A Genocide by Any Other Name:
Language, Law, and the Response to Darfur

“We can then say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if someone comes after innocent civilians and tries to kill them en mass because of their race, their ethnic background or their religion, and it is within our power to stop it, we will stop it.”

—President Bill Clinton, after Rwanda¹

I. Introduction

In 2005, when the United Nations Security Council (U.N.S.C. or “Security Council”) for the first time exercised its power to refer a case to the International Criminal Court (I.C.C.), it described the subject of the referral somewhat vaguely as “the situation existing in Darfur since 1 July 2002” (i.e., since the date that the I.C.C. became operational).² The I.C.C. was established by the Rome Statute as a forum of last resort to try individuals for the worst offenses of international concern—namely, genocide, war crimes, and crimes against humanity—when individual states have proved unable or unwilling to do so.³ The U.N.S.C. did not specify what incidents or types of crimes the I.C.C. Prosecutor should investigate in Darfur, Sudan; it expressed a more general concern about “violations of international humanitarian law and human rights law.”⁴ The Prosecutor therefore had latitude to examine the conflict in Darfur, decide what specific violations, if any, were occurring, and make recommendations for further action by the Court. On February 27, 2007, after conducting over 70 missions in 17 countries for the collection of evidence, the Prosecutor presented a much-

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³ Rome Statute of the International Criminal Court, U.N. Doc. 2187, U.N.T.S. 90, July 1, 2002 (entered into force). Crimes within the I.C.C.’s jurisdiction are detailed in Article 5. While a fourth crime, the crime of aggression, is also covered by the statute, that crime has yet to be defined by States Parties.
⁴ Resolution 1593.
anticipated application to the Pre-Trial Chamber requesting summonses for two Sudanese nationals suspected of war crimes and crimes against humanity. Arrest warrants were issued two months later, on April 27, and quickly denounced by the Sudanese government.

While the I.C.C. Prosecutor’s application expressed condemnation of atrocities that have occurred in Darfur, it was also criticized as “[d]ilatory, exceedingly cautious, of little consequence, and taking minimal cognizance of the salient ethnic features of human destruction in Darfur.” The two accused individuals, who are identified as Arabs, are alleged to have orchestrated and carried out horrific mass attacks on black African civilians in 2003 and 2004. The significance of the Prosecutor’s failure to identify the “salient ethnic features” of the crimes is that in effect the I.C.C. has declined to find an essential element of the crime of genocide. The decision not to use the label “genocide” is in line with the conclusion of the UN’s Commission of Inquiry on Darfur (COI or “the Commission”), which in 2004 issued a report describing what it, too, called “war crimes” and “crimes against humanity,” but not “genocide.” Regional state organizations have been equally evasive: the African Union determined that the conflict in Darfur does not constitute genocide, and the Parliament of the European Union declared by a vote of 566–6 that events were “tantamount to genocide,” but not actually genocide. The United States Congress, however, has twice declared the contrary. First, in 2004, Congress urged the UN “to assert leadership by calling the atrocities being

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5 Situation in Darfur, the Sudan: Prosecutor’s Application Under Article 58(7) (Public Redacted Version), I.C.C.-02/05, Feb. 27, 2007; hereinafter, Prosecutor’s Application.
9 Udombana, supra note 1, at 64.
committed in Darfur by their rightful name: ‘genocide.’” 11 Congress reaffirmed its characterization of the conflict in the Darfur Peace and Accountability Act of 2006, which authorized financial and logistical support for the African Union peacekeeping mission and instituted economic sanctions against Sudan. 12

Why all the semantic wrangling, when most observers agree that, by whatever name, mass killing, rape, and torture of civilians are terrible crimes that should be stopped? The immediate reason is that calling a conflict genocide appears to trigger a legal obligation—albeit a very broadly worded one—under the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) for States Parties “to prevent and to punish” the acts in question. 13 The possibility that a finding of genocide carries a legal imperative to act means the label (or non-label) is often the result of a protracted political debate. Additionally, the word genocide carries a historical and moral weight that is not present with other types of crimes and that therefore tends to create a moral obligation in the view of the public. As legal scholar David Luban stated after the Commission of Inquiry released its report, “With headlines such as ‘Murder—But No Genocide,’ the motivation to intervene was gone….Genocide sounds like it might be our business, but ‘mere’ murder is theirs.” 14 In short, calling a conflict genocide spreads responsibility throughout the international community in a way that “regular” mass killing does not.

We need not search far in history to learn what can result from the international community’s failure to recognize genocide for what it is. In Rwanda in 1994, as many as 800,000 Tutsis and

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moderate Hutus (or one-tenth of the population of Rwanda) were slaughtered in 100 days while the world looked the other way. Even as it became clear from press reports and intelligence analyses that Hutu extremists intended to eradicate the entire population of Tutsis, interagency discussions in the Clinton administration were filled with concerns about committing US troops and other resources. Indeed, US government documents that have been declassified since the Rwandan debacle reveal an explicit US policy of non-intervention that relied on finding that genocide was not occurring. Regarding the possibility of conducting an investigation into human rights abuses in Rwanda, one Department of Defense memorandum warned, “Be Careful. Legal at State was worried about this yesterday—Genocide finding could commit [the US government] to actually ‘do something.’” The same document also expresses ambivalence toward UN attempts to achieve a ceasefire, suggesting that the US change the wording of its own policy from “attempts” to “political efforts” because “without ‘political’ there is a danger of signing up troop contributions.” In the end, what happened in Rwanda was the most efficient genocide in history, but world leaders’ refusal to use the word genocide helped them circumvent the Genocide Convention and withhold crucial military intervention that might have saved hundreds of thousands of lives.

The comparison between Darfur and Rwanda has become a sad cliché, though its lesson seems not to have sunk in. Despite at least fourteen UN resolutions, two detailed studies by high-level UN commissions, and economic sanctions, not to mention numerous academic articles and

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15 The declassified documents were obtained by the nonprofit organization National Security Archive via the Freedom of Information Act and are available at http://www.nsarchive.org. Samantha Power has written a detailed account of the United States’ policy with regard to Rwanda, based on a three-year investigation that included assessment of the declassified documents I have cited in this paper, as well as numerous interviews with U.S. officials and others involved in the international response. See Power, Bystanders to Genocide, The Atlantic Monthly (Sep. 2001), accessed Mar. 25, 2007 at http://www.theatlantic.com/doc/200109/power-genocide.


NGO reports and countless demonstrations, op-eds, and petitions by activists, the killing in Darfur continues. Estimates of casualties range from 200,000 to 500,000 dead and up to 4.5 million displaced since the current conflict began in 2003. Although a limited peace accord was signed between the Government of Sudan one of the three main rebel groups in May 2006, it had virtually no effect; in fact, the violence appears to be increasing. Moreover, there is little chance that the I.C.C. will get far with its case since officials in Khartoum have refused to cooperate, claiming the I.C.C. does not have jurisdiction.

The Genocide Convention, which entered into force in 1951, defines the crime of genocide as certain enumerated acts—killing, causing serious bodily or mental harm, deliberately inflicting conditions that threaten life, preventing births, and forcibly transferring children out of the community—committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” There is little doubt that the mass killings, rapes, bodily harm, torture, and destruction of entire villages satisfy the physical element of the crime’s actus reus, so the debate
over whether or not the conflict constitutes genocide centers around two other questions, which I would like to examine in this paper. First, do the victims constitute “a national, ethnical, racial or religious group”? Reports and news stories frequently refer to a racial conflict between “black Africans” and “Arabs”—what exactly are these groups? Do the terms do justice to the history of the region and the complexity of the current situation, or is the racial characterization an expedient simplification, adopted by outside observers, of another type of conflict? Second, is the group “as such” being targeted “with intent to destroy”? Some argue the conflict is a fight over land and water, and any division along racial lines is incidental. The government insists that its actions are self-defense against rebel attacks, with no racial animus. Are these descriptions accurate or are there political reasons for denying the true, racial nature of the conflict?

At the heart of the paper is the question: how has the international community—in particular, the US and the UN—managed to dodge its moral obligation to take action, when even the sparse framework of international law explicitly condemns mass violence against civilians? There are of course many non-legal reasons, including the political sensitivity of “western” intervention in a state dominated by self-identified Arab Muslims and widespread bias against the perceived (black) race of the victims and aggressors. Any nation’s political will to expend resources (and potentially lives) on a foreign rescue mission will nearly always be weak. It is the role of international law to insist that the international community act to halt the worst atrocities when a state turns against its own population. The Genocide Convention and other international legal instruments have failed to do this for Darfur.

I argue that a major reason for the failure is that existing legal mechanisms do not adequately account for the reality of civil conflicts in postcolonial nations today. I suggest that contemporary international law mistakenly imputes universal salience to the concepts of “ethnicity” and “race,”
and that the western professionals who write treaties obfuscate the complex, strategic ways in which collective identities arise, solidify, and change in postcolonial contexts. To accept the authority of those treaties requires us to accept at face value the imagined historical and cultural bases upon which postcolonial identities are supposedly formed. The central paradox is that in order to identify (and thereby prevent and punish) the wholesale destruction of postcolonial African communities, one must rely on either the “biological” categories of race, which have been long discredited, or the equally unstable concept of ethnicity, 23 while simultaneously recognizing how insufficient the terms are for describing postcolonial societies.

The Convention and other instruments that define the crime of genocide reflect a specific view of atrocity shaped by the horrific crimes of the Holocaust and the historical and political circumstances of postwar Europe. In particular, the enumeration of protected categories (national, ethnic, racial, and religious) reflects themes that shaped European national identity in the mid-twentieth century. Some mass crimes that have occurred in postcolonial nations are difficult to fit into the mold of “genocide”—at least, without the advantage of leisurely retrospective analysis—because they are committed by or against groups that may not be fully recognizable within those categories. In addition, the specific intent required by the Convention is very difficult to prove without a massive cache of records and evidence produced by an obsessive, technology-focused regime such as Nazi Germany. As M. Auguste Champetier De Ribes, Chief Prosecutor for the French Republic during the Nuremburg Trials, noted, “This is a crime so monstrous, so undreamt of in history...[that] an accumulation of documents and testimonies has been needed to make it credible.”24 In the case of Darfur, the mismatch between the legal instrument and the urgent reality it seeks to address allows a reticent international community to escape the legal obligation to act (or at

least to stall for unacceptable lengths of time) by characterizing a genocidal conflict as something other than the “crime of crimes”\textsuperscript{25} that it is.

II. Colonialism and the Genocide Convention’s Protected Groups


In \textit{Imagined Communities}, an influential examination of the origins and rise of nationalism originally published in 1983, Benedict Anderson sought to expand the understanding of nationalism beyond the “Eurocentric provincialism” that he felt dominated scholarship. Starting with the invention of the printing press and its impact on political life in Europe, he traced the origins of nationalism into its newer manifestations in the Americas and southeast Asia. The breadth of the work has made it one of the most widely-cited texts in political and cultural theory. Nevertheless, in 1991, Anderson revisited his work to correct what he acknowledged was a “serious theoretical flaw” in the first edition: the oversimplification of the nationalism of the nineteenth century colonial state and the trajectory of “Third World” nationalisms that arose in the context of decolonization.\textsuperscript{26} He writes in a new chapter:

My short-sighted assumption was then that official nationalism in the colonized worlds of Asia and Africa was modelled directly on that of the dynastic states of nineteenth-century Europe. Subsequent reflection has persuaded me that this view was hasty and superficial and that the immediate genealogy should be traced to the imaginings of the colonial state.\textsuperscript{27}

Anderson’s thoughts reflect a shift in thinking among many scholars with regard to the development of postcolonial African states, based at least in part on a more complex understanding of race and ethnicity as they developed under colonial rule. Specifically, Anderson recognized that “the imaginings of the colonial state” differed in substantial ways from the imaginings of the European

\textsuperscript{25} David Bosco, \textit{Crime of Crimes: Does It Have to Be Genocide for the World to Act?}, Wash. Post, B01, Mar. 6, 2005; quoting the judges of the International Criminal Tribunal for Rwanda.


\textsuperscript{27} Anderson, supra note 26 at 163.
(colonizer) state, and as a consequence, the coalescing of identity groups into a nation after independence differed as well..

An examination of Sudanese colonial history sheds light on the identity groups that comprise the independent nation of Sudan. Many journalists, activists, and political leaders, especially in western countries, as well as Darfurians themselves, describe the civil conflict in Darfur as an ethnic or racial conflict between “black Africans” and “Arabs”; some use the terms ethnicity and race interchangeably. Such a description seems to place the situation within the parameters of the Genocide Convention. But, as descriptive categories, ethnicity and race are inadequate and even misleading. Collectivities in Sudan are multidimensional—as they are anywhere in the world, but especially so here, where successive waves of conquest and colonial rule by Arabs and the British have brought about a unique mixture of peoples and political identities.

Moreover, making the situation especially confusing to outsiders, the country has spent most of its years since independence submerged in a civil war between self-identified Arab Muslims in the North and black Christians and animists in the South. That conflict, the longest-running civil war in modern history, killed nearly two million. It ostensibly ended in 2005 with the largely U.S.-brokered Comprehensive North–South Peace Accord, but the peace between North and South has been fragile. Among other problems, prejudicial policies of the minority Arab government have continued to disenfranchise the majority black African population, while the fundamentalist regime’s imposition of Sharia law that makes life difficult for non-Muslims. As a result, in 2003, a violent rebel uprising began in Darfur. The government responded by destroying entire villages suspected of harboring rebels, with a devastating impact on black civilians. That is the conflict that, quite separately from the North–South civil war, continues today.28 Perhaps because the previous

28 Testimony of Representative Donald Payne, Transcript of Hearing Before the Committee on International Relations, House of Representatives (Nov. 1, 2005) at 6.
“religious conflict” between North and South matched the familiar paradigm of the “clash” between Christian and Muslim “civilizations,”29 that war was easier for Americans and Europeans to understand than the current conflict in Darfur, which is characterized by violence not only between Muslims, but also between dark-skinned people whom westerners perceive as all black.

The Sudanese government denies genocide is taking place in Darfur; instead, it insists that the conflict is strictly a domestic matter (i.e., one in which the international community has no legal role) stemming from long-standing “intertribal” disputes and that reports of mass atrocities are exaggerated. However, it is no secret that the government recruited, armed, and continues to support the Janjaweed, a loosely organized, mostly Arab militia that continues to commit terrible crimes against black African civilians.30 The government and its followers claim ascendancy based on their “Arab” identity. The term Arab poses particular problems for categories of race and ethnicity. For starters, it is unclear what type of group the term refers to. In common usage, it may mean a cultural or religious tradition (e.g., “Arab” or “Islamic” civilization, which are often conflated), a racial grouping (e.g., “Arab” versus “black”), an ethnic identity or category of tribal affiliations (e.g., “Arab” Bedouin peoples; nomadic Arab tribes), or even a national grouping (e.g., the Arab League). “Black African,” on the other hand, is understood as a racial category, subdivided into ethnic groups or tribes. A conflict in which Arabs and black Africans are pitted against each other is, not surprisingly, subject to multiple interpretations. For a genocidaire to perceive himself as belonging to one race and his victim as belonging to another is one thing—but can one group commit genocide against another if they are not parallel groups? The Sudanese government’s argument that the Darfur conflict is actually a decentralized series of smaller disputes, none of them based on a clear racial divide, begins to make sense when one considers the apples-and-oranges problem.

30 COI Report, supra note 17; see also reports collected at the website of the Damanga Coalition for Freedom and Democracy, www.damanga.org.
b. Race, Ethnicity, Culture

The US’ Genocide Convention Implementation Act of 1987, also called the Proxmire Act, defines racial group as “a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent.” By contrast, an ethnic group is “a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage.” But racial, ethnic, and cultural lines are difficult to draw in Sudan. The geographic region in which the nation is located has been a mosaic of migrating peoples since long before British colonial rule; intermingling of tribes and ethnicities has been documented since the arrival and spread of Islam (and writing) in the 12th century. The seemingly entrenched group divisions that fuel many of today’s conflicts in Africa are actually a relatively new phenomenon: the categories of race and ethnicity, as they are used today in reference to African populations, are substantially products of nineteenth and twentieth-century colonialism and anti-colonial struggle. Legal definitions such as those in the Proxmire Act, while based on parlance commonly used throughout the world, reflect a view of human groups that originated in the west; when they are applied to Africa, such definitions reveal at least as much about European colonialism as they do about the racial or ethnic group members themselves.

As V. Y. Mudimbe wrote in *The Invention of Africa*, “Explorers do not reveal otherness. They comment on ‘anthropology,’ that is, the distance separating savagery from civilization.” Explorers who believed they were interpreting their encounters with Africa with scientific accuracy sometimes actually relied on misappropriations of evolutionary theory and their own preconceptions about “primitive” peoples to explain the differences between themselves and black Africans. Religion, too, gave credence to the idea that the races were “naturally” unequal: it was believed by many Europeans that the Bible described “the same origin for all human beings, followed by

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31 18 USC.A. § 1093(6), 28 I.L.M. 754 (1989); see generally 18 USC.A. § 1090 et seq.
geographical diffusion and racial and cultural diversification. And it was believed that the Bible stipulated that the African could only be the slave of his brethren.”\textsuperscript{33} European artists rounded out this view of Africa by helping those in Europe imagine the exotic, faraway race, via paintings and drawings that created “cultural distance, thanks to an accumulation of accidental differences, namely, nakedness, blackness, curly hair, bracelets, and strings of pearls.”\textsuperscript{34} The physical differences depicted through art reinforced the “truth” of scientific and religious explanations of race.

During European colonial rule, race became a principle of governance based on the perceived “natural” racial hierarchy that was posited as a justification for colonialism, and it has proved difficult, if not impossible, to shake. In South Africa, for example, the official policy of apartheid survived well into independence. Throughout Sub-Saharan Africa, colonial rule imbued existing group distinctions within the “Negroid” race with new importance, particularly as Christians emerged as a subgroup within African “tribes,” and “race” became the firm basis for a prejudicial political and economic class system. The colonizing structure created “a dichotomizing system…and with it a great number of current paradigmatic oppositions [such as] traditional versus modern; oral versus written and printed; agrarian and customary communities versus urban and industrialized civilization; subsistence economies versus highly productive economies.”\textsuperscript{35} Some would argue that these dichotomies survive today as pervasive assumptions underlying contemporary western policies with regard to Sub-Saharan Africa.

In his insightful work on contemporary African political economies,\textsuperscript{36} Bruce Berman critiques the two, predominant analytic approaches to ethnicity in post-1945 studies of Africa: “primordialism,” which relies on a stereotypical dichotomy between tradition and modernity as it

\textsuperscript{33} Mudimbe, \textit{supra} note 32 at 8–9.
\textsuperscript{34} Mudimbe, \textit{supra} note 32 at 9.
\textsuperscript{35} Id. at 4.
seeks a prehistoric cultural basis for ethnic identity, and “instrumentalism,” which focuses on the manipulation of ethnic identities for political and economic purposes. Berman rejects both theories in favor of a constructivist approach that views ethnicity instead as the result of historical pressures wrought by colonialism and its aftermath.

Noting that pre-colonial African societies were anything but ahistorical or unchanging (though historians, anthropologists, and political theorists have frequently depicted them as such), Berman writes that constantly shifting, conflicting, and overlapping collective identities were always the norm. In his view, ethnicity has never been “a fixed condition or essence, but [is] a historical process that can only be studied in specific contexts….Ethnicities are the ambiguous, constantly contested and changing results of cultural politics…always simultaneously old and new, grounded in the past and perpetually in the process of creation.”37 Some of the ethnic boundaries we observe today, even the seemingly intractable ones that keep certain areas of the world in constant civil conflict, were not so sharply defined until they formed or became entrenched in response to European colonialism. Such group divisions should be considered in the context of colonial history, in light of the strategic uses of group identity by both the rulers and the ruled.

Berman points out the weakness of political theories that do not recognize the individual histories of pre-colonial African social structures but instead focus on the ways in which African states fail to meet western expectations of political and economic development. He writes, “the continuing and even increasing salience of communal solidarities in African politics…cannot be adequately understood by theories preoccupied with the reproduction of the modernist paradigms of state and society, with what Africa is not, rather than with explaining what it is.” To the extent that ethnic affiliations (that is, separate cultural traditions) are seen as hampering the development of

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37 Berman, supra note 36 at 311–12.
stable political processes, western observers interpret political violence in Africa as a poor transition from “traditional” identities to “modern” (national) identities.

The dichotomy shows clearly in the concept of the “tribe,” a kinship-based community with an internal leadership structure—under western eyes, a primitive form of group identity that fades as a population progresses into nationalism. Even today, as Immanuel Wallerstein has observed, “[e]veryone ‘knows’ that something called ‘racial tensions’ exists in South Africa, in the United States, in Great Britain….Conversely, everyone ‘knows’ that ‘tribalism’ exists in Black Africa.”

Nineteenth-century Europeans believed that Africans belonged to tribes “just as every European belonged to a nation.” At the 1885 Conference of Berlin, where the “scramble for Africa” took place, the European powers pledged “to watch over the preservation of the native tribes” as they divided the continent amongst themselves to serve their own economic interests. Tribes are essentially a prehistoric parallel to the nation-state—simple, orderly, and self-contained. The idea was critical to the colonial enterprise: tribes do not require national independence because they can be neatly subsumed by another’s overarching statehood. They need not be included in decisionmaking at the national level because they have no international interests. In a colonial scheme, it is enough that a European nation-state represents its African tribes (its colonies) on the international scene.

Although many modern scholars of African history recognize that pre-colonial African societies where characterized by “flexibility, fluidity and ambiguity,” colonial rulers viewed mixing between communities as abnormal for Africans as well as disruptive to the colonial enterprise. This view was encouraged by the anthropological theory that black Africans had lived since the beginning

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39 Id., quoting anthropologist John Iliffe.
40 General Act of the Conference of Berlin, art. 6, Feb. 26, 1885.
of time in clearly defined, unchanging, and primitive “tribes.”41 The colonial construction of the tribe led to the division of African societies into administrative units based on what officials perceived as rigid, preexisting group identities. In many areas, colonial administrators deliberately empowered and enriched local tribal chiefs and village headmen, and relied on them to be the day-to-day “muscle of colonial domination.”42 Such a system encouraged the formation of distinct hierarchies out of already-existing social cleavages (tribal or otherwise). Such hierarchies served the interests of colonialism and of the select few tribal leaders but obfuscated the fluid nature of the collectivities as they had existed before colonialism.

When African peasants eventually mobilized against colonial rule, their struggle bridged some of the tribal and ethnic divisions within their class. Consequently, the power of local chiefs, which had become intertwined with European administration and exploitation, began to function as a “fundamentally conservative instrument of political fragmentation and isolation.”43 After independence, many tribal leaders sought to consolidate their power over communities through patronage and authoritarian control, wishing to preserve and legitimate their power by taking control of the new national government. This led to sharp “political” divisions that formed in the image of western politics—that is, as political parties that vied for legitimacy and power—under the guidance and with the economic assistance of their former European rulers. Many of the political parties, however, were essentially based on tribal identities, whereas in Europe disparate social and economic interests were more likely to define political parties.

In some areas, the divide-and-rule strategy of early European colonialism—that is, cultivating the tribe as essentially a “subnation” in a sort of representative form of government—gradually gave way to the development of a more integrated colony with “ethnic” divisions. Ethnic

41 Id. at 320.
42 Berman, supra note 36 at 316.
43 Id., 317–18.
groups as such did not organize or rule themselves; they were not extensions of the colonial regime like tribes were. Today, both “tribe” and “ethnic group” are commonly used to refer to communities in Africa (and sometimes used interchangeably), but the former retains a connotation of the “pre-national.” The Genocide Convention reflects this distinction: because tribe is not an enumerated category, “tribal disputes” are not a matter of international concern, whereas “interethnic violence” may rise to the level of genocide, with moral consequences for the international community.

In my view, it is no accident that “tribe” is not a protected category in the Genocide Convention, but that nation, race, and ethnicity are. Darfur is said to be home to some 90 tribes. It is debatable whether these same groups constitute “ethnic groups” within the meaning of the Convention, but the UN Commission of Inquiry apparently concluded that they do not. To explain its finding that genocide was not occurring in Darfur, the COI wrote: “the [government’s] policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.” The westerners who created the language of international law did not account for the category of the tribe because, in a sense, tribes were not supposed to exist in the world of the modern nation-state; it was believed by many that in order for an African population to progress into statehood on its own, the tribe had to be left behind. Even today, the destruction of the tribe as such is not only not genocide, but it might be considered by some as a necessary step along the path to European-style statehood.

By way of example, the intergroup animosity that escalated into the Rwandan genocide in 1994 was substantially a product of Belgian rule. Although the Tutsi and Hutu “tribes” had existed prior to colonial rule, they were fluid categories based partly on lineage, partly on socioeconomic

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45 COI Report at 4; emphasis added.
class; the groups had their own, distinct internal social structures, but individuals moved between the groups as a result of intermarriage or change in economic circumstances. In the 1930s, Belgium consolidated its colony by reshaping it into a single, rigid “ethnic” hierarchy. In an effort to organize the population in a rational manner, the Belgians required black Rwandans to carry identity cards that stated their “ethnicity” (“ubwoko” in Kinyarwanda and “ethnie” in French). Because the Belgians viewed Tutsis as more intelligent and civilized, they became the favored ethnic group and received greater political privileges than the Hutus, who comprised 84% of the population and who were generally shorter and darker-skinned. The groups were incorrectly perceived as clearly-defined “tribes” and encouraged to remain so in order to ease the exercise of Belgian authority. The resultant social tensions flared after independence into a struggle for power that manifested itself as a raging ethnic dispute.46

Alison Desforges, an expert witness who testified before the International Criminal Tribunal for Rwanda, described the Rwandan ethnic groups this way:

The primary criterion...is the sense of belonging to that ethnic group. It is a sense which can shift over time....But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time....[R]eality is an interplay between the actual conditions and peoples' subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience which imposed a categorisation which was probably more fixed, and not completely appropriate to the scene....This practice was continued after independence...to such an extent that [it] became an absolute reality.47

Desforges’ testimony in Prosecutor v. Akayesu helped secure one of the tribunal’s (and the world’s) first convictions for genocide. Jean-Paul Akayesu, a bourgmestre in charge of the police force in his prefecture, participated in genocide against the Tutsi population, as well as crimes against humanity. In all, he presided over the murder of approximately 2,000 Tutsis. In order to prove the “special


47 Id.
intent” that was a necessary element of Akayesu’s crime, it was necessary for Desforges to trace the manufacture of the ethnic groups in Rwanda during Belgian colonial rule to show how entrenched the ethnic conflict was.

The judgment in Akayesu recognized the limitations of the Genocide Convention’s literal language in a way that political debates about Darfur often do not: “In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.” In other words, the four enumerated categories should not be viewed as the Convention’s strict parameters, but should be seen instead as examples of group identities protected by the Convention. Nevertheless, it was important that Desforges’ testimony emphasized Rwanda’s colonial history and pointed out that the Belgians had an “official” system for differentiating the manufactured ethnic groups. Evidence of the Belgian practices helped prosecutors to establish that the Hutus and Tutsis were, indeed, ethnic groups within the meaning of the Genocide Convention—as stable and permanent as they could be, given that they were shaped by Europeans.

III. Identifying Genocide in Darfur

a. Nationalism and the Invention of Genocide

The creation of the Genocide Convention at the end of World War II, after the breathtaking extent of atrocities committed against Jews had come to light, was spurred largely by the efforts of Raphael Lemkin, a Polish attorney and consultant to the League of Nations (“the League”). Lemkin coined the term “genocide” not because the act was new, but because it was not cognizable in the existing international legal framework despite having existed throughout human history.\(^{48}\) Winston

Churchill had called it “a crime without a name.”49 It is significant that Lemkin invented his new word during the same era that saw the emergence of the League of Nations, the product of an unprecedented convergence of transnational interests. The relatively new concept of a rule-bound international arena in which nation-states are the primary “official” actors was critical to the backdrop against which the law of genocide was written. The League affirmed the supremacy of the nation-state in the global order: national governments created it and national values and interests propelled it. Lemkin describes genocide as the “antithesis” of the conventional wisdom that “war is conducted against states and armed forces and not against populations.”50 He argued that criminalizing the act of genocide was necessarily an international obligation because of the fact that states could perpetrate genocide against their own people and therefore could not be trusted to prosecute the crime domestically.51 Paradoxically, a global order based on the interaction of sovereign states provides the greatest potential for the regulation of genocide: only states have the power to consent to and enforce an agreement for collective suppression of the crime.

The definition of genocide written in the Genocide Convention was thoughtfully constructed to reflect the threat as it was understood in its context. The definition loses some of its salience, however, when applied to conflicts occurring outside of Europe and after the end of colonial rule. The term “national” as Lemkin used it was broad, including within its scope numerous aspects of group identity, tied in different ways to the state, that are targeted through distinct genocidal “tactics.” (The Jews and Armenians, for example, could be called national groups in Lemkin’s usage.) Nevertheless, once “national” groups were enshrined in the Genocide Convention as a

51 Lemkin, Genocide—A Modern Crime, supra note 48.
protected category, alongside “racial, ethnical, and religious groups,” the term took on a narrower legal meaning, distinct from the three other categories. Today, “national” refers to state identity; race, ethnicity, and religion are group identities that coexist with nationality and that have the potential to both unify and divide nations.

Genocide is both a product and a perversion of nationalism, and a large part of its insidiousness lies in the conflation of nationality with one or more of the other protected categories. In the case of Germany, genocide eviscerated the protective functions of the state as it attempted to racially “purify” the German nationality, “dignifying genocide as a sacred purpose of the German people.”\(^ {52}\) Lemkin defined the crime of genocide as a nationalistic endeavor, consisting of two steps: first, “the destruction of the national pattern of the oppressed group” and, second, “the imposition of the national pattern of the oppressor.”\(^ {53}\) By way of example, Lemkin wrote: “If one uses the term ‘Germanization’ of the Poles…it means that the Poles, as human beings, are preserved and that only the national pattern of the Germans is imposed upon them.”\(^ {54}\) Along with the process of Germanization, the Nazi regime attempted to shape the German nationality by preserving it as a space free of Jews and certain other groups. Lemkin has referred to genocide as “a new term and new conception for destruction of nations,”\(^ {55}\) as opposed to the destruction of individual people, and notes that “the attack on individuals is only secondary to the annihilation of the national group to which they belong.”\(^ {56}\)

b. “Blacks” and “Arabs” in Darfur

\(^ {52}\) Lemkin, \textit{Genocide—A Modern Crime}, supra note 48.
\(^ {53}\) Lemkin, \textit{supra} note 50 at 80.
\(^ {54}\) \textit{Id.} at 80.
\(^ {55}\) \textit{Id.} at 79.
\(^ {56}\) For Lemkin, genocide does not necessarily involve mass killing but refers more often to a coordinated plan for destruction: The end may be accomplished by the forced disintegration of political and social institutions, of the culture of the people, of their language, their national feelings and their religion. It may be accomplished by wiping out all basis of personal security, liberty, health and dignity. When these means fail the machine gun can always be utilized as a last resort. Lemkin, \textit{Genocide—A Modern Crime}, supra note 48.
In order to interpret the events in Darfur as a genocide, it is necessary to distinguish the groups involved and understand the nature of the perpetrators’ animosity toward the victims. That is a difficult task. The country is culturally divided between North and South, with Arab history and culture pervading the North and greater Christian and sub-Saharan African influences in the South. Most black Darfurians today are Muslim and many speak Arabic rather than their “native” tribal language; others speak both languages or a mixture. Due to centuries of intermarriage, self-identified black Africans and Arabs in Darfur do not look like different groups: by appearances, all are black, though some insist there are differences in facial features that distinguish the groups. The UN Commission of Inquiry on Darfur notes that members of certain Arab tribes (e.g., the Misseriya and Rizeigat) are fighting on the side of the black African rebels, while some blacks side with the Arab government or fight in the Sudanese military. What journalists describe as a conflict between Arabs and black Africans is not nearly that clear-cut.

Nevertheless, the “racism” observed by outsiders is fact as well as fiction—though its roots are complex. To understand the racism, one must look to Sudan’s relationship with the rest of the world, in particular the Middle East. Gerard Prunier, in his analysis of the Darfur genocide, writes:

‘Arabs’ and ‘Black Africans’ are not at each other’s throats because they are like cats and dogs but rather because, for the ‘Arabs’ at least, they are not completely sure of what and who they are. In the Sudan they are ‘Arabs’, but in the Arab world they are seen as mongrels who hardly deserve that name. They desperately strive for recognition of their ‘Arab’ status by other Arabs, who tend to look down upon them—even using for them the dreaded name of abd (slave) that they use for those more black than they are.

The Arab world’s disdain for Sudan is reflected in its leaders’ refusal to even discuss the events in Darfur, much less intervene to bring peace to the people of Darfur. The Arab Summit that took place earlier this year in Doha, Qatar, remarkably made no mention of the situation in Darfur until a

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57 For a thorough, insightful examination of the racial and ethnic history of Darfur, see Gerard Prunier, *Darfur: the Ambiguous Genocide* (London: Hurst, 2005).
59 Prunier at 77.
Darfurian activist, Mohamed Yahya, stood up from the audience to lambaste the conference body for ignoring the matter.  

As Prunier describes it, Sudanese “Arabs” are essentially “Arabized” black African tribes—that is, tribes into which Arab (or previously Arabized) settlers intermarried during two major waves of migration. The first wave was an Arab migration in the 14th through 16th centuries; the second, a migration of Arabized tribes from the Nile Valley region in the 18th and 19th centuries. The Arabized tribes that resulted from the first migration are often referred to as “native Arabs” to distinguish them from the later arrivals. According to Prunier, the later migrants “were conquerors rather than settlers,” since they took over the existing slave and elephant trade and settled in towns rather than integrating with nomadic groups. In Darfur, though not in the South, they were viewed as an elite group of foreigners who held power and prestige based on “their wealth and their Islamic learning, real or supposed.” Because of their common language and cultural (and later political) identity, they viewed themselves as part of the “native Arab” population. Prunier remarks, “We see later what this elite did with its prestige and power.” Paradoxically, although Arabs have historically viewed themselves as more “civilized” than black Africans, “Arab” could also be a contemptuous label because nomads, who considered themselves Arab, were poor. Marc Lavergne, chair of the UN’s Panel of Experts on the Sudan, stated in an interview:

Cette notion d’« Arabe » est culturelle, elle n’a rien de raciale. Les milices peuvent être qualifiées d’arabes parce qu’elles ont été arabisées….Pour moi, tout le monde est noir dans cette histoire. La notion de racisme n’a pas sa place.

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60 This information comes from my informal conversations with Mohamed Yahya, whose organization, Damanga Coalition for Freedom and Democracy, is based in Charlottesville. I have worked with Mr. Yahya as a pro bono student volunteer for the past two years.
61 Prunier at 8.
62 Prunier at 5.
(The notion of ‘Arab’ is cultural, not at all racial. The militias can be considered Arab because they have been Arabized….In my view, everyone in this story is black. The notion of racism has no place.)

Lavergne believes it is only newer generations that have become militantly “racist” in any familiar sense of the term.

But that is not the whole story, either. In addition to the region’s confusing history of Arab migration and settlement, another key feature of historical Arab–African relations was the Sudanese slave trade, which spanned the 18th through 20th centuries and remnants of which continue to this day. During the 19th century, 30 percent of the population of Darfur was comprised of black slaves owned by Arabs. The number is shocking even without comparing it to 17 percent in Georgia, the most slave-populated American state, at height of American slavery. Race prejudice is at least as strong in Arab societies today as it is in western societies. As for the victims of the “genocide,” those called black Africans do not generally think of themselves as black first and foremost, but as members of their tribes; in Darfur, these are principally the Fur, Masseleit, and Zagawa (“Darfur” meaning “land of the Fur”). They are, however, viewed as a single race by those who target them for destruction—the Janjaweed militias and the Sudanese government. A common feature of the atrocities committed in Darfur is racial name-calling; one of the most common epithets is abd, or slave.

The UN Commission of Inquiry (COI or “the Commission”) uses “Janjaweed” to refer to the Arab militias operating in Darfur “with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions.” Lavergne describes the Janjaweed as...

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64 Id.
65 Prunier at 34.
66 Prunier at 77.
68 COI Report, supra note 8 at 31–32.
a generation of young, impoverished mercenaries who have been armed by the government and told that they can do whatever they want: “Ils ne sont pas le vrai problème. En exagérant, on pourrait dire que ce sont là des pauvres qui se battent contre des pauvres.” (“They are not the real problem. In a sense, one could say they are the poor fighting the poor.”)\(^{69}\) When anti-government rebel groups began their attacks in Darfur in early 2003, the Government of Sudan recruited a significant number of Arabs, including outlaws and convicted felons, and foreign fighters from Chad and Libya to assist in suppressing the rebellion.\(^{70}\) Since that time, the Government has repeatedly and unconvincingly insisted that it does not support the militias. More recently, however, the Sudanese government appears to be giving up the pretence of distinguishing between their forces and the Janjaweed; there are increasing reports of attacks on civilians carried out by joint Sudanese Army and Janjaweed forces.\(^{71}\)

c. “Intent to Destroy”

As discussed above, genocide is not a synonym for mass killing or even mass killing of a particular group of people, but refers to the underlying attempt to eradicate a collectivity as it exists within the social and political contours of the state. Genocide is not only a crime of specific intent; it could be said to be a crime of intent, since it is the \textit{mens rea} that makes it what it is. The physical destruction of individual people may be a tactic employed by the genocidaires, but it is not required; where it has occurred, it does not necessarily constitute genocide.

When the UN Commission of Inquiry on Darfur was created, one of its tasks was “to determine whether or not acts of genocide have occurred.” It determined that genocide was not occurring, arguing that the Sudanese government’s actions in Darfur lacked the essential element of specific intent. However, the Commission noted, rather confusingly, that “in some instances

\(^{69}\) Aït-Hatrit, supra note 63; my translation.

\(^{70}\) Id.

\(^{71}\) See, e.g., reports collected at the website of the Damanga Coalition for Freedom and Democracy, www.damanga.org.
individuals, including Government officials, may commit acts with genocidal intent,” though such instances would have to be evaluated case-by-case in a judicial setting. Some who deny genocide is occurring attribute the violence (which they view as two-sided) instead to severe droughts that have plagued the region since the 1980s. In that version of events, the shortage of water caused nomadic groups to travel farther distances and eventually settle in semi-pastoral villages that competed for resources with the farming communities that already lived there. Scarcity led to violent clashes as each group attempted to remove the other from the area. Yet another explanation is the “counter-insurgency gone wrong” theory, in which the Sudanese government unwisely responded with excessive force to a spate of rebel uprisings.

Gerard Prunier refers to such theorizing as “improvising a final solution,” invoking the difficulty of fitting Darfur into a legal framework that was created in response to the Holocaust, a very different kind of genocide. Similarly, Scott Anderson, a columnist for the New York Times, has observed:

If this is a genocide, it doesn’t look very much like those we have seen before. No public proclamations about ‘the enemy within,’ no extermination lists….Instead, it is shadowy, informal; the killing takes place offstage…..[I]t is virtually impossible to distinguish incompetence from conspiracy. Is that by design, the sheer evil genius of it all, or just more evidence of a government’s utter haplessness? A genocide may, it seems, occur almost inadvertently.

At the heart of the problem is the near-impossibility of finding specific intent within the mixed-up reality of a postcolonial civil conflict. In Darfur, there was never a stable, technocratic regime or a bureaucracy to plan, execute, and document an orderly mass killing. Darfur never had a close relationship with the central government in Khartoum. Without documentation produced by a state

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72 COI Report, supra note 8 at 4.
73 Anderson, supra note 44.
74 Prunier at 110.
75 Prunier at 110.
76 Anderson, supra note 44.
bureaucracy focused on genocide, the burden of proving intent is great. Furthermore, there are not enough resources or time for international observers to investigate a “shadowy, informal” killing campaign for evidence of genocidal specific intent before intervening to save the victims.

Complicating the picture, the terms “ethnic cleansing,” “extermination,” and “persecution” are also commonly used in reference to Darfur—often interchangeably, though legally they have distinct meanings and implications. For instance, the term “ethnic cleansing” does not actually appear in any major treaty. It is, however, sometimes “used for the political purpose of avoiding the charge of genocide,” particularly when specific intent for genocide is difficult to prove. A UN Commission of Experts defines ethnic cleansing as “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.” Ethnic cleansing is essentially the product of a land dispute: one group claims a geographic region for its own and proceeds to “cleanse” the area of another population currently living there. Although case law and official reports characterize ethnic cleansing as a subset of war crimes or crimes against humanity, the ICTY has, in especially grave cases, determined that acts of ethnic cleansing constitute genocide. Matthew Lippman reminds us that the Holocaust is not the best model for regulating mass atrocities that occur in civil conflicts today: “The singularity of Jewish suffering…is enhanced by the fact that various victim groups lack the organization, resources or popular pull to construct their suffering as genocide….Unable to successfully capture the flag of genocide, victim groups retreat to the safety and security of less controversial and novel categories such as ethnic cleansing.” Where genocide is difficult to prove, however, ethnic cleansing becomes a “next-best” label—a crime that is similar in actus reus but that lacks the requirement of specific intent.

77 Udombana, supra note 1, at 57.
78 COI Report, supra note 8.
Under the Rome Statute, extermination is another crime against humanity that involves “intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”\(^8^0\) Like ethnic cleansing, it is a crime whose *actus reus* may resemble certain acts of genocide, but whose *mens rea* requirement is easier to fulfill when it comes to prosecution. Persecution is the only crime against humanity that requires discriminatory intent.\(^8^1\) This makes it, in the view of the ICTY, the closest crime in essence to genocide: “when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.”\(^8^2\)

IV. Redefining State Obligation

a. The Politics of (In)Action

Certainly, the ambiguities built into international legal institutions and treaties do not cause inaction, but they give reluctant international decisionmakers a way to justify inaction that results for other reasons. Given the range of atrocities that have been criminalized under international law, an argument for international intervention could be made with little imagination, even if the conflict’s racial and ethnic lines are not completely clear. But the absence of political will leads nations to interpret legal instruments in ways most favorable to their own interests rather than to the victims’ interests. The UN is authorized to use force to achieve its mission of maintaining international peace and security, but it has opted to pursue ineffective diplomatic channels in the case of Darfur, deferring to the much more powerful mandate to protect state sovereignty (specifically, Sudan’s).\(^8^3\)

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\(^{80}\) Article 7(2)(b).


\(^{82}\) *Prosecutor v. Kupreskic*, supra note 86.

\(^{83}\) The U.N. Charter provides for use of multinational troops for peacekeeping and humanitarian purposes when invited by the target state (though, as mentioned above, Sudan is far from extending such an invitation). It also provides, in Chapters 7 and 51, justifications for the use of force in the most serious situations of international concern, expressly for the purpose of neutralizing imminent threats to peace.
The case of Darfur, as with many other crises in the history of the UN, highlights the structural impediments to swift, effective action: China and Russia, both veto-holding permanent members of the Security Council, not only oppose the use of UN force without consent from the Sudanese government, but have actually been accused of breaching the multilateral arms embargo against Sudan by supplying weapons to Khartoum.84

As far as the American public is concerned, although many people are aware of and concerned on some level about Darfur, their sense of urgency is tempered by preoccupation with events closer to home. In addition, disenchantment with the war in Iraq has led to some wariness about foreign intervention—especially with respect to a Muslim nation led by an Arab government. Ironically, the “war on terror” provides a potential rationale for unilateral US intervention.

Negotiating for peace with the Sudanese government (that is, instead of sending peacekeeping or intervention forces to Sudan) may be seen as compromising with “the same bloody hands that let Osama bin Laden live in that country from 1991 to 1996, that planned the bombing of the [US embassies in] Nairobi and…Dar es Salaam.”85 On April 23, 2006, Osama bin Laden reaffirmed his connection with Sudan by releasing a video declaration, aired by Al Jazeera. In it, he rejected the Darfur Peace Agreement and called for a jihad in Darfur; he urged fighters to prepare by familiarizing themselves with the territory and tribes of Darfur.86 Because of America’s troubled relationship with the Middle East, American interests (political, economic, and moral) with respect to Darfur are unclear. Such a state of affairs makes unilateral intervention very unlikely.

Determining whether or not a situation constitutes genocide is a process fraught with ambiguities and biases. Legal scholar Matthew Lippman has written that the difficulty of deciding when states are obliged to intervene (and whether or not they want to expend the resources to do so)

85 Testimony of Donald Payne, supra note 28 at 33.
“confronts us with the crisis of conceding that there are limits to our compassion and concern and that some people are expendable. The notion that the Western World makes a moral distinction between European and Third World genocide is particularly problematic. Thus, we seek solace in the self-delusion that we are not witnessing genocide.”\textsuperscript{87} More pointedly, Simon Deng, a former Sudanese slave who is now an outspoken activist, attributes the lack of action to a deep-rooted belief (conscious or unconscious) in many societies that black African lives are worth less than others: “It is very painful to say this, but we Sudanese victims can not avoid uttering the truth, at least among ourselves: we are black, and therefore nobody cares about us. We are the ultimate victims of a global racism that continues even in the new millennium.”\textsuperscript{88} According to Mohamed Yahya, a prominent Darfurian activist now resettled in the United States, in the early days of the conflict, the Sudanese government launched a very effective public relations offensive. It spread the message to African and Middle Eastern leaders via diplomatic channels that rebel insurgencies were threatening the central government, but that the matter was being adequately handled internally.\textsuperscript{89} Critics argue that, at the very least, Khartoum has engaged in disproportionate and collective punishment for rebel attacks, targeting entire civilian villages that it believes are harboring rebels. The information war continues: in the face of economic sanctions and official condemnation from the U.S. government, Sudan has hired a high-powered lobbyist “to develop and sell a public relations strategy on Capitol Hill.”\textsuperscript{90}

\begin{itemize}
\item \textbf{Revising Genocide Law: From Prevention and Punishment to Protection}
\end{itemize}

\textsuperscript{87} Lippman, \textit{supra} note 79 at 528.
\textsuperscript{89} This information comes from my informal conversations with Mohamed Yahya, whose organization, Damanga Coalition for Freedom and Democracy, is based in Charlottesville. I have worked with Mr. Yahya as a pro bono student volunteer for the past two years.
\textsuperscript{90} Testimony of Former Ambassador and Congresswoman Diane Watson (D-Calif.), Transcript of Hearing Before the Committee on International Relations, House of Representatives (Nov. 1, 2005) at 8.
In the aftermath of the Holocaust, the international community was rightfully horrified at the determination and thoroughness with which the Nazi regime had sought to fully eliminate a recognized collectivity, the Jewish people. Even aside from the unprecedented number of people murdered, one thing that set the Holocaust apart from, say, the earlier Armenian genocide or Stalinist Russia, was the absolutely clear, well-documented intent to destroy. The Genocide Convention was conceived as a deterrence to future genocides, but it was also a confession of collective responsibility by all nations for failing to identify and stop the Holocaust while it was occurring. It served a healing purpose as well as a legal one. Today, the conflicts that are occurring in the postcolonial world are very different and require a new approach.

A number of historians and social scientists have suggested rewriting the definition of genocide; rather than enumerating what types of groups merit protection, their recommendations focus on the destructive intent of the crime, in order to better fulfill what they each believe to be the mission of the Genocide Convention. Some of the suggestions would broaden the scope of genocide law by adding to the types of collectivities protected. Helen Fein, for example, has defined genocide as “sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim.”91 Steven Katz, Frank Chalk, and Kurt Jonassohn have argued that victim groups must be recognized as subjective constructions. Chalk and Jonassohn have written that genocide is a “one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.”92 In at least one definition, the “collectivity” element is missing altogether:

92 Chalk and Jonassohn, cited in Social Scientists’ Definitions of Genocide, Institute for the Study of Genocide; emphasis added.
Israel Charny has written of genocide as “the mass killing of substantial numbers of human beings, when not in the course of military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims.”93

These alternate definitions of genocide might be able to expand the coverage of the current genocide law, or they could just shift the semantic debate slightly but leave the central problem intact: that whatever the definition of genocide, there is no clear mandate for the international community to act as long as there is doubt as to the existence of a victim group. The problem of focusing on definitions of genocide is, as Jerry Fowler of the Holocaust Museum has pointed out, is that legal definitions are useful in judicial settings after a crime has occurred, but they do nothing to prevent the crime from occurring or to stop it while it is in progress. He writes that “the question of prevention is not a legal question, the question of prevention is a political question, and predicking political action on satisfaction of a legal definition is a recipe for inaction.”94 Indeed, asking the question “is genocide occurring?” before taking action means that observers must process the question of guilt or innocence before acting to prevent further killing. To avoid such delays, Fowler argues, parameters for intervention should be set separately from the judicial standard for criminal responsibility. For that reason, the Holocaust Museum has developed a “three-tier warning system: genocide watch, genocide warning, and genocide emergency,” intended to trigger protective action without wrangling over definitions. The system attempts to provide a principled basis for international intervention when “indicators” of genocide are present. The idea is: “We can let a court later decide whether it actually was genocide in the legal sense, but first we have laid a basis for political action.”95

93 Israel W. Charny, cited in Social Scientists’ Definitions of Genocide, Institute for the Study of Genocide; emphasis added.
95 Id. at 215.
Such a “basis for political action” presupposes a certain responsibility on the part of the international community that is different from that set forth in the Genocide Convention: the responsibility to protect rather than to prevent and punish. That international obligation, a relatively new concept not yet widely accepted as customary international law, was first articulated in a major way at the 2005 World Summit.

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.…

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means…to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council…should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.… 96

The advantage of the responsibility to protect model is that it turns away from the judicial toward the political, and focuses on the decisions made by global actors in response to an ongoing or impending crisis. In addition, it reaches beyond genocide to cover crimes that do not require specific intent or a sure determination that victims are members of a protected group. Proponents of the responsibility to protect argue that members of the international community (specifically, decisionmakers at the UN including the Security Council) would have a more comprehensive mandate to protect against atrocities that may not fit the legal definition of genocide.

Certainly, the concept has its detractors. The language of the World Summit’s outcome document still enumerates specific crimes that are subject to interpretation just as genocide is, and it is not explicit about thresholds for determining when “peaceful measures” can be considered to have failed. In addition, as Nicholas Wheeler has pointed out, it is unclear what happens when members

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of the Security Council are unable or unwilling to act (for example, if one permanent member resists authorizing the use of force). Nevertheless, the most important difference is that the responsibility to protect lessens the focus on enumerated categories and specific genocidal intent, making the moral obligation to act more difficult to ignore when atrocities are occurring. Unlike the Convention, the outcome document focuses more on the failure of a state to protect its own citizens than on whether those citizens are deserving of protection. As such, the nature of collectivities, as they have developed in various parts of the world and in disparate historical contexts, matters much less.

V. Conclusion

Semantic wrangling serves as a stalling mechanism among world leaders who fear triggering an obligation to “prevent and punish” genocide, but it also reflects serious, widespread confusion about the meanings of ethnicity and race. Because of a belief among former colonial powers that ethnicity and race are universal concepts, international law fails to account for the more complex history and nature of modern collectivities in postcolonial societies. Moreover, one obstacle to understanding contemporary collectivity is the mistaken notion of “the tribe,” left over from racist, colonial-era policies. As a result, the Genocide Convention, which was created in response to the Holocaust and prior to the end of colonial rule in nearly all European colonies, envisions a certain paradigm of genocide that does not fit the circumstances of mass atrocity in developing countries.

The weaknesses in genocide law have made the international community susceptible to propaganda by the Sudanese government claiming the conflict in Darfur is a purely domestic dispute between tribes over land and resources. They have also made decisionmakers vulnerable to stereotypes about black African societies being intractably violent—the view that the “infighting” will never end because it has no rational purpose or explanation. (Such a view, of course, reflects a

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lack of understanding of the colonial history of the region.) As a result, fatalism and a sense of decreased moral urgency—brought on partly by misunderstanding, partly by racial bias—make western intervention unlikely in Darfur. Compounding the problem is the fact that the UN is structurally unable to respond quickly to crisis situations like the one in Darfur. Although the UN is the only global body charged with ensuring peace and security and authorized to use force, the U.N.S.C. allows a small number of countries (or even one country) from among the permanent membership to block interventions that are unfavorable to their economic or strategic interests. In addition, a major purpose of the UN is to protect state sovereignty, which leads the UN to defer to the sovereignty of repressive regimes when it is totally inappropriate to do so.

The current anti-genocide framework, consisting of the UN and a small set of treaties and international courts, is inadequate to protect people in African and other decolonized countries. Alternate theories and perhaps instruments of international law are needed to protect people effectively from genocide. A lot of resources have been dedicated to developing international fora to bring justice after the fact, but this does nothing to stop atrocities that are occurring in the moment and so far the fora have had no discernable deterrent effect. One idea is to broaden the definition of genocide in order to more clearly state an obligation to intervene regardless of disagreement about the meanings of ethnicity or race; this is unlikely because of political opposition. A relatively new legal theory that has greater potential is the “responsibility to protect,” which charges the international community with the responsibility to intervene to prevent mass killing of civilians when their own national governments are unwilling or unable to protect them. In any event, any changes instituted must take into account the ways in which conflicts in postcolonial societies may differ from those envisioned by the writers of the Genocide Convention back in 1948.