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JUSTICE FOR THE FORGOTTEN: SAVING THE WOMEN OF DARFUR

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Abstract: Since 2003, Darfur has lost nearly half of its six million inhabitants. As many as 500,000 people have been slaughtered, 2.2 million have been displaced, and an untold number have been savagely raped—all victims of a brutal five-year genocide orchestrated by the Sudanese government. The women of Darfur have borne the brunt of the violence: constantly targeted for rape, left physically and emotionally broken. The use of rape as a weapon of war should have shocked the conscience of the world, but we have failed to act, and instead have allowed the women of Darfur to be victimized repeatedly. This note argues that the international community must take two steps to save the women of Darfur: (1) continue criminal prosecutions of those responsible for the genocide in the International Criminal Court and (2) immediately undertake humanitarian solutions in Darfur, including aid disbursement, reparations, military intervention, and political pressure. It is only by combining legal and restorative solutions that the forgotten women of Darfur will truly receive justice.

INTRODUCTION

Man's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good.

—Martin Luther King, Jr.¹

Halima Abdelkarim is twenty-one years old.² She lives in Chad, just over the border from Darfur, Sudan, and is married with a baby daughter.³ She is also a member of the Dajo, a black African tribe,

* Managing Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2007–2008). With thanks to my mom, for teaching me the importance of social justice and the rewards of hard work.

¹ Nicholas D. Kristof, *Disposable Cameras for Disposable People*, N.Y. TIMES, Feb. 12, 2006, at D14 (quoting THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 229 (Clayborne Carson ed., 1998)).

² Nicholas D. Kristof, *The Face of Genocide*, N.Y. TIMES, Nov. 19, 2006, at D13. Halima was twenty years old at the time of Kristof's writing, which would make her at least twenty-one years old now. *See id.*

³ *Id.*

which makes her a target of the Janjaweed—the Arab militias who, bankrolled by the Sudanese government, are on a five-year genocidal quest to control the region by systematically exterminating the Africans who live on the land.⁴ In March 2006, the Janjaweed spilled over from Sudan to Chad and attacked Halima's village, killing many of the men and kidnapping ten women and girls, among them Halima, who was four months pregnant at the time, and her ten-year-old sister, Sadia.⁵ Over the next two days, three men wearing Sudanese military uniforms gang raped Halima, beat her with sticks, and taunted her with racial epithets.⁶ The Janjaweed eventually released the women, but not before demanding Sadia's donkey, and then shooting and killing Sadia when she refused to give it to them.⁷ After escaping, Halima and the other survivors settled in a makeshift camp some distance away from their village, which the Janjaweed had destroyed.⁸ Although they lived fearfully in deplorable conditions, Halima was able to deliver a healthy baby girl.⁹

⁴ *Id.*; see AMNESTY INT'L, SUDAN, DARFUR, RAPE AS A WEAPON OF WAR 3 (2004), available at [http://web.amnesty.org/library/pdf/AFR540762004ENGLISH/\\$File/AFR5407604.pdf](http://web.amnesty.org/library/pdf/AFR540762004ENGLISH/$File/AFR5407604.pdf); Justin Wagner, Note, *The Systematic Use of Rape as a Tool of War in Darfur: A Blueprint for International War Crimes Prosecutions*, 37 GEO. J. INT'L L. 193, 195 (2005). "Janjaweed" is an Arabic word meaning "a man (a devil) on a horse," and was originally used to describe bandits who attack rural areas. Wagner, *supra*, at 198. The Janjaweed in today's Darfur is a massive, loosely-united militia made up of nomadic Arabs. *Id.* The Janjaweed was formed by and is controlled by the Sudanese government, which uses the militia to attack the African tribes living in Darfur. *Id.*; see also Rosanna Lipscomb, Note, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 189–90 (2006) (stating that human rights groups, international news agencies, the United Nations (U.N.), and the U.S. State Department have gathered intelligence that clearly demonstrates that the Sudanese government is responsible for the atrocities committed by the Janjaweed).

⁵ Kristof, *The Face of Genocide*, *supra* note 2.

⁶ *Id.* Unlike most conflicts in Arab nations, the Darfur conflict has nothing to do with religion, as the Janjaweed, the government, and the black African tribes are all Muslim. See Wagner, *supra* note 4, at 197. Rather, although the Arab tribes and the African tribes look very similar to outsiders, the conflict is at least partially based on race. See *id.* When carrying out attacks, particularly rapes, the Janjaweed often vocalize their hatred of the black African tribes (the Fur, the Barni, the Tama, the Jebel, the Aranaga, and the Masaalit, among others), shouting that militias are allowed to rape and take land because the victims are black. See Wagner, *supra* note 4, at 193, 197, 204; see also Stephanie N. Sackellares, *From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict*, 20 WIS. WOMEN'S L.J. 137, 138 (2005).

⁷ Kristof, *The Face of Genocide*, *supra* note 2.

⁸ *Id.*

⁹ See *id.* Although Halima managed to escape the Janjaweed, the attacks destroyed her family. *Id.* Because rape victims face an extraordinary stigma in Sudanese culture, often finding themselves ostracized by their husbands and parents, shamed by their communities, and blamed for the attack, Halima did not tell her husband of the attack. *Id.*; see also Wagner, *supra* note 4, at 205. He deduced what happened, however, from her two-day dis-

Then, in October 2006, the Janjaweed found Halima again; this time the militia preyed upon a group of women as they gathered firewood.¹⁰ The Janjaweed ripped Halima's infant daughter from her arms, and called her a "monkey" and "not human" while gang raping her, beating her, and stealing her clothes.¹¹ This time, however, the fault for Halima's brutalization does not lie solely with the Janjaweed and the Sudanese government.¹² This note argues that fault also lies with the entire international community, with all of the countries and organizations and people who have spent four years either ignoring the worsening genocide in Darfur or doing shockingly little to stop it.¹³ If the international community had intervened, as stories of atrocity after atrocity continued to surface over the past four years, Halima may not have had to endure a second nightmarish attack at

appearance, and soon after left her to grow crops. Kristof, *The Face of Genocide*, *supra* note 2. The area to which he traveled was later attacked by the Janjaweed, and he had not been heard from as of November 2006. *Id.*

¹⁰ Kristof, *The Face of Genocide*, *supra* note 2. The culture and habits of the black African tribes in Darfur have, ironically, helped facilitate the attacks on women. See Wagner, *supra* note 4, at 203. Men are rarely in the villages; they traditionally work outside the villages for long stretches of time, leaving women to assume many of the daily tasks necessary for survival. Eileen Meier, *Prosecuting Sexual Violence Crimes During War and Conflict: New Possibilities for Progress*, 10 INT'L LEGAL THEORY 83, 119 (2004); Kristof, *The Face of Genocide*, *supra* note 2. Since the attacks by the Janjaweed began in 2003, this role has become much more precarious for women. Meier, *supra*, at 119; Wagner, *supra* note 4, at 206; Kristof, *The Face of Genocide*, *supra* note 2. Many of their duties, such as gathering firewood, make them vulnerable to attack by the Janjaweed. Meier, *supra*, at 119; Wagner, *supra* note 4, at 206; Kristof, *The Face of Genocide*, *supra* note 2. The majority of women who have reported their rapes stated that they were engaged in their normal daily activities when they were attacked. Wagner, *supra* note 4, at 206. Furthermore, men often flee when villages are attacked by the Janjaweed, knowing that they will be killed if caught. Meier, *supra*, at 119; Wagner, *supra* note 4, at 203. This leaves women, who are much less mobile because of their responsibilities caring for children and the elderly, in the villages, without any protection from the Janjaweed. Wagner, *supra* note 4, at 203; Kristof, *The Face of Genocide*, *supra* note 2. The prevailing thought in Darfur is that since the Janjaweed kill men but "only" rape women, it is better to put the women at risk. Kristof, *The Face of Genocide*, *supra* note 2.

¹¹ Kristof, *The Face of Genocide*, *supra* note 2.

¹² See Clinton W. Alexander, *Ignoring the Lessons of the Past: The Crisis in Darfur and the Case for Humanitarian Intervention*, 15 J. TRANSNAT'L L. & POL'Y 1, 3 (2005).

¹³ See HUMAN RIGHTS WATCH, DAFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN 50 (2004), available at <http://hrw.org/reports/2004/sudan0504/sudan0504simple.pdf> [hereinafter HUMAN RIGHTS WATCH, DAFUR DESTROYED]; see also Nicholas D. Kristof, *Bandages and Bayonets*, N.Y. TIMES, Nov. 12, 2006, at D13; Nicholas D. Kristof, *Sudan's Department of Gang Rape*, N.Y. TIMES, Nov. 22, 2005, at A23. For purposes of this note, "international community" is defined as the U.N., the United States, and other advanced countries. See Nadia A. Deans, Comment, *Tragedy of Humanity: The Issue of Intervention in the Darfur Crisis*, 19 EMORY INT'L L. REV. 1653, 1654 (2005).

the hands of the Janjaweed.¹⁴ But the international community did not intervene, and our complacency in the face of genocide has become as horrific as the attacks themselves.¹⁵ As Halima and the Dajo women and all the women of Darfur struggle to survive, the rest of the world has closed its eyes.¹⁶ We refuse to see that women continue to bear the brunt of the violence in Darfur, that women are being violently raped in public, beaten like animals, and left with horrific and permanent injuries.¹⁷ We choose to ignore that women are being targeted for attack because of their gender, and then, after enduring physical brutalization, are being abandoned and ostracized by their families, forced to relive their trauma alone every day.¹⁸ As the first genocide of the twenty-first century ravages Darfur, the world has turned its collective head.¹⁹

This note argues that the international community must immediately respond to the ongoing genocide in Darfur with decisive criminal prosecutions and holistic reparations, to both repay the women of Darfur for years of international ignorance of their suffering and to protect

¹⁴ Kristof, *The Face of Genocide*, *supra* note 2.

¹⁵ Nicholas D. Kristof, *Never Again, Again?*, N.Y. TIMES, Nov. 20, 2005, at D13; Kristof, *Sudan's Department of Gang Rape*, *supra* note 13; Kristof, *The Face of Genocide*, *supra* note 2.

¹⁶ Kristof, *The Face of Genocide*, *supra* note 2.

¹⁷ See AMNESTY INT'L, *supra* note 4, at 3; Nicholas D. Kristof, *A Tolerable Genocide*, N.Y. TIMES, Nov. 27, 2005, at D11; Nicholas D. Kristof, *If Not Now, When?*, N.Y. TIMES, Oct. 29, 2006, at D13.

¹⁸ See Wagner, *supra* note 4, at 211; Kristof, *Bandages and Bayonets*, *supra* note 13; Kristof, *Sudan's Department of Gang Rape*, *supra* note 13; Kristof, *The Face of Genocide*, *supra* note 2.

¹⁹ Kristof, *The Face of Genocide*, *supra* note 2. International criminal law describes genocide as crimes against humanity committed with the specific intention of exterminating a certain civilian population based on the population's race, nationality, religion, or ethnicity. David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the U.N. Report*, 7 CHI. J. INT'L L. 303, 308, 316 (2006). Under the Rome Statute, which governs the International Criminal Court (ICC), genocide includes "[c]ausing serious bodily or mental harm to members of the group," "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," and "[i]mposing measures intended to prevent births within the group." Rome Statute of the International Criminal Court art. 1-128, July 17, 1998, 2187 U.N.T.S. 93, available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute]. The rape of the women of Darfur constitutes genocide under both of these definitions. See TARA GINGERICH & JENNIFER LEANING, *THE USE OF RAPE AS A WEAPON OF WAR IN THE CONFLICT IN DARFUR, SUDAN 8* (2004), available at <http://physiciansforhumanrights.org/library/documents/reports/the-use-of-rape-as-a-weapon.pdf>. The rapes are committed with the specific intention of exterminating and physically destroying the African tribes of Darfur by preventing reproduction and polluting bloodlines. See *id.* Rape can also be prosecuted as a war crime or a crime against humanity, which are international crimes of lesser severity, but for purposes of this note, it will be assumed that the rapes in Darfur constitute genocide. See Rome Statute, *supra*, 2187 U.N.T.S. at 93-98.

them from future harms. Part I explores the use of rape in the Darfuran genocide and details the physical, emotional, social, and economic consequences that widespread and systematic rape has had on the women of Darfur. Part II examines the history of international criminal prosecutions for rape, the establishment of the International Criminal Court (ICC), and the ICC's ongoing investigation in Darfur, which resulted in the court's first indictments of Sudanese war criminals in February 2007. Part II details potential obstacles faced by the ICC in the prosecutions of these defendants and concludes that while ICC prosecutions are necessary and will be effective in the long run, they present a problem of delayed justice for the women of Darfur. Finally, Part III argues that the women of Darfur deserve more immediate and holistic forms of justice beyond the legal justice offered by the ICC. Part III suggests that the international community must repay the women of Darfur for years of keeping our eyes closed to their plight and for our inability to bring them immediate justice through international courts. This note proposes that as an apology for our willful ignorance, the international community must assist the women of Darfur through immediate humanitarian aid, financial reparations, and political and military solutions.

I. THE DESTRUCTION OF DARFUR

It is . . . rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through the community, to shatter a society, to destroy a people. It is rape as genocide.

—Catherine A. MacKinnon²⁰

A. A Conflict Defined By Sexual Violence

Sudan's recent history is scarred with political instability and internal religion-based strife.²¹ For much of the past two decades, a civil war raged between the Sudan People's Liberation Army, an armed group of black African tribes in the predominantly Christian southern part of the country, and the country's Islamic central government in

²⁰ Catherine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 11–12 (1994).

²¹ Wagner, *supra* note 4, at 195.

Khartoum.²² Then, in the 1990s, disagreements over land use in Darfur emerged between the black Muslim African tribes who farm there and the nomadic Arab groups who wanted the land for grazing.²³ This strife coincided with the arrival of a hard-line, racist Islamic government—led by President Omar Hassan al-Bashir, who took power in a military coup in 1989—that supported Arabic supremacy over the African tribes and granted disproportionate power to the Arab groups in Darfur.²⁴ Eventually, in 2003, two rebel groups—the Sudan Liberation Movement and the Justice and Equality Movement, both composed mostly of members of black African tribes—took up arms against government targets in Darfur, demanding more rights for the settled African population.²⁵ The government responded with overwhelming and brutal

²² See AMNESTY INT'L, *supra* note 4, at 6; Wagner, *supra* note 4, at 195; see also Jamal Jafari, "Never Again," *Again: Darfur, the Genocide Convention, and the Duty to Prevent Genocide*, HUM. RTS. BRIEF, Fall 2004, at 8, 8. This civil war came to a tenuous end with the signing of the Comprehensive Peace Agreement in January 2005, although there have been delays in the implementation of this agreement. U.S. Dep't of State, Bureau of African Affairs, Background Note: Sudan, <http://www.state.gov/r/pa/ei/bgn/5424.htm> [hereinafter U.S. Dep't of State, Background Note].

²³ See International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General, ¶¶ 60–62, U.N. Doc S/2005/60 (Jan. 25, 2005), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf [hereinafter Commission of Inquiry Report]; Jafari, *supra* note 22, at 8; Wagner, *supra* note 4, at 197. Darfur is a predominantly desert region in far west Sudan, bordered by Chad and the Central African Republic. U.S. Dep't of State, Background Note, *supra* note 22. Some experts note that the strife has roots in Darfur's long-running environmental crises, including droughts and resulting famines in the 1980s that brought about increasing competition for resources between the black African farmers and the Arab herders. See Lydia Polgreen, *A Godsend for Darfur, or a Curse?*, N.Y. TIMES, July 22, 2007, at D1. In July 2007, researchers at Boston University discovered a huge underground lake beneath the barren land of northern Darfur. *Id.* While some experts, including U.N. Secretary-General Ban Ki-moon, believe that this discovery could help bring an end to the violence in the region by reducing competition for resources, others suggest that the lake will likely become an additional source of conflict. *Id.*

²⁴ See Commission of Inquiry Report, *supra* note 23, ¶¶ 59, 62; U.S. Dep't of State, Background Note, *supra* note 22. The Sudanese government, headquartered in the capital of Khartoum, has historically neglected Darfur, located nearly a thousand miles to the west. PHYSICIANS FOR HUMAN RIGHTS, DARFUR—ASSAULT ON SURVIVAL: A CALL FOR SECURITY, JUSTICE, AND RESTITUTION 9 (2006), available at <http://physiciansforhumanrights.org/library/report-sudan-2006.html>. President al-Bashir's government has staffed the police, military, and judiciary in Darfur with non-Darfurians who are loyal to Khartoum. *Id.*

²⁵ See Commission of Inquiry Report, *supra* note 23, ¶ 62; AMNESTY INT'L, *supra* note 4, at 6; see also Alexander, *supra* note 12, at 36 (the rebel groups blame the central government for the region's problems and claim they are being marginalized). The turning point occurred in early 2003 when the rebel groups ambushed the Sudanese Air Force at a base in northern Darfur, embarrassing the Sudanese government and giving way to more brutal attacks. See Commission of Inquiry Report, *supra* note 23, ¶¶ 63, 64; see also Human Rights Watch, Q & A: Crisis in Darfur, <http://hrw.org/english/docs/2004/05/05/darfur8536.txt.htm> (last updated Sept. 18, 2007) [hereinafter Human Rights Watch, Q & A].

military force that did not target the rebels but rather purposely attacked all Darfurians.²⁶ The government directed Sudanese military personnel to carry out these attacks, and in a deliberate attempt to exploit the long-simmering tension between the Arab and African groups, also recruited nomadic Arabs to form the armed militias that came to be known as the Janjaweed.²⁷

Together, the Janjaweed and the Sudanese government have spent the past five years destroying the black African population in the Darfur region.²⁸ The government has orchestrated widespread attacks on civilians, ordering the Janjaweed to bomb villages, murder men, rape and torture women, abduct children, burn homes, and loot crops and cattle.²⁹ These attacks, which are obviously blatant and massive human rights violations, are committed in a systematic manner, often in coordination with Sudanese soldiers and the Sudanese Air Force.³⁰ The

²⁶ See HUMAN RIGHTS WATCH, *DARFUR DESTROYED*, *supra* note 13, at 7; Alexander, *supra* note 12, at 36; Wagner, *supra* note 4, at 198–99. There are reports that the African rebel forces are also responsible for separate attacks on civilians, but there is no definitive evidence on this point. Commission of Inquiry Report, *supra* note 23, ¶ 190.

²⁷ HUMAN RIGHTS WATCH, *DARFUR DESTROYED*, *supra* note 13, at 7–8; see Wagner, *supra* note 4, at 198. The link between the Janjaweed and the Sudanese government is well-documented. See Wagner, *supra* note 4, at 198; see also Lipscomb, *supra* note 4, at 189. Human Rights Watch has obtained numerous documents showing the government's high-level involvement in recruiting and arming the Janjaweed. Wagner, *supra* note 4, at 198–99. See generally HUMAN RIGHTS WATCH, *DARFUR DOCUMENTS CONFIRM GOVERNMENT POLICY OF MILITIA SUPPORT 6* (2004), available at <http://hrw.org/backgrounder/africa/072004/darfur.pdf> (discussing numerous Sudanese government documents and interviews with eyewitnesses and victims, all of which describe the “hand-in-glove” manner in which the government and the Janjaweed have operated). The Sudanese government denies this connection, and has repeatedly claimed that the Janjaweed are simply independent, uncontrollable militias acting on the traditional tensions in the region. See Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES, Apr. 2, 2006, § 6 (Magazine), at 46.

²⁸ Commission of Inquiry Report, *supra* note 23, ¶ 72; AMNESTY INT'L, *supra* note 4, at 4; Jafari, *supra* note 22, at 8. The violence halted temporarily in May 2006 with the signing of a cease-fire agreement between the central government and a faction of the Sudan Liberation Movement—known as the Darfur Peace Agreement—but the deadlines of the deal were never met and the agreement, now called “flawed,” ended up making the violence worse. See Nicholas D. Kristof, *How Do You Solve a Crisis Like Darfur?*, N.Y. TIMES, March 13, 2007, at A19; Nicholas D. Kristof, *When Genocide Worsens*, N.Y. TIMES, July 9, 2006, at D13; Human Rights Watch, Q & A, *supra* note 25.

²⁹ AMNESTY INT'L, *supra* note 4, at 4; Human Rights Watch, Q & A, *supra* note 25; see also U.S. DEP'T OF STATE, *SUDAN: COUNTRY REPORTS OF HUMAN RIGHTS PRACTICES—2005* (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61594.htm> [hereinafter U.S. DEP'T OF STATE, *SUDAN: COUNTRY REPORTS*].

³⁰ AMNESTY INT'L, *supra* note 4, at 4. See generally U.S. DEP'T OF STATE, *SUDAN: COUNTRY REPORTS*, *supra* note 29. Amnesty International reports that most of the Janjaweed are incorporated into the Sudanese army and the Popular Defense Forces, a government paramilitary force. AMNESTY INT'L, *supra* note 4, at 6.

government's "divide and rule" tactics have destabilized the social structure of communities and have allowed the government to control the civilians of Darfur through fear, while denying any responsibility for any of the atrocities.³¹ In total, as of the fall of 2007, the Sudanese government and the Janjaweed have killed as many as 500,000 people and displaced at least 2.2 million others.³²

What these numbers do not reveal, however, are the women, like Halima, whose lives will never be the same.³³ The use of rape as a deliberate military tactic and weapon of war has destroyed Darfur in a way that no other crime could.³⁴ There is no way to know how many women have been victims of sexual violence at the hands of the Janjaweed, and how many women continue to suffer because of physical injuries, economic losses, and the loneliness of ostracization.³⁵ The

³¹ See AMNESTY INT'L, *supra* note 4, at 8. In addition to providing military and logistical support to the Janjaweed, the Sudanese government has also squelched any resistance from black Africans in the region, including human rights workers, lawyers, and village leaders, through arbitrary arrests, forced detentions, unfair trials, cruel punishments, and torture. *See id.* at 4.

³² Karen Hirschfeld, Sudan Coordinator for Physicians for Human Rights, Public Address at Massachusetts Institute of Technology, *The Genocide in Darfur: Roots of the Conflict and the Current Stalemate* (Mar. 1, 2007); Human Rights Watch, Q & A, *supra* note 25. The number of dead ranges from 200,000 to 500,000; the higher number includes deaths at the hands of the Janjaweed as well as deaths from disease and malnutrition brought on by the genocide. Hirschfeld, *supra*. Some experts estimate that the death toll could reach one million if the genocide continues. Nicholas D. Kristof, *Why Genocide Matters*, N.Y. TIMES, Sept. 10, 2006, at D13. However, this conflict is about more than just the body count. *Id.* At least two million people have become internally displaced persons (IDPs), forced to move to other towns or villages in Darfur, and at least 232,000 are refugees across the border in Chad. Human Rights Watch, Q & A, *supra* note 25. All refugees and displaced persons remain vulnerable to more attacks by the Janjaweed. *Id.*; *see also* PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 5; M. Rafiqul Islam, *The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable*, 18 INT'L J. REFUGEE L. 354, 356-57 (2006). The Chadian refugee camps are dangerously understaffed and provide only spotty access to humanitarian aid. *See* Lisa Avery, *The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War*, 51 LOY. L. REV. 103, 118 (2005). IDPs, who are not afforded the same protections under international law as refugees, are also extremely susceptible to illness, as they have no access to humanitarian aid, little food or medicine, and no secure shelter. *Id.* at 121; Islam, *supra*, at 356-57. In addition to refugees and IDPs, human rights groups estimate that there are an additional two million "conflict-affected" individuals in Darfur who require some form of food assistance because of the damage the genocide has caused to the Darfuri economy. Human Rights Watch, Q & A, *supra* note 25.

³³ Wagner, *supra* note 4, at 193.

³⁴ *See id.* at 242; GINGERICH & LEANING, *supra* note 19, at 1.

³⁵ *See* AMNESTY INT'L, *supra* note 4, at 29; U.S. DEP'T OF STATE, *SUDAN: COUNTRY REPORTS*, *supra* note 29. An August 2004 report by the U.S. State Department indicated that sixteen percent of Darfurians interviewed had experienced or witnessed a rape, a high

attacks themselves are bad enough, but when combined with these uniquely horrific after-effects, the continuing sexual violence in Darfur amounts to genocide, a genocide in which the international community must intervene in order to protect the women of Darfur.³⁶

number for a historically underreported crime. Jafari, *supra* note 22, at 9. Some scholars believe that such statistics, based mostly on refugee interviews, severely underestimate the extent to which rape is being perpetrated against civilians in the region. Wagner, *supra* note 4, at 204. The stigma and shame attached to rape in Sudanese culture, as well as the ostracism from the community that typically follows it, prevent most women from reporting their rapes, or even discussing rape with human rights workers. AMNESTY INT'L, *supra* note 4, at 11, 16; *see also* Wagner, *supra* note 4, at 204–05. In many cases, even if women wanted to report what was done to them, there is no one to investigate or prosecute the perpetrators. *See* AMNESTY INT'L, *supra* note 4, at 25. In several cases, community leaders reported to Amnesty International that they attempted to report a rape by the Janjaweed to local police, only to have the police ignore them or, worse, to be arrested for spreading false information, to have the police force the victim to undergo a medical examination, or to have the Janjaweed attack the police station and kill the remaining police. *Id.*; *see also* U.S. DEP'T OF STATE, SUDAN: COUNTRY REPORTS, *supra* note 29; Commission of Inquiry Report, *supra* note 23, ¶ 425.

³⁶ *See* Avery, *supra* note 32, at 110; Sackellares, *supra* note 6, at 156. I believe that the events in Darfur fit the criteria for genocide. *See* Sackellares, *supra* note 6, at 156; *see also supra* note 19. Most human rights organization have declared the events in Darfur to be a genocide. *See generally* AMNESTY INT'L, *supra* note 4 (noting that there is a large amount of evidence of massive human rights violations in Darfur); Human Rights Watch, Q & A, *supra* note 25 (describing a systematic campaign of “ethnic cleansing”). However, the international community, particularly the United States and the U.N., has been reluctant to deem Darfur a genocide. Commission of Inquiry Report, *supra* note 23, ¶ 518; Alexander, *supra* note 12, at 38; Dawn Yamane Hewett, Recent Development, *Sudan's Courts and Complementarity in the Face of Darfur*, 31 YALE J. INT'L L. 276, 276 (2006). The United States first referred to the events in Darfur as genocide when then-Secretary of State Colin Powell used the term in a speech in September 2004. Glenn Kessler & Colum Lynch, *U.S. Calls Killings in Sudan Genocide*, WASH. POST, Sept. 10, 2004, at A1. After hesitating to use the term publicly for several years, President Bush referred to Darfur as a genocide in May 2007. Rubin, *supra* note 27; Alex Perry, *Will Sanctions End the Darfur Killings?*, TIME IN PARTNERSHIP WITH CNN, May 29, 2007, <http://www.time.com/time/world/article/0,8599,1626020,00.html?id=feed-cnn-topics>. In January 2005, the U.N.'s International Commission of Inquiry for Darfur, an investigatory body created in October 2004, declined to label the events decisively as a genocide. Commission of Inquiry Report, *supra* note 23, ¶ 518; PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 12. Some scholars believe that the U.N.'s reluctance to use the term “genocide” is due to the resistance of China and Russia—two powerful U.N. members that have extremely close ties to Sudanese oil and military interests and that do not want to anger or embarrass the Sudanese government. Nsongurua J. Udombana, *An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur*, 40 INT'L L. 41, 63 (2006); *see* Deans, *supra* note 13, at 1691. Others believe that the U.N. is reluctant to use the term because of its association with the need for immediate and decisive action. *See* Joshua M. Kagan, Comment, *The Obligation to Use Force to Stop Acts of Genocide: An Overview of Legal Precedents, Customary Norms, and State Responsibility*, 7 SAN DIEGO INT'L L.J. 461, 481–82 (2006). Labeling the situation in Darfur a genocide would result in expectations and obligations on the part of the U.N. to respond with force. Kagan, *supra*, at 482, 484; *see also* Alexander, *supra* note 12, at 40 (suggesting that the failure to recognize the events as genocide has sparked controversy within the U.N.). The U.N. has

When scores of women are raped so violently that they suffer injuries preventing them from bearing children or leading them to early deaths due to infection, this constitutes an intentional, planned extermination of the women of Darfur.³⁷ When women are forced to bear the children of their attackers and forbidden from procreating their own tribes, there is a deliberate attempt to destroy an entire racial group.³⁸ When these rapes take place in public to cause the humiliation and ostracization of women, this constitutes a cruel plan to displace cultures and communities.³⁹ This destruction is rape as ethnic cleansing, rape as genocide.⁴⁰ This destruction is, as then-United Nations Humanitarian Coordinator in Sudan, Mukesh Kapila, said in March 2004, “the world’s greatest humanitarian crisis.”⁴¹

B. *The Effects of Rape on the Women of Darfur*

The Janjaweed’s decision to rape the women of Darfur as part of their genocidal war is a massacre without murder, a deliberate and calculated plan designed to have particularly severe and long-lasting effects on the female population and, by extension, on the society as a whole.⁴² They engage in gang rapes, with multiple men raping women

instead declared the events in Darfur to constitute war crimes and crimes against humanity—everything except genocide. See Commission of Inquiry Report, *supra* note 23, ¶¶ 518–19, 522.

³⁷ See Sackellares, *supra* note 6, at 140; see also Rome Statute, *supra* note 19, 2187 U.N.T.S. at 93 (defining genocide as “[c]ausing serious bodily or mental harm to members of the group”).

³⁸ See Rome Statute, *supra* note 19, 2187 U.N.T.S. at 93 (defining genocide as “[i]mposing measures intended to prevent births within the group”); Sackellares, *supra* note 6, at 140; Wagner, *supra* note 4, at 205 (stating that one notable element of the sexual violence against the women of Darfur has been the Janjaweed’s desire to populate the region with Arab children and hinder the ability of the African tribes to re-populate themselves).

³⁹ See Rome Statute, *supra* note 19, 2187 U.N.T.S. at 93 (defining genocide as “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”); Sackellares, *supra* note 6, at 140, 157. Rape is used not only as an attack on the woman, but is also intended to humiliate, shame, degrade, and terrify the entire ethnic group. Wagner, *supra* note 4, at 205, 211.

⁴⁰ Meier, *supra* note 10, at 125; Sackellares, *supra* note 6, at 138; Wagner, *supra* note 4, at 205, 211. Scholars have distinguished rape from other forms of genocidal crimes because of its unique impact on women. See Veronica C. Abreu, *Women’s Bodies as Battlefields in the Former Yugoslavia: An Argument for the Prosecution of Sexual Terrorism as Genocide and for the Recognition of Genocidal Sexual Terrorism as a Violation of Jus Cogens Under International Law*, 6 GEO. J. GENDER & L. 1, 16 (2005).

⁴¹ AMNESTY INT’L, *supra* note 4, at 3.

⁴² See Naomi R. Cahn, *Women in Post-Conflict Reconstruction: Dilemmas and Directions*, 12 WM. & MARY J. WOMEN & L. 335, 335–36 (2006) [hereinafter Cahn, *Dilemmas and Direc-*

multiple times, with vaginal and anal penetration and penetration with objects.⁴³ They use rape as a form of torture, beating and cutting women, breaking their legs, pulling out their fingernails, mutilating their genitals, and holding them as sex slaves, often as a tactic to try to force the women to reveal where their husbands are hiding.⁴⁴ The Janjaweed rape indiscriminately, attacking girls as young as eight and women as old as eighty, single women, married women, pregnant women.⁴⁵ The Janjaweed also use rape deliberately as a tool of ethnic cleansing; numerous reports speak of forced pregnancies, with the Janjaweed telling victims that they are being raped to create Arab children and to wipe out the black African tribes.⁴⁶

But the impact of these rapes goes beyond the immediate physical brutalization; for the women of Darfur, rape has long-term and life-threatening consequences.⁴⁷ For the Janjaweed, rape is strategic dehumanization; they often rape women in public or in front of their husbands, parents, or children in an attempt to destroy families and communities.⁴⁸ They use rape to intimidate, creating a population stricken by fear, a population afraid to leave its villages, afraid to engage in economic activity, afraid to live.⁴⁹ Women must live with the scars of rape in a country that stigmatizes rape victims as at fault, refuses to prosecute their attackers, and, most dangerously, that has virtually no medical fa-

tions]; see also Naomi Cahn, *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, 1 Stan. J. Civ. Rts. & Civ. Liberties 217, 218 (2005) [hereinafter Cahn, *Beyond Retribution*]; Sackellares, *supra* note 6, at 138. This calculated decision to rape is bolstered by the Janjaweed's perception that they have a license to rape because sexual violence is an accepted practice during wartime. See Fleming Terrell, *Unofficial Accountability: A Proposal for the Permanent Women's Tribunal on Sexual Violence in Armed Conflict*, 15 TEX. J. WOMEN & L. 107, 109, 114 (2005).

⁴³ Commission of Inquiry Report, *supra* note 23, ¶¶ 333–34; GINGERICH & LEANING, *supra* note 19, at 15; Meier, *supra* note 10, at 120.

⁴⁴ AMNESTY INT'L, *supra* note 4, at 18; Meier, *supra* note 10, at 120; Sackellares, *supra* note 6, at 157; Wagner, *supra* note 4, at 207.

⁴⁵ See AMNESTY INT'L, *supra* note 4, at 12; Sackellares, *supra* note 6, at 138.

⁴⁶ See Sackellares, *supra* note 6, at 140; Andrea R. Phelps, Note, *Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution*, 12 WM. & MARY J. WOMEN & L. 499, 503 (2006); Wagner, *supra* note 4, at 205, 211.

⁴⁷ See Avery, *supra* note 32, at 110.

⁴⁸ See Sackellares, *supra* note 6, at 140; Wagner, *supra* note 4, at 193, 205.

⁴⁹ See GINGERICH & LEANING, *supra* note 19, at 15; Meier, *supra* note 10, at 121. In one infamous attack, well-documented by human rights organizations, the Sudanese military and the Janjaweed stormed the northern Darfur town of Tawila, surrounded a boarding school that housed 110 girls, and eventually raped at least forty-one students and teachers in one day. Commission of Inquiry Report, *supra* note 23, ¶ 339; Wagner, *supra* note 4, at 204.

cilities to treat their injuries.⁵⁰ These lingering effects make rape the most devastating and premeditated tactic of the Janjaweed—rape and its after-effects are destroying the very core of Darfurian society and forcing women to live alone, broken, in its rubble.⁵¹ It is these physical, psychological, social, and economic consequences that demonstrate why rape is the first aspect of the Darfur genocide that the international community should be most intent on eliminating.⁵²

1. Physical and Psychological Effects

The majority of women raped in Darfur suffer horrific physical injuries.⁵³ The Janjaweed rape violently, often raping women multiple times in a row and penetrating them with sticks and bayonets.⁵⁴ Following the rapes, the Janjaweed have attempted to cause further injury by firing bullets into women's vaginas, among other atrocities.⁵⁵ If the women survive, they often are left with serious medical conditions, most frequently an injury known as a traumatic gynecological fistula.⁵⁶ A gynecological fistula occurs when the wall between the vagina and the bladder or bowel is ruptured, leaving women incontinent and highly susceptible to infection.⁵⁷ Fistulas are all but unheard

⁵⁰ See Cahn, *Beyond Retribution*, *supra* note 42, at 258; Sackellares, *supra* note 6, at 140; Wagner, *supra* note 4, at 205.

⁵¹ See Cahn, *Dilemmas and Directions*, *supra* note 42, at 335–36 (arguing that women are affected differently by armed conflict due to their second-class status in most war-torn countries and their role as the primary caretakers of homes and families).

⁵² See *id.* at 337, 358–59. Some argue that rape should be at the very top of any criminal prosecutions against the perpetrators of the Darfur genocide. Wagner, *supra* note 4, at 194, 212.

⁵³ AMNESTY INT'L, *supra* note 4, at 18. The severity of these injuries is increased due to the widespread practice of female genital mutilation in Sudan. *Id.* Most women in Darfur are circumcised, and a large number are infibulated, making intercourse extremely painful and dangerous and greatly increasing the risk of injury. *Id.*; GINGERICH & LEANING, *supra* note 19, at 20; see also Wagner, *supra* note 4, at 213; Kristof, *Sudan's Department of Gang Rape*, *supra* note 13.

⁵⁴ Commission of Inquiry Report, *supra* note 23, ¶¶ 333–34; Kristof, *Sudan's Department of Gang Rape*, *supra* note 13.

⁵⁵ Cahn, *Beyond Retribution*, *supra* note 42, at 232.

⁵⁶ See AMNESTY INT'L, *supra* note 4, at 18; THE ACQUIRE PROJECT, *Traumatic Gynecological Fistula: A Consequence of Sexual Violence in Conflict Settings* 3 (2006), available at http://www.acquireproject.org/fileadmin/user_upload/ACQUIRE/Publications/TF_Report_final_version.pdf; U.N. Office for the Coordination of Humanitarian Affairs (U.N. OCHA), *Sudan: Fighting Fistula in Khartoum*, Jan. 23, 2007, <http://irinnews.org/report.aspx?reportID=57172> [hereinafter U.N. OCHA, *Fighting Fistula*].

⁵⁷ See AMNESTY INT'L, *supra* note 4, at 18; THE ACQUIRE PROJECT, *supra* note 56, at 3; U.N. OCHA, *Fighting Fistula*, *supra* note 56. Women suffering from gynecological fistulas

of in the developed world, and typically occur in the third world only as a result of problematic labor and delivery.⁵⁸ In Darfur, however, they have increasingly become a common conflict-related injury.⁵⁹ It is unknown how many women suffer from gynecological fistulas in Darfur.⁶⁰ All that is known is that the women who have developed fistulas after being raped are suffering horribly and alone, having been shunned by their families and communities.⁶¹

Compounding the problem of fistulas and other rape injuries is the lack of adequate medical facilities in Darfur that can provide comprehensive medical care to rape victims.⁶² While fistulas can be easily repaired with surgery, surgical facilities are virtually non-existent in the remote villages, makeshift communities, and desperate refugee camps where many Darfurians currently live.⁶³ There are no sanitary products that can help women with fistulas avoid their high risk of infection, nor are there the necessary rehabilitation services that would allow them to remain part of the community.⁶⁴ In addition, the sheer number of rapes has very likely led to a significant spread of HIV/AIDS and other sexually transmitted diseases, none of which are being protected against or treated.⁶⁵ As a result, the women of Darfur are essentially left to fend for themselves against a litany of public health crises.⁶⁶

In addition to the horrific physical effects, many of the rape victims in Darfur, like rape victims all around the world, suffer profound

are unable to control excretion and constantly smell of urine and feces, making it impossible for them to leave their homes. See U.N. OCHA, *Fighting Fistula*, *supra* note 56.

⁵⁸ THE ACQUIRE PROJECT, *supra* note 56, at 3; see U.N. OCHA, *Fighting Fistula*, *supra* note 56.

⁵⁹ See THE ACQUIRE PROJECT, *supra* note 56, at 9–10.

⁶⁰ See *id.* Between 2003 and 2004, 300 women sought treatment for fistulas at Darfur's largest hospital; this number is only a small fraction of those affected by fistula, as it is believed that most women do not seek treatment. *Id.*

⁶¹ See U.N. OCHA, *Fighting Fistula*, *supra* note 56.

⁶² See AMNESTY INT'L, *supra* note 4, at 18; THE ACQUIRE PROJECT, *supra* note 56, at 10.

⁶³ See AMNESTY INT'L, *supra* note 4, at 18; THE ACQUIRE PROJECT, *supra* note 56, at 10. There is only one hospital in Darfur that practices fistula repair, and it can handle only the simplest cases. THE ACQUIRE PROJECT, *supra* note 56, at 10. Most women would need to travel to better-equipped hospitals in Chad or Kenya for the surgery. *Id.*

⁶⁴ See AMNESTY INT'L, *supra* note 4, at 18; THE ACQUIRE PROJECT, *supra* note 56, at 10.

⁶⁵ See AMNESTY INT'L, *supra* note 4, at 18; Wagner, *supra* note 4, at 212. While there are no statistics available about HIV/AIDS transmission in Sudan, some speculate that the transmission rate is alarmingly high. Wagner, *supra* note 4, at 212. Some have compared the rapes in Darfur to the widespread rapes that were part of the Rwandan genocide in the mid-1990s. Sackellares, *supra* note 6, at 141; Wagner, *supra* note 4, at 212. Seventy percent of all women raped during that conflict are believed to have contracted HIV. Sackellares, *supra* note 6, at 141; Wagner, *supra* note 4, at 212.

⁶⁶ See Cahn, *Dilemmas and Directions*, *supra* note 42, at 337.

psychological consequences.⁶⁷ They often experience depression and post-traumatic stress disorder, as well as feelings of abandonment, isolation, guilt, and constant fear.⁶⁸ And without access to psychological care, there is little hope for these women ever to recover fully.⁶⁹

2. Social and Economic Effects

Darfurian women who are victimized by the Janjaweed's brutality, even the few who escape serious physical injuries, must deal with tangible social and economic ramifications.⁷⁰ Rape carries such a strong stigma in Sudanese society that victims are nearly universally shamed and cast out of their families.⁷¹ Rape victims who are married are often abandoned by their husbands and forced to raise their children—including, often, their rapist's child—alone, without any type of income; those who are still single are typically deemed unfit for marriage and fated to a difficult life.⁷² Other victims have been separated from their families, perhaps permanently, and forced to flee to remote IDP or refugee camps.⁷³ These destructive after-effects are not a byproduct of the sexual violence, but rather are the primary motivation for the attacks.⁷⁴ The Janjaweed are acutely aware of the ramifications of rape,

⁶⁷ Cahn, *Beyond Retribution*, *supra* note 42, at 233; Cahn, *Dilemmas and Directions*, *supra* note 42, at 359.

⁶⁸ Cahn, *Dilemmas and Directions*, *supra* note 42, at 359; Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violations Console Their Victims*, 46 HARV. INT'L L. J. 295, 306 (2005).

⁶⁹ Cahn, *Dilemmas and Directions*, *supra* note 42, at 359. The lack of psychological care for rape victims stems from the overall lack of mental health facilities in Darfur, but also from the traditional beliefs about rape in Sudan. *See id.* In a country where rape is rarely recognized as a crime and victims are blamed and ostracized, there is obviously little thought given to the psychological needs of victims. *See* Cahn, *Beyond Retribution*, *supra* note 42, at 233; Cahn, *Dilemmas and Directions*, *supra* note 42, at 359–60.

⁷⁰ *See* Wagner, *supra* note 4, at 212; *see also* Cahn, *Beyond Retribution*, *supra* note 42, at 218 (arguing that women are disproportionately affected, politically and economically); Cahn, *Dilemmas and Directions*, *supra* note 42, at 336–37 (stating that women struggle for economic survival during and after wars).

⁷¹ *See* O'Connell, *supra* note 68, at 312; Wagner, *supra* note 4, at 213. O'Connell notes that sexual violence is an especially powerful tool for humiliation and shame. O'Connell, *supra* note 68, at 312. *See generally* Kristof, *The Face of Genocide*, *supra* note 2 (explaining that Halima was abandoned by her husband after he discovered that she was raped by the Janjaweed).

⁷² *See* Wagner, *supra* note 4, at 213; Lydia Polgreen, *Darfur's Babies of Rape Are on Trial From Birth*, N.Y. TIMES, Feb. 11, 2005, at A8.

⁷³ *See* Cahn, *Beyond Retribution*, *supra* note 42, at 234.

⁷⁴ *See* Wagner, *supra* note 4, at 212.

and use it deliberately to dismantle the family and social relationships at the core of Darfurian society.⁷⁵

The after-shocks of widespread rape are already clearly visible in the Darfurian economy.⁷⁶ Economic activity in the region has essentially stalled.⁷⁷ Traditionally, the men of Darfur control the farming and agriculture essential to families' survival, while Darfurian women transport, prepare, and sell the food and other goods.⁷⁸ As the conflict in Darfur has raged on, however, intensifying fears of rape and physical abuse have drastically impacted women's ability to participate in this economic cycle.⁷⁹ Now, when women do engage in the work outside of the home that is necessary to keep their families alive, such as gathering firewood, they do so with the knowledge that they will most likely be beaten, raped, or killed.⁸⁰ The women of Darfur have been left unprotected, without resources, and with no viable opportunities to generate income and support themselves and their families.⁸¹ They are alone in the world.⁸²

II. ACHIEVING LEGAL JUSTICE

There is no hope for sustainable peace in Darfur without immediate access to justice.

—Louise Arbour, former U.N. High Commissioner for Human Rights⁸³

Rape has been used as a tactic of war for centuries, but it is only in the last decade that it has been fully recognized to be as evil as mass killings and other atrocities.⁸⁴ The international community has come to agree that widespread and systematic rape of women can constitute

⁷⁵ See Avery, *supra* note 32, at 113.

⁷⁶ Commission of Inquiry Report, *supra* note 23, ¶ 346.

⁷⁷ See *id.*; Human Rights Watch, Q & A, *supra* note 25; see also Cahn, *Dilemmas and Directions*, *supra* note 42, at 337.

⁷⁸ See Commission of Inquiry Report, *supra* note 23, ¶ 346; Wagner, *supra* note 4, at 206.

⁷⁹ See AMNESTY INT'L, *supra* note 4, at 18; Commission of Inquiry Report, *supra* note 23, ¶ 346.

⁸⁰ See Wagner, *supra* note 4, at 206; Kristof, *The Face of Genocide*, *supra* note 2.

⁸¹ See Avery, *supra* note 32, at 105.

⁸² See Jafari, *supra* note 22, at 9.

⁸³ Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses*, 8 CHAP. L. REV. 153, 173 (2005).

⁸⁴ See Sackellares, *supra* note 6, at 149; Phelps, *supra* note 46, at 500; Wagner, *supra* note 4, at 214–15. International recognition of rape is a new phenomenon; until recently, international human rights law was a reflection of only the male experience in armed conflict. Sackellares, *supra* note 6, at 137.

genocide or, at the very least, a war crime and a crime against humanity.⁸⁵ In recent years, the international community, led by the U.N., has made great strides in targeting and prosecuting sexual violence against women in internal conflicts.⁸⁶ Beginning with the International Criminal Tribunals in Rwanda and the former Yugoslavia and continuing through the development of the Rome Statute, the establishment of the ICC, and the current investigation and indictments by ICC, the international community has taken great steps to protect women when individual countries cannot or will not.⁸⁷ This protection must now be extended to the women of Darfur.⁸⁸ There must be vigorous prosecution of the perpetrators of the Darfurian genocide, with prosecutions of rape and sexually violent crimes at the forefront.⁸⁹

A. *The Recognition of Rape as a Crime of War*

The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) announced the international criminal justice community's first clear condemnations of the use of rape as a weapon of war.⁹⁰ The tribunals are independent, temporary courts run by the U.N. that, for the first time, prosecute both the direct perpetrators of international crimes and the government officials who enable them.⁹¹ A hallmark of both tribunals is the recognition of the unique victimization of women during armed conflict and the resulting careful prosecution of those who order, permit, or commit crimes of sexual violence.⁹² The ICTY and the ICTR represent a new way of dealing with rape as a war crime, taking a victim-centered approach and focusing on justice for the women rather than pursuing sometimes impossible or harmful prosecu-

⁸⁵ See Sackellares, *supra* note 6, at 137; see also discussion *supra* note 36. In the context of war, mass rape is a uniquely effective tool for undermining the social order of a region. GINGERICH & LEANING, *supra* note 19, at 8.

⁸⁶ See Sackellares, *supra* note 6, at 148–53; Wagner, *supra* note 4, at 210.

⁸⁷ See Sackellares, *supra* note 6, at 148–53.

⁸⁸ See Wagner, *supra* note 4, at 194.

⁸⁹ *Id.*

⁹⁰ See Sackellares, *supra* note 6, at 149. The ICTY was established in 1993 after the conflict in Yugoslavia ended; the ICTR was set up in 1994 after the civil war in Rwanda subsided. See Sackellares, *supra* note 6, at 147–48; International Criminal Tribunal for Rwanda, General Information, <http://69.94.11.53/default.htm> (last visited Jan. 2, 2008). Sackellares states that the tribunals' focus on sexual violence stemmed in part from worldwide media attention on mass rapes and pressure from feminists and women's organizations. Sackellares, *supra* note 6, at 148–49.

⁹¹ Sackellares, *supra* note 6, at 147–50.

⁹² See *id.* at 148–50.

tions.⁹³ The ICTY is known for changing the way the international community looks at sexual violence, particularly systematic rape during armed conflict.⁹⁴ The ICTR is responsible for the recognition that rape can be prosecuted as genocide and a crime against humanity and for demonstrating to the international legal community that such prosecutions stand as dramatic statements that there will be no impunity for sexual violence.⁹⁵ This legal significance, however, has not been enough to deter the ongoing genocide in Darfur.⁹⁶

B. *The Role of the International Criminal Court*

1. Establishment of the ICC

After the ICTY and ICTR, the international criminal justice community recognized the need for a permanent international court to prosecute war crimes, crimes against humanity, and genocide.⁹⁷ In July

⁹³ See *id.* at 150. The ICTR and ICTY are groundbreaking in their recognition of the impact sexual violence crimes have on individual victims. *Id.*; see Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT'L & COMP. L. 119, 120 (2005).

⁹⁴ See Sackellares, *supra* note 6, at 150. In *Prosecutor v. Tadic*, the defendant, a leader of Serbian forces, was acquitted of rape charges, but the case retained significance simply by demonstrating that it was possible to bring such charges. See *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment (July 15, 1999); Sackellares, *supra* note 6, at 150. *Prosecutor v. Kunarac* broadened the definition of rape to require only an unwanted sexual penetration, eliminating the requirement of coercion or force, bringing international law into conformity with rape laws in jurisdictions around the world. See *Prosecutor v. Kunarac*, Case Nos. IT-96-23, IT-96-23/1, Trial Chamber II, Judgment (Feb. 22, 2001); Sackellares, *supra* note 6, at 151. *Kunarac* was also significant because it was the first prosecution of a defendant for a single act of rape, and also the first to recognize the systematic rape of women as a war crime. See Sackellares, *supra* note 6, at 151.

⁹⁵ See Cahn, *Beyond Retribution*, *supra* note 42, at 240–41; Sackellares, *supra* note 6, at 151. The case of *Prosecutor v. Akayesu* was groundbreaking because the ICTR defined rape and sexual violence for the first time in international criminal history. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); Sackellares, *supra* note 6, at 152. In *Akayesu*, the ICTR also considered rape as a method of torture for the first time. See Oosterveld, *supra* note 93, at 120–21, 122; Sackellares, *supra* note 6, at 152. However, despite these legal milestones, some scholars argue that the ICTR has not had a significant impact on the Rwandan people. See Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 46 (2005). Drumbl argues that the international community, not Rwandans themselves, have been the greatest beneficiaries of the ICTR and that most Rwandans are unaware of the ICTR's work. *Id.* at 47.

⁹⁶ See Cahn, *Beyond Retribution*, *supra* note 42, at 241.

⁹⁷ See International Criminal Court: Frequently Asked Questions, <http://www.icc-cpi.int/about/ataglance/faq.html> (last visited Jan. 3, 2008) [hereinafter ICC: FAQ]. The ICTY and ICTR served as laboratories for the ICC. See Mireille Delmas-Marty, *Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J. INT'L CRIM. JUST. 2, 6 (2006). The ICC is a better solution for dealing with international

2002, the U.N. and 104 countries—with the notable exception of the United States—entered into effect the Rome Statute, which established the ICC.⁹⁸ The ICC is an unprecedented international tribunal: a permanent court coordinated by, but independent of, the U.N. and made up of judges and prosecutors from around the world.⁹⁹ The tribunal has jurisdiction to prosecute the most heinous international crimes—war crimes, crimes against humanity, and genocide—in nearly every country.¹⁰⁰ Most importantly, the ICC, guided by the Rome Statute, recognizes widespread and systematic rape as a form of genocide.¹⁰¹

The ICC has jurisdiction in any country that is a party to the Rome Statute, any country that consents to ICC jurisdiction, or any country referred to the court by the U.N. Security Council; combined, this essentially covers every country in the world.¹⁰² Although Sudan is not a party to the Rome Statute, the ICC has jurisdiction in Sudan due to a U.N. Security Council Referral made in March 2005.¹⁰³

crimes than the ICTY and ICTR because its permanency will make it less expensive to run, due to fewer set-up costs in individual countries, and will allow investigations and prosecutions to happen more quickly. *See id.* at 6; *see also* Phelps, *supra* note 46, at 514.

⁹⁸ International Criminal Court: About the Court, <http://www.icc-cpi.int/about.html> (last visited Jan. 3, 2008) [hereinafter ICC: About the Court]; *see* Rome Statute, *supra* note 19, 2187 U.N.T.S. at 91–92. Only seven countries refused to sign the Rome Statute—the United States, China, Iraq, Libya, Yemen, Qatar, and Israel. Human Rights Watch, The United States and the International Criminal Court, <http://hrw.org/campaigns/icc/us.htm> (last visited Jan. 3, 2008). The United States refused to sign the statute because of fear that U.S. soldiers could be arrested and prosecuted for war crimes by other countries. *Id.*; *see also* Beth Stephens, *Accountability for International Crimes: The Synergy Between the International Criminal Court and Alternative Remedies*, 21 WIS. INT'L L.J. 527, 529–30 (2003).

⁹⁹ ICC: About the Court, *supra* note 98; ICC: Structure of the Court, <http://www.icc-cpi.int/about/ataglance/structure.html> (last visited Jan. 3, 2008); *see* Stephens, *supra* note 98, at 527.

¹⁰⁰ ICC: FAQ, *supra* note 97; *see* Sackellares, *supra* note 6 at 153; Stephens, *supra* note 98, at 527. Because the ICC has prospective jurisdiction, it can only prosecute crimes committed after July 1, 2002. *See* Meier, *supra* note 10, at 105.

¹⁰¹ *See* Rome Statute, *supra* note 19, 2187 U.N.T.S. at 93; Phelps, *supra* note 46, at 515–16. The statute provides a list of sexually violent crimes that constitute crimes against humanity, including rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and “other forms of sexual violence.” Rome Statute, *supra* note 19, 2187 U.N.T.S. at 93. When these crimes are committed “with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group,” they constitute genocide. *Id.* The explicit recognition of these crimes in the statute demonstrates a new, broader way of thinking about sexual violence. *See* Meier, *supra* note 10, at 84; Oosterveld, *supra* note 93, at 124.

¹⁰² *See* Rome Statute, *supra* note 19, 2187 U.N.T.S. at 91–92, 99; ICC: FAQ, *supra* note 97; ICC: How the Court Works, available at <http://www.icc-cpi.int/about/ataglance/works.html> (last visited Jan. 3, 2008) [hereinafter ICC: How the Court Works].

¹⁰³ Wagner, *supra* note 4, at 219–20; INT'L CRIMINAL COURT, FACT SHEET: THE SITUATION IN DARFUR (2007), http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf [hereinafter ICC, FACT SHEET]. The U.N. Security Council re-

Three months after receiving the referral, in June 2005, ICC Prosecutor Luis Moreno-Ocampo announced that the ICC was opening an investigation in Darfur, over Sudan's vehement objections.¹⁰⁴

2. ICC Indictments

After a twenty-month investigation, the ICC's work in Darfur reached a crescendo in February 2007, when Moreno-Ocampo announced indictments against two high-ranking Sudanese officials for crimes against humanity and war crimes in Darfur.¹⁰⁵ The indictments contain fifty-one counts of atrocious crimes, including rape, murder, and torture, against Ahman Muhammad Harun, the former Minister of

ceived the case in January 2005 from the U.N.'s International Commission of Inquiry for Darfur. See Hewett, *supra* note 36, at 276. See generally Commission of Inquiry Report, *supra* note 23 (concluding that the extent of violence in Darfur required a referral to the Security Council). The commission, while declining to find the events in Darfur to be genocide, detailed serious violations of international criminal law in Darfur and sent the names of fifty-one individuals, including government and Janjaweed officials, believed to be responsible to the Security Council for further action. Hewett, *supra* note 36, at 276–77; Rubin, *supra* note 27. See generally Commission of Inquiry Report, *supra* note 23 (detailing accounts of the violence and documentation proving the government's involvement). The Security Council gathered further information, including written documentation of the atrocities from human rights groups and anti-government activists in Sudan. See Rubin, *supra* note 27. On March 31, 2005, the Security Council voted eleven to zero to officially refer Darfur to the ICC, with Algeria, Brazil, China, and the United States abstaining. Van Dyke, *supra* note 83, at 174; see Hewett, *supra* note 36, at 277. Because of its objection to the ICC, the United States had threatened to veto the referral, but backed off of this threat, stating that it was important for the international community to speak with one voice. Van Dyke, *supra* note 83, at 174. The Security Council's referral in the face of U.S. opposition has been called "remarkable." Delmas-Marty, *supra* note 97, at 5.

¹⁰⁴ See Hewett, *supra* note 36, at 277. Sudan immediately rejected the Security Council's referral to the ICC. Hewett, *supra* note 36, at 277; Wagner, *supra* note 4, at 219. President al-Bashir repeatedly reaffirmed Sudan's sovereignty and stated that he would not hand over any Sudanese nationals to the court. Hewett, *supra* note 36, at 277; Wagner, *supra* note 4, at 219. The ICC's decision to go ahead with an investigation and prosecution in Darfur over Sudan's objections has been called a "defining moment" for the court. Van Dyke, *supra* note 83, at 173.

¹⁰⁵ ICC, FACT SHEET, *supra* note 103. In announcing the indictments, the prosecutor stated that he was basing his charges on statements from victims, eyewitnesses, and those with knowledge of the government's activities; documents and other information provided by the Sudanese government; the Commission of Inquiry Report; and documents, reports, and statements provided by non-governmental organizations. INTERNATIONAL CRIMINAL COURT, SITUATION IN DARFUR, THE SUDAN, PROSECUTOR'S APPLICATION UNDER ARTICLE 58(7), 3 (2007), available at http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Summary-Darfur-20070227_en.pdf [hereinafter ICC, PROSECUTOR'S APPLICATION]; ICC, FACT SHEET, *supra* note 103. The defendants are not being charged with genocide, most likely due to the fact that the Commission did not definitively find genocidal intent. Commission of Inquiry Report, *supra* note 23, ¶ 518

State for the Interior of the Government of the Sudan, and Ali Kushayb, a Janjaweed leader.¹⁰⁶ Harun allegedly managed and personally participated in Janjaweed recruitment, directed Janjaweed activities through the “Darfur Security Desk,” and provided funds and weapons directly to the Janjaweed, all with the full knowledge that the Janjaweed were routinely attacking civilians.¹⁰⁷ Kushayb allegedly commanded thousands of Janjaweed members and personally led attacks on civilians—including a mass rape where he personally “inspected” women who were tied to trees with their legs apart before being raped repeatedly.¹⁰⁸ In May 2007, the ICC’s Pre-Trial Chamber ruled on the merits of the prosecutor’s evidence against Harun and Kushayb and found reasonable grounds to believe that they are criminally responsible for the alleged incidents of murder, rape, and torture.¹⁰⁹ The ICC also issued arrest warrants for Harun and Kushayb, which serve as a request to Sudan and all countries party to the Rome Statute to arrest the defendants and turn them over to the court.¹¹⁰

These indictments are an extremely significant step, but, at the same time, barely scratch the surface of what needs to be done in Darfur.¹¹¹ There are many more individuals who need to be investigated

¹⁰⁶ ICC, PROSECUTOR’S APPLICATION, *supra* note 105, at 1; ICC, FACT SHEET, *supra* note 103. The prosecutor’s choice of defendants is significant. See ICC, FACT SHEET, *supra* note 103. By including one government official who orchestrated the attacks and one Janjaweed leader who carried out the attacks, the prosecutor is showing the depth of the government involvement in the attacks. See *id.*

¹⁰⁷ ICC, PROSECUTOR’S APPLICATION, *supra* note 105, at 5. Harun was often seen traveling with guards and large boxes of cash, which he distributed directly to the Janjaweed. *Id.* Harun is reportedly currently in Jordan for medical treatment. *Sudan Rejects ICC Jurisdiction, Says One Suspect Held*, SUDAN TRIB., Feb. 27, 2007, available at <http://www.sudantribune.com/spip.php?article20473>.

¹⁰⁸ ICC, PROSECUTOR’S APPLICATION, *supra* note 105, at 7. Sudan claims to be investigating Kushayb for international crimes and allegedly has him in custody. *Sudan Rejects ICC Jurisdiction*, *supra* note 107. The ICC has stated that this is irrelevant because Sudan’s investigation does not involve the same incidents or conduct cited by the ICC. Press Release, International Criminal Court, ICC Prosecutor Presents Evidence on Darfur Crimes (Feb. 27, 2007), available at <http://www.icc-cpi.int/press/pressreleases/230.html> (last visited Jan. 3, 2008) [hereinafter Press Release, ICC Prosecutor Presents Evidence].

¹⁰⁹ Prosecutor v. Harun & Al Abd-Ak-Rahman, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶¶ 76, 107 (Apr. 27, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf.

¹¹⁰ Prosecutor v. Harun & Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf; Prosecutor v. Harun & Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf.

¹¹¹ See Wagner, *supra* note 4, at 218. The U.N. has identified ten high-ranking central government officials, seventeen local government officials, fourteen members of the Jan-

and prosecuted by the ICC, including President al-Bashir himself.¹¹² Until this happens, however, the ICC must dedicate itself to bringing Harun and Kushayb to justice.¹¹³ Although the indictments have been universally applauded by human rights groups and concerned nations, they will be meaningless in stopping and preventing genocide unless justice is actually done.¹¹⁴

3. Obstacles to Effective ICC Prosecutions in Darfur

Despite the great progress made by the ICC, there are multiple obstacles to the court's effectiveness.¹¹⁵ As a court of last resort, the ICC operates under a complementarity rule: the ICC can exercise its jurisdiction to investigate and prosecute crimes in a country only after it determines that the country is unwilling or unable to handle the prosecution itself.¹¹⁶ The ICC has determined that Sudan is both unwilling and unable to investigate and prosecute the crimes and perpetrators identified by the ICC, and thus has declared jurisdiction.¹¹⁷ Sudan disagrees, however, and has attempted to ward off the ICC by establishing its own court to investigate crimes in Darfur, called the Special Court for Darfur.¹¹⁸ This court, opened in 2005, has conducted very few prosecutions and, in a country that barely acknowledges rape as a crime, is not expected to provide justice to any of the women victimized

jaweed, and seven members of rebel groups as being directly responsible for the atrocities. *Id.* See generally Commission of Inquiry Report, *supra* note 23 (noting that numerous individuals have been directly linked to the violence). Human Rights Watch has also identified twenty perpetrators of the violence besides Harun and Kushayb. Human Rights Watch, Darfur: Policy of Impunity, <http://hrw.org/campaigns/darfur/impunity/list.htm> (last visited Jan. 3, 2008). The prosecutor acknowledges that he focused on only some of the most serious incidents from 2003 to 2004 and only some of the individuals who bear the greatest responsibility. Press Release, International Criminal Court, ICC Prosecutor Ready With Evidence Against Darfur War Criminals (Dec. 14, 2006), available at <http://www.icc-cpi.int/press/pressreleases/217.html> [hereinafter Press Release, ICC Prosecutor Ready With Evidence].

¹¹² See Press Release, Human Rights Watch, ICC Prosecutor Identifies First Darfur Suspects (Feb. 27, 2007), available at <http://hrw.org/english/docs/2007/02/23/darfur15402.htm>. Because the indictments are so limited, there is some concern that the ICC prosecutor is dragging his feet. See Sackellares, *supra* note 6, at 160–61.

¹¹³ See Press Release, Human Rights Watch, *supra* note 112.

¹¹⁴ See *id.*

¹¹⁵ See Wagner, *supra* note 4, at 220.

¹¹⁶ Rome Statute, *supra* note 19, 2187 U.N.T.S. at 100–01; ICC: FAQ, *supra* note 97.

¹¹⁷ ICC, FACT SHEET, *supra* note 103.

¹¹⁸ See Hewett, *supra* note 36, at 277; Human Rights Watch, Q & A, *supra* note 25.

by the Janjaweed.¹¹⁹ Many believe that the court completely lacks credibility and will never touch the government officials, military officers, and other influential administrators who orchestrated the campaign of rape.¹²⁰ The ICC, according to the February indictments, is confident that it can overcome the significant hurdle of Sudan's resistance and continues to press ahead with investigation and prosecution.¹²¹

Beyond the complementarity issue, however, the ICC faces three major limitations to its effectiveness.¹²² First, the lack of support for the court from the United States weakens the ICC's credibility in the eyes of the rest of the world; it may severely limit the impact of any judgment by the ICC and restrict the international community from following through on punishments.¹²³ Second, ICC judgments may not carry much weight in countries that feel far removed from the prosecution process, and may result in empty punishments and hol-

¹¹⁹ See Lipscomb, *supra* note 4, at 204. By late fall 2005, the court had heard only six cases—most of them prosecutions of men who refused to take part in the genocide. AMNESTY INT'L, *supra* note 4, at 24; Rubin, *supra* note 27. The chairman of the court has called allegations of mass rape a "Western fabrication." HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY: GOVERNMENT RESPONSIBILITY FOR INTERNATIONAL CRIMES IN DARFUR 60 (2005), available at <http://hrw.org/reports/2005/darfur1205/darfur1205text.pdf> [hereinafter HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY]. Furthermore, many Sudanese citizens are unaware of the court's existence. Rubin, *supra* note 27.

¹²⁰ See Hewett, *supra* note 36, at 279. Hewett quotes the former head of the U.N. Commission of Inquiry as asserting that the trials have "no credibility" and calling the entire Sudanese judiciary "flawed." *Id.* Hewett also notes that human rights groups have expressed skepticism of Sudan's motives. *Id.*; see HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY, *supra* note 119, at 1, 52 (describing the Sudanese court as having no accountability or intention to prosecute defendants); Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 TULSA J. COMP. & INT'L L. 1, 31 (2005) (calling the Sudanese court a "Kangaroo court").

¹²¹ See Press Release, ICC Prosecutor Presents Evidence, *supra* note 108. The prosecutor states that the ICC has devoted considerable resources to assessing admissibility on the jurisdiction issue, and is confident that the indictments do not violate the complementarity rule. Wagner, *supra* note 4, at 221; Press Release, ICC Prosecutor Presents Evidence, *supra* note 108. This was confirmed by the ICC in its ruling on the merits of the case. *Harun & Al Abd-Ak-Rahman*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, *supra* note 109, ¶¶ 11–17.

¹²² See J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT'L L. REV. 37, 40 (2006). From these three specific limitations arise arguments that international criminal prosecutions can sometimes do more harm than good. See Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 818–19 (2006).

¹²³ See Van Dyke, *supra* note 83, at 172–73. Some believe that the United States' refusal to support the Rome Statute has weakened the credibility of the ICC and could make convictions difficult to enforce. See Phelps, *supra* note 46, at 518–19. Others contend that the United States' opposition to the ICC is a losing battle and that the United States will eventually have to become a party to the court. Stephens, *supra* note 98, at 529–30.

low justice.¹²⁴ Third, even with the progress brought by the February indictments, it will take several more years for justice truly to be done, as the process of obtaining enough evidence to prosecute war criminals is extremely lengthy.¹²⁵

4. Why the ICC Is Necessary

Despite these limitations, criminal trials are an essential component of the quest for justice for Darfur and, as discussed above, the ICC is the most effective channel available for such trials.¹²⁶ Trials, even if they take years, not only hold perpetrators accountable, but

¹²⁴ See Blumenson, *supra* note 122, at 854; Cahn, *Beyond Retribution*, *supra* note 42, at 267. Blumenson argues that those with the greatest stake in ICC decisions—the victims—have no power to influence the process or hold the ICC accountable for prosecution failures. Blumenson, *supra* note 122, at 854. Others argue that because the ICC prosecutions are based in the Hague, they are detached from the political and cultural realities of the victims and may not be effective at promoting reconciliation. Lipscomb, *supra* note 4, at 193–94. Lipscomb also cautions that the ICC will be less effective if it operates under a traditional Western punitive justice framework focused on retribution and deterrence rather than under a healing framework more reflective of the cultures of the victims. *Id.* at 194–95.

¹²⁵ See Sackellares, *supra* note 6, at 165; Wagner, *supra* note 4, at 220 (arguing that Sudan's lack of cooperation could seriously impede attempts at holding the perpetrators accountable for their actions in Darfur); Rubin, *supra* note 27 (noting that the ICC prosecutor has admitted that his investigation will take years); ICC: How the Court Works, *supra* note 102 (describing the ICC's lengthy evidentiary and pre-trial processes). Commentators suggest that the international legal proceedings for Darfur have been exceptionally slow due to a Western bias against Africa and a lack of media attention on the genocide due to this bias. See Sackellares, *supra* note 6, at 160–61. The investigation into Darfur is not yet complete more than two years after it began, as the prosecutor has acknowledged that there remain a number of outstanding requests for documents. Press Release, ICC Prosecutor Ready With Evidence, *supra* note 111.

¹²⁶ Commission of Inquiry Report, *supra* note 23, ¶ 573; see Pham, *supra* note 122, at 41–42; Wagner, *supra* note 4, at 240. Some have advocated the use of a hybrid national and international tribunal rather than a strictly international forum like the ICC. Lipscomb, *supra* note 4, at 186. Lipscomb argues that a hybrid tribunal involving the Sudanese legal community overseen by the ICC would be more effective because it would also strengthen the Sudanese judicial system. *Id.* Others, however, have noted problems with hybrid tribunals. See Udombana, *Pay Back Time*, *supra* note 120, at 10. A hybrid tribunal currently exists in Sierra Leone, but it has been hampered by credibility and financial problems, largely because of lukewarm support and interest from the international community. *Id.* Furthermore, others have noted that even if hybrid tribunals are effective elsewhere, one would be impractical in Sudan because the judicial system is completely controlled by the same government officials who are responsible for the genocide. See Delmas-Marty, *supra* note 97, at 6. Given the fact that the current peace agreements in force in Sudan promise continued power to President al-Bashir, regime change, and thus changes in the judicial system, is extremely unlikely. See Lipscomb, *supra* note 4, at 186.

also provide victims with a voice they otherwise would not have had.¹²⁷ Trials are important to the legal community as a whole because the establishment of a permanent record condemning atrocities creates a vivid reminder of genocide's destruction.¹²⁸ This can serve as a powerful legal precedent for punishing future acts of rape as a weapon of war, create more international acceptance of protections for women in armed conflict, and reduce cultural stigmas against rape victims.¹²⁹ Prosecutions may help prevent future genocides by sending a signal to governments around the world that the international community will hold perpetrators of sexual violence accountable.¹³⁰ Furthermore, in the case of Sudan, where the genocide continues and increasingly threatens international peace and security, prosecution is one of the only tools that can bring a permanent end to the violence.¹³¹ But despite these benefits, prosecution cannot be the only response, as the victims of these atrocities deserve much more complete and immediate justice.¹³²

III. ALTERNATIVE FORMS OF JUSTICE

This is ethnic cleansing, this is the world's greatest humanitarian crisis, and I don't know why the world isn't doing more about it.

—Mukesh Kapila, former U.N. Humanitarian Coordinator in Sudan¹³³

Justice is more than simply prosecution.¹³⁴ Justice is also restorative and humanitarian, and does not necessarily come from within the

¹²⁷ O'Connell, *supra* note 68, at 310, 319–20. O'Connell argues that trials can signal society's new solidarity with victims and acknowledgment of victims' dignity, which may alleviate some victims' loneliness and suffering. *Id.*

¹²⁸ See Cahn, *Beyond Retribution*, *supra* note 42, at 241; Meier, *supra* note 10, at 133.

¹²⁹ Wagner, *supra* note 4, at 241, 242. Vigorous prosecution can delegitimize the cultural stigma attached to rape, educate the public about the true plight of rape victims, and shape public opinion about the unacceptability of rape. Udombana, *Pay Back Time*, *supra* note 120, at 22; Wagner, *supra* note 4, at 241, 242.

¹³⁰ Rubin, *supra* note 27.

¹³¹ Angelina Jolie, Op-Ed., *Justice for Darfur*, WASH. POST, Feb. 28, 2007, at A19; see Wagner, *supra* note 4, at 194, 241, 242.

¹³² See, e.g., Pham, *supra* note 122, at 41; Jolie, *supra* note 131; Kristof, *The Face of Genocide*, *supra* note 2.

¹³³ AMNESTY INT'L, *supra* note 4, at 3.

¹³⁴ See Cahn, *Beyond Retribution*, *supra* note 42, at 220, 269; see also Drumbl, *supra* note 95, at 65 (arguing that legal justice must be externalized); Wagner, *supra* note 4, at 240 (stating that no international court will be able to undo the great damage that sexual violence has brought on Darfur).

law.¹³⁵ The standard human rights response to past genocides has been to investigate and prosecute those responsible; although this long and complicated process benefits the international community, it ignores the more immediate needs of the victims.¹³⁶ Survivors of genocide, and rape victims in particular, need more than just legal vindication.¹³⁷ During and after the conflict, they need food and medical treatment for themselves and their families, financial assistance to rebuild their local economies, and protection against future attacks.¹³⁸ These short-term needs cannot be met by the legal system.¹³⁹ Thus, in formulating a response to the Darfur genocide, the international community must recognize the realities of the victims and make justice resonate on the ground.¹⁴⁰ This is a complementary process; one form of justice cannot supersede or replace the other.¹⁴¹ Rather, this approach adds focus to the victims' physical and social needs during the wait for the legal process to bring its form of justice.¹⁴²

A. *Where Do We Go from Here?*

1. Humanitarian Assistance

It is difficult to conceptualize what it would take to make the women of Darfur whole again.¹⁴³ But it is clear that the international community, including the U.N., the United States, other governments, and non-governmental organizations, must take steps to meet the women of Darfur's immediate physical and economic needs with targeted humanitarian aid.¹⁴⁴ This cannot wait until after the genocide has

¹³⁵ Cahn, *Beyond Retribution*, *supra* note 42, at 220, 269. Cahn argues that legal responses are often inadequate because they only address limited aspects of the victims' post-conflict needs and not practical aspects of victims' lives. *Id.* at 221. As a result, the ICC is not the complete answer to genocide. *Id.* at 267; *see also* Chanté Lasco, *Repairing the Irreparable: Current and Future Approaches to Reparations*, HUM. RTS. BRIEF, Winter 2003, at 18, 18 (2003).

¹³⁶ *See* Cahn, *Beyond Retribution*, *supra* note 42, at 218; *see also* Drumbl, *supra* note 95, at 42.

¹³⁷ Cahn, *Beyond Retribution*, *supra* note 42, at 220–21.

¹³⁸ *Id.* at 221, 242, 247; *see* Udombana, *Pay Back Time*, *supra* note 120, at 47.

¹³⁹ Cahn, *Beyond Retribution*, *supra* note 42, at 221.

¹⁴⁰ *See id.* at 219. This means shaping the administration of aid in ways that address customs within Sudanese society, including the social and familial roles occupied by women. *Id.*

¹⁴¹ *See id.* at 245.

¹⁴² Lipscomb, *supra* note 4, at 195. Some believe that focusing on the long-term economic and social needs of the victims may be more valuable than criminal prosecutions in the prevention of future genocides. *Id.*

¹⁴³ *See* Cahn, *Beyond Retribution*, *supra* note 42, at 247; Lasco, *supra* note 135, at 1.

¹⁴⁴ *See* Cahn, *Beyond Retribution*, *supra* note 42, at 247; Lasco, *supra* note 135, at 18. The current humanitarian response has been weakened by the failure of many nations to fulfill

ended or the violence has ceased; it must happen now.¹⁴⁵ There are no legal barriers, no complementarity tests, to ending despair in this way.¹⁴⁶ The Sudanese government, which continues to deny the existence of the humanitarian crisis in Darfur, is unable or unwilling to fulfill its human rights obligations to its own citizens, and has allowed the country to become a wilderness of atrocity and crime.¹⁴⁷ Sudan is utterly incapable of providing even the most basic services and protections to its own citizens, including physical security, health care, education, transportation, or economic infrastructure.¹⁴⁸ The international community must step in where Sudan has failed.¹⁴⁹

The international community must immediately devise a plan for distributing both basic short-term and more comprehensive long-term humanitarian aid in Darfur.¹⁵⁰ Initial distribution of food and clean water must be accompanied by an immediate deployment of skilled physicians to provide comprehensive, gender-sensitive medical care.¹⁵¹ In order to save their lives, the women of Darfur, particularly rape victims, desperately need obstetric and gynecological care, HIV/AIDS testing, and psychological counseling.¹⁵² Next, the international community must make improvements in the living conditions in the refugee camps in Chad and the IDP camps in Sudan, as these will be home to hundreds of thousands of Darfurians for the foreseeable future.¹⁵³ These camps can be made safer for women through increased numbers of female aid workers, the addition of trained medical professionals,

promised commitments. See Jafari, *supra* note 22, at 21. Likewise, the U.N. has been notably slow and ineffective in providing humanitarian aid in Darfur. See Deans, *supra* note 13, at 1654; see also Islam, *supra* note 32, at 357 (stating that the U.N. response “has been more than whispering but less than roaring”); Nicholas D. Kristof, *Dithering Through Death*, N.Y. TIMES, May 16, 2006, at A25 (stating that the U.N. has “barely put a speed bump in the path to genocide in Darfur”).

¹⁴⁵ Sackellares, *supra* note 6, at 155–56.

¹⁴⁶ See Islam, *supra* note 32, at 370.

¹⁴⁷ *Id.*; see Udombana, *Pay Back Time*, *supra* note 120, at 5; Wagner, *supra* note 4, at 200.

¹⁴⁸ Udombana, *Pay Back Time*, *supra* note 120, at 5.

¹⁴⁹ See *id.*

¹⁵⁰ See PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 5; Lasco, *supra* note 135, at 20.

¹⁵¹ See PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 5; Avery, *supra* note 32, at 134–35.

¹⁵² See AMNESTY INT’L, *supra* note 4, at 34–35; Cahn, *Beyond Retribution*, *supra* note 42, at 247–48, 258; see also Drumbl, *supra* note 95, at 70 (noting that rape victims require specialized medical and psychological treatment). Providers should ensure that medical and psychological treatment is compatible with the religious and cultural traditions of Darfur. GINGERICH & LEANING, *supra* note 19, at 2.

¹⁵³ See AMNESTY INT’L, *supra* note 4, at 34–35. These camps are overcrowded and lack food, water, and basic supplies. Jafari, *supra* note 22, at 21. In 2004, new arrivals had to wait up to a month just for a tent. *Id.*

development of economic and education opportunities for women, and the implementation of systems for reporting crimes and catching perpetrators.¹⁵⁴

Beyond these immediate life-sustaining measures, the international community should address the long-term economic and social needs of the Darfurian people through programs that provide access to land, credit, and other financial resources.¹⁵⁵ The community and social structures of Darfur have been depleted, and the survivors of the genocide will require help in reclaiming their homes, rebuilding their communities, and forging sustainable livelihoods.¹⁵⁶ Currently, women whose husbands have been killed or are missing are under tremendous pressure to provide for their families, and often place themselves at risk of rape to do so.¹⁵⁷ Thus, long-term reconstruction assistance is imperative to keep the women of Darfur from being re-exposed to violence.¹⁵⁸

Complicating these efforts, however, is the fact that the security situation in Darfur is incredibly unstable.¹⁵⁹ Since the failed peace agreement among the government and the rebel groups in May 2006, violence in the region has spiked considerably and humanitarian operations have begun to suffer as a result.¹⁶⁰ At least twelve aid workers have been killed, and many more have been attacked, in Darfur since May 2006.¹⁶¹ Workers have increasingly found themselves targeted for attack and theft by the Janjaweed, the Sudanese police, and, recently, multiple rebel groups.¹⁶² The U.N. and United States must take the

¹⁵⁴ AMNESTY INT'L, *supra* note 4, at 35; GINGERICH & LEANING, *supra* note 19, at 2; Avery, *supra* note 32, at 128.

¹⁵⁵ See PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 7; Avery, *supra* note 32, at 131.

¹⁵⁶ See GINGERICH & LEANING, *supra* note 19, at 25; PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 7; Avery, *supra* note 32, at 131.

¹⁵⁷ See GINGERICH & LEANING, *supra* note 19, at 29.

¹⁵⁸ See *id.* at 25.

¹⁵⁹ Udombana, *Escape From Reason*, *supra* note 36, at 64; Nicholas D. Kristof, *A Boy's Wish: Kill Them All*, N.Y. TIMES, Nov. 21, 2006, at A29; Rod Nordland, *Darfur: Aid Workers Are the New Targets*, NEWSWEEK, Jan. 29, 2007, at 36; Human Rights Watch, Letter to the Assembly of African Heads of State and Government on the Situation in Sudan and Chad (Jan. 29, 2007), http://hrw.org/english/docs/2007/01/26/darfur15195_txt.htm [hereinafter Human Rights Watch, Letter to Africa]; Human Rights Watch, Q & A, *supra* note 25.

¹⁶⁰ See Kristof, *When Genocide Worsens*, *supra* note 28.

¹⁶¹ Human Rights Watch, Q & A, *supra* note 25; see U.S. DEP'T OF STATE, SUDAN: COUNTRY REPORTS, *supra* note 29; Jeffrey Gettleman, *Darfur Rebels Kill 10 in Raid on Peace Force*, N.Y. TIMES, Oct. 1, 2007, at A1; Nicholas D. Kristof, *Spineless on Sudan*, N.Y. TIMES, July 9, 2007, at A17.

¹⁶² Gettleman, *Darfur Rebels Kill 10 in Raid on Peace Force*, *supra* note 161. In January 2007, Sudanese police raided a social gathering at an international aid compound in Nyala, Darfur and arrested twenty workers, beating and sexually assaulting several. U.S.

lead in providing protection for humanitarian workers, through military or other forces, so that the victims in Darfur can receive the assistance they so desperately need.¹⁶³

2. Reparations

In addition to tangible humanitarian assistance, the international community must attempt to make victims of genocide whole through financial reparations.¹⁶⁴ Reparations promote a sense of justice and contribute to the process of reconciliation by helping victims rebuild their identities.¹⁶⁵ Even though reparations have not traditionally been part of international criminal justice, victims' right to reparations is a well-founded concept in international law.¹⁶⁶ The ICC is unique in its power to make reparations orders directly against perpetrators as part of its punishment.¹⁶⁷ Through the ICC's Victims' Trust Fund, the ICC can award reparations to victims against their perpetrators' property or from the fund itself.¹⁶⁸

Direct reparations, though complicated and time-consuming, are possible.¹⁶⁹ In the 1990s, a U.N. Compensation Committee provided restitution to hundreds of thousands of corporations and individuals

DEP'T OF STATE, SUDAN: COUNTRY REPORTS, *supra* note 29; Human Rights Watch, Q & A, *supra* note 25.

¹⁶³ See Deans, *supra* note 13, at 1686; Kristof, *A Tolerable Genocide*, *supra* note 17.

¹⁶⁴ See Lasco, *supra* note 135, at 18–19.

¹⁶⁵ See Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT'L L. & INT'L REL. 25, 26 (2006); O'Connell, *supra* note 68, at 341.

¹⁶⁶ See Peter G. Fischer, Comment, *The Victims' Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187, 192, 197 (2003); Udombana, *Pay Back Time*, *supra* note 120, at 45.

¹⁶⁷ See Rome Statute, *supra* note 19, 2187 U.N.T.S. at 134–36; Di Giovanni, *supra* note 165, at 26. Di Giovanni notes that the Victims' Trust Fund is a significant step forward in the recognition of victims' rights and demonstrates the shift in international criminal law from a purely retributive to more restorative focus. Di Giovanni, *supra* note 165, at 26. The creation of the Trust Fund was influenced by female survivors of the Rwandan genocide who demanded compensation. Oosterveld, *supra* note 93, at 131.

¹⁶⁸ Lasco, *supra* note 135, at 21; Fischer, *supra* note 166, at 204–05. Because the Trust Fund will be funded solely by voluntary contributions, the ICC must be aggressive in seeking donations. See Fischer, *supra* note 166, at 215, 231. Although it is difficult to predict what the level of contributions will be, it is realistic to compare the ICC Trust Fund to the trust fund established for the ICTR, which collected \$200 million, and the ICTY, which collected \$30 million. *Id.* at 215–16. Scholars note, however, that there are doubts that the ICC could secure enough funds to fulfill any reparations awards. See Di Giovanni, *supra* note 165, at 27.

¹⁶⁹ See Fischer, *supra* note 166, at 222 (highlighting problems with distribution and prioritizing the disbursement of reparations among victims).

who suffered losses during Iraq's invasion and occupation of Kuwait in the early part of the decade.¹⁷⁰ Additionally, in the twelve years since the end of its destructive ethnic conflict, Bosnia and Herzegovina has successfully managed to return more than 200,000 homes to people displaced during the conflict.¹⁷¹ This effort has become a leading model for the emerging post-conflict right of restitution, which argues that compensating victims is a durable solution that helps redress the crimes and restore the rule of law.¹⁷² The institution of a similar program to provide the return of property and direct financial compensation to the women of Darfur could help rectify the loss of their homes, livelihood, and families.¹⁷³ Whether paid for by the perpetrators, the Sudanese government, the international community, or some combination thereof, these reparations would not only serve as an unmistakable apology, it would also provide the women with a tangible way to rebuild their lives.¹⁷⁴

3. Military Protection

In addition to humanitarian and financial assistance, the international community needs to expand and improve current military tactics aimed at ending the genocide.¹⁷⁵ To put a true end to the violence in Darfur and to ensure the protection of women, the international community, led by the U.N. and the United States, must immediately send a massive peacekeeping force to the region.¹⁷⁶ Right now, there is

¹⁷⁰ John J. Chung, *The United Nations Compensation Commission and the Balancing of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA J. INT'L L. & FOREIGN AFF. 141, 141 (2005).

¹⁷¹ Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT'L L. & POL. 441, 442–43 (2005). This legal process has succeeded despite fierce initial political resistance to refugee return. *Id.* at 444.

¹⁷² *See id.* at 448.

¹⁷³ *See* PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 3–4; Lasco, *supra* note 135, at 20; Kristof, *How Do You Solve a Crisis Like Darfur?*, *supra* note 28.

¹⁷⁴ *See* PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 3–4; Lasco, *supra* note 135, at 20; Kristof, *How Do You Solve a Crisis Like Darfur?*, *supra* note 28. The ideal solution would be for the Sudanese government to pay the full amount of reparations using profits from the sale of oil and other commodities, but such an order would be difficult to enforce. *See* PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 4.

¹⁷⁵ *See* Kristof, *Disposable Cameras for Disposable People*, *supra* note 1; Kristof, *If Not Now, When?*, *supra* note 17; Joseph Loconte, *The U.N.'s Masquerade*, NAT'L REVIEW ONLINE, Sept. 26, 2006, <http://www.nationalreview.com/> (use search term "masquerade" for 9/26/2006).

¹⁷⁶ Deans, *supra* note 13, at 1685–86; Kagan, *supra* note 36, at 462. With proper international support and adequate financial and logistical resources, which the U.N. is capable of providing, a large peacekeeping mission can be successful. *See* GINGERICH & LEANING,

no force in Darfur capable of protecting civilians or preventing further violence.¹⁷⁷ Nearly 7000 African Union (AU) troops are stationed throughout the country, but the force is poorly equipped, underfinanced, and, per an agreement with the Sudanese government that gives them no mandate to intervene against violence, nearly powerless.¹⁷⁸ In response to pleas for additional help, in August 2007 the U.N. announced a plan to send nearly 26,000 additional peacekeepers to Darfur beginning in late 2007.¹⁷⁹ The Sudanese government, having

supra note 19, at 1; Deans, *supra* note 13, at 1687; Kagan, *supra* note 36, at 473. Many believe that an international protection force is the only hope for peace in the region. Samantha Power, *It's Not Enough to Call It Genocide*, TIME, Oct. 4, 2004, at 63.

¹⁷⁷ Deans, *supra* note 13, at 1686; Nicholas D. Kristof, *What's to Be Done About Darfur? Plenty*, N.Y. TIMES, Nov. 29, 2005, at A27; Human Rights Watch, Q & A, *supra* note 25. Successful intervention will require a large force strategically deployed throughout the vast regions of Darfur, in contrast to the current scattered deployment of AU troops. See Deans, *supra* note 13, at 1686.

¹⁷⁸ Deans, *supra* note 13, at 1686; Rubin, *supra* note 27; Human Rights Watch, Q & A, *supra* note 25. The AU troops are overwhelmed, and are beginning to become targets of the Janjaweed and the increasingly violent rebel groups. See Gettleman, *Darfur Rebels Kill 10 in Raid on Peace Force*, *supra* note 161; Kristof, *A Tolerable Genocide*, *supra* note 17; Mohammed Osman, *Gunmen Kill Two Darfur Peacekeepers*, WASH. POST, Mar. 7, 2007, at A17. In March 2007, the Janjaweed killed two AU soldiers. Osman, *supra*. In late September 2007, rebel fighters overran an AU base in central Darfur, killing at least ten soldiers, kidnapping others, and stealing weapons and supplies. Gettleman, *Darfur Rebels Kill 10 in Raid on Peace Force*, *supra* note 161. Furthermore, the Janjaweed appears to have broken into smaller militias that are beginning to fight each other viciously, creating new danger zones throughout the region. Jeffrey Gettleman, *Chaos in Darfur Rises as Arabs Fight with Arabs*, N.Y. TIMES, Sept. 3, 2007, at A1.

The failure of the AU troops can be at least partially attributed to a lack of funding; in 2006, Congress slashed the United States' contribution to the AU force. See Kristof, *A Tolerable Genocide*, *supra* note 17; Craig Timberg, *As Peace Mission Nears End, War in Sudan Intensifies*, WASH. POST, Sept. 18, 2006, at A12. The AU, which lacks the logistical and administrative capacity to engage in peacekeeping operations alone, has called for the U.N. to take over in Darfur as soon as possible. See Deans, *supra* note 13, at 1686–87; Kagan, *supra* note 36, at 485–86. Furthermore, even Darfur residents have called the AU ineffective and have begged for U.N. protection. Ophera McDoom, *More Darfuris Flee, Begging for U.N. Troops to Help*, REUTERS NEWS, Mar. 10, 2007, <http://www.reuters.com/article/worldNews/idUSMAR05470420070310>.

¹⁷⁹ Lydia Polgreen, *Sudan Agrees to U.N. Peacekeepers to Complete African Union Force*, N.Y. TIMES, Aug. 2, 2007, at A8; see also Kristof, *A Tolerable Genocide*, *supra* note 17; Human Rights Watch, Q & A, *supra* note 25. The force will include 20,000 soldiers and 6000 civilian police officers from Senegal, France, Indonesia, Denmark, Sweden, and Norway. Polgreen, *Sudan Agrees to U.N. Peacekeepers*, *supra*. The U.N. will have general command of the force, but day-to-day decisions will be made by the AU. Alex Perry, *U.N. Darfur Force Aims for Cease-Fire*, TIME IN PARTNERSHIP WITH CNN, July 31, 2007, <http://www.time.com/time/world/article/0,8599,1648546,00.html>.

previously rejected plans for additional peacekeepers, has agreed to accept this peacekeeping force.¹⁸⁰

While a significant step, the U.N. plan is not sufficient.¹⁸¹ It does not move peacekeepers into the region quickly enough and, in giving the soldiers only a defensive role, does not provide the necessary protection for the women of Darfur.¹⁸² Therefore, in addition to this minimal peacekeeping force, the U.N. must also explore the use of other military options with or without Sudan's consent, such as the deployment of proactive NATO troops into the region, the establishment of a strict no-fly zone over Darfur, and blockades of Sudanese ports.¹⁸³ This idea is a controversial one, as the U.N. and the United States are terrified of establishing a military presence in yet another Muslim country, but with the violence in Darfur only getting worse, it is time to put the lives of the Darfurian people ahead of geopolitical concerns.¹⁸⁴ Despite optimistic statements by international leaders, the threat of rape and violence in Darfur is not going away.¹⁸⁵ Rather than abandon Darfur because of the politics involved, the international community must take drastic steps, even those previously considered unthinkable, because of the humanity involved.¹⁸⁶

In addition to an immediate military force capable of protecting the people of Darfur, the international community must also make long-range plans to maintain peace in the region.¹⁸⁷ This must include monitoring peace talks between Darfurian rebel groups, who are oper-

¹⁸⁰ Polgreen, *Sudan Agrees to U.N. Peacekeepers to Complete African Union Force*, *supra* note 179. Sudan has reneged on similar promises in the past, however. *Id.*

¹⁸¹ Perry, *U.N. Darfur Force Aims for Cease-Fire*, *supra* note 179.

¹⁸² *Id.* The U.N. force is limited to acting only defensively to protect civilians and humanitarian workers and monitoring, but not seizing, weapons. *Id.*

¹⁸³ See PHYSICIANS FOR HUMAN RIGHTS, *supra* note 24, at 4; Bradley Graham & Colum Lynch, *NATO Role in Darfur on Table*, WASH. POST, Apr. 10, 2006, at A1; Nicholas D. Kristof, *Mr. Bush, Here's a Plan for Darfur*, N.Y. TIMES, Aug. 6, 2007, at A19; Peter Beinart, *How to Save Darfur*, TIME IN PARTNERSHIP WITH CNN, Sept. 24, 2006, <http://www.time.com/time/magazine/article/0,9171,1538646,00.html>. The no-fly zone would be patrolled by NATO fighter jets stationed in Chad and would have a mandate to shoot down Sudanese planes or destroy them on the ground. Beinart, *How to Save Darfur*, *supra*.

¹⁸⁴ Beinart, *How to Save Darfur*, *supra* note 183. The Bush administration has openly stated its reluctance to send U.S. troops to another Muslim country during the current war in Iraq. See Kristof, *Mr. Bush, Here's a Plan for Darfur*, *supra* note 183.

¹⁸⁵ See GINGERICH & LEANING, *supra* note 19, at 14; Kristof, *Spineless on Sudan*, *supra* note 161.

¹⁸⁶ Beinart, *How to Save Darfur*, *supra* note 183.

¹⁸⁷ Kristof, *Mr. Bush, Here's a Plan for Darfur*, *supra* note 183.

ating under an uneasy peace, and the Sudanese government.¹⁸⁸ Long-term peace will also require increased intelligence surveillance of the region, a careful watch of the Sudanese government's importation of weapons, and contingency plans for more forceful military intervention if the violence does not cease or if the Sudanese government becomes even more uncooperative.¹⁸⁹

4. Diplomatic Tactics

Beyond peacekeeping and military operations, which are an admittedly unpopular step, there are several political tactics that the United States and the U.N. should take to pressure the Sudanese government to end the genocide.¹⁹⁰ The United States has slowly begun to implement pressure tactics; in 2006, Congress enacted legislation calling for sanctions on Sudan, and in 2007, President Bush announced several small economic repercussions for the country.¹⁹¹ However, there

¹⁸⁸ Daniel B. Schneider, *Darfur Rebels Agree on Approach to Peace Talks*, *U.N. Says*, N.Y. TIMES, Aug. 7, 2007, at A3. Eight rebel groups met in August 2007 at the request of the U.N. to establish a common platform for peace talks with the government which were scheduled for late 2007. *Id.* At this meeting, the groups committed to ceasing all violence and to permitting the distribution of humanitarian aid. *Id.* However, this commitment seems to have already dissolved and many of the rebel groups are beginning to battle each other, endangering the scheduled peace talks. Jeffrey Gettleman, *Chaos in Darfur Rises as Arabs Fight with Arabs*, *supra* note 178. For any peace talks to be successful, the U.N. and the United States must become involved; the U.N. can assist immediately by securing the release of Suleiman Jamous, a Darfurian elder who is imprisoned by the Sudanese government and is said to be the key to uniting the rebel factions. Kristof, *Mr. Bush, Here's a Plan for Darfur*, *supra* note 183.

¹⁸⁹ See Deans, *supra* note 13, at 1679–80; Kristof, *If Not Now, When?*, *supra* note 17; Kristof, *Mr. Bush, Here's a Plan for Darfur*, *supra* note 183. Military intervention is justified under international law because the situation in Darfur constitutes a threat to international peace and security. Deans, *supra* note 13, at 1679–80.

¹⁹⁰ Kristof, *How Do You Solve a Crisis Like Darfur?*, *supra* note 28; Kristof, *If Not Now, When?*, *supra* note 17; Kristof, *What's to Be Done About Darfur? Plenty*, *supra* note 177; Kristof, *When Genocide Worsens*, *supra* note 28.

¹⁹¹ Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344, §§ 1–9, 120 Stat. 1869; Sheryl Gay Stolberg, *Bush Tightens Penalties Against Sudan*, N.Y. TIMES, May 29, 2007, at A1. The plan announced by President Bush includes barring more than 130 Sudanese companies, including thirty controlled by the Sudanese government, from doing business within the United States and directing sanctions against individual government officials responsible for the violence. Stolberg, *supra*.

The Congressional legislation, known as the Darfur Peace and Accountability Act, which was signed into law by President Bush in October 2006, is a separate sanctions package than the one announced by the President in 2007. See §§ 1–9. If it is ever enforced, the legislation would impose travel bans and asset freezes on Sudanese government officials and deny the government access to oil revenues. §§ 5, 6. In addition, the legislation authorizes the President to give financial and logistical assistance to the AU force, advocates

are many more tangible steps that can and should be taken immediately in order to give the Sudanese government a clear message that its genocidal actions will no longer be tolerated.¹⁹²

To send this message, stricter economic sanctions on the Sudanese government are necessary.¹⁹³ The plan announced by President Bush will not convince President al-Bashir to end his relentless violence; rather, buoyed by wealth from oil exports, he will continue to blithely ignore weak international pressure.¹⁹⁴ Instead, the international community must come up with a unique and comprehensive sanctions plan, one that includes broad economic measures such as blocking ships that transport Sudanese oil from international ports, freezing the bank accounts of Sudanese government officials, and prohibiting international banks from conducting oil-related transactions that benefit the Sudanese government.¹⁹⁵ This plan must be accompanied by heavy political pressure on China, Sudan's closest ally, to convince the Sudanese government to end the violence in Darfur.¹⁹⁶ As Sudan's major weapons supplier and the largest buyer of Sudanese oil, China has incredible leverage over the Sudanese government.¹⁹⁷ The United States

for NATO intervention in Darfur, and permits the President to provide economic assistance to marginalized areas in Sudan for rebuilding purposes. §§ 6, 8.

¹⁹² See Jolie, *supra* note 131; Kristof, *Bandages and Bayonets*, *supra* note 13; Kristof, *If Not Now, When?*, *supra* note 17.

¹⁹³ See HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY, *supra* note 119, at 2; Deans, *supra* note 13, at 1675; Nicholas D. Kristof, *Death by Dollars*, N.Y. TIMES, Feb. 11, 2007, at D12; Kristof, *How Do You Solve a Crisis Like Darfur?*, *supra* note 28.

¹⁹⁴ Jad Mouawad, *Oil May Allow Sudan to Escape Sanctions' Pain*, N.Y. TIMES, May 30, 2007, at C3; Perry, *Will Sanctions End the Darfur Killings?*, *supra* note 36.

¹⁹⁵ Kristof, *Disposable Cameras for Disposable People*, *supra* note 1; Kristof, *How Do You Solve a Crisis Like Darfur?*, *supra* note 28; John Prendergast, *A "Plan B" with Teeth for Darfur*, BOSTON GLOBE, May 10, 2007, at A15; Human Rights Watch, Q & A, *supra* note 25.

¹⁹⁶ See Alfred De Montesquiou, *China's Hu Presses Sudan for Progress on Darfur*, WASH. POST, Feb. 3, 2007, at A12; Kristof, *Mr. Bush, Here's a Plan for Darfur*, *supra* note 183. The close political ties and economic interdependence between China and Sudan are well-documented. See De Montesquiou, *supra*; Kristof, *Mr. Bush, Here's a Plan for Darfur*, *supra* note 183. China buys 400,000 barrels of oil a day from Sudan, financed Sudan's oil pipelines, sells weapons to the Sudanese military, and recently built a new presidential palace in Khartoum. *Chinese Leader Boosts Sudan Ties*, BBC NEWS, Feb. 2, 2007, <http://news.bbc.co.uk/2/hi/africa/6323017.stm>.

¹⁹⁷ See Kristof, *Mr. Bush, Here's a Plan for Darfur*, *supra* note 183. Human rights groups have already begun exerting pressure on China. Human Rights Watch, Letter to China on the Crisis in Darfur (Jan. 29, 2007), available at http://hrw.org/english/docs/2007/01/29/sudan15189_txt.htm (encouraging China to support the imposition of targeted sanctions against Sudan and monitor its weapon sales to Sudan). Many groups have threatened to boycott or protest the 2008 Summer Olympics, to be held in Beijing, China, and many others plan to use the games as leverage against the Chinese government to force action

and the U.N. must use their combined political leverage to force China to intervene.¹⁹⁸

The obligation to stop genocide extends beyond governments.¹⁹⁹ Individual citizens and businesses must take responsibility for ending the violence in Darfur.²⁰⁰ Divestment by corporations, financial institutions, universities, and individuals from all financial ties with Sudan is a small but powerful step that will show the Sudanese government that the entire world condemns its actions in Darfur.²⁰¹ Some progress in divestment efforts has already been made; persistent lobbying by the Save Darfur Coalition, a non-profit organization that advocates for intervention in Darfur, forced two major investors to divest holdings in a large Chinese petroleum company involved in Sudan's oil industry.²⁰² Eight states and dozens of colleges and universities have begun selling their Sudanese-related investments.²⁰³ If widespread, continued divestment of Sudanese- and Chinese-related investments could be a powerful addition to the fight against genocide in Darfur.²⁰⁴

CONCLUSION

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.

—Martin Luther King, Jr.²⁰⁵

As the genocide in Darfur rages and expands, the rest of the world continues to fail to condemn and intervene.²⁰⁶ Beyond the ICC,

on Darfur. See Harvey Araton, *Good Guy Is Forgotten in Bad Week for Sports*, N.Y. TIMES, July 31, 2007, at D1.

¹⁹⁸ See Kristof, *Mr. Bush, Here's a Plan for Darfur*, *supra* note 183.

¹⁹⁹ Kristof, *Death by Dollars*, *supra* note 193.

²⁰⁰ Kathy M. Kristof, *How Investors Can Help Fight the Darfur Genocide*, LOS ANGELES TIMES, May 13, 2007, at C2; Kristof, *Death by Dollars*, *supra* note 193.

²⁰¹ Kristof, *Death by Dollars*, *supra* note 193. A similar divestment effort was used in the 1980s and 1990s to press South Africa to end apartheid; although it took more than a decade to be successful, the effort eventually left the South African government economically isolated. Kathy M. Kristof, *How Investors Can Help Fight the Darfur Genocide*, *supra* note 200.

²⁰² Jeffrey H. Birnbaum, *Saving Darfur, Multiple Steps at a Time*, WASH. POST, June 1, 2007, at D1. Fidelity Investments and Berkshire Hathaway have completely divested holdings in PetroChina. *Id.*

²⁰³ Kathy M. Kristof, *How Investors Can Help Fight the Darfur Genocide*, *supra* note 200.

²⁰⁴ *Id.*

²⁰⁵ Letter from Martin Luther King, Jr. from Birmingham Jail (Apr. 16, 1963), in *WHY WE CAN'T WAIT*, 77–100 (Martin Luther King, Jr. ed., 1963).

the international community's response has been feeble, painfully slowed by political and economic concerns, resistance by the Sudanese government, and, sadly, a simple apathy on the part of many countries and individuals toward the plight of an invisible people.²⁰⁷ Four years of hesitancy and resistance has allowed the genocide in Darfur to spiral essentially to a point of no return, to a point where women like Halima Abdelkarim are being attacked over and over again, with no help in sight.²⁰⁸

The lack of response is not for lack of knowledge, because the genocide in Darfur has certainly not occurred in a vacuum.²⁰⁹ There have been numerous—although still not nearly enough—news reports chronicling the destruction of Darfur over the past four years, nearly all containing desperate cries for help directly from Darfurian women.²¹⁰ Major human rights groups, including Human Rights Watch and Amnesty International, have produced painstaking documentation about the atrocities in the country.²¹¹ Despite the ready availability of bone-chilling stories and statistics, most countries have

²⁰⁶ See Commission of Inquiry Report, *supra* note 23, ¶ 592; Alexander, *supra* note 12, at 3; Kristof, *Never Again, Again?*, *supra* note 15.

²⁰⁷ HUMAN RIGHTS WATCH, DARFUR DESTROYED, *supra* note 13, at 50, 52, 56; Kristof, *Never Again, Again?*, *supra* note 15. The global public has been disturbingly unmoved by the slaughter in Darfur. Nicholas D. Kristof, *Save the Darfur Puppy*, N.Y. TIMES, May 10, 2007, at A18.

²⁰⁸ See Lasco, *supra* note 135, at 21; Kristof, *A Tolerable Genocide*, *supra* note 17; Kristof, *Never Again, Again?*, *supra* note 15; Kristof, *The Face of Genocide*, *supra* note 2; Human Rights Watch, Letter to Africa, *supra* note 159.

²⁰⁹ See generally AMNESTY INT'L, *supra* note 4; HUMAN RIGHTS WATCH, DARFUR DESTROYED, *supra* note 13; HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY, *supra* note 119; Kristof, *Never Again, Again?*, *supra* note 15; Kristof, *The Face of Genocide*, *supra* note 2.

²¹⁰ See, e.g., Jolie, *supra* note 131; Nordland, *supra* note 159; Polgreen, *Darfur's Babies of Rape Are on Trial from Birth*, *supra* note 72; Rubin, *supra* note 27. Nicholas Kristof in particular has been a pioneer in bringing attention to the crisis and spurring action from the international community, and should be commended for his work. See Kristof, *A Boy's Wish: Kill Them All*, *supra* note 159; Kristof, *A Tolerable Genocide*, *supra* note 17; Kristof, *Bandages and Bayonets*, *supra* note 13; Kristof, *Death by Dollars*, *supra* note 193; Kristof, *Disposable Cameras for Disposable People*, *supra* note 1; Kristof, *How Do You Solve A Crisis Like Darfur?*, *supra* note 28; Kristof, *If Not Now, When?*, *supra* note 17; Kristof, *Never Again, Again?*, *supra* note 15; Kristof, *Sudan's Department of Gang Rape*, *supra* note 13; Kristof, *The Face of Genocide*, *supra* note 2; Kristof, *What's to Be Done About Darfur? Plenty*, *supra* note 177; Kristof, *When Genocide Worsens*, *supra* note 28. An increase in media attention would prompt more international awareness of the conflict and perhaps spur quicker enforcement of international law. See Sackellares, *supra* note 6, at 162.

²¹¹ See generally AMNESTY INT'L, *supra* note 4; HUMAN RIGHTS WATCH, DARFUR DESTROYED, *supra* note 13; HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY, *supra* note 119.

distanced themselves from Darfur or paid it only brief lip service.²¹² This is unacceptable, as countering genocide is a shared global responsibility.²¹³

As the alleged leader of the free world, the United States is responsible for defending universal rights and leading the response when these rights are violated.²¹⁴ Other countries must become involved too, whether inspired by their moral duty to stop genocide—which includes confronting its aftermath and helping to ensure that conflict does not recur—or by their own economic and political self-interest in promoting regional security in Africa.²¹⁵ An overwhelming, though belated, international response must now begin, both to send a message to the perpetrators that they can no longer act with impunity and also to reassure the victims, who have been betrayed not only by their attackers but also by those who did not step in to stop the violence.²¹⁶

By combining long-term legal justice with concrete responses to Darfurian women's immediate needs, we can punish the perpetrators of this horrific genocide, help repair the suffering the victims have undergone, and provide lessons to the world on the revulsion with which genocide will be treated in the future.²¹⁷ This type of holistic approach, one that places genocide in the broader context of economic disparity, poverty, global political instability, intolerance, and violence, is our best defense against both the current genocide and all future ones.²¹⁸ Failure to respond to this massive human tragedy is a failure of our most basic human instincts.²¹⁹ Continued failure to intervene will cost thousands of lives, undermine advancements in international law, and possibly spell disaster for all of Africa.²²⁰ We owe Halima Abdelkarim—and thousands of women like her all over Darfur—an apology, in the form of both legal justice and all the redevelopment and protective assistance we can offer. But we also owe something to her baby daughter—a promise that we will never forget the women of Darfur again.

²¹² See Kristof, *Disposable Cameras for Disposable People*, *supra* note 1; Kristof, *Never Again, Again?*, *supra* note 15.

²¹³ Kristof, *A Tolerable Genocide*, *supra* note 17.

²¹⁴ See Avery, *supra* note 32, at 137; see also Daniel Allott, *Strategic Compassion in Darfur*, AM. SPECTATOR ONLINE, Mar. 24, 2006, http://www.spectator.org/dsp_article.asp?art_id=9574 (predicting that the United States' work in Darfur is just beginning).

²¹⁵ See Cahn, *Beyond Retribution*, *supra* note 42, at 250.

²¹⁶ See Drumbl, *supra* note 95, at 68–69.

²¹⁷ See Cahn, *Beyond Retribution*, *supra* note 42, at 222.

²¹⁸ See Islam, *supra* note 32, at 384.

²¹⁹ See *id.* at 385.

²²⁰ See Alexander, *supra* note 12, at 47; Kristof, *If Not Now, When?*, *supra* note 17.