

## **REDEFINING GENOCIDE: THE INTERNATIONAL CRIMINAL COURT'S FAILURE TO INDICT ON THE DARFUR SITUATION\***

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**Abstract:** While the Appeals Chambers of the International Criminal Court reversed the Pre-trial Chamber I's decision not issue a warrant of arrest in respect of the crime genocide against President Omar Al-Bashir of Sudan on the basis of existence of genocide intent, this article argues that the present definition of genocide is too narrow in scope. It excludes a significant category of victims groups, which undermines the prohibition of the crime of genocide. The crime of genocide ought to be redefined in order to protect all victim groups.

**Keywords:** *genocide; special intent (dolus specialis); crimes against humanity; extermination; international human rights, international humanitarian law*

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"The law must be stable, but it must not stand still"  
- Roscoe Pound, (Introduction to the Philosophy of Law, 1922).

### **Introduction**

The Appeals Chamber of the International Criminal Court (ICC) on April 3<sup>rd</sup> 2010 reversed the Pre-Trial Chamber I's (Chamber) decision that rejected the Prosecutor's request to issue a warrant of arrest for the arrest of President Omar Al-Bashir of Sudan on genocide. The Chamber, however, issued a warrant of arrest for two other crimes; crimes against humanity and war crimes alleged to have been committed against the members of the Fur, Masalit and Zaghawa groups of Darfur Sudan. The Appeals Chamber agreed with the minority opinion of Judge Ušacka on the standard of proof requirement under Article 58 of the ICC Statute.<sup>1</sup> The only standard of proof required for a successful issuance of a warrant of arrest under the Statute requires an inference of genocidal intent that is reasonable, but not one that provides a reasonable conclusion based on the evidence produced.<sup>2</sup>

The present definition of genocide was a political compromise reached in 1948 in order to accommodate the concerns of the delegates of Great Britain and the former Soviet Union Republics who argued that the inclusion of political and other groups would weaken the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 1948 (Kuper, 1982). In other words, the inclusion of political and other groups in the definition of genocide would have discouraged member states from signing and finally ratifying the Genocide Convention, which is true, since it took the United States of America 40 years to ratifying the convention (Powers, 2002).

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<sup>1</sup> See Article 58 of the ICC Statute <http://untreaty.un.org/cod/icc/statute/romefra.htm> (Last visited January 4, 2011)

<sup>2</sup> See Dissenting Opinion, para 32, 34 <http://212.159.242.181/iccdocs/doc/doc644001.pdf> (Last visited January 6, 2011)

In this article I argue that the International Criminal Court's (ICC) failure to indict the President of Sudan, Omar Al Bashir (defendant) with genocide lies solely on the Rome Statute's adopted definition of genocide.<sup>3</sup> Genocide requires that the acts, (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, and (e) forcibly transferring children of the group to another group, be committed against a racial, religious, national or ethnic group and be done with the specific intent (*dolus specialis*) of destroying the group in whole or in part "as such."<sup>4</sup> It is my argument that the exclusion of targeted groups such as women, social or economic classes, cultural and political groups undermines the adjudication of the crime of genocide and hence catalyzing impunity in preventing and prosecuting genocide, the gravest crime against humanity, as its gravity aims at the systematic extermination of human groups. The Rome Statute that established the ICC adopted the definition of genocide under the Genocide Convention, which I contend has definite defects. The first obvious defect is the protected groups. The protected groups are limited to national, ethnical, racial or religious and do not include social or political groups. The second defect is the element of intent, which requires "specific intent" (*dolus specialis*), a standard that is ambiguously difficult to meet. The Trial Chamber's dissenting opinion of Judge Ušacka and international jurisprudence on *dolus specialis* is evidence of this difficulty. I therefore join the debate over the proper definition of genocide; a debate that will definitely continue unabated for years to come.

The United Nations Commission of Inquiry (CoI) on Darfur was given a mandate by the United Nations Secretary General to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties and to determine whether or

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<sup>3</sup> Article 6 of the ICC Statute is verbatim to Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

<sup>4</sup> Article 6 of the Rome Statute, 1998.

not acts of genocide have occurred, and to identify the perpetrators of such violations so that they should be found responsible and held accountable to the atrocities.<sup>5</sup> Section II of the Report entertained the issue whether or not genocide was being committed in Darfur and concluded that the Government of Sudan has not pursued a policy of genocide, and stated that although there may have been genocidal intent in the part of individuals of the Sudanese government, a court of competent jurisdiction should examine the evidence and make a legal finding if such is the case.<sup>6</sup>

To this juncture my discussion proceeds in five sections. Section II discusses the genesis of the definition of genocide, a discussion on how this definition has evolved. Section III discusses the variations on the definition of genocide. Section IV provides an analysis on Judge Ušacka's dissenting opinion on the prosecutor's application for a warrant of arrest against the defendant as a foundation on this article's argument for a need of redefining genocide as the opinion provides a progressive interpretation of the definition of genocide. Section V provides an analysis on the jurisprudence on *dolus specialis* and how the *ad hoc* tribunals have dealt with this underlining element in the definition of genocide. This section describes why Article 6 of the Statute is given such an interpretation and how it should be interpreted. Section VI concludes the discussion by summing up important issues and provides a challenge on the way forward.

### **The genesis of the definition of Genocide**

The negotiation history of the 1948 Convention reveals the intention of the drafters of the definition of genocide. They intended a flexible and progressive definition that will meet the evolving demands of the time.<sup>7</sup> The two unprotected victim groups, social and

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<sup>5</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 (2004) of September 18, 2004, p.2.

<sup>6</sup> *Id.*, at pp. 124 – 132.

<sup>7</sup> See United Nations Report on the Study of the Question of the Prevention and Punishment of the Crime of Genocide, E/CN.4/Sub. 2/416, July 4, 1978, pp. 13 – 24 particularly paragraphs. 46 – 91; See also Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by B.

political were included in the original draft of the Convention; however the former U.S.S.R. opposed to the inclusion of these groups. The Russian representative argued that the inclusion of political groups was not in conformity with the scientific definition of genocide and would in practice, distort the perspective in which the crime should be viewed and impair the efficacy of the Convention, giving the notion an extension of meaning contrary to the fundamental conception of genocide as recognized by science (Kuper, 1981, p.25).

Not all delegates accepted the Russian delegation's contention, although it ended up being the adopted definition under the Genocide Convention. The Haitian representative cautioned the delegates on the consequences of excluding social and political groups in the definition stating, "[s]ince it was established that genocide always implied the participation or complicity of Governments, that crime would never be suppressed. The government which is responsible for committing genocide would always be able to allege that the extermination of any group had been dictated by political considerations such as the necessity for quelling an insurrection or maintaining public order" (Kuper, 1981, p.28).

### **Variation of definitions of genocide**

Thus the present narrow definition of the victim groups which lies at the heart of the genocide convention was the direct result of a political compromise based on the fear that the inclusion of social and political groups would expose nations to external intervention in their domestic concerns, and might endanger the future of the convention because many States would be unwilling to ratify it. Since there was a sense that the defined groups under Article II would not provide the necessary intended purpose, that is, to protect all victim

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Whitaker, Review of Further Developments in Fields with which the Sub-Commission has been concerned, U.N. ESCOR, Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 38<sup>th</sup> Sess., U.N. Doc. E/CN.4/Sub. 2/1985.

groups, several scholars have come up with alternative definitions of genocide that intend to include all the victim groups.

Drost opined that the omission of political and other groups from the genocide convention would be used by governments to exploit this obvious loophole. Rejecting the notion that the victims of genocide were limited to racial, religious, national, and ethnic groups, he proposed that the United Nations redefine genocide as "the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such" (Drost, 1959, p.125).

Horowitz amended the definition of genocide to emphasize "a structural and systematic destruction of innocent people by a state bureaucratic apparatus" (Horowitz, 1976). In the 1980s, Fein developed a broader and deeper sociological definition of genocide and concluded that "genocide is a 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" (Fein, 1988). In this definition Fein included political and social groups as victims and excluded deaths resulting from warfare.

Chalk elucidates recent literature pointing to the importance assigned to intentionality. "A genocidal society exists when a government and its citizens persistently pursue policies which they know will lead to the annihilation of the aboriginal inhabitants of their country. Intentionality is demonstrated by persistence in such policies whether or not the intent to destroy the aboriginal groups is verbalized" (Andreopoulos, 1994, p.53).

Wallimann and Dobkowski argue that the emphasis on *intentionality* in the definition of genocide is antiquated in the present age because individuals are no longer dominated by the will of given people but market mechanisms, bureaucracies, distant decision making by committees and parliaments. They state that "in the modern age, the issue of intentionality on the societal level is harder to locate because of the anonymous and amorphous structural

forces that dictate the character of our world” (Andreopoulos, 1994, p.54). The idea that “only intentional or planned massive destruction of human lives should be called genocide leads to the neglect of those processes of destruction which, although massive, are so systematic and systemic, that they appear so ‘normal’ to the extent that most individuals involved at some level of the process of destruction may never see the need to make an ethical decision or even reflect upon the consequences of their action (Andreopolus, 1994, p.54).

In Kuper’s (1981) book *Genocide*, he gives an analytical discussion on the genocidal process and motivations that emerge as challenges in defining genocide. Kuper’s analysis of modern genocides clusters the motives of the perpetrator around three categories: (1) genocides designed to settle religious, racial, and ethnic differences; (2) genocides intended to terrorize a people conquered by a colonizing empire; and (3) genocides perpetrated to enforce or fulfill a political ideology. Kuper is worried about the increasing frequency of genocidal events in the modern period. Since modern genocides, as he defines them, usually occur within nation-states that have the character of plural societies, the creation of new multiethnic states during the period of colonization and decolonization becomes particularly significant for his analysis.

In his later book, *The Prevention of Genocide* (1985) Kuper laments the critical omission of political mass murder in the definition of genocide under the genocide convention and brings it into his genocide analysis two main groups: domestic genocides arising on the basis of internal divisions within a society, and genocides arising in the course of international warfare. He lists four types of domestic genocide, which are: (1) genocides against indigenous peoples; (2) genocides against hostage groups, a category that includes the Holocaust; (3) genocide following upon decolonization of a two-tier structure of domination; and (4) genocide in the process of struggles by ethnic or racial or religious groups for power or secession, greater autonomy, or more equality. Under international

warfare Kuper includes the United States' nuclear destruction of Hiroshima and Nagasaki, the Chinese invasion and occupation of Tibet, the Indonesian invasion and occupation of East Timor, and the American war in Vietnam amounting to genocide (Kuper, 1985).

### **Judge Ušacka's dissenting opinion on the Bashir ruling**

Even though the majority opinion on the Bashir decision ruled that the defendant is criminally responsible for war crimes and crimes against humanity and that a warrant of arrest should be issued for these crimes, Judge Ušacka's minority opinion invites a discussion on her reasoning on the finding of genocide. Judge Ušacka disagrees with the majority and is satisfied that the defendant possessed genocidal intent and thus criminally responsible for genocide. This section dives into the opinion and divulges the analysis behind the reasoning, which is in my opinion a progressive interpretation of the definition of genocide. The opinion raises three issues in determining whether Bashir is criminal responsible under Article 6 of the Statute for (1) Genocide by killing,<sup>8</sup> (2) Genocide by causing serious bodily or mental harm,<sup>9</sup> (3) Genocide by deliberately inflicting conditions of life calculated to bring about destruction of the group.<sup>10</sup> For the purposes of proving genocidal intent the Elements of Crimes<sup>11</sup> (EoC), provides first, for proof of a contextual element to establish that a genocidal conduct occurred "in the context of a manifest pattern of similar conduct" directed against a protected group, or that the conduct "could itself

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<sup>8</sup> Article 6(a) of the Rome Statute.

<sup>9</sup> Article 6(b).

<sup>10</sup> Article 6(c).

<sup>11</sup> Pursuant to article 9, the Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21 and the general principles set out in Part 3, are applicable to the Elements of Crimes.



effect such destruction [of the group]”.<sup>12</sup> A second common element requires proof that the victims are members of the protected group, national, ethnical, racial or religious.<sup>13</sup> A third common element requires the intention to “destroy, in whole or in part, the national, ethnical, racial and religious group, as such.”<sup>14</sup>

On the first issue, whether there was reasonable ground to believe that each of the common elements was met, Judge Ušacka ruled that the contextual element had been met. In interpreting the term “manifest pattern” the judge employed the ordinary meaning (or plain meaning) as provided under Article 31(1) of the Vienna Convention on the Law of Treaties<sup>15</sup> and stated that the term referred to a systematic, clear pattern conduct in which the alleged genocidal conduct occurs. On the other hand the majority interpreted the same term to mean that “the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or part thereof.”<sup>16</sup> Judge Ušacka reasons that this interpretation by the majority converts the term into a “result-based” requirement which duplicates the purpose of the second part of the sentence, “or was conduct that could itself effect such destruction.”<sup>17</sup> The evidence produced by the prosecution showed the existence of a widespread and systematic attack on members of the Fur, Masalit and Zaghawa population, in which the learned Judge found to satisfy the

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<sup>12</sup> Separate and Partly Dissenting Opinion of Judge Anita Ušaka, March 4, 2009, p. 7, available at <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> (Last visited May 19, 2009).

<sup>13</sup> EoC, Articles 6(a)(2), 6(b)(2), and 6(c)(2), available at [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf) (Last visited May 19, 2009).

<sup>14</sup> EoC, Articles 6(a)(3), 6(b)(3), and 6(c)(3) available at [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf) (Last visited May 19, 2009).

<sup>15</sup> “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

<sup>16</sup> Paragraph 124 of the Majority decision on the Prosecutor’s application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, available at <http://www2.icc-cpi.int/iccdocs/doc/doc639096.pdf> (Last visited May 19, 2009).

<sup>17</sup> Elements of Crimes, Article 6(a)(4).

“manifest pattern” paradigm and hence consistent with the statutory definition of genocide as currently defined.

On the second issue whether the victims are members of the protected group, the Judge ruled that the Fur, Masalit and Zaghawa were a stigmatized group by the perpetrator and hence qualified as a protected group that falls within the definition. The prosecution’s evidence shows that the Fur, Masalit and Zaghawa were targeted by the Government of Sudan (GoS) because they were accused of being rebels, or supporting the rebels fighting the GoS. A prosecution witness testified that when asked who he had to fight, he responded, “[w]hat he said is I do not want any, one single village for the Zurgas in Darfur.”<sup>18</sup> The Fur, Masalit and Zaghawa are targeted as a unitary as “African tribes” who are racially distinct from the “Arab tribes” the perceived perpetrators. The learned Judge henceforth defines the targeted population “as a single ethnic group of the African tribes who make up a protected group.”<sup>19</sup>

On the third issue, whether the defendant had intention (*dolus specialis*) to destroy, in whole or in part, the protected groups, Judge Ušacka held that there was reasonable ground to believe that the defendant had genocidal intent. A finding of *dolus specialis* is particularly an intricate legal endeavor since the perpetrator may not explicitly show genocidal intent, which is normally inferred by way of speech. According to Judge Ušacka’s opinion, four elements need to be proved before a finding of *dolus specialis* is affirmed: (1) an accused possessed intent, that is, the intent consisted of the intent to destroy; (2) the intent was to destroy a group or a substantial part thereof; and (3) the intent to destroy a group consisted of the intent to destroy the group as such.

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<sup>18</sup> Witness Transcript, DAR-OTP-0147-0071 at 0114, lines 1457-1463. The term “Zurga” is a racial slur for non-Arab peasants derived from the Arabic word for black), and the inhabitants of the urban centers.

<sup>19</sup> Dissent opinion, p. 13.

First, the existence of intent, as I have stated above, may be manifested by way of communication, for instance, words and utterances used by the offender-perpetrator. The prosecution in this case, submitted evidence to this effect. One witness reported that;

“In April 2003, the President, Al-Bashir, went to AL FASHER and publicly gave orders to the military to eliminate the opposition and leave no survivors .... Having received orders from their chief, the military then went to African villages and left nothing behind. Together with the *Janjaweed*, they burned houses, killed small children and raped girls. They did not attack the opposition or rebels even though they knew where they were. These rebel bases were well-known to people in the area and the Government. They only attacked civilian villages which could not inflict damage to the military”.<sup>20</sup>

A number of witnesses reported that code words were used to refer to the victims' race. During one of the attacks the *Janjaweed* insulted the victims by calling them wives and mothers of *Toro Bora* (rebels) and calling them black *Nubas*. They also told their victims that they had permission from the government to wipe them out, and kill them.<sup>21</sup> Some secret memorandum also referred to “intent” as the National Islamic Front (NIF) planned to undermine and exterminate the Fur so that Darfur remains safe.<sup>22</sup> Further intent can be implied from the planning and mobilization supported by the Khartoum government, by arming the civilian Arab, Gimir and Tama populations that are not the African populations of Fur, Masalit and Zaghawa. A witness testified that the distribution of arms was restricted to Arabs, Tama and Gimir. The Bashir government recruited and trained the Arabs with the coordination of the police. “The GoS believed that the strongest rebel component was the Zaghawa tribe and that therefore the Zaghawa tribe had to be destroyed ... in similar fashion the Government believed that the Masalit and Fur supported the rebels and that they therefore had to be driven out of their lands. This was a hidden agenda which only obvious from the effect on the ground in Darfur, as told to me by the civilian population,

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<sup>20</sup> Witness Statement, DAR-OTP-0097-0619 at 0624, and paragraph 21.

<sup>21</sup> Witness Statement, DAR-OTP-0095-0049 at 0076-0077 at paragraph 128.

<sup>22</sup> Witness testimony in Darfur Dotting The ‘i’s And Crossing the ‘t’s by Professor Sulayman Hamid, DAR-OTP-0150-0105 at 0118.

military colleagues and fellow detainees".<sup>23</sup> The prosecution provided the Trial Chamber with evidence that suggested *modus operandi* as evidence to show the perpetrator's intent. For example, the evidence demonstrated that the acts of the perpetrator were consistent and systematically directed against a protected group. A witness provided this account of the events;

"All the government soldiers arrived in seven camouflaged-colored Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them. The *Janjaweed* were on horseback and camelback. Some of the *Janjaweed* were on foot. They started firing randomly. At first, nobody thought it was an attack because of the message the soldiers had delivered about 'Azzakat' earlier that morning. When the attackers got closer to town, they started killing people and set fire to the huts ... 3 combat aircrafts also arrived and started bombing the town. There were 2 Antonovs and 1 Hercules".<sup>24</sup>

Elements showing the breadth and scale of attacks against the Fur, Masalit and Zaghawa increase the finding of genocidal intent (*dolus specialis*). The attacks against this protected group were widespread as reported by NGOs. The International Federation for Human Rights reported that in March 5, 2004, persons belonging to the Fur tribes were arrested in Zaray, Fairgo, Tairgo and Kaskildo and were summarily executed in Delaij, Wadi Salih province and in April 2004, the bombing of Mahajrea village killed four civilians, belonging to the Zaghawa tribe. Most of these killings have been accompanied by looting and burning of properties. Many like cases have been reported, as well as cases of arbitrary arrests.<sup>25</sup> All this solidarity was towards building a nucleus of the Arabic, Islamic congregation.<sup>26</sup> All the above activities show (1) an existence of execution of a targeted group, (2) a dissemination of an extremist ideology, and (3) the screening and selection of victims by the offender-

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<sup>23</sup> Witness Statement, DAR-OTP-0125-0665 at 675, paragraphs 55, 56.

<sup>24</sup> Witness Statement, DAR-OTP-0088-0060 at 0064-0072, paragraph 21.

<sup>25</sup> Judge Ušacka's Dissenting Opinion at paragraph 52.

<sup>26</sup> Witness Statement, DAR-OTP-0156-0164 at 0178, paragraph 58.

perpetrator on the basis of their membership in the protected group, which show the formation of intent.<sup>27</sup>

Second, the intent to destroy a group could be implied through the extent and nature of the intended destruction. In order to show genocidal intent, there must be intent to destroy the group in a biological or physical sense.<sup>28</sup> The prosecution provided evidence that showed the perpetrator's intent to physically destroy the victim group. Evidence was produced from an NIF report that stated the intent to destroy, thus;

"The Revolution has decided to bypass this tribe, (even though) it occupies a strategic place in dissemination of the concepts of the Islamic Movement to Western and Central Africa. It also occupies an area considered to be the Movement's last line of defense in the event of its being cornered. The Movement has thus bypassed this tribe and undertaken to reinforce other powers in the States of Greater Darfur. It has invited heavily armed Chadian tribes into Darfur as well as ... promoting divide and rule amongst the elements making up the Fur Sultanate (Fur, Tunjur, etc). The Movement will not feel safe until this tribe is contained or exterminated and the Western front made secure ....<sup>29</sup>

Several other witnesses testified that the GoS planned to wipe out the rest of the Zaghawa who were still in the Darfur area. The other two tribes, Fur and Masalit were viewed by the GoS as supporting the rebels and so they were also to be destroyed.<sup>30</sup> The learned judge in her dissenting opinion clearly reasoned by her expansive approach, that the physical destruction with genocidal intent is different from the physical destruction with the intent to destroy rebels and sources of support for rebels to the extent that they are considered combatants. Citing Protocol I of the Geneva Conventions (Additional Protocol I), civilians do not lose their protected status and become legitimate targets until they participate in

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<sup>27</sup> Judge Ušacka's Dissenting Opinion, paragraph 46.

<sup>28</sup> *Id.* at paragraph 58.

<sup>29</sup> The Islamic Movement and the Fur Tribe Report in Darfur Dotting the 'i's And Crossing the 't's by Professor Sulayman Hamid Al Hajj, DAR-OTP-0150-0105 at 0108 and 0115 – 0118.

<sup>30</sup> Witness Statement, DAR-OTP-0079-0244.

hostilities as combatants.<sup>31</sup> The example of Rwanda genocide affirmed that groups who are subjected to genocide are often targeted on the basis of allegations that they posed a threat to the offender group. The Hutu perpetrators accused the members of the Tutsi ethnic group of supporting the then rebels (Rwanda Patriotic Front (RPF)). The perpetrator-government's targeting of Tutsi suspected of supporting the RPF rebels was considered evidence of *dolus specialis*, and not evidence showing intent to target rebels.<sup>32</sup> Judge Ušacka therefore disagrees with the Majority opinion that even if the evidence indicated that some members of the Fur, Masalit and Zaghawa assisted the rebels, such evidence does not legitimize estimation that the entire victim group was a lawful target of the offender.<sup>33</sup>

Third, the existence of intent to destroy a group, as such, is evaluated in the context of being a substantial part of the group.<sup>34</sup> However, no quantitative threshold of victims is necessary to establish genocidal intent. Citing *Krstić*, the learned Judge opined "[t]hat if only a part of the group is targeted, the proportion of the targeted group in relation to the protected group as a whole, as well as the prominence of the targeted group within the protected group may be relevant to a determination of substantiality".<sup>35</sup> The prosecution submitted evidence that showed that (1) between 2,705 and 3,413 people were killed in connection with the nine attacks on predominantly Fur villages; (2) approximately 530 people were killed directly in connection with three attacks on predominantly Masalit village, and (3) approximately 925 people were killed during the five attacks on predominantly Zaghawa villages.<sup>36</sup> The prosecution also submitted the United Nations High Commission for

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<sup>31</sup> Id. note 27 at paragraph 64.

<sup>32</sup> Id. paragraph 65.

<sup>33</sup> Id. paragraph 66.

<sup>34</sup> *Prosecutor v. Krstić*, ICTY Case No. IT-98-33-T.

<sup>35</sup> Judge Ušacka's Dissenting opinion, paragraph 67.

<sup>36</sup> Id. at paragraph 68.

Refugees (UNHCR) data that showed that 97 percent of predominantly Fur and 85 percent of predominantly Masalit villages within the area of three administrative units, Habila, Wadi Saleh and Mukjar were attacked.<sup>37</sup> The attacks directed to the Fur, Masalit and Zaghawa qualified the words “as such” that “reemphasizes spirit behind the prohibition of genocide, the destruction of the protected group itself, rather than the destruction of its individual members”.<sup>38</sup> The CoI report found that;

“In a vast majority of cases, victims of the attacks belonged to the African tribes, in particular the Fur, Masalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations.”<sup>39</sup>

A witness narrated the course of events that transpired in their village, which corroborates evidence that “African tribes” were classified according to their membership in the group, prior to the commission of a crime;

“I had a shop in the market of New Bendisi, and the men destroyed ten barrels of oil and looted *kebkebay* from it. They also took sugar and tea and other things from my shop. The looting took place right in front of us, so I could see everything. When the Fursan were looting, some other people were assisting them to identify the shops which had something to loot. They had placed in advance some special marking on the shop doors to identify the ones which were not to be looted. Our shops were in one line and there was one man from the Mararit tribe whose shop had a piece of green cloth hanging from the door hinge. The shop was not looted. I saw later that all other shops which were not looted had similar signs. The collaborators were from the Mararit and the Tama tribes.”<sup>40</sup>

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<sup>37</sup> Id. at paragraph 69.

<sup>38</sup> Id at paragraph 70.

<sup>39</sup> Commission of Inquiry on Darfur Report, paragraph 638, available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (Last visited May 21, 2009). Judge Ušacka’s Dissenting Opinion, paragraph 74.

<sup>40</sup> Witness Statement, DAR-OTP-0119-0503 at 0520-0523 at paragraphs 76 – 87.

With this analysis Judge Ušacka concluded Bashir possessed the requisite intent to destroy the ethnic group of the "African tribes" as such.<sup>41</sup>

Having tackled the *mens rea* element of the crime of genocide the learned Judge went ahead to discuss the *actus reus* of genocide. The issues analyzed according to the charges the prosecution brought forthwith, was an inference of (1) genocide by killing, contrary to article 6(b) of the statute; and (3) genocide by deliberate infliction on the group conditions of life calculated to bring about the physical destruction of the group, contrary to article 6(c) of the statute.

On the first issue, the learned Judge cited the Majority's finding that there were grounds to believe that mass killings took place in the context of a widespread and systematic attack on the Fur, Masalit and Zaghawa of Darfur and that murders took place in the context of the same widespread and systematic attack.<sup>42</sup> She thus concluded "that members of the 'African tribes' were killed as part of the manifest pattern of conduct outlined in the Majority Decision within the meaning of article 6(a) of the statute".<sup>43</sup>

On the second issue, the learned Judge analyzed the prosecution evidence that showed that members of the target group were subjected to serious bodily or mental harm, including acts of rape, torture and forcible displacement that occurred within the same context of the manifest pattern of conduct. To support their application the prosecution cited *Akayesu* that stated that cruel treatment, torture, rape and forcible deportation may constitute serious bodily or mental harm.<sup>44</sup> The Trial Chamber also noted and held that there were reasonable grounds to believe that acts of torture, forcible transfer, and rape occurred in the context of a widespread and systematic attack on the Fur, Masalit and

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<sup>41</sup> Judge Ušacka's Dissenting Opinion, paragraph 76.

<sup>42</sup> *Id.* at paragraph 92.

<sup>43</sup> *Id.* at paragraph 93.

<sup>44</sup> *Prosecutor v. Akayesu*, ICTR Case No. ICTR-96-4-T, Trial Judgment, September 2, 1998, paragraph 504.



Zaghawa of Darfur.<sup>45</sup> On the basis of this evidence the learned Judge concluded “that members of the “African tribes” were subjected to serious bodily harm as a part of the manifest pattern of conduct outlined in the Majority Decision within the meaning of article 6(b) of the statute”.<sup>46</sup>

On the third issue, whether genocide by deliberate infliction on the group conditions of life calculated to bring about the physical destruction of the group, the learned Judge, taking to account the prosecution’s evidence, reasoned that the conditions in the harsh terrain in Darfur, in which water and food are naturally scarce by themselves were intolerable conditions. The GoS destructive campaign against the Fur, Masalit, and Zaghawa forced this targeted group to find their way to internally displaced people camps where the GoS led by Bashir made it difficult for humanitarian assistance to reach them. And hence they were deprived of “means of survival, which included food supplies, food sources and shelter, in addition to water supplies and sources.”<sup>47</sup> The learned Judge concluded that there was sufficient evidence to find that the groups’ means of survival were systematically destroyed to bring about the physical destruction of the “African tribes”.<sup>48</sup>

### **Jurisprudence on *Dolus Specialis***

This section is a perfect follow-up to Judge Ušacka’s dissenting opinion on her analysis on the finding of genocide, that is, the criminal acts committed by Bashir amounted to genocide. The *ad hoc* tribunals’ jurisprudence on genocidal intent is a relevant discussion in this article even though their decisions are not binding to the Trial Chamber. Article 6 of the statute that provides the intent prong - *dolus specialis* as was discussed in the

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<sup>45</sup> Majority Decision, paragraphs 104 – 108.

<sup>46</sup> Judge Ušacka’s Dissenting Opinion, paragraph 96.

<sup>47</sup> *Id.* at paragraph 98.

<sup>48</sup> *Id.* at paragraph 102.

deliberations of the 1948 adoption of the Genocide Convention. The concerns had to do with problem of proving *dolus specialis*, which requires a subjective element that is often difficult to either prove and/or establish. The United Kingdom representative argued that its inclusion was completely useless and indeed dangerous, for its limitative nature would enable those who committed a crime of genocide to claim that they had not committed genocide since they lacked 'motive'. The requirement of 'intent' provides an easy means for evading responsibility (Kuper, 1981, pp.33-35). Despite the difficulty of proving *dolus specialis*, international jurisprudence on genocide has provided guidance on the legal standard to meet a *dolus specialis* finding. In *Prosecutor v. Rutaganda*, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) stated that *dolus specialis* is a key element of an intentional offense, an offense characterized by a psychological nexus between the physical result and the mental state of the perpetrator. The Chamber applied the reasoning in *Akayesu* in determining the offender's specific intent and stated thus:

"Intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber is of the view that the genocidal intent inherent in a particular act charged can be inferred from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act".<sup>49</sup>

The Trial Chamber in *Rutaganda* also cited the cases of *Kayishema and Ruzindana* Judgment that held that "[i]ntent can be inferred either from words or deeds and may be determined by a pattern of purposeful action. In particular, the Chamber considers evidence such as the methodical way of planning, the systematic manner of killing [...]".<sup>50</sup>

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<sup>49</sup> ICTR-96-T (6 December 1999) paragraph 60.

<sup>50</sup> *Id.* at paragraph 61.

The Trial Chamber at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Jelisić* case held that genocidal intent may be inferred from prior statements and acts of the defendant.<sup>51</sup> While the *Karadžić* and *Mladić* case held that the “general political doctrine that gave rise to the acts” and the “repetition of destructive and discriminatory acts” may imply genocidal intent.<sup>52</sup> The Chamber in this case further held that the perpetrators’ acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group ... committed as part of the same conduct infer genocidal intent.<sup>53</sup>

The above cited jurisprudence of the *ad hoc* tribunals provides us with the legal incite on determining *dolus specialis*, which could have been used by the Trial Chamber to indict the defendant with genocide. In brief, the genocide definition embodied under Article 6 of the Rome Statute defines genocide as, killing members of the group; causing serious bodily or mental harm to members of the group; imposing conditions on the group calculated to destroy it; preventing births within the group; and forcibly transferring children from the group to another group; *with intent to destroy a national, ethnical, racial or religious group as such*, should have been interpreted in the light of international case law on genocide as analyzed in Judge Ušacka’s dissenting opinion.

### Conclusion

The task of this article is not to discuss the distribution of punishment between the finding of war crimes and crimes against humanity on one hand and genocide on the other, as far as the ICC Bashir indictment is concerned. Rather this contribution is a critic on the

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<sup>51</sup> *Prosecutor v. Jelisić*, Case No. IT-95-10-T, ICTY Trial Chamber Judgment, December 14, 1999, paragraph 73.

<sup>52</sup> *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-R61 and IT-95-18-R61, paragraph 294.

<sup>53</sup> *Id.* at paragraph 84.

definition of genocide as a crime, a gravest crime against humanity. Some will argue that there is no need for a new definition of genocide that remedies the legal deficiencies that I have attempted to address in this article because the *ad hoc* tribunal decisions and Judge Ušacka's dissent ruled as they did by interpreting article 6 of the Statute. This argument fails to appreciate the nature of international adjudication and the non-observance of the principle of *stare decisis* that insures legal stability and predictability in most common law jurisdictions. This is the reason why an amendment that remedies those uncertainties of the definition of genocide as I have discussed in this article will cure the problem of statutory interpretation and that will bring about stability and predictability to the international legal system. It took a number of years after the Genocide Convention was open for signature, for member states to ratify this convention, for example, it took the United States, 40 years to ratify it. However, this should not be an excuse for amending article 6, since the ICC is an independent legal system that was "established to help end impunity for the perpetrators of the most serious crimes of concern to the international community".<sup>54</sup> A valid argument, nevertheless, would be that certain provisions of the Genocide Convention (including article II) have been elevated to the level of custom as a source of international law and by amending the article 6 of the statute would be creating a new customary rule that is going against, predictability, certainty and uniformity, which assumes that the usage is regarded by member states as having an obligatory character.<sup>55</sup> Again, a response would be that the ICC is an independent institution, established by a law-making treaty, and hence the new definition of genocide embodied in the statute will be deemed a creation of a new

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<sup>54</sup> See <http://www.icc-cpi.int/Menus/ICC/About+the+Court> (Last visited May 25, 2009).

<sup>55</sup> For a detailed discussion on sources of international law, see article 38 (1) of the Statute of the International Court of Justice (ICJ). See also the *North Sea Continental Shelf Cases* (1969) ICJ Rep 3, where the ICJ held:  
"Not only must the acts concerned amount to a settled practice, but they must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it ... the States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough".

international rule of law.<sup>56</sup> As noted within this article, several authorities have called on the redefinition of genocide.<sup>57</sup> The Whitaker Commission, an authoritative commission under the auspices of the U.N. called for an amendment of the genocide convention to include all political mass murders, stating:

“The fact remains that although the Convention has been in force since 12 January 1951, any ascertainable effect of it is difficult to quantify, whereas all too much evidence continues to accumulate showing that acts of genocide are still being committed in various parts of the world. Certainly in its present form, the Convention therefore must be judged to be not enough. Further evolution of international measures against genocide is necessary and indeed overdue”.<sup>58</sup>

This article continues the call from the Whitaker’s Commission that the genocide demands a redefinition that reflects the present day concerns of society and the level of progress attained by the same. Terminology such as ethnicity has very ambiguous meaning in the present day. In the case of the Darfur tribes who are victims of attacks and killings, subjectively make up a protected group even if not, ethnic, national, racial or religious. The facts and evidence show that in the Darfur situation the *Janjaweed* militia while attacking “African” villages tend to use derogatory epithets such as slaves, blacks, Nuba, that signify a subjective group. An example is the Fur woman, who was raped by three men during an attack on her village near Kass town; she was told by her attackers, that she was a slave of

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<sup>56</sup> There are two types of treaty and the relations they have with custom differs tremendously. Law-making treaties are directly creative of international law and are used where a particular problem arises and urgently demands a creation of a new law, which I argue is the route to go since there is little custom relating to this redefinition of genocide that I have discussed extensively in this piece. The second type of treaty is the treaty-contract type, where a long established custom is codified into a formal treaty. For further discussion on this issue see ICJ decisions in the *North Sea Continental Shelf Cases* (1969) ICJ Rep 3; *West Germany v. Denmark and the Netherlands* (1969) ICJ Rep 3.

<sup>57</sup> See section II of this article.

<sup>58</sup> Whitaker Report, United Nations Economic and Social Council Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Thirty-eighth session, Item 4 of the provisional agenda, E/CN.4/Sub.2/1985/6, 2 July 1985, paragraph 71, available at [http://www.abarundi.org/documents/Whitaker\\_Report\\_July\\_1985.html](http://www.abarundi.org/documents/Whitaker_Report_July_1985.html) (Last visited May 25, 2009).

el Bashir, the President of Sudan (Sungi, 2007). If the definition of genocide under Article 6 of the Rome Statute is not amended to include social and political groups it will be deemed condoning the culture of impunity that is intolerable. The new law should codify *dolus specialis* a high standard of motive, a subjective state of mind, which is notoriously difficult to prove according to the discussed sources of international law. Judge Ušacka's dissenting opinion and the *ad hoc* tribunal jurisprudence state that such a determination must be subjected to an objective assessment, that is, a demonstrated policy persistent in destruction of a group, such as is in Darfur, to satisfy the genocidal intent prong. Criminal behavior evolves rapidly and so both procedural and substantive rules ought to be adjusted in order to cope with present day's concerns in society. This is the spirit behind Article 123 of the Statute that provides a seven year exclusion of any amendment to the statute:

"Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions".

The redefinition of genocide within the ICC statute may be initiated by any State party, at any time, as provided under Article 121(1).<sup>59</sup> A Review Conference will consider this amendment and submit the same to the United Nations Secretary General, who circulates it to State parties. The Assembly of States Parties and a Review Conference have concurrent jurisdiction to consider the amendment, that is, it is the Assembly of State Parties or Review Conference that will adopt the amendment either by consensus or a majority of two-thirds of all State parties. An amendment that is adopted by one of these bodies does not come into force until seven-eighths of States parties have filed instruments accepting it. When the adopted amendment has reached the seven-eighths quorum, any other State party that

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<sup>59</sup> "After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties". For Article 121 all sub articles see <http://untreaty.un.org/cod/icc/statute/rome fra.htm> (Last visited may 25, 2009)

objects to the adoption of the new rule may give notice to withdraw from the Statute.<sup>60</sup>

The statute came into force in 2002 and so this is the appropriate time for the Assembly of States Parties to adopt a new definition of genocide that reflects the suggestions proposed in this article.

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<sup>60</sup> Id. These procedures of adoption of an amendment to the Rome Statute reflect the basic nature of International law. International law is consensus based and hence these rules of law ought to emanate from the free wills of States as expressed in conventions or custom, which is generally accepted as expressing a principle of law.

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