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# HEARTBREAK IN DARFUR: WHEN DOES GENOCIDE BECOME GENOCIDE?

Konjit Gomar\*

For more than a year now, the mass killings of black African civilians by pro-government, Arabized<sup>1</sup> militias known as the Janjaweed have plagued the western region of the Sudan.<sup>2</sup> Hostilities between the region's black peasant farmers and Arabized nomads have existed for decades as the two groups have long grappled with one another for control of the country's Darfur region.<sup>3</sup> However, the situation boiled over in or around February 2003 after two rebel groups, the Sudan Liberation Army/Movement and the Justice and Equality Movement began attacking government property in an attempt to end what they consider the economic and political suppression of Sudan's black African populations in favor of their pro-government, Arabized brethren.<sup>4</sup> Comprised of tribesmen belonging to

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<sup>1</sup> The author would like to note the racial similarities between the peoples involved in the present conflict. Undoubtedly African in racial make-up, the Sudanese people nevertheless insist on distinguishing themselves from one another with the use of the racial labels "black African" and "Arab." Such labels reflect the political history of Sudan's western region. See Reports: Peoples Darfur, at <http://www.sudanupdate.org/REPORTS/PEOPLES/Darf.htm> (last visited Aug. 24, 2004) (Similar in size to France, "Darfur was an independent sultanate until 1917, when it was the last region to be incorporated into the Anglo-Egyptian Sudan. The Arabic word Dar roughly means homeland, and its population of nearly four million is divided into several Dars; not only of the Fur people, as its name suggests, but also of several communities, determined by livelihood as much as ethnicity. These ecological and social distinctions are more meaningful than the administrative divisions imposed by government. Ethnicity is not itself clear-cut, given the long history of racial mixing between the indigenous "non-Arab" peoples and the "Arabs", who are now distinguished by cultural-linguistic attachment rather than race.").

<sup>2</sup> See Q & A: *Sudan's Darfur Conflict*, BBC NEWS UK Edition (2004) at <http://news.bbc.co.uk/1/hi/world/africa/3496731.stm> (last visited Oct. 19, 2004). [hereinafter BBC Q & A].

<sup>3</sup> Crippled by drought and desertification, Darfur has long been one of the most impoverished regions in the Sudan. The evergrowing scarcity of arable lands has inspired inter-group hostilities between black peasant farmers and Arabized nomads. These hostilities were originally slight with low casualty numbers on both sides. However, as more automatic weapons entered the region from neighboring Chad, inter-group conflicts became more devastating at times resulting in the slaughter and destruction of entire communities. But it would be a mistake to characterize these conflicts as incidents resting solely upon a contest involving land. In addition to the struggle over Darfur's remaining natural resources there exist controversies touching upon political power, lifestyle and culture. Frustrated with their lack of representation in local politics, Arabized nomads—who make up a minority of the population—have fiercely fought (some say with Khartoum's support) to not only achieve representation but to also completely usurp political power from non-Arabized Darfurians. See Human Rights Watch, *Darfur in Flames: Atrocities in Western Sudan* Vol. 16, No.5(A),40-42 (Apr. 2004), available at <http://hrw.org/reports/2004/sudan0404/index.htm> (last visited Oct. 19, 2004) [hereinafter *Darfur in Flames*]; See also Human Rights Watch, *Darfur civil Conflict 1989-1990*, at <http://www.globalsecurity.org/military/world/para/darfur2.htm> (last modified June 25, 2004); See also Human Rights Watch, *Darfur Liberation Front* at <http://www.globalsecurity.org/military/world/para/darfur.htm> (last modified September 5, 2004) [hereinafter Liberation Front].

<sup>4</sup> See Liberation Front *supra* note 3. Though many Darfurians are practicing Muslims, over forty percent are non-Arabs. *Id.* Even among those who practice Islam, many are against Sudan's arabized

Darfur's Fur, Masalit, and Zaghawa ethnic groups, the rebels also sought protection from the Janjaweed who have a history of traversing the affected areas on horse back in armed militia groups.<sup>5</sup>

Sudan is accused of responding to the rebel attacks by further arming the Arab Janjaweed militia and giving it license to engage in a "scorched earth policy" which has entailed the systematic killings of unarmed civilians, the mass kidnapping and rape of young girls and women, and the looting of villages and farms which are subsequently burned to the ground.<sup>6</sup> Many survivors report that the Janjaweed used racial epithets during these attacks.<sup>7</sup> Although the Sudanese government has denied backing the Janjaweed<sup>8</sup>, civilians who have escaped the onslaught report that government helicopters and planes usher in the Janjaweed militia with air raids and bombings of villages.<sup>9</sup> As a result, causality numbers are estimated between fifteen and fifty thousand and more than a million persons have been displaced as they seek refuge along the Chadian border.<sup>10</sup> But even there they are apparently not safe, as refugees have reported repeated Janjaweed attacks along the peripheries of the displacement camps.<sup>11</sup>

There would seem to be little reason—even if allowed—to return home. Most Darfurians are subsistence farmers, their very survival dependent upon activities initiated during the planting season.<sup>12</sup> The systematic destruction of farms and villages coupled with the fear of future attacks has more or less halted all planting activities, thereby dashing any hope of a successful October harvest.<sup>13</sup> Hu-

government accusing it of refusing to share economic and political power with the people of Darfur. *Id.* They furthermore accuse Sudan's government of turning a blind eye to Janjaweed abuses as a means to further "Arabize" the Darfurians and maintain power in the region. *Id.* See *The Black Book History of Darfur's Darkest Chapter*, Sudan Tribune (Aug. 21, 2004) at [http://www.sudantribune.com/article\\_impr.php3?id\\_article=4868](http://www.sudantribune.com/article_impr.php3?id_article=4868) (last visited Nov. 22, 2004).

<sup>5</sup> Human Rights Watch, *DARFUR DESTROYED Ethnic Cleansing by Government and Militia Forces in Western Sudan* Vol. 16, No. 6(A) (May 2004), at <http://www.hrw.org/reports/2004/sudan0504/> (last visited Oct. 19, 2004) [hereinafter *DARFUR DESTROYED*]

<sup>6</sup> *Id.*

<sup>7</sup> Marc Lacey, *U.S. Report on Violence in Sudan Finds a 'Pattern of Atrocities'*, N.Y. TIMES, August 24, 2004, available at <http://www.nytimes.com/2004/08/25/international/africa/25darfur.html> (last visited August 27, 2004). (In July 2004 the U.S. State Department conducted 257 interviews in displacement camps along the Chadian border. *Id.* The interviews were conducted to determine the truth behind claims the Sudanese government was engaged in a genocidal campaign against ethnic Darfurians. *Id.* Almost 50 percent of the refugees interviewed told of how they were attacked by government soliders and the Janjaweed. *Id.* Many also accused government soliders and the Janjaweed of using racial epithets during these attacks including the phrases "Kill the slaves" and "We have orders to kill all blacks." The terms "slave" and "black" are pejorative terms leveled against non-Arab Darfurians and those belonging to the farming class.)

<sup>8</sup> Koert Lindijer, *Analysis: Reigning in the Militia*, BBC NEWS UK Edition at <http://news.bbc.co.uk/1/hi/world/africa/3540126.stm> (last visited Oct. 19, 2004).

<sup>9</sup> *DARFUR DESTROYED*, *supra* note 5.

<sup>10</sup> BBC Q & A, *supra* note 2.

<sup>11</sup> See Alexis Masciarelli & Ilona Eveleens, *Sudanese Tell of Mass Rape*, BBC NEWS UK Edition at <http://news.bbc.co.uk/1/hi/world/africa/3791713.stm> (last visited Oct. 19, 2004). (Details plights of Sudanese women in their villages during an attack by the Janjaweed.)

<sup>12</sup> See *Darfur in Flames*, *supra* note 3.

<sup>13</sup> *Id.* See also Lindijer, *supra* note 8. There are also reports that after Janjaweed militia succeeded in running the farmers off their lands, the families of Janjaweed members moved in. *Id.*

manitarian agencies have already noted severe malnutrition among the children within the displacement camps.<sup>14</sup> The lack of clean water has also contributed to a high mortality rate among children from curable diseases such as diarrhea.<sup>15</sup> Due to the rough terrain and lack of infrastructure in Darfur, relief agencies are unable to reach many of the displaced settlements.<sup>16</sup> Chadian communities playing host to the refugees also lack the financial resources and food stocks necessary to combat the crisis.<sup>17</sup> In May, the rainy season hit, further complicating matters as the refugees' only means of shelter is often times small structures made of twigs covered with torn plastic bags.<sup>18</sup> And many of the refugees are not even equipped with these.<sup>19</sup>

The great potential for immense human loss as a result of starvation and the spread of infectious diseases prompted the United Nations ("U.N.") in May 2004 to label the situation in Darfur, "the world's worst humanitarian crisis of the year."<sup>20</sup> The U.S. Congress assumed a more pessimistic view pronouncing in July that the conflict in Darfur amounts to "genocide."<sup>21</sup> However, during his trip to the Sudan this past June, US Secretary of State Colin Powell would only concede that there exists "indicators and elements that would start to move you toward a genocidal conclusion but we're not there yet."<sup>22</sup> U.N. Secretary General Kofi Annan has also shied away from applying the term genocide to define

<sup>14</sup> *Darfur in Flames*, *supra* note 3.

<sup>15</sup> *Aiding Darfur: A Nurse's Story V*, BBC NEWS UK Edition (Oct. 22, 2004) at <http://news.bbc.co.uk/1/hi/world/africa/3946079.stm> (last visited Nov. 22, 2004)

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Hilary Andersson, *Sudan's Cruel and Slow Starvation*, BBC NEWS UK Edition, (2004), at <http://news.bbc.co.uk/1/hi/world/africa/3922461.stm> (last visited Oct. 19, 2004).

<sup>19</sup> *Id.*

<sup>20</sup> Muninni K. Mulers, *It's Genocide in Darfur*, (Aug. 9, 2004.), at <http://allafrica.com/stories/200408090532.html>.

<sup>21</sup> *US House call Darfur 'genocide,'* BBC NEWS UK Edition, July 23, 2004, at <http://www.bbc.co.uk/1/hi/world/africa/3918765.stm>; *see also Sudan Says Conflict is 'Not Genocide,'* CNN World, July 24, 2004, at <http://www.cnn.com/2004/WORLD/africa/07/24/sudan> [hereinafter *Not Genocide*].

<sup>22</sup> *Sudanese refugees welcome Powell*, BBC NEWS WORLD Edition, (2004), at <http://news.bbc.co.uk/2/hi/africa/3849593.stm> (last visited Oct. 19, 2004). After the U.S. States Department conducted an investigation into claims that genocide was occurring in Darfur, Colin Powell pronounced on September 9, 2004 that he believed the Sudanese government and Janjaweed militias were committing genocide on black African ethnic groups within the region. However, in spite of Powell's assessment outside of threatening economic sanctions and encouraging both sides in the conflict (Sudanese rebel groups and Sudan's central government) to reach a peace accord the international community has done nothing substantial to end the violence. World powers remains divided on whether genocide exists and on how best to address the crisis. Donor organizations have also been slow to provide adequate funds to finance an African Union led peace force in the region. Meanwhile reports of mass killings still flow into media outlets and some humanitarian organizations have pulled out of refugee areas. *See Powell declares genocide in Darfur* BBC NEWS WORLD Edition (Sept. 9, 2004) at <http://news.bbc.co.uk/2/hi/africa/3641820.stm>. ("Use of word genocide does not legally obligate the US to act); *see also* The Crisis in Darfur, U.S. Department of State (Sept. 9, 2004) at <http://www.state.gov/secretary/rm/36042.htm>; *see also Aid Groups Flee New Darfur Fighting*, at CNN WORLD NEWS (Nov. 5, 2004) at <http://www.cnn.com/2004/WORLD/africa/11/05/sudan.darfur.reut/index.html>; *See also Why Washington Won't Save Darfur Villagers*, Sudan Tribune (Oct. 6, 2004) at [http://www.sudantribune.com/article.php3?id\\_article=5837](http://www.sudantribune.com/article.php3?id_article=5837).

the Darfur conflict<sup>23</sup> as have many international human rights groups and member states of the U.N. Security Council.<sup>24</sup> Most observers appear to take comfort in labeling the Janjaweed attacks a program of “ethnic cleansing,” knowing full well that a cry of genocide would obligate the international community to become militarily involved under the Genocide Convention of 1948.<sup>25</sup> With public and political fallout still raging over the war and continued military presence in Iraq, many nations seem reluctant to become entangled in yet another foreign military campaign. The tightrope Western leaders now walk in their relations with Arab states has no doubt also colored their interpretation and commitment to the Darfur situation.<sup>26</sup>

Although on July 30th the U.N. threatened economic sanctions if the Sudanese government did not disarm the Janjaweed by August 31,<sup>27</sup> many observers argue that even if the Sudanese government wanted to disarm the militia—which many doubt<sup>28</sup>—it is unrealistic to believe that the government can do so within the thirty day time frame handed down by the U.N.<sup>29</sup> Given the numerous reports and accusations concerning the Sudanese government’s endorsement of the Janjaweed attacks, many also question how safe the refugees would be upon returning to their villages under the guard of the government’s military personnel.<sup>30</sup> As the world’s great powers struggle with how best to label and react to the conflict, human lives are still being lost as reports of mass killings continue to flow into media outlets.<sup>31</sup> Whatever one calls it, the debate over how to label the Janjaweed attacks has raised important questions on the meaning of genocide, its occurrence, and what evidence is needed to trigger its application as well as the international community’s resolve to crush it.

This Article asserts that the UN’s Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Convention) is patently flawed. By limiting its application to anti-group atrocities directed at ethnic, racial, national, and religious groups, the Convention’s drafters have failed to provide protection to the most vulnerable groups today—political and economic groups. In light of this flaw this Article also asserts that the Convention is essentially impo-

<sup>23</sup> *Not Genocide*, *supra* note 21.

<sup>24</sup> *Id.*

<sup>25</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 available at [http://www.unhchr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhchr.ch/html/menu3/b/p_genoci.htm) (last visited Oct. 19, 2004) [hereinafter *Genocide Convention*].

<sup>26</sup> See Ed O’Keefe and Jeffrey Marcus, *Crisis in Sudan*, washingtonpost.com (Sept. 9, 2004) at <http://www.washingtonpost.com/ac2/wp-dyn/A20765-2004Jul1?language=printer>.

<sup>27</sup> The author is aware that by the time this article is published, the August 31 deadline will have come and past. For historical purposes the date was included. See *Powell declares genocide in Darfur* BBC NEWS WORLD Edition (Sept. 9, 2004) at <http://news.bbc.co.uk/2/hi/africa/3641820.stm> (last visited Nov. 22, 2004).

<sup>28</sup> See *U.N. envoy pessimistic on Sudan*, CNN WORLD (Aug. 11, 2004) at <http://www.cnn.com/2004/WORLD/Africa/08/11/Sudan/index.html>.

<sup>29</sup> Lindijer, *supra* note 8.

<sup>30</sup> *Id.*

<sup>31</sup> See *Thousands Flee New Darfur Clashes*, BBC NEWS WORLD Edition at <http://news.bbc.co.uk/2/hi/africa/3630582.stm> (last visited Oct. 19, 2004).

tent, and must undergo a revision if it is to have any real deterrent effect in the world today.

## The Evolution and Interpretation of Genocide

Coined in 1944 by Ralph Lemkin, the term “genocide” is a combination of the ancient Greek word *genos*, which means race or tribe, and the Latin word *cide*, which means killing.<sup>32</sup> For Lemkin “genocide” referred to discriminatory activities directed at targeted national and ethnic groups.<sup>33</sup> He based his definition on the atrocities Germany committed against European Jews during World War II.<sup>34</sup> The term was therefore all encompassing as it signified not only “the immediate destruction of a nation. . .by the mass killings of all members of a nation” but more importantly “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”<sup>35</sup> Thus according to Alexander Greenawalt, the confiscation or destruction of a targeted group’s cultural property, the forced cultural and religious assimilation of group members, as well as the imposition of “‘morally debasing’ policies’ aimed at eradicating the group’s moral habits, all constituted genocidal acts under Lemkin’s definition.<sup>36</sup> Members of the targeted group were therefore victimized “not in their individual capacity, but as members of the [targeted] national group.”<sup>37</sup>

The U.N. General Assembly ultimately narrowed such a broad definition when it formally adopted the Convention in 1948.<sup>38</sup> Borrowing from Lemkin, Article 1 of the Convention pronounced genocide an international crime, “whether committed in time of peace or in time of war,” which “[the Contracting Parties] undertake to prevent and punish.”<sup>39</sup> Genocide is further defined in Article 2 as:

<sup>32</sup> Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case For A Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2270 (1999).

<sup>33</sup> *Id.* at 2270-272.

<sup>34</sup> *Id.* at 2270-272.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (“If Lemkin’s understanding of genocide is elusive, this may be explained in part by the context in which he was writing. At the time when he published *Axis Rule in Occupied Europe*, World War II was still in progress and, as a result, the specific policies of the Axis powers were his immediate subject. In this light, his definition reads not so much as an attempt to clearly delineate a form of individual criminal liability, but rather, as an indictment of the Axis Powers’ general treatment of the populations that they subjected. In addition, the breadth of Lemkin’s concept may be explained in light of the threat he perceived genocide as posing. Lemkin was ultimately less concerned with the evil motivations of genocidal acts themselves than with the preservation of the rich array of nations and cultures that constituted the world community.” *Id.* According to Greenawalt, Lemkin’s concern with preserving the cultural contributions of human groups was shared by the U.N. General Assembly and was a motivating factor in its adoption of Resolution 96 (1) which formerly pronounced genocide an international crime and required U.N. member states to incorporate in their criminal codes laws aimed at preventing and punishing genocidal acts.) *Id.* at 2272-273.

<sup>37</sup> Greenawalt, *supra* note 32, at 2271.

<sup>38</sup> *Id.*

<sup>39</sup> *Genocide Convention*, *supra* note 25, Article 1.

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- a) killing members of the group;
- b) causing serious bodily or mental harm to members of the group;
- c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) imposing measures intended to prevent births within the group;
- e) forcibly transferring children of the group to another group.<sup>40</sup>

Therefore to properly trigger a finding of genocide there must exist three elements: (1) the destruction or attempted destruction of a human group in whole or in part; (2) the victimization of the group because of its national, racial, ethnical, or religious status; and (3) the specific perpetration of the destructive act(s) as a means to annihilate the targeted group as a group.<sup>41</sup>

Critics have long complained that the Convention's definition of genocide is too narrow and therefore cannot aptly apply to more recent acts of violence directed at targeted human populations.<sup>42</sup> Their dissatisfaction stems in part, from the fact that the definition only makes reference to violence perpetrated against national, ethnical, racial, or religious groups.<sup>43</sup> As a result, they argue, human groups that are attacked because of political affiliation, socio-economic status, or sexuality are left with no legal recourse on the international stage.<sup>44</sup> Critics likewise find it troubling that the Convention's definition provides no number or standard by which to determine how many deaths must occur to properly trigger a genocide finding.<sup>45</sup> Other dissenters insist that the definition should embrace not only the direct physical destruction of members within a targeted group but also the purposeful destruction of that group's cultural and environmental property<sup>46</sup>

By far, the most universal complaint seems to lie with the intent element of the definition. By requiring proof that an alleged perpetrator specifically intended his destructive act(s) to further an underlying campaign of group annihilation, prosecutors are asked to do what is seemingly impossible—determine the mental state of the accused during the commission of the act.<sup>47</sup> Not only does such a

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<sup>40</sup> *Id.*, at Article 2.

<sup>41</sup> See Sonali B. Shah, Comments, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Courts Definition of Genocide*, 16 EMORY INT'L. L. REV. 356 (2002).

<sup>42</sup> LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 39 (1981) [hereinafter *ITS POLITICAL USE*].

<sup>43</sup> See Shah, *supra* note 41, at 381-90.

<sup>44</sup> *Id.*

<sup>45</sup> *Analysis: Defining Genocide*, BBC NEWS, (2001) at <http://news.bbc.co.uk/1/hi/world/europe/1701562.stm> (last visited Oct. 19, 2004).

<sup>46</sup> *Id.* See also KURT JONASSOHN ET AL., GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS 25-6 (Transaction Publishers 1998); see also David Marcus, Article, *Famine Crimes in International Law*, 97 A.J.I.L. 245, 262-64 (2003) (arguing that international law should extend to man made famines because "famines are often functionally equivalent to genocide"). *Id.* at 248.

<sup>47</sup> See generally Shah, *supra* note 41 at 351; See also Greenawalt, *supra* note 32 at 2281-2282.

high standard allow for some alleged perpetrators to possibly escape liability by feigning their acts were motivated by non-genocidal sentiments, but the specific intent standard also raises questions regarding the scope of liability.<sup>48</sup> Should liability extend to those persons who, following the directives of another, commit acts that further the other's genocidal campaign?<sup>49</sup> Or should liability simply rest with those who instigate a genocidal plot even when he or she has not personally inflicted the fatal blow?<sup>50</sup> The Convention appears to answer these questions when it lists as punishable the following five acts: (1) genocide; (2) conspiracy to commit genocide; (3) direct and public incitement to commit genocide; (4) attempt to commit genocide; and (5) complicity in genocide.<sup>51</sup> Article 4 of the Convention further establishes that persons are punishable for genocidal acts "whether they are constitutionally responsible rulers, public officials, or private individuals."<sup>52</sup> However the specific genocidal intent is still a threshold prosecutors must meet when bringing such persons to trial. It is in fact the element of specific intent within the genocide definition that has resulted in a haphazard application of the Convention on post-World War II anti-group atrocities.

## 20th Century Genocides

There is continual debate amongst critics as to how much genocide has occurred during the 20th century. Some commentators limit the number to three: the mass killings of Armenians by the Turks in the early 1900's, the German massacre of six millions Jews during the Holocaust, and the slaughter of 800,000 Rwandan Tutsis by their Hutu countrymen in 1994.<sup>53</sup> Other commentators have been more "generous" in their application of genocide, adding to the anti-group atrocities enumerated above the near annihilation of the Hereros tribe in South-west Africa by the Germans<sup>54</sup>; the starvation of three million Ukrainians from the Kulaks class by Stalin's man-made famine<sup>55</sup>; the 1970's slaughter of 1.7 million Cambodians by Pol Pot's Khmer Rouge<sup>56</sup>; the mass killings of the Ache Indian

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<sup>48</sup> See generally Greenawalt, *supra* note 32.

<sup>49</sup> *Id.* at 2265-2289.

<sup>50</sup> See generally Greenawalt, *supra* note 32 (arguing that intent should be knowledge based. Thus liability would flow to persons who not only specifically intend to commit genocide, but also to persons who were aware of the consequences of their actions).

<sup>51</sup> Genocide Convention, *supra* 25, art. 3

<sup>52</sup> Genocide Convention, *supra* 25, art. 4

<sup>53</sup> See Karyn Becker, *Genocide and Ethnic Cleansing*, available at <http://www.munfw.org/~archive/50th/4th.htm> (last visited August 12, 2004); See also Genocide Watch *End Genocide* at <http://www.genocidewatch.org/internationalcampaign.htm> (last visited Aug. 9, 2004) [hereinafter Genocide Watch].

<sup>54</sup> See *Germany Regrets Namibia 'genocide'*, BBC NEWS World Edition (2004) at <http://news.bbc.co.uk/2/hi/afrihttp://news.bbc.co.uk/2/hi/africa/3388901.stm>

<sup>55</sup> See Genocide Watch, *supra* note 53. (There is a variation in the number of Ukrainians who died in 1932 during Stalin's rule. Some commentators list the figure at three million while others list it as "at least five million.") See David Marcus, Article, *Familne Crimes in International Law*, 97 A.J.I.L. 245, 245 (2003).

<sup>56</sup> See Genocide Watch, *supra* note 53.



population by the Paraguarian government from 1962-1972;<sup>57</sup> the mass killings of Timorese during the 1975 Indonesian invasion of East Timor<sup>58</sup>; and the systematic killings of ethnic Kurds by Iraq's former dictator Saddam Hussein.<sup>59</sup>

And yet despite this expansive list of anti-group atrocities, it was not until the slaughter of Tutsis in Rwanda that an international tribunal tried and convicted a defendant for genocide.<sup>60</sup> At The Hague, former Yugoslavian leader Slobodan Milosevic is currently charged with war crimes, crimes against humanity, and genocide for the slaughter of Bosnian Muslims during the Bosnian-Serbian war of 1992-1995.<sup>61</sup> Though many commentators argue that "genocidal patterns" are evident in the mass killings of which Milosevic is charged, they doubt the trial court will hand down a genocide conviction.<sup>62</sup> They concede that in light of the Convention's specific intent element, there exists insufficient evidence to prove genocidal intent.<sup>63</sup>

This has been a common pattern throughout the history of the Genocide Convention—perpetrators of anti-group atrocities evading liability thanks to the legal loopholes punctuating the Convention's genocide definition. Participants in anti-group atrocities are aware of such loopholes and unabashedly use them not only to escape punishment but seemingly to minimize the horror of their actions.<sup>64</sup> Alexander Greenawalt noted such brashness in the response of Paraguay's Defense Minister when questioned about his government's military campaign against the country's Ache Indian population.<sup>65</sup> Though half of the Ache population was slaughtered during the ten-year campaign, the Defense Minister dismissed the idea that his government had committed genocide, pointing out that the campaign's purpose was purely economical, as it sought to clear for economic development, the area inhabited by the Aches.<sup>66</sup> Thus, because Paraguay's military campaign was motivated by economics and not by the desire to annihilate the Aches as a group, Paraguay's actions were permissible—in the eyes of the defense minister. They were also apparently permissible in the eyes

<sup>57</sup> Greenawalt, *supra* note 32, at 2285. See also ITS POLITICAL USE, *supra* note 42 at 34.

<sup>58</sup> See Genocide Watch, *supra* note 54.

<sup>59</sup> See Greenawalt, *supra* note 33, at 2291.

<sup>60</sup> Shah, *supra* note 41, at 370-71.

<sup>61</sup> ERIC. D. WEITZ, A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION 191 (Princeton University Press 2003).

<sup>62</sup> Analysis: Defining Genocide, *supra* note 45.

<sup>63</sup> *Id.*

<sup>64</sup> See ITS POLITICAL USE, *supra* note 42, at 34. (Discusses Brazil's and Paraguay's manipulation of the Convention's intent element when addressing allegations of genocide against the countries' indigenous populations.) See generally Richard Arens, *The Ache of Paraguay*, in GENOCIDE AND HUMAN RIGHTS 218 (Jack Nusan Porter ed., University Press of America, 1982) (providing detailed account of the plight of Paraguay's Ache population during and after Paraguay's military campaign).

<sup>65</sup> Greenawalt, *supra* note 32, at 2285 (The campaign started in 1962 and ended ten years later); see also ITS POLITICAL USE, *supra* note 42, at 34.

<sup>66</sup> *Id.*

of the international community, as no legal sanctions have been levied against the South American country.<sup>67</sup>

The mass killings of a human group due to their political affiliation is also apparently permissible as evident by the massacre of 1.7 million Cambodians during a three year period starting in 1975.<sup>68</sup> Desiring to create a homogenous society replete with communist ideology, Pol Pot waged a murderous campaign against those persons and elements that did not fit neatly into his social plan.<sup>69</sup> He therefore attacked members belonging to the elite and middle classes, intellectuals, ethnic and national minorities, Muslim Khmers, as well as those who remained affiliated with past political regimes.<sup>70</sup>

Witnesses to the atrocities reported the mass deportations of urban citizens into the countryside,<sup>71</sup> the kidnappings of young children who were subsequently placed in labor camps,<sup>72</sup> the closing of monasteries and schools,<sup>73</sup> as well as the torture and disembowelment of unarmed civilians.<sup>74</sup> The slaughter did not end until 1979 when Vietnam invaded Cambodia and deposed Pol Pot's Khmer Rouge.<sup>75</sup> By then Pol Pot and the Khmer Rouge had killed off an estimated 20 percent of Cambodia's population.<sup>76</sup>

Though the U.N. has labeled the atrocities "the worst crimes against humanity since Nazism," Pol Pot was never brought before an international tribunal and tried for his crimes.<sup>77</sup> Nor have any surviving members of the Khmer Rouge faced legal actions for their participation in the carnage.<sup>78</sup> As Sonali Shah noted, even if an international tribunal was set up to try and convict members of the Khmer Rouge, under the Convention only the killings of ethnic and Muslim Khmers would be actionable.<sup>79</sup> The political killings and murders of persons

<sup>67</sup> LEO KUPER, *THE PREVENTION OF GENOCIDE* 162 (Yale University Press 1985) [hereinafter LEO KUPER].

<sup>68</sup> WEITZ, *supra* note 61, at 186.

<sup>69</sup> *Id.* at 145.

<sup>70</sup> See generally WEITZ, *supra* note 61 (providing detailed history of the Cambodian conflict).

<sup>71</sup> *Id.* at 166-67

<sup>72</sup> *Id.* at 151.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 178. Much of Cambodia's cultural history was lost during Pol Pot's reign. The Khmer Rouge destroyed Buddhist Temples and Catholic churches all over the country. "[K]nowledge of longstanding agricultural practices, and also of Cambodia's traditional art forms, especially in dance and music" were forgotten by the people. *Id.* at 186.

<sup>75</sup> *Id.* at 187.

<sup>76</sup> *Id.* at 186. Experts differ on the number of lives lost during the Cambodian crisis. *Id.* Some experts list the number as "low" as 800,000 and as high as 1.7 million. *Id.* One expert insists that anywhere between 1.17 to 3.42 million people dies under Pol Pot's regime. *Id.* However, most experts believe the figure was between 1.5 and 1.7 million. *Id.*

<sup>77</sup> Shah, *supra* note 41, at 361-65. In fairness to the UN, there have been continual discussions with the current Cambodian government for the establishment of a tribunal to try those responsible for the carnage. However there is disagreement between the UN and Cambodia's government on how much control the later will have over the proceedings. *Id.* at 363-65.

<sup>78</sup> Pol Pot died in April 1998 without ever facing legal actions for his crimes.

<sup>79</sup> Shah, *supra* note 41, at 361-65.

who belonged to the intellectual and disfavored economic classes would therefore go without legal redress.<sup>80</sup>

### The Politicization of Genocide

The error in not including political and economic groups as one of the protected parties under the Convention has rendered it impotent in a world in which domestic conflicts are often ignited because of the real or imagined political and/or economic “contradictions” emanating from a disfavored group or class. In Leo Kuper’s book, *The Prevention of Genocide*, he notes that genocidal campaigns, past and present, often times consist of a combination of political, ethnic, and religious mass killings.<sup>81</sup> Such “interweaving,” as he terms it, is most apparent in pluralistic societies where there exists an array of racial, ethnic, and religious populations with a history of inter-group conflict.<sup>82</sup> According to Kuper, in these polarized societies, “internal divisions become politicized, and political division tends more and more to coincide with ethnic (or racial or religious) origin. Thus political mass murders and the ethnic factor become interwoven, raising difficult problems of classification.”<sup>83</sup>

Such interweaving was evident in Cambodia during Pol Pot’s reign of terror, which resulted in the mass killings of persons who were disfavored either because of their ethnic or racial make-up, class status, or political affiliation. The crisis in the Sudan also appears to represent a melding of political and racial issues, all of which retain characteristics of interweaving. A vast region comprised of Muslims, Animists (persons who adhere to indigenous African religious beliefs), and Christians who are further divided into a veritable smorgasbord of racial and ethnic groups, the Sudanese government has found it difficult to impose its Islamic Fundamentalism on the Sudanese populace.<sup>84</sup> In its effort to gain control of a people overwhelmingly African in sentiment and culture who have grown weary of the government’s unwillingness to address the needs of all Sudanese, the government has fanned the fires of decades long hostilities.<sup>85</sup> The current conflict is at once about race, religion, and politics.<sup>86</sup>

However, the failure of the Convention to serve as a formidable deterrent to anti-group atrocities has to do not only with the flawed definition of genocide but also with the political and economic self-interests of nation-states within the international community. At the time of the Convention’s drafting there was initial agreement amongst participating countries that the Convention would include po-

<sup>80</sup> *Id.*

<sup>81</sup> LEO KUPER, *supra* note 67, at 126.

<sup>82</sup> *Id.* at 126-7.

<sup>83</sup> *Id.*

<sup>84</sup> See *The Black Book History of Darfur’s Darkest Chapter*, Sudan Tribune (Aug. 21, 2004) at [http://www.sudantribune.com/article\\_impr.php3?id\\_article=4868](http://www.sudantribune.com/article_impr.php3?id_article=4868); see also *Darfur In Flames*, *supra* note 3.

<sup>85</sup> See *Darfur In Flames*, *supra* note 3.

<sup>86</sup> *Id.*

litical groups as one of the protected parties.<sup>87</sup> However delegates from Russia, in an obvious reference to Lemkin and the Jewish Holocaust, soon expressed concern that such an inclusion would compromise the “‘scientific definition of genocide and would, in practice, distort the perspective in which the crime should be viewed.’”<sup>88</sup> Iranian delegates supported Russia’s argument by noting the involuntary membership of persons belonging to a specific racial, ethnic, national, or religious group as opposed to the voluntary membership of persons belonging to political parties.<sup>89</sup> Such a distinction, the delegates remarked, rendered “the destruction of the first type (involuntary members in a group). . .most heinous in the light of the conscience of humanity, since it was directed against human beings whom chance alone had grouped together.”<sup>90</sup>

As Leo Kuper notes, it was not that nations believed political groups should have no protection whatsoever, but rather that such protection should come more appropriately from governments and national assemblies.<sup>91</sup> Nations have historically demanded the right to suppress rebellious political groups on their own terms.<sup>92</sup> Many drafters therefore perceived a Convention affording protection to political organizations as inimical to the principle of territorial sovereignty.<sup>93</sup> They feared such a Convention might be used as a tool to spurn government resistance during times of domestic discord.<sup>94</sup> It might also invite interference from “outsiders” seeking to establish their own influence or hegemony.<sup>95</sup> Thus in spite of counter-arguments and predictions that future genocides would more than likely be waged primarily on political grounds, the fear that the Convention would not receive the requisite number of votes for ratification prompted an agreement among the drafters to exclude political groups from the genocide definition.<sup>96</sup>

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<sup>87</sup> ITS POLITICAL USE, *supra* note 42, at 24. Before the actual Genocide Convention was drafted, in December 1946, the United Nations passed a resolution in which instances of genocide included those anti-group atrocities directed at “racial, religious, [and] political” groups. Therefore under the 1946 resolution genocide was declared a crime under international law “whether committed on religious, racial, political or any other grounds.” *Id.*

<sup>88</sup> *Id.* at 25. Following the 1946 resolution, Ad Hoc Committees were set up for deliberations on the exact wording of the Genocide Convention. Russian first raised its argument against the inclusion of political groups under the Convention during the Ad Hoc Committee of 1948.

<sup>89</sup> *Id.* at 26

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Kuper also notes that the representatives believed the then incomplete Human Rights Commission would provide political groups sufficient protection from governmental abuses.

<sup>92</sup> *Id.* at 26-30.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 27-9. During the Ad Hoc Committee meeting on October 14, 1948 delegates from Haiti argued against the exclusion of political groups from the Convention, on the grounds that “those who committed the crime of genocide might use the pretext of the political opinions of a racial or religious group to persecute and destroy it, without becoming liable to international sanctions.” *Id.* at 28. As Kuper notes, the Haitian delegates “developed the argument further: ‘since it was established that genocide always implied the participation or complicity of Governments, that crime would never be suppressed: the Government which was responsible would always be able to allege that the extermination of

The horrible error in not affording protection to political groups is most evident in the 1972 Hutu-Tutsi conflict in Burundi. Situated in the Great Lakes region, this small Central African country, which is similar in size to Maryland, is one of the most densely populated areas on the African continent.<sup>97</sup> Its people consists of ethnic Hutus, Tutsi, and the Twa “pygmies” of the forest.<sup>98</sup> Though the Hutus dominate in population figures, historically the minority Tutsi class has always ruled the country.<sup>99</sup> Prior to Germany’s colonization of Burundi in 1899, a fierce power struggle existed between two rival Tutsi clans—the Bezi and the Batare—both of whom were members of the country’s royal family.<sup>100</sup> Their support bases consisted of both Hutus and Tutsi resulting in clan loyalties.<sup>101</sup> However once Burundi obtained independence in 1962 such loyalties gave way to “a rapid ethnicing of political competition.”<sup>102</sup>

Under Tutsi rule the Hutus—even the elite—had always felt economically and politically marginalized.<sup>103</sup> Such sentiments and the political achievements of Hutus in neighboring Rwanda planted seeds of self-determination in the minds of the politically frustrated Burundi Hutus.<sup>104</sup> In response, the ruling Tutsis took measures to strengthen their power in order to ensure that the political shifts occurring in Rwanda did not appear in Burundi as well.<sup>105</sup> In April of 1972, following a brief insurgence by Hutu elites, which resulted in the deaths of approximately 2,000 Tutsis, the Tutsi ruled government responded with a fierce and systematic counter-attack.<sup>106</sup> Military forces summarily and indiscriminately executed Hutu civilians along with those implicated in the insurgence.<sup>107</sup> Educated Hutus were specifically targeted, as military personnel yanked university students from class, priests from churches, and medical personnel from local hospitals, killing anyone who had the misfortune to be Hutu.<sup>108</sup> Many Hutus simply “disappeared,” their bodies never recovered.<sup>109</sup> There was talk of mass graves and the killings of moderate Tutsis.<sup>110</sup> When the violence ended the Tutsi ruled gov-

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any group has been dictated by political considerations, such as the necessity for quelling an insurrection or maintaining public order.” *Id.* at 28-9.

<sup>97</sup> Burundi, CIA World Fact Book, at <http://www.cia.gov/cia/publications/factbook/geos/by.html> (last updated May 11, 2004).

<sup>98</sup> Rene Lemarchand, *The Hutu-Tutsi Conflict in Burundi*, in *GENOCIDE AND HUMAN RIGHTS* 195, 196 (Jack Nusan Porter ed., University Press of America, 1982).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* See also Gregory Mthembu-Salter, *Burundi*, Self-Determination in Focus at [http://www.selfdetermine.org/conflicts/brundi\\_bodt.html](http://www.selfdetermine.org/conflicts/brundi_bodt.html) (last modified June 17, 2002).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Lemarchand, *supra* note 98, at 199-200.

<sup>104</sup> Mthembu-Salter, *supra* note 100.

<sup>105</sup> *Id.*

<sup>106</sup> Lemarchand, *supra* note 98, at 203-04.

<sup>107</sup> *Id.* at 204.

<sup>108</sup> *Id.* at 204-05. “The repression took on the qualities of a selective genocide directed at all the educated or semi educated strata of Hutu society.” *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

ernment had slaughtered an estimated 100,000 persons out of 3.5 million, nearly 3.5 percent of Burundi's total population.<sup>111</sup>

Nonetheless, the U.N. has done very little to stop the violence. In Rene Lemarchand's article, "The Hutu-Tutsi Conflict in Burundi", he remarks upon the timidity of the U.N. and the failure of the world's nations to get involved.<sup>112</sup> Though there had been talk of establishing "a foreign presence" in the region to try and quell the violence, the U.N. only sent in two–five person missions, seemingly indicating its level of commitment to the conflict.<sup>113</sup> Lemarchand attributes such inaction to the fact that the crisis only involved the killings of Hutu and Tutsi, thus making it, in the eyes of the U.N., a domestic matter with no real threat to international security.<sup>114</sup> The conflict in Burundi therefore "ranked too far low in the scale of international priorities to justify anything more than a pro forma intervention."<sup>115</sup> Lemarchand notes that even the theft of UNICEF Land Rovers for the purpose of transporting Hutus to their deaths, did not raise the ire of the U.N.<sup>116</sup>

African nations were no more helpful in trying to stem the violence. Despite the presence of Hutu and Tutsi exiles and sympathizers in neighboring Rwanda, Tanzania, and Zaire, member states belonging to the Organization of African Unity (OAU) argued that the Burundi conflict was essentially a domestic one and therefore any outside involvement would be improper.<sup>117</sup> Yet Lemarchand hypothesizes an alternative motive for the OAU's inaction. Believing that many African nations saw parallels between their own internal socio-political problems and those plaguing Burundi, Lemarchand asserts that the African nations did not want to do anything that would "establish a precedent that might prevent . . . [them] . . . from dealing with such crises by means of . . . [their] . . . own choosing."<sup>118</sup> Therefore the OAU adopted a resolution which more or less left peace efforts in the hands of the Tutsi government.<sup>119</sup>

As for the West, according to Lemarchand, "key figures in the Western diplomatic corps were not even on speaking terms with each other[.]" therefore making it difficult for Western nations to reach any real agreement on how to handle the crisis.<sup>120</sup> The absence of a political or economic interest in Burundi also apparently influenced their decision to not get involved in the crisis:

<sup>111</sup> *Id.* at 195.

<sup>112</sup> *Id.* at 215.

<sup>113</sup> *Id.* at 216.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 215.

<sup>118</sup> *Id.* at 217.

<sup>119</sup> *Id.* at 216. ("[T]he wording of the resolution adopted at the OAU Summit in Rabat in late June 1972 strikes one as little short of astounding, amounting in effect to a message of support for Micombere: 'The Council of Ministries is convinced that, thanks to your saving action, peace will be rapidly reestablished, national unity consolidated and territorial integrity preserved.'") *Id.*

<sup>120</sup> *Id.* at 215. ("Whereas North Korea and China were the only powers outside Africa to officially support the [government] regime, the Soviets showed no compunctions about signing the Western note of

## Heartbreak in Darfur

Reflecting on the appalling events of 1972 one journalist was prompted to ask: "does an international conscience exist?" The answer given by a Western diplomat sums up the dilemma: 'Nobody wants to start up another fuss in a faraway country if personal interests are not involved.' . . . The sad truth is that Burundi is too far away, too exotic, too small, in short too marginal in terms of the priorities set by international diplomacy to elicit concern or compassion among Westerns.<sup>121</sup>

When confronted with accusations that its counter-attack during the political uprising constituted genocide, the Burundi government justified its actions on political grounds.<sup>122</sup> The government argued that such a counter-attack was necessary to quell the insurrection and suppress political opposition.<sup>123</sup> Again the Genocide Convention was used not to protect targeted human populations unjustly slaughtered but instead to insure that their murderers would not face liability.<sup>124</sup>

This is not to suggest that sovereign nations should be denied the right to determine how best to handle their own domestic affairs. It is a commonly accepted principle, that sovereign territories have the "duty to maintain law and order."<sup>125</sup> However when governments, in their quest to maintain law and order, employ methods that create more turmoil than not; when governments aim to achieve peace through violence, death and intimidation; when governments expect unarmed civilians to bear the brunt of political uprisings for no other reason than their political, familial, ethnical, and/or economic affiliation with; when governments move beyond the realm of governance and into the realm of mass slaughter; it raises the question of whether such governments should be left to their own devices.

Yet, as Kuper asserts, the exclusion of political groups under the Convention, has done exactly that. By honoring the principle of territorial sovereignty, Kuper argues that the Convention has inadvertently upheld a sovereign state's perceived right to commit genocide on its own people, albeit on political grounds—"to maintain law and order. . . to preserve the territorial integrity of the state."<sup>126</sup> Such a—hopefully—unintended endorsement has colored the reaction and commitment of the U.N. to domestic conflicts gone amok:

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protest, in part because differences of opinion among Western diplomats made the note sound platitudinous, if not downright hypocritical. With the exception of Belgium, the dominant impression one gains of Western diplomacy during the crisis is one of almost total indifference in the face of an unrelieved tragedy.") *Id.*

<sup>121</sup> *Id.* at 217.

<sup>122</sup> ITS POLITICAL USE, *supra* note 42, at 29.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* ("At meetings in 1973, the Sub-Commission on Prevention of Discrimination and Protections of Minorities forwarded to the Commission on Human Rights a complaint against Burundi of consistent patterns of gross violations of human rights. But when the Commission met in 1974, it effectively shelved the matter by appointing a new working party to communicate with the government by Burundi, and to report back to the next annual meeting of the Commission.") *Id.* at 164.

<sup>125</sup> *Id.* at 161.

<sup>126</sup> *Id.*

And though the norm for the United Nations is to sit by, and watch, like a grandstand spectator, the unfolding of the genocidal conflict in the domestic arena right through to the final massacres, there would generally be concern, and action to provide humanitarian relief for the refugees, and direct intercession by the Secretary-General.<sup>127</sup>

Such action is inadequate in dealing with today's domestic conflicts, especially when governments seem to resort more and more to mass carnage in their quest to retain power. Yet, as Kuper so eloquently put it, humanity is too often sacrificed for the benefit of the Territorial State.<sup>128</sup> Given the diverse realities of human life where ethnic issues can quickly become political and political ones can just as easily take on an ethnic, racial, or religious slant, such a sacrifice is all too pervasive and too great.

### Conclusion

The failure of the Convention to afford protection to political and economic groups renders it an empty gesture providing false hope for today's victims of anti-group atrocities. By leaning too heavily on the particulars of the Jewish Holocaust and Ralph Lemkin's definition of genocide, the Convention has left millions of people vulnerable to governmental abuses. Conversely, by neglecting to apply the Convention even in those circumstances where application is by law proper, many are left wondering if the commitment "to prevent and punish genocide" is fact or pure fiction.

Therefore, if the Convention is to have any force it must apply to the realities and character of anti-group atrocities as they exist today. The "rules" of genocide have changed. No longer will perpetrators of genocidal crimes be as ostentatious and industrial in their genocidal designs as in the case of Hitler, and the Hutus of Rwanda. No longer will they publicly admit to harboring ethnic, racial, or religious resentments to the point of murderous insanity. And no longer will they kill on ethnic, racial, or religious grounds alone. Perpetrators of genocidal acts have become more sophisticated, more cognizant of how far they can go in their domestic affairs before raising the suspicions and outrage of the international community. Therefore if the Convention is to have any real force and act as an effective deterrent for anti-group atrocities, four principles must be applied: (1) members of the U.N. General Assembly must realistically evaluate their own goals, whether they be political or economic, domestic or international, and determine if they mesh well with basic human decency and the humanitarian principles they themselves extol; (2) the definition of genocide must be expanded to include political groups as one of the protected parties under the Convention; (3) as Alexander Greenawalt argues, the intent element must also undergo a revision, extending liability to "those who may personally lack a specific genocidal purpose but who commit genocidal acts while understanding the destructive conse-

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 183.



## Heartbreak in Darfur

quences of their actions;”<sup>129</sup> and (4) the international community must affirm and not fear the famous question, “Am I my brother’s keeper?”<sup>130</sup>

This final admonishment is perhaps the most important in light of the rise in incidents of domestic and international terrorism. Long dead are the days of sapping the strength of others for self-interested purposes. The fear and threat of reprisal is real and devastating. If the international community truly desires to maintain international security and domestic peace, each nation and government must ensure that it is not itself committing acts which compromise such security and peace. It is very noble to enact laws aimed at holding communities to a higher standard, however if such laws fail to register in the reality, they become little more than empty promises.

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<sup>129</sup> Greenawalt, *supra* note 32, at 2259.

<sup>130</sup> *Genesis* 4:9.