- 44 percent reported witnessing or experiencing a shooting.
- 33 percent reported hearing racial epithets during attacks.⁵

Secretary of State Colin Powell made headlines when he summarized results from this survey for the United Nations Security Council and the United States Congress as evidence of a racially targeted and militarily unjustified Sudanese-sponsored genocide in Darfur.

The release of Powell's testimony by the State Department was followed minutes later by a separate White House statement from President Bush which again built on the ADS as its foundation:

I sent Secretary of State Powell to Darfur and Khartoum to demand that the Sudanese Government act to end the violence Secretary Powell later sent a team of investigators into the refugee camps to interview the victims of atrocities. As a result of these investigations and other information, we have concluded that genocide has taken place in Darfur. We urge the international community to work with us to prevent and suppress acts of genocide. We call on the United Nations to undertake a full investigation of the genocide and other crimes in Darfur.

This was the first time an American President had rebuked a sovereign nation by invoking the Geneva Genocide Convention, and certainly the first time that a crime victimization survey had played a support role in the formation of United States

⁴ BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, PUBL'N NO. 11182, DOCUMENTING ATROCITIES IN DARFUR 1 (2004).

⁵ *Id.* at 3, chart 1.

foreign policy. This victimization survey recorded a level of criminal detail that no health survey could provide. The resulting report outlined the criminology of genocide.

Nonetheless, this United States declaration of genocide was combined with the tentativeness of a request by Powell for more African Union troops to act as “monitors” and Bush’s call for a United Nations investigation. These actions were a timid answer to genocidal atrocities and signaled the Bush Administration’s fundamental ambivalence about Darfur. Powell insisted in his Congressional testimony that “no new action is dictated by this determination,” which undercut the potential force of his genocide charge.

We will demonstrate in this essay that the Administration’s use of survey evidence, including its own victimization survey, ultimately became an exercise in flip-flop diplomacy. To understand the confusing politics of these events it is important to first understand the uniqueness of the Atrocities Documentation Survey.

III. SURVEYING HOSTILE CIRCUMSTANCES

Colin Powell and the State Department were motivated in the summer of 2004 by horrific news stories of attacks and killings in Darfur, and further by the fact that Congress had already passed a unanimous condemnation of genocide in Darfur. The Administration wanted to reassert a leadership position on this foreign policy issue by providing systematic evidence of the seriousness of the war and human rights crimes that were reportedly taking place.

As a step toward this goal, in June of 2004, Andrew Natsios, a United States Agency of International Development administrator, who is now the United States Special Envoy to Sudan, appeared before a donors conference in Geneva and presented satellite images of the destruction of a village in Darfur. The images were described by David Springer, a geospatial analyst from the State Department, who pointed to a pair of pictures that recorded the fate of the village of Shattay—before and after a militia attack. Springer offered a detailed explanation of changes in the surrounding vegetation and the further geophysical signs of the destruction of Shattay.

One purpose of this presentation was to place the government of Sudan on notice that their activities in Darfur were being observed and recorded. An official who described this event nonetheless cautioned “that the images are not hard evidence until they are corroborated by testimony of witnesses on the ground.”⁶ Under the increasing pressure to provide a reliable assessment of the situation, the State Department had also sent an atrocities documentation team into the field to survey the refugees fleeing Darfur.

The ADS was conducted under the direction of Stephanie Frease of the CIJ, and Jonathan Howard, a research analyst with the State Department’s Office of Research. Frease volunteered when the American Bar Association approached her as a person

⁶ Monica Amarelo, *Using Science to Gauge Sudan’s Humanitarian Nightmare*, AM. ASS’N ADVANCEMENT SCIENCE, Oct. 24, 2004, <http://www.aas.org/news/releases/2004/1026sudan.shtml>.

who could organize and conduct a large survey in Chad. She was asked by the United States Ambassador on War Crimes and the State Department to complete the survey in just two months time.⁷ This was an audacious demand, but Frease, in spite of her youthful appearance, had demonstrated her capacity a few years earlier to organize and complete challenging data-collection projects. Working inside what she had called “the Srebrenica ghost team,” Frease located and successfully brought to court the “smoking gun” audio intercept evidence for the genocide trial of General Radislav Krstic at the International Criminal Tribunal for the Former Yugoslavia [ICTY].⁸ That trial had climaxed with a chilling recorded voice giving the deadly orders to “kill them all, kill them all.” Frease was the ICTY investigator who, with a small team of investigators and interpreters, had searched through reams of intercepted communications to find this incriminating verbal order.

The current challenge was of a different sort, but no less daunting. It included developing the survey instrument, recruiting interviewers and interpreters, planning the logistics of conducting surveys in nineteen locations in eastern Chad that were unreachable by normal roads, designing a sampling plan, moving the research team in and out of the survey locations, and organizing the coding and analyzing of over one thousand interviews. Several hundred of the interviews were conducted for Secretary of State Powell’s use in his appearance before the United Nations Security Council in July, and the full survey of 1136 households in Chad was completed with a preliminary analysis for the brief *Documenting Atrocities* report that accompanied Powell’s Congressional testimony in early September.

The field interviews were conducted in July and August of 2004 by two groups working for two-week periods, each with fifteen interviewers that included area experts, social scientists, lawyers and police investigators. A protocol was developed for the survey that mixed the closed-ended format of a crime-victimization survey with the semi-structured format of legal witness statements. The interviewers worked with interpreters in ten camps and nine settlements across the West Darfur border in Chad.

The sampling was systematic. Interviewers randomly selected a starting point in each camp or settlement and then from within this designated sector selected every tenth dwelling unit for interview. All the adults living in the unit were listed on the survey instrument and one adult from the household was randomly chosen for a private interview, resulting in the final 1136 sampled households.

Up to twenty incidents were coded for each household interview, with detailed information collected about the nature of the crimes. The legally-oriented interviewers were intent on collecting responses to their survey questions with sufficient detail to support potential courtroom claims. The *Documenting Atrocities* report of the survey used univariate descriptive statistics and formed the background

⁷ Mark Goldberg, *Khartoum Characters*, AM. PROSPECT, July 2005, at 14.

⁸ See JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL I (2003).

for Secretary of State Powell's testimony on September 9, 2004, to the United States Senate Foreign Relations Committee, reporting that genocide was occurring in Darfur.

We have used the ADS data to elaborate a preliminary estimate of mortality in Darfur. Of course, the ADS is not the only source of data about the conflict in Darfur. Probably the best known data on this conflict come from survey work conducted by the World Health Organization [WHO] in the internal displacement camps inside Darfur. Since there is no census or hospital data for Darfur from which to otherwise calculate mortality, the breadth of the WHO survey work is important. However, the differences between the ADS and WHO survey contributions also reflect the important distinctions between crime and health research paradigms. While the ADS design represents a cutting edge example of the use of a crime-victimization approach, with its emphasis on incident-based reporting of a wide range of different kinds of criminal events before and in the refugee camps, the WHO survey represents an application of a health-research approach to complex humanitarian emergencies, with its parallel emphasis on mortality linked to disease and nutritional problems in displacement camps.

Important survey work has also been reported by the French human rights group, *Medecins Sans Frontieres* [MSF], from surveys conducted in the state of West Darfur. Although the MSF survey work was limited to a smaller number of camps in West Darfur, this initiative represents a unique attempt to combine attention to pre-camp and in-camp experiences, including attention to mortality in both settings. This research will become important for conclusions we reach later in this article. First it is important here, however, to learn more about the findings of the WHO and ADS studies.

IV. EARLY FINDINGS FROM THE WORLD HEALTH ORGANIZATION SURVEYS

Organizations such as the World Health Organization, the World Food Program, and the Center for Disease Control and Prevention—especially in a setting such as Darfur—are understandingly more preoccupied with the immediate and ongoing challenges of disease and malnutrition than they are with the past violence that leads displaced persons to flee camps in the first place. This is a key reason why Powell's State Department and its ambassador on war crimes needed a crime-victimization survey for Darfur and, therefore, initiated the ADS.

At about the same time as the ADS, during the late summer of 2004, the WHO was conducting surveys of mortality and other health and nutrition issues with the Sudanese Ministry of Health across a large number of camps inside the three states of Darfur. This work produced estimates of crude mortality rates [CMRs]. Thus, a WHO retrospective survey for two summer months of 2004 produced a CMR of 2.14 for the states of North and West Darfur (South Darfur was less fully surveyed). This is a level of mortality four to seven times greater than normally expected in sub-Saharan Africa.

It is significant to add some further detail about what this CMR, calculated by the WHO, includes. This CMR is a meaningful estimate of mortality following

displacement due to health problems in the camps, with some added deaths resulting from forays outside the camps during this period to collect firewood or other necessities of life in the camps. Few of the deaths included in the calculation of this CMR could have been due to violent attacks prior to displacement. We will say more about this below. Unfortunately, as we also note further below, the latter point was not well understood at the time, and still is not widely understood today. Of course, for criminological purposes, it is essential to have information on the violent deaths resulting from attacks prior to displacement.

The survey work of WHO also became the source of an influential estimate that 70,000 Darfurian refugees had died in just seven months of 2004, with the deaths again coming almost entirely from malnutrition and disease.⁹ This estimate was announced personally by David Nabarro, a public spokesman for WHO.¹⁰ Nabarro concluded from the WHO surveys that deaths were occurring in Darfur at the rate of about 5,000 to 10,000 persons per month. This estimate required going beyond the original retrospective survey, by linking the CMRs with separate estimates of the larger population at risk in Darfur. The latter population was estimated from counts of displaced persons in the camps and reported in United Nations reports known as "Humanitarian Profiles." This count of the population at risk can be used along with the CMR, expressed as the number-of-deaths per 10,000-population per day, to estimate a monthly death toll. Obviously both the CMR and the internal displaced camp population will vary from month to month. However, in the 2004 summer months covered by the WHO survey, the death toll was probably near its peak, and the emphasis was on trying to gauge this emergency level of mortality.

In March of 2005, Jan Egeland, a United Nations emergency relief coordinator, had just returned from a fact-finding trip to Darfur. Egeland was pressed by the United Nations press corps to provide an updated estimate of the death toll in Darfur. At first, he enigmatically responded that it was impossible to estimate the death toll because "it is where we are not that there are attacks." Then, when he was asked to comment on the outdated 70,000 estimate, he responded by saying, "Is it three times that? Is it five times that? I don't know but it is several times the number of 70,000 that have died altogether."¹¹

Several days later, Egeland obviously had concluded that the imprecision of his earlier answer was unsatisfactory. In a new response to the press, he extrapolated from the United Nations' WHO survey by multiplying Nabarro's 10,000 per-month figure by eighteen months instead of seven. The official United Nations estimate thus jumped to 180,000.¹² Although this latter estimate was based on no further data

⁹ David Nabarro, Media Briefing, World Health Organization, Mortality Projections for Darfur (Oct. 15, 2004), <http://www.who.int/mediacentre/news/briefings/2004/mb5/en/>.

¹⁰ Donald McNeil, *At the U.N.: This Virus Has an Expert 'Quite Scared'*, N.Y. TIMES, Mar. 28, 2006, at F1.

¹¹ Evelyn Leopold, *U.N. Envoy Says Deaths in Darfur Underestimated*, REUTERS, Mar. 10, 2005.

¹² Evelyn Leopold, *Over 180,000 Darfur Deaths in 18 month—U.N. Envoy*, REUTERS, Mar. 15, 2005.

collection or analysis, other than simply multiplying the 10,000-monthly estimate by eighteen months, Egeland's estimate began to consolidate an early media appraisal of the scale of the genocide in Darfur. While it is doubtful that deaths remained at a constant peak level of 10,000 per month in Darfur for eighteen months, there were reasons to think the peak monthly death toll was actually higher than 10,000 per month.

V. A GATHERING CONSENSUS

The projection of 180,000 deaths from the WHO survey was at the lower end of a collection of estimates receiving attention in the media at the beginning of 2005. In February, 2005, Jan Coebergh, a British physician, noted the absence of violent deaths from the WHO survey and, drawing some simple inferences from the ADS, estimated in an article in *Parliamentary Brief* that the true death toll was nearer 300,000.¹³ The scale of this estimate echoed the views of American activist-scholar Eric Reeves of Smith College, who had been posting on the Internet similarly large estimates based on parallel assumptions for some time.¹⁴ Eric Reeves soon updated his work in a *Boston Globe* op-ed piece, projecting a death toll of 400,000.¹⁵ The importance of Coebergh and Reeves' estimates is that they made explicit that their higher projections involved adding deaths resulting from violence recorded in the ADS work to the deaths mainly following from disease and malnutrition in the WHO survey. These estimates were attempts to bridge the crime and health paradigms.

At almost the same time, in conjunction with the CIJ, we issued a press release detailing an estimate based on a combination of the WHO and ADS surveys. The estimate involved going back through each of the 1136 ADS surveys and retracing all of the steps necessary to make this projection clearly and completely transparent. We concluded that as many as 350,000 persons might have died, and that nearly 400,000 persons were likely either missing or dead in Darfur.¹⁶ The *New York Times* and *Washington Post* now began reporting with some frequency an estimate of 300,000 deaths. Kofi Annan seemingly endorsed the higher assessment when he indicated in a *New York Times* op-ed article that 300,000 "or more" Darfurians were thought to have died.¹⁷ In April, 2005, Marc Lacey cited our nearly 400,000 dead-and-missing figure

¹³ Jan Coebergh, *Sudan: Genocide Has Killed More than Tsunami*, PARLIAMENTARY BRIEF, Feb. 2005, at 5-6.

¹⁴ Eric Reeves, *Darfur Mortality Update: June 30, 2005*, SUDAN TRIBUNE, July 1, 2005, available at http://www.sudantribune.com/spip.php?article10470&var_recherche=Darfur%20Mortality%20Update%3A%20June.

¹⁵ Eric Reeves, *Hunanitarian Intervention in Darfur?*, BOSTON GLOBE, Apr. 17, 2005, at C11.

¹⁶ John Hagan, Wenona Rymond-Richmond & Patricia Parker, Press Release, Coalition for International Justice (Apr. 21, 2005) (on file with author).

¹⁷ Koffi Annan, *Billions of Promises to Keep*, N.Y. TIMES, Apr. 13, 2005, at A19.

for the first time in the *New York Times*.¹⁸ A consensus was emerging that hundreds of thousands had died, with the estimates now ranging from 180,000 to 400,000 deaths.

VI. THE CONSENSUS BREAKS

In the early spring of 2005, Assistant Secretary Robert Zoellick, the deputy to the new Secretary of State, Condoleezza Rice, paid a personal visit to Darfur. The *New York Times* described Zoellick as “a diplomatic lone ranger with 3 x 5 cards.” He later left the Bush Administration to join the Wall Street investment firm, Goldman Sachs, and today is President of the World Bank. Much of his government service involved negotiating trade agreements, and he saw himself as bringing the “comparative advantage” of economic thinking to his State Department diplomacy.¹⁹ Condoleezza Rice spoke to the press before his departure to Sudan to emphasize the importance she attached to the trip. So the press was attentive when Zoellick’s visit produced a revised, and highly unexpected, upbeat assessment of events in Darfur.

In a press conference held in Khartoum with the first Vice President of Sudan, Ali Uthman Muhammad Taha, Zoellick startled reporters by declining to reaffirm Powell’s earlier determination that genocide had occurred. When he was asked about the characterization of the conflict in Darfur as genocide, he answered that he did not want to “debate terminology.”²⁰ He went on to dispute the then-prevailing consensus estimates of deaths that we have seen were all in the hundreds of thousands. Zoellick instead reported a new State Department estimate that as few as 60,000 and at most 146,000 “excess” deaths had occurred in Darfur. The State Department subsequently posted a new report on its web site, *Sudan: Death Toll in Darfur*, explaining that “violent deaths were widespread in the early stages of this conflict, but a successful, albeit delayed, humanitarian response and a moderate 2004 rainy season combined to suppress mortality rates by curtailing infectious disease outbreaks and substantial disruption of aid deliveries.”²¹

The reference to “excess” deaths was a sign that the new State Department estimate was now tilting toward the public health side of a disciplinary divide, while simultaneously stepping away from its own victimization methodology. The more explicit sign of this shift was that the State Department had now chosen to exclude the results from its own ADS survey in its new estimate. This was a unique indication of the extent to which the new estimate was framed in the health paradigm of “complex humanitarian emergencies” rather than the war crimes context of genocide. The new

¹⁸ Marc Lacey, *Nobody Danced. No Drugs. Just Fear. Some Holiday!*, N.Y. TIMES, Apr. 22, 2005, at A4.

¹⁹ Joel Brinkley, *A Diplomatic Lone Ranger With 3 x 5 Cards*, N.Y. TIMES, Apr. 17, 2005, at 8.

²⁰ Robert B. Zoellick, Press Briefing, U.S. Dep’t of State (Apr. 14, 2005), available at <http://www.state.gov/s/d/former/zoellick/rem/44656.htm>.

²¹ BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP’T OF STATE, FACT SHEET, SUDAN: DEATH TOLL IN DARFUR (Mar. 25, 2005), <http://www.state.gov/s/inr/rls/fs/2005/45105.htm>.

estimate was based on the troubling assumption that the kind of survey work done by the WHO comprehensively measured the scale of mortality occurring in Darfur.

Yet it was already clear from public statements by the WHO's David Nabarro (discussed further below) that its survey was a partial picture of the death toll, since by the evidence of Nabarro's own carefully framed remarks, the WHO survey did not take into account those killed in the attacks on the Darfur villages that had provoked the flight to the displacement and refugee camps in the first place.

It may also be noteworthy, as we also explain further below, that the Zoellick visit came just a week after the United Nations had given the names of fifty-one persons identified by the United Nations's Commission of Inquiry on Darfur to the International Criminal Court [ICC] for possible prosecution.²² The list of suspects was known to include high ranking Sudanese government officials, perhaps even including Zoellick's Vice Presidential host at the press conference in Khartoum. This provides some background context to the press conference that Zoellick held with the Sudanese Vice President, where he announced the new, much lower, estimate that as few as 60,000 persons were now believed to have perished in Darfur.

The immediate response to Zoellick's announcement of the State Department's new estimate was shock. The *American Prospect's* Mark Goldberg called the State Department visit to Sudan "Zoellick's Appeasement Tour."²³ John Prendergast, speaking for the International Crisis Group, summarized feelings in much of the non-governmental organization, saying "for Zoellick to float 60,000 as a low end number is negligent criminally."²⁴ He added that "it's a deliberate effort by the Bush administration to downplay the severity of the crisis in order to reduce the urgency of an additional response. I find that to be disingenuous and perhaps murderous."²⁵ Prendergast, who served as a National Security Council official in the Clinton Administration, also indicated a motivation for the low estimate, saying "[w]e have not taken adequate measures given the enormity of the crimes because we don't want to directly confront Sudan when it is cooperating on terrorism."²⁶ Nonetheless, the State Department's new estimate had its apparently intended effect on major media news outlets. Whereas these sources previously were regularly reporting *hundreds of thousands* of deaths in Darfur, boilerplate articles reporting of the death toll now shrunk to *tens of thousands*.²⁷ Major mainstream news services—including Reuters, United Press International, and the British Broadcasting Company—now included the

²² Warren Hoge, *International War-Crimes Prosecutor Gets List of 51 Sudan Suspects*, N.Y. TIMES, Apr. 6, 2005, at A6.

²³ Mark Goldberg, *Zoellick's Appeasement Tour*, AM. PROSPECT, Apr. 29, 2005, http://www.prospect.org/cs/articles?article=zoellicks_appeasement_tour.

²⁴ Sue Fleming, *Aid Group Criticizes US Policy on Sudan*, REUTERS, Apr. 26, 2005, available at <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/37/10647/printer>.

²⁵ *Id.*

²⁶ Ken Silverstein, *Official Pariah Sudan Valuable to America's War on Terrorism*, L.A. TIMES, Apr. 29, 2005, at A4.

²⁷ JOHN HAGAN, *DARFUR AND THE CRIME OF GENOCIDE*, fig.4.2 (forthcoming 2008).

tens-of-thousands framing of the conflict as a stock phrase in their new stories, a practice that would continue for more than a year following. A picture soon began to emerge of why the State Department's Robert Zoellick had shifted its framing of the conflict in Darfur. It supported earlier speculation about the Bush Administration's war on terrorism.

VII. THE OSAMA BIN LADEN CONNECTION

Within a week of Zoellick's return to Washington, The *Los Angeles Times* reported that just prior to Zoellick offering his new mortality assessment in Khartoum, the C.I.A. had provided a jet to bring the Sudanese government intelligence chief, Major General Salah Abdallah Gosh, to Washington.²⁸ The purpose of the visit was apparently to elicit information in the war on terrorism. The *L.A. Times* quoted State Department sources as attesting to the importance of Sudanese cooperation, following on Sudan's role in the early 1990s in providing sanctuary to Osama Bin Laden and a base for Al Qaeda operations. Sudan's General Gosh now was quoted as saying "we have a strong partnership with the C.I.A." Gosh had been an official "minder" of Bin Laden during his time in Darfur.²⁹

The *New York Times* reported that the C.I.A. flew Gosh from Khartoum to Baltimore-Washington International Airport on April 17, returning him to Khartoum on April 22, making Gosh's trip coincide with Zoellick's stay in Sudan.³⁰ The *Los Angeles Times* reported Gosh met in Washington with C.I.A. officials on April 21 and 22.³¹ Zoellick arrived in Sudan on April 14, and his low mortality estimate was reported in the *Washington Post* on April 24.³²

As chief of Sudan's intelligence and security service, observers have frequently charged that Gosh, as chief of Sudan's intelligence and security service, directed or at least knew of the role of the Sudanese military in the attacks on Darfur villages. Gosh's name is prominently positioned in the Sudanese government chain of command. A follow-up *L.A. Times* story indicated that the Justice and State Departments were at odds over Gosh's Washington visit, with some in the Justice Department suggesting that the trip should have more appropriately been an opportunity to detain a suspected war criminal.³³ Instead, General Gosh met during the visit with Porter Goss, the Bush Administration C.I.A. chief, who later resigned amidst allegations and prosecutions of bribes and government contracts.

²⁸ Ken Silverstein, *Sudanese Visitor Split U.S. Officials*, L.A. TIMES, June 17, 2005, at A13.

²⁹ Silverstein, *supra* note 26.

³⁰ Scott Shane, *C.I.A. Role in Visit of Sudan Intelligence Chief Causes Dispute Within Administration*, N.Y. TIMES, June 18, 2005, at A7.

³¹ Silverstein, *supra* note 28.

³² Editorial, *Darfur's Real Death Toll*, WASH. POST, Apr. 24, 2005, at B6.

³³ Silverstein, *supra* note 28.

The suggestion that Sudan's General Gosh is a suspected war criminal is not new, and responsibility for his protective treatment extends beyond the United States. Alex de Waal writes:

the real power in Khartoum is not President Bashir, who is a pious, tough soldier, but a cabal of security officers who have run both the Sudanese Islamist movement and the Sudanese state as a private but collegial enterprise for the last 15 years. . . . And the members of this cabal are serial war criminals.³⁴

General Gosh, as Sudan's national security chief, was cited by Congress in 2004 as having played a key role in orchestrating the Darfur genocide.³⁵

Despite these allegations, the Administration saw Gosh as potentially useful in its war on terrorism, and in May 2004, it removed Sudan from its list of countries not cooperating in counter-terrorism. The trip for Gosh to Washington by private C.I.A. chartered jet during Deputy Secretary Zoellick's trip to Khartoum seemed intended to reward his past cooperation in providing information, and to encourage the possibility of future assistance. The *L. A. Times* has continued to report on the links between the C.I.A. and Sudan's security service, called the Mukhabarat, noting that "Gosh has not returned to Washington since, but a former official said that 'there are liaison visits every day' between the C.I.A. and the Mukhabarat."³⁶ The United States Department of State recently issued a report calling Sudan a "strong partner in the war on terror."

It seems likely that the reduced mortality estimate in Darfur and the temporarily suspended references to genocide were part of the cooperative strategy. President Bush did not mention the genocide in Darfur for a period of more than four months in 2005. In May, 2005, the columnist Nicholas Kristof wrote that, "today marks Day 141 of Mr. Bush's silence on the genocide, for he hasn't let the word Darfur slip past his lips publicly since Jan. 10 (even that was a passing reference with no condemnation)."³⁷ This is the period that the State Department reduced its Darfur mortality estimate and brought Sudan's General Gosh to Washington. The nonpartisan Congressional Research Service indicates that although Gosh and other Sudanese officials played "key roles in directing . . . attacks against civilians," the Administration was "concerned that going after these individuals could disrupt cooperation on counter-terrorism."³⁸ This was actually a return to a recurring policy

³⁴ Alex de Waal, *Tragedy in Darfur*, BOSTON REV.: A POLITICAL AND LITERARY FORUM, OCT.-NOV. 2004, available at <http://bostonreview.net/BR29.5/dewaal.html>. See also JULI FLINT & ALEX DE WAAL, *DARFUR: A SHORT HISTORY OF A LONG WAR* (2005).

³⁵ Marisa Katz, *A Very Long Engagement: Bush Channels Neville Chamberline*, NEW REPUBLIC, May 15, 2006, at 24.

³⁶ Greg Miller & Josh Meyer, *U.S. Relies on Sudan Despite Condemning It*, L.A. TIMES, June 11, 2007, at A4.

³⁷ Nicholas Kristof, *Day 141 of Bush's Silence*, N.Y. TIMES, May 31, 2005, at A17.

³⁸ Silverstein, *supra* note 26.

dating at least to the first Bush Administration, when it is also reported that “Washington bureaucrats turned a blind eye towards the policy of the authorities in Khartoum, mainly in the hope of securing their support for American goals in the Middle East.”³⁹

General Gosh’s visit to Washington apparently reaped benefits both for Sudan and for himself. Sudan subsequently was allowed to enter into a \$530,000 public relations contract with a Washington based lobbying firm, C/L International. This was in violation of Executive Order 13067, which prohibits American companies and citizens from doing business with Sudan.⁴⁰ Congress forced an end to this deal in February 2006. Still, Sudanese Foreign Minister Mustafa Osman Ismail was also allowed to meet with Secretary Rice in Washington and was promised a review of economic sanctions, while Deputy Secretary Zoellick attended Sudan’s presidential inauguration.

Most important, however, is the issue of General Gosh and his success in evading personal sanctions. It is reported that Gosh is ranked number two on the widely leaked United Nations list of senior Sudanese officials blamed for allowing, if not directing, the ethnic cleansing in Darfur by the janjaweed militias he is accused of controlling. Nonetheless, Gosh also was able to visit London and meet with British officials.⁴¹ One year after Gosh’s visit to Washington and Zoellick’s announcement of his low estimate in Khartoum, the United Nations belatedly imposed sanctions on four men for Darfur war crimes, but the most highly ranked and only government official was a Sudanese Air Force officer.⁴² A senior State Department official, Donald Steinberg, explained that our interests, “cut on the side of not offending the regime in Khartoum.” The Administration pushed to keep Gosh off the list.⁴³

VIII. STATE’S NEW VIEW OF DEATH IN DARFUR

To alter its perspective and reframe the killing in Darfur, the State Department had to reorganize its survey research by shifting attention away from its own Bureau of Democracy, Human Rights and Labor, and Bureau of Intelligence and Research. These two bureaus had worked together to produce the State Department/CIJ ADS survey of Darfur refugees in Chad and the earlier noted report, *Documenting Atrocities in Darfur*. The State Department shifted its focus by outsourcing a re-analysis to a research group in Brussels at the University of Louvain’s Centre for

³⁹ John Burton, *Development and Cultural Genocide in the Sudan*, 29 J. MOD. AFR. STUD. 511, 518 (1991).

⁴⁰ CRS ISSUE BRIEF FOR CONGRESS, SUDAN: HUMANITARIAN CRISIS, PEACE TALKS, TERRORISM, AND U.S POLICY, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS (2006), available at <http://www.fas.org/sgp/crs/row/IB98043.pdf>.

⁴¹ Peter Beaumont, *Darfur Terror Chief Slips into Britain*, OBSERVER, Mar. 12, 2006.

⁴² Warren Hoge, *U.N. Council Imposes Sanctions on 4 Men in Darfur War Crimes*, N.Y. TIMES, Apr. 26, 2006, at A10.

⁴³ Katz, *supra* note 35, at 25.

Research on the Epidemiology of Disasters. Working with Mark Phelan, a new liaison person from a different part of the State Department, and using surveys done outside the Department, the Brussels group reported the background details of the new low estimate that Deputy Secretary Zoellick had announced more than a month earlier in Khartoum. This report does not provide the full details on the primary source surveys it relied upon. However, the report is otherwise detailed in an internet working paper titled, *Darfur: Counting the Deaths*,⁴⁴ and was the foundation for the State Department's new calculations.

On the Sunday following his Khartoum announcement, the *Washington Post* reproached Zoellick about the validity of his mortality estimate in an editorial titled "Darfur's Real Death Toll." The *Post* insisted that "the 60,000 number that Mr. Zoellick cited as low-but-possible is actually low-and-impossible," and the editorial concluded that "next time he should cite better numbers." The editorial cited the estimate we had posted on the CIJ website to make its point.⁴⁵

Zoellick took the unusual step of responding with a letter of protest to the *Post* in which he defended his actions and referred by implication to parallel disputes involving charges that Administration officials invented and stretched intelligence, in this case scientific surveys, to support policy preferences.⁴⁶ The description of the population-based survey mortality estimates as "intelligence" was unusual, but perhaps understandable when viewed in conjunction with the Washington visit of the Sudanese security and intelligence minister General Gosh. Zoellick protested in his letter that,

I did not invent intelligence or stretch it. I did not recommend that the analysts change their assessment. I did indicate that estimates varied widely and that many were higher. Our estimate was based on more than 30 health and mortality surveys by public health professionals, and it was corroborated by a World Health Organization research center.⁴⁷

To support Zoellick's claim, the State Department had previously posted on its website an earlier, very brief, report, *Sudan: Death Toll in Darfur*.⁴⁸

The corroborative role of the WHO affiliated research center is more fully revealed in the outsourced report from the Brussels group introduced above, but here

⁴⁴ DEBARATI GUHA-SAPIR, OLIVER DEGOMME & MARK PHELAN, *DARFUR: COUNTING THE DEATHS: MORTALITY ESTIMATES FROM MULTIPLE SURVEY DATA*, CENTRE FOR RESEARCH ON THE EPIDEMIOLOGY OF DISASTERS, UNIVERSITY OF LOUVAIN, SCHOOL OF PUBLIC HEALTH, BRUSSELS (2005), available at <http://www.cred.be/docs/cedat/DarfurCountingTheDeaths-withClarifications.pdf>.

⁴⁵ Editorial, *supra* note 32.

⁴⁶ R. Zoellick, Letter to the Editor, *On Darfur, A Call for the Wrong Action*, WASH. POST, Apr. 27, 2005, at A22.

⁴⁷ *Id.*

⁴⁸ BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T OF STATE, FACT SHEET, *SUDAN: DEATH TOLL IN DARFUR* (Mar. 25, 2005), <http://www.state.gov/s/inr/rls/fs/2005/45105.htm>.

the WHO's own characterization of this and the later Brussels "multiple survey" analysis is notable. A late May 2005 protocol from WHO concluded that "even if, overall, the findings of these surveys are consistent in showing broad spatial and time trends, they cannot be directly compared or combined in a meta-analysis due to differences in the study populations or methods utilized." A follow-up *Washington Post* article quoted a "senior State Department official" as saying that the report was "less scientific than you'd think."⁴⁹ It is noteworthy that Mark Phelan, the public health specialist newly involved from the State Department, has an extensive background of research experience in public health and nutrition surveys.

Why was the State Department now relying on a review involving a health and nutrition expert and based on uncited sources that reported results substantively at odds with its earlier report issued under Colin Powell? What were these uncited sources and what could they tell us about death in Darfur during this continuing lethal conflict? How could scientific studies of such a lethal and protracted conflict produce such different conclusions? What can this experience tell us about the place of criminology in science and diplomacy? The answers to these questions may not definitively tell us whether outsourced scientific research in this episode was, to use Zoellick's words, "invented or stretched intelligence," but the answers do help to reveal the ways in which scientific research can flip-flop in response to demands of diplomacy, in this case involving a denial of the deaths of many Darfurians.

The answers again involve the health and crime perspectives applied in surveying the events in Darfur. The tension between these approaches is apparent from the outset of the outsourced Brussels report. In a broadside against the State Department's ADS work from the previous summer (i.e., the survey that was the foundation of Colin Powell's testimony about genocide to the United Nations and United States Congress), the Brussels report complains that "these interviews . . . were not designed in any way to function as a mortality survey nor was there an overall systematic sampling methodology used that could make it representative of the roughly 200,000 refugees that fled to eastern Chad, much less of the entire 2.4 million people affected of Darfur."⁵⁰ Yet the survey applied a probability sampling methodology we described above (based on a random one-in-ten household selection in all nineteen identified Chad camps and settlements), and that is explicitly described in the State Department's own *Documenting Atrocities in Darfur* publication.⁵¹ Why would the Brussels report suggest otherwise?

The answer at least partly involves the criminal-victimization, as contrasted with public-health, approach followed in the earlier State Department/CIJ work. Despite the common social and political causes of the health and crime dimensions of such

⁴⁹ Glenn Kessler, *State Department Defends Estimate in Darfur Conflict*, WASH. POST, Apr. 27, 2005, at A17.

⁵⁰ GUHA-SAPIR ET AL., *supra* note 44.

⁵¹ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR & BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T OF STATE, *DOCUMENTING ATROCITIES IN DARFUR* (Sept. 2004), available at <http://www.state.gov/g/drl/rls/36028.htm>.

humanitarian emergencies, epidemiologists and demographers are inclined to focus mainly on the health outcomes,⁵² whereas criminologists prioritize issues of legal responsibility.⁵³ As we have noted, a common sequence in these emergencies involves the onset of violent attacks, the flight of the resulting victims, and ensuing health problems that all contribute to mortality. The challenge is to simultaneously keep in mind the cumulative and multiplicative effects of violence, flight, and displacement to concentrated encampments, and the political state and non-state origins of these disastrous consequences.⁵⁴

IX. REEXAMINING THE SURVEYS

We originally were concerned that the WHO survey work underestimated mortality in Darfur by ignoring almost all of the pre-camp killing that led survivors to flee to the camps. Yet we were also concerned when we undertook our own combined estimation that the ADS work could exaggerate Darfur mortality due to the pre-camp violence by including multiple family members' overlapping reports of the same killings. Stephanie Frease, of the CIJ, had acknowledged this point by noting in an early report of the ADS results that "refugees included extended family—such as uncles and cousins—in their answers."⁵⁵

To address this problem, we further examined each of these 1136 surveys from the ADS to establish that during the seventeen-month period covered, 360 persons *specifically identified as husbands, wives, sons and daughters* were reported as dead or missing and presumed dead. Unless there was a specific reference in the original interview to the death involving a nuclear family member, the death was not included in the 360 total. This requirement of explicit nuclear family membership was invoked to eliminate overlapping, duplicate reports of deaths by extended family members. The count of 360 dead or missing persons formed the basis for the calculation of a CMR of 1.2 deaths per 10,000 people per day, or more than 98,000 persons presumed dead for the first eighteen months of the conflict.

Note that this figure exceeds by more than fifty percent the low estimate reported by Zoellick, even though it does not cover the full period of the conflict and does not include deaths from malnutrition and sickness in the camps, which was the focus of the WHO survey cited above. Why such a large disparity on such a fundamental matter of life and death?

⁵² See, e.g., WORLD HEALTH ORGANIZATION, *DARFUR: ONE YEAR ON, WHO'S WORK TO SAVE LIVES AND REDUCE SUFFERING* (2004), available at <http://www.emro.who.int/sudan/media/pdf/Darfur%20report%202004.pdf>.

⁵³ See John Hagan & Scott Greer, *Making War Criminal*, 40 *CRIMINOLOGY* 231 (2002).

⁵⁴ John Hagan, Heather Schoenfeld & Alberto Palloni, *The Science of Human Rights, War Crimes and Humanitarian Emergencies*, 32 *ANN. REV. SOC.* 329 (2006).

⁵⁵ *Survey: Many Thousands Killed in Darfur Attacks*, ASSOCIATED PRESS, Jan. 20, 2005, <http://www.msnbc.msn.com/id/6847039/>.

From a criminological perspective, the key lies in the difference between the Powell State Department's criminal victimization survey methodology and the studies done for health-focused organizations in Darfur. Recall that while Powell wanted to testify on the basis of reliable evidence about the genocidal killing that led Darfurians to flee their villages and seek refuge in camps, the public health organizations worked with a different purpose. These organizations subsequently needed to work with and for those living in the camps to stop them from dying of starvation and disease. Population health surveys of mortality, morbidity and nutrition are undertaken by these public health organizations to establish the risks posed in camp settings by starvation and disease. As we have noted, these organizations (such as the World Health Organization, the World Food Program, and the Center for Disease Control and Prevention) are more concerned with these immediate and ongoing risks than they are with the past violence that leads refugees to camps. This is why Powell needed his own victimization survey to substantiate his congressional testimony about genocide.

The survey work was undertaken by the State Department through the CIJ in the Chad refugee camps because the Sudanese government would not allow this kind of violence-based investigation to be broadly undertaken within its national borders. Instead, the Sudanese government wanted to blame the deaths in Darfur on problems of health and nutrition that the international health organizations had failed to overcome and control.⁵⁶ The State Department therefore adopted its own alternative victimization survey methodology. Since the refugees in the Chad camps had fled from Darfur, they could provide through their retrospective accounts a window on the violence in the homes and villages they left behind. This kind of indirect estimation approach is increasingly used by demographers, for example, to inquire through surveys of North Koreans, who took refuge across the border in China, about their family history of nutrition and health problems, including those among siblings remaining behind the closed North Korean boundary.⁵⁷

Parallel differences between crime and health surveys are reflected in much of the respective research of other organizations undertaken in studies that have produced distinctively different death estimates for Darfur. Much of the resulting confusion and debate in the case of Darfur goes back to the WHO mortality survey noted early in this article as the source of the seven-month estimate of 70,000 deaths. We noted that this survey was conducted at about the same time as the State Department/CIJ survey in Chad, in late summer of 2004; but the WHO survey was done inside Darfur, and jointly conducted with the Sudanese Ministry of Health [henceforth WHO/SMH], as a health—rather than a legally—oriented crime victimization survey.

⁵⁶ See INTERNATIONAL DEVELOPMENT COMMITTEE, DARFUR, SUDAN: THE RESPONSIBILITY TO PROTECT, 2004-05, H.C. 67-II, 48-59, available at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67ii.pdf> (testimony of Mukkesh Kapila, the former United Nations Resident and Humanitarian Coordinator for Sudan).

⁵⁷ See W. Courtland Robinson et al., *Mortality in North Korean Migrant Households: A Retrospective Study*, 354 LANCET 291 (1999).

The different foci of the State Department/CIJ and WHO/SMH studies can be seen as complimentary, but the confusion of their separate criminal law and health purposes has led to the flip-flop in conclusions in the State Department's recent reports. David Nabarro of WHO attempted to forestall this outcome in October of 2004, when he posted his report of the seven-month 70,000 death estimate. He stated clearly that "[t]hese projections have not sought to detail deaths due to violent incidents within Darfur communities"⁵⁸ The CNN coverage of Nabarro's press conference indicated this by noting that "the figure does not take into account deaths from direct violence in the conflict-torn region."⁵⁹

This would seem to be a clearly understood statement about the WHO/SMH survey, but on February 23, 2005, the British Secretary of State, Hilary Benn, testified to the Parliamentary International Development Committee that "[i]t is my best information that the WHO estimate for the period March to October . . . 2004 did include deaths from injuries and from violence."⁶⁰ Later in the same hearing, the Member of Parliament who raised the issue reported that

I am since told that the Committee has been advised by the WHO that that 70,000 does not include deaths due to the violence from which people have fled, which is obviously the vast bulk of the violence, it includes only that violence which has come about through fights over the distribution and allocation of food within the IDP camps.⁶¹

Secretary Benn wrote further to the Committee on March 14, 2005, to clarify her view with regard to the WHO/SMH survey, stating that "it is not possible to calculate with confidence the number of deaths directly related to the conflict."⁶² The Committee felt strongly enough on this matter to present in bold print the statement in its final report at the end of March 2005 that "[t]he only violent deaths which the WHO's estimate includes are those which took place in the camps for Internally Displaced Persons (IDPs) Cited without clear explanation of its limitations, the WHO's estimate is extremely misleading."⁶³

This might seem to have definitively resolved this issue, yet the issue arose again in the late May 2005 report from the Brussels group that provides further insight into Zoellick's low State Department estimate. The Brussels report, co-authored with the

⁵⁸ Nabarro, *supra* note 9.

⁵⁹ *Report: Up to 70,000 Sudanese Dead*, CNN.COM, Oct. 17, 2004, <http://edition.cnn.com/2004/WORLD/africa/10/17/un.sudan/index.html>.

⁶⁰ INTERNATIONAL DEVELOPMENT COMMITTEE, *supra* note 56, at 65 (testimony of Hilary Benn).

⁶¹ *Id.* at 69–70 (testimony of John Bercow).

⁶² Official correspondence from Hilary Benn, Secretary of State, to Tony Baldry MP, Chairman, International Development Committee (Mar. 14, 2005) (on file with author).

⁶³ INTERNATIONAL DEVELOPMENT COMMITTEE, DARFUR, SUDAN: THE RESPONSIBILITY TO PROTECT, 2004–05, HC 67–I, 11, *available at* <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67i.pdf>.

State Department's Mark Phelan, asserted that "[t]he WHO mortality survey and the WHO mortality projections have often been confused and misguidedly used interchangeably. This has led some to misinterpret a WHO statement indicating exclusion of violent death from the WHO estimate, as also meaning violent deaths were not included in the WHO mortality surveys."⁶⁴ Yet the point earlier made by the WHO's David Nabarro and the British Parliamentary Committee is that the violent deaths picked up in the WHO/SMH survey represented less common violent mortality in and around the camps, rather than the widespread deaths from attacks on the villages that led individuals to flee to the camps.

There are several ways to demonstrate this crucial point of difference between the State Department/CIJ and WHO/SMH surveys. First, there are few deaths due to "injury and violence" reported in the WHO/SMH survey (less than fifteen percent overall), while all of the deaths in the State Department/CIJ survey are directly or indirectly due to violence (in the village attacks or on the journey to the camps). Second, the majority of deaths by violence in the State Department/CIJ survey are of persons between fifteen and forty-nine years of age, while in the WHO/SMH survey the majority of those who died from injury or violence are over fifty years of age, suggesting the latter deaths may include accidents and injuries among the elderly. Third, while the period covered by the WHO/SMH survey was restricted to the prior two months in the summer of 2004, the average person in an IDP camp had been there for six or more months. This last two-month restriction of the WHO/SMH survey, which we again emphasize was jointly conducted with Sudanese government's consent and cooperation, is a key way in which the study was prevented from providing evidence of the violent origins of the genocide. The need to collect this otherwise unavailable evidence was the specific purpose of the State Department/CIJ survey.

X. A COMPLIMENTARY AND COMBINED APPROACH

Viewed more constructively, the division of labor in the State Department/CIJ and WHO/SMH surveys between the pre- and in-camp experiences makes their results potentially complimentary. The WHO/SMH survey is especially useful in indicating the health and nutrition related deaths in the Darfur IDP camps in the late summer of 2004, while the State Department/CIJ surveys informs us about the violent deaths from attacks leading victims and their families to take refuge in the camps for the preceding seventeen months. These two different surveys can be brought together to better inform us about mortality due to health *and* violence in Darfur.

Our approach involves a simple recalculation with the combined WHO and State Department/CIJ surveys. We noted earlier that a CMR of 2.14 is reported for North and West Darfur in the WHO survey (with South Darfur less fully surveyed). Given the discussion above, we take this survey as providing a meaningful estimate of mortality following displacement due to causes in and around the camps, but

⁶⁴ GUHA-SAPIR ET AL., *supra* note 44, at 9.

excluding deaths due to violent attacks prior to displacement. To complete the picture of Darfur mortality, we can simply add the WHO estimate to the State Department/CIJ survey's crude mortality rate due to violence and flight, which is 1.2, yielding a combined estimate of 3.34.

Since the "normal" mortality rate in a sub-Saharan African country with the demographic characteristics of Sudan conventionally is estimated from .35 to .5 (per 10,000 per day), it is reasonable to conclude that the rate of violence and health-related death in Darfur for the affected period of 2003 to 2004 exceeded expectations by a multiple of six or more. This rate of death is consistent with deaths of up to 15,000 or more Darfurians a month at the peak of the genocide.

It is uncertain how long the monthly death toll persisted at this elevated level, but the overall conflict in Darfur has been ongoing for more than three years. Recall that the WHO projection was 10,000 deaths per month. The 15,000 death estimate we have just presented implies that the WHO estimate was low, but recall also that Jan Egeland of the United Nations extrapolated this figure over eighteen months, a period that is almost certainly longer than the peak in mortality, even if this mortality was prolonged and sustained. In this sense, the WHO projection may have been both too low and too long, with consequences that are to some extent off-setting.

Our calculations to this point suggest that it is much more likely that the Darfur death toll is between 200,000 and 400,000 than between the 60,000 to 160,000 new estimate of Zoelick's State Department. As noted earlier, this amounts to the difference between hundreds and tens-of-thousands of deaths. The tens-of-thousands estimate held sway in much of the media for more than a year after the new State Department estimate. So where does the latter low number come from?

The answer involves the other surveys which the Brussels group and Mark Phelan of the State Department incorporated to generate the low estimates that led to the lower-bound report of 60,000 deaths. Probably the most extensively used of these other surveys is a study jointly undertaken by the United States Centers for Disease Control and Prevention (CDC) and the United Nations World Food Programme (WFP), again in the summer of 2004 and with the co-authorship of Mark Phelan.⁶⁵

The title of the aforementioned study, *Emergency Nutrition Assessment of Crisis Affected Populations, Darfur Region, Sudan*, is significant in relation to the division of labor we have emphasized between justice and health research. Just as the WHO study was designed to reflect mortality in the displacement camps from health problems, the CDC/WFP survey was designed to reveal nutritional problems. The figures in the Brussels group's report reveal that the low estimate of deaths by Zoelick in Darfur is dependent on this kind of CDC/WFP nutritional survey, which produced low mortality estimates. However, consider the following: the recall period

⁶⁵ U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) & U.N. WORLD FOOD PROGRAMME (WFP), EMERGENCY NUTRITION ASSESSMENT OF CRISIS AFFECTED POPULATIONS: DARFUR REGION, SUDAN (2004), available at <http://www.reliefweb.int/library/documents/2004/wfp-sdn-26ocr.pdf>. The alphabetized contributors to this study are: Rita Bhatia, Curtis Blanton, Muireann Brennan, Cecelia Garzon, Mark Phelan, Leisel Talley, David Sussman, Andrew Thornel Lyman, and Tami Zalewski.

for this survey was only six months (while among those who were in displacement camps the average duration of stay was 7.5 months), the cause of death was not indicated among nearly half of those who were reported dead in this survey (while among all those indicated as dead only sixteen percent reported “violent injury” as the cause), and these deaths were mostly among older respondents. The point is that the nutritional studies are a source of likely downward bias in determining the low estimates of the genocide in Darfur.

There are further reasons to doubt the validity and purposes of Zoellick’s low State Department estimates, including a refusal to meaningfully consider missing persons in these estimates. Yet rather than belabor these further divergences in crime and health orientations to the death count, it is more constructive to consider a final mortality survey from Darfur that managed to bridge the crime and health divide by including measures of both violence and health-related deaths, albeit in too few settings to in itself allow broadly generalized conclusions.

XI. A NEW AND ALTERNATIVE APPROACH

Because the estimation of the death toll has been such a source of controversy and is widely believed to be central to a genocide charge, we decided to develop an alternative approach to this estimation that did not rely on the State Department ADS work and instead took advantage of a unique study which bridges the concerns of the crime and health perspectives. This study was led by Medecins Sans Frontieres [MSF]⁶⁶ and published in the journal of medical research *Lancet* in October 2004.⁶⁷ The study was conducted in only four displacement camps in West Darfur between April and June 2004, with recall periods from one to six months between October and June 2004, probably the period of highest violence in Darfur. In retrospect, the limitation of sites is easy to understand; the Sudanese government would not authorize the scale of sampling required across many sites to representatively study the wide ranging violence in Darfur.

As in the larger WHO study, MSF found within-camp violence accounting for only six to twenty-one percent of the deaths across the several camps. But the MSF study also asked about the period leading to flight to three of the four camps, with nearly ninety percent of these deaths resulting from violence. In these camps, the village and flight CMRs (5.9-9.5) were much higher than the camp CMRs (1.2-1.3). Heavy rains and worsening camp conditions subsequently increased the camp mortality rates in the WHO study reported above, and a further camp studied by MSF already had a mortality rate heading into this period of 5.6. Overall, the average mortality rate across the four MSF camps, with pre-camp violence included in three of

⁶⁶ For a fascinating account of MSF and other French NGOs, see Johanna Siméant, *What is Going Global? The Internationalization of French NGOs ‘Without Borders,’* 12 REV. INT’L. POL. ECON. 851 (2005).

⁶⁷ See Evelyn Depoortere et al., *Violence and Mortality in West Darfur, Sudan (2003–04): Epidemiological Evidence from Four Surveys*, 364 LANCET 1315 (2004).

the camps, was 3.2. Note that this combined rate is approximately the same level of mortality we estimated above with the joined State Department/CIJ and WHO/SMH studies.

Still, we concluded that it would be more persuasive to develop a new and alternative estimate that adopted the second State Department's approach of estimating mortality in Darfur on a month-by-month basis and that took advantage of the different time periods included in the MSF camp surveys. The MSF surveys use essentially the same sampling design as the WHO survey, although the former are limited to five camps in the state of West Darfur, while WHO surveyed camps in North and South Darfur as well. Both the MSF and WHO surveys report age-specific CMRs and some information on violence, although we have emphasized that the MSF surveys systematically included pre-camp as well as in-camp mortality. The strongest feature of the WHO surveys is the number of camps included, while the strongest feature of the MSF surveys is the coverage of pre- and in-camp mortality. We combine the MSF and WHO surveys to draw on the strengths of both in our new estimate. We narrow the focus initially to these survey estimated CMRs for nineteen months of the conflict and the state of West Darfur, and later draw broader conclusions. The risk population for corresponding months is taken from the United Nations humanitarian profiles of people counted in the internal displacement camps and people surrounding the camps who together constitute what the United Nations calls "conflict-affected persons." We include United Nations refugee camp counts in Chad to complete the estimate of the population at risk.

Our new estimate involves calculations of direct and indirect monthly estimates of CMRs to better take into account sources of over- and under-reporting of deaths. The premise is that if we have two estimations with contrasting upward and downward biases, then we can look for a more realistic estimate of the actual death toll in the space in-between these upper and lower bound projections.

The direct estimation method is based on CMRs that are calculated for all age groups in the surveys. Earlier in this article we noted our concern with regard to the ADS work in Chad that respondents could use extended definitions of their families to include grandparents, uncles, aunts, cousins and even more distant relatives in their reports of deaths. Put differently, these directly reported CMRs for family members of all ages likely are upwardly biased by reports of deaths of extended, as well as nuclear, family members, because kinship boundaries often expand and become more inclusive in response to war.

The indirect estimation method we use is alternatively based on CMRs that are calculated for only family members under five years of age. We expected that these reports are less likely to include extended family members because respondents are focused in a more narrow way when they are asked about their own children. (On the other hand, there is a different source of survivor bias involved in under-reporting for this age group. These reports are likely downwardly biased by missing children whose entire unrepresented families have died.) Life tables for sub-Saharan Africa are used to estimate the full age distribution of mortality in peacetime, and violence is

then reincorporated into the estimate on the basis of the proportion of violence reported in the surveys.

The results of this new alternative estimation approach are presented in an article co-authored with Alberto Palloni, published in the journal *Science*,⁶⁸ and briefly summarized here. We found that the overall rise and decline in estimated deaths in West Darfur is consistent with a classically described pattern of complex humanitarian emergencies. The peak mid-point monthly level of deaths estimated for West Darfur is about 4000. There is reason to believe that deaths are distributed approximately evenly across the three Darfur states. If this is so, the estimate is that the death toll in Darfur peaked in early 2004 at about 12,000 per month. Note that this figure is between the 10,000 estimate of WHO and our earlier 15,000 estimate that combined the findings of WHO and ADS. This 12,000-peak monthly death estimate does not include missing persons and is intended to provide a cautious baseline figure.

We can also now say something more specifically about the nineteen months that are best surveyed in West Darfur between 2003 and 2004, and then suggest some broader conclusions. When the mid-points between the high and low monthly death estimates are summed over nineteen months, the number of deaths is 49,288. When the right tail of this distribution is extended to May 2006 using additional data from a subsequent WHO survey, the death toll is 65,296 in West Darfur alone. This estimate covers thirty-one months of the conflict that has now been underway for more than four years. If the further months of conflict were well estimated, and/or if all or most missing or disappeared persons were presumed dead, the death estimate would be much higher.

Largely as a result of the violence, more than one million individuals are now displaced or affected in West Darfur. About one million people are similarly displaced in each of the adjoining states of North and South Darfur. If the same ratio of death to displacement applies across states, this implies that close to 200,000 deaths have occurred over thirty-one months in Greater Darfur. This calculation divides the difference between the potential upward and downward biases of the direct and indirect methods. If the high-direct and low-indirect bands of estimates are extended across the three states for thirty-one months, the range is between 170,000 and 255,000 deaths. So it is likely that the number of deaths for this conflict in Greater Darfur is higher than 200,000 individuals. If extended for the further two years of the conflict and to include the missing disappeared, the number of deaths could be in the range of 400,000. Since the government of Sudan has sharply curtailed survey work in Darfur, it is not possible to be more precise than this.

XII. CRIME AND HEALTH DIPLOMACY

Although the number of deaths is certainly not the only measure of a genocide, scale is one inescapable aspect of the public understanding of this crime. We have demonstrated a tendency for health-oriented research to under-report violent deaths in

⁶⁸ John Hagan & Alberto Palloni, *Death in Darfur*, 313 *SCIENCE* 1578 (2006).

what are characterized in this field as complex humanitarian emergencies. The United States Department of State in April of 2005 shifted its focus away from its own ADS study of criminal violence and victimization in Darfur. It featured in its place a collection of studies that emphasized health-oriented surveys of disease and malnutrition in producing a low estimate of mortality in Darfur. In the period immediately following the State Department's low estimate, major news organizations such as Reuters, United Press International, and the British Broadcasting Corporation joined in a pattern of reporting tens-of-thousands rather than hundreds-of-thousands of deaths. During this same period, the State Department stopped describing the Darfur conflict as genocide. Although the President and the State Department have since then sometimes reasserted the genocide charge, there is also credible evidence that policy on this issue has been counterbalanced by an effort to nurture an alliance with the Sudanese government in the war on terrorism.

The findings of this article underline the importance in violence-driven disasters such as Darfur of considering the difference between crime- and health-oriented research, and the political as well as humanitarian purposes to which this research is put. It is not difficult to understand the cautious approach taken in health-oriented research. Two events in the spring and summer of 2005 highlighted the problems of sustaining important working relationships in countries like Sudan where the humanitarian needs are staggering.

The first event was the arrest in May in Sudan of two senior MSF officials after their NGO published a study reporting hundreds of rapes in Darfur. The second event was a meeting convened by the MacArthur Foundation of ICC representatives with NGOs doing aid work in Darfur. One representative at this meeting observed that “[n]obody wants to do anything that will compromise the security of workers on the ground or their ability to do their job,” another remarked that “[g]athering information for war crimes investigations is not part of our mission,” and a third said that “security for our staff and beneficiaries is totally dependent on how we are perceived in the area.”⁶⁹ These are the problems that restricted MSF's mortality study to a handful of camps, that limited the WHO/SMH mortality survey to deaths occurring in the camps and not before, and that led the State Department/CIJ to undertake its initial survey in the neighboring Chad refugee camps.

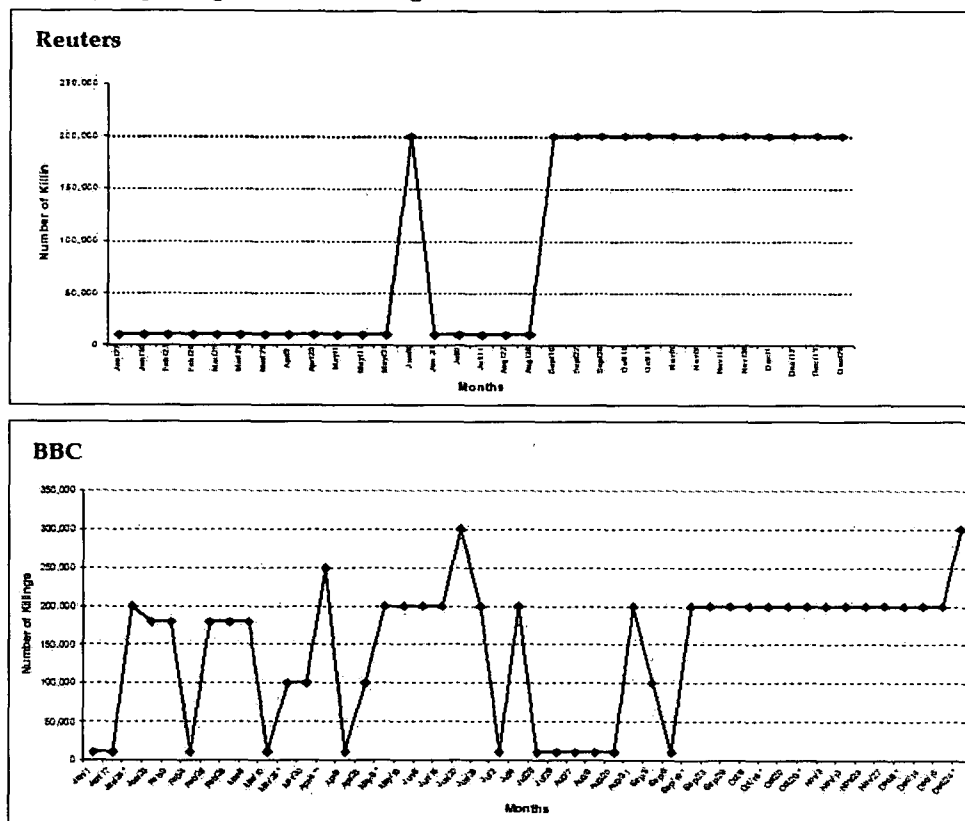
When the respective findings of such studies are not understood in terms of their limitations as well as possibilities, the results can be misleading and lend themselves to flip-flopping interpretations. The problem is not the underlying science. The problem is more likely the diplomatic purposes to which the science is put, with knowledge of the dimensions of the first genocide of the twenty-first century hanging in the balance. As noted, a new alternative estimate of mortality described above was published in the journal *Science* in September of 2006. The conclusion—that hundreds-of-thousands, rather than tens-of-thousands have died as a result of the

⁶⁹ Carol Giacomo, *Aid Groups to Meet War Crimes Prosecutor on Darfur*, SUDAN TRIBUNE, June 17, 2005, available at http://www.sudantribune.com/spip.php?page=imprimable&id_article=10204.

conflict in Darfur—was reported in more than one-hundred newspaper articles worldwide.

As a final check on media reporting of mortality in Darfur, we conducted a content analysis of news articles by the two largest international news services, Reuters and the BBC. We included articles appearing in 2006 that cited numbers of deaths in Darfur. The results of this analysis appear in the accompanying figure.

Monthly Reporting of Darfur Killings in 2006



Prior to the September 2006 article in *Science*, Reuters was consistently reporting “tens-of-thousands of deaths,” while the BBC was reporting fluctuating numbers. Following the appearance of the *Science* article in September, both news organizations consistently reported the 200,000 number. Since this time, nearly all news organizations have joined in reporting that hundreds of thousands of deaths—in excess of 200,000 deaths—have occurred during the conflict in Darfur.

Oddly, the United States Government Accountability Office [GAO] published a review of Darfur death estimates in November 2006 that did not include the *Science*

estimate.⁷⁰ The review was critical, as reflected by its sub-title, “Death Estimates Demonstrate Severity of the Crisis, but Their Accuracy and Credibility Could Be Enhanced.” It included the observation that “many experts believed that the lower end of State’s estimate was too low and found that published documents describing State’s estimate lacked sufficient information about its data and methods to allow it to be replicated and verified by external researchers.”⁷¹

The GAO found strengths and weaknesses in all the estimates, but it was more concerned about the higher than lower estimates. The GAO’s omission of the *Science* estimate was puzzling: it was the most recent estimate; it was the only peer reviewed estimate published in a journal; the journal is among the most highly regarded in the world; and the article was in print two months before the GAO report was completed.

The GAO insisted it did not have time to include the *Science* estimate. The two month interval and the importance of the issue made this implausible. Two explanations seem more likely. First, the GAO may not have wanted to more fully probe the assumptions of the population health paradigm that guided its report. As we have seen, the lower estimates were based on health surveys that neglected the violence leading displaced persons to flee their homes for the camps where the health surveys took place. Second, our *Science* paper would have led the GAO to more directly confront the background and timing of the State Department estimate and its neglect of its own ADS data on the violence that substantiated Secretary Powell’s determination of genocide in Darfur. Fortunately, as shown in the figure above, the State Department’s low estimate was displaced from the public’s mind when major news organizations reported and adopted the *Science* estimate of 200,000 or more deaths.

⁷⁰ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, DARFUR CRISIS: DEATH ESTIMATES DEMONSTRATE SEVERITY OF THE CRISIS, BUT THEIR ACCURACY AND CREDIBILITY COULD BE ENHANCED 3 (2006), available at <http://www.gao.gov/new.items/d0724.pdf>.

⁷¹ *Id.*