

RECENT STEPS OF THE ICC PROSECUTOR IN THE DARFUR
SITUATION: PROSECUTOR V. PRESIDENT

The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide

Andrew T. Cayley*

Abstract

The Prosecutor's application for the issuance of an arrest warrant against President Al Bashir contains three charges of genocide, five charges of crimes against humanity and two charges of war crimes allegedly committed against the Fur, Masalit and Zaghawa peoples since March 2003. The author discusses the appropriateness of the legal characterization of crimes in Darfur as 'genocide'.

1. Introduction

On 14 July 2008, the Prosecutor of the International Criminal Court ('ICC') requested the Pre-Trial Chamber to issue a warrant of arrest against Sudanese President Omar Hassan Ahmad Al Bashir ('Al Bashir'). The Prosecutor's application contains three counts of genocide, five counts of crimes against humanity and two counts of war crimes allegedly committed against the Fur, Masalit and Zaghawa peoples of Darfur since March 2003 ('Al Bashir Application').¹ Legal and regional scholars agree, almost universally, that since

* Barrister of 9 Bedford Row London, LLB, LLM (London), former Senior Prosecuting Counsel at the ICTY and ICC and currently being led by Steven Kay QC in the defence of Ivan Cermak before the ICTY. The author wishes to thank Thomas J.G. Scott of the Stanford Law School for his invaluable assistance in the writing and research for this article. [andrewcayley@gmail.com]

¹ Office of the Prosecutor, 'Annex A: Public Document – Public Redacted Version of the Prosecutor's Application under Article 58', regarding the situation in Darfur, Sudan,

1 March 2003, Government of Sudan ('GoS') forces and their militia proxies have committed serious crimes against parts of Darfur's civilian population. Vigorous debate, however, continues over whether those crimes are properly characterized as 'genocide'. Indeed some critics raise concerns that external political factors, unrelated to matters of law or fact, have led the Prosecutor to this determination. Alex de Waal, an expert noted for his understanding of Sudan's politics and recent history, expressed outright astonishment at the genocide charges.²

Expert opinions, of course, often differ particularly on a subject matter as complex as recent events in Darfur. Nevertheless, the ICC and its Prosecutor would do well to remember that facts ultimately drive any criminal case. Conflicting observations, especially when made by individuals with a comprehensive knowledge of the facts on the ground in Darfur, should be heeded with great care.

The central issue around which most of the controversy hangs is whether the evidence establishes 'reasonable grounds' on which to believe that Al Bashir intended to destroy, in part, national, ethnical, racial or religious groups as such in Darfur. Related to this is the threshold issue of whether there are reasonable grounds to believe that the three tribes targeted in Darfur each constitute '... a national, ethnical, racial or religious group, as such'.³

'Reasonable grounds' to believe that a person has committed a crime within the jurisdiction of the court is the standard of evidential proof required by the Pre-Trial Chamber at the point of issuance of a warrant of arrest or summons to appear.⁴ As a case progresses through the court the standard of proof, required of the Prosecutor, becomes incremental. After the arrest of an accused, the confirmation of charges requires the Prosecutor to demonstrate 'substantial grounds' to believe that a person has committed the crime or crimes charged in the charging instrument.⁵ In a trial, of any charges confirmed by the Pre-Trial Chamber, the Trial Chamber must be convinced of the guilt of the accused in respect of each charge beyond a 'reasonable doubt'.⁶

ICC-02/05-157-AnxA, 14 July 2008, available at <http://www.icc-cpi.int/library/cases/ICC-02-05-157-AnxA-ENG.pdf> ('Al Bashir Application').

2 A. de Waal, 'Moreno Ocampo's Coup de Theatre', *Monthly Review*, 30 July 2008, available at <http://www.monthlyreview.org/mrzine/dewaal300708.html> (stating: 'For nineteen years, President Bashir has sat on top of a government that has been responsible for incalculable crimes. Hundreds of thousands of Sudanese citizens have died in violence, or been starved or rendered homeless, or have been tortured or otherwise punished. The head of state must bear much responsibility for these countless crimes committed by those who profess their loyalty to him. Two weeks ago, Moreno Ocampo succeeded in accusing Bashir of the crime for which he is not guilty. That is a remarkable feat.')

3 Genocide Convention, Art. II.

4 Rome Statute, Art. 58(1).

5 *Ibid.*, Art. 61(5).

6 *Ibid.*, Art. 66(3).

2. Groups Protected by the 1948 Genocide Convention

The Prosecutor's evidence demonstrates that three tribes of Darfur have borne the brunt of attacks by GoS forces: the Fur, Zaghawa and Masalit. At the same time, these three tribes have provided resources and manpower to rebel forces operating in Darfur.⁷ The perpetrators of crimes against these three tribes have in the main come from the Arab tribes of Darfur. The Prosecutor alleges that, on both subjective and objective bases,⁸ the three targeted tribes constitute ethnic groups within the meaning of Article 6 of the Rome Statute.⁹

The term 'ethnic', as employed by Article II of the Genocide Convention, designates a 'community of people bound together by the same customs, the same language and the same race'.¹⁰ In *Kayishema and Ruzindana*, the International Criminal Tribunal for Rwanda stated: 'An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or a group identified by others, including perpetrators of the crimes (identification by others)'.¹¹

It is the *génocidaire* who usually determines the victim's status as a member of a particular ethnic group.¹² Examining evidence of the mindset of the perpetrator not only helps to determine his view of the status of the victim, but also is valuable in establishing genocidal intent. Difficulties arise, however, where a perpetrator believes that a group of people constitutes an ethnic group whereas in fact no objective existence of that group supports this belief.

The International Commission of Inquiry on Darfur ('UNCOI'), the UN body charged with establishing 'facts relating to possible violations of international humanitarian law and human rights law in Darfur', concluded that no objective basis existed for distinguishing between members of the three targeted tribes and their attackers.¹³ Darfur's Arabs are black, indigenous, African and Muslim — just like Darfur's non-Arabs, who predominantly hail from the Fur, Masalit and Zaghawa tribes.¹⁴ All tribes in Darfur practise Islam. Generations of intermarriage and socio-economic coexistence have blurred distinctions between the tribes of Darfur. The principal difference between the groups

7 The principal rebel movements in Darfur are the Sudanese Liberation Army ('SLA') and Justice and Equality Movement ('JEM').

8 Al Bashir Application, at 26–28.

9 *Ibid.*, at 27, § 77. The Prosecutor uses the word 'ethnic' as opposed to 'ethnic' which is found in the Rome Statute and the Genocide Convention. The word 'ethnic' is used in the Rome Statute out of fidelity to the Convention.

10 W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), at 111–112, citing S. Glaser, *Droit international pénal conventionnel* (Brussels: Bruylant, 1970).

11 Judgment, *Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 98.

12 Schabas, *supra* note 10, at 109.

13 International Commission of Inquiry on Darfur (UNCOI), Report to the Secretary General, pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, at 129.

14 A. de Waal, 'Darfur's grievances defy all hope for an easy solution', *Guardian*, 25 July 2004, available at www.guardian.co.uk/society/2004/jul/25/internationalaidanddevelopment.voluntarysector (visited 23 October 2008).

appears to be their modes of subsistence: historically, ‘Arabs’ tended to be nomadic pastoralists while ‘Africans’ tended to be sedentary agriculturalists; yet, even that distinction is not conclusive. The Prosecutor acknowledges, for example, that both the Zaghawa and Arabs engage in similar farming practices.¹⁵

The rebel forces recruit mostly from the Fur, Zaghawa and Masalit. The GoS recruits its militias almost exclusively from the Arab tribes. These recruiting practices have naturally led to sharp social divisions among tribes in Darfur and a reassertion of strong ethnic identities. The rebels see themselves as Africans and the pro-government militias see themselves as Arabs. Evidence suggests that Arab militias are known to use racial epithets when attacking predominantly Fur, Masalit and Zaghawa villages in Darfur.¹⁶

The Prosecutor’s reliance on both subjective and objective elements, in assessing whether these three tribes constitute ethnical groups, reflects the somewhat contradictory facts on the ground. However, although some doubt remains, it seems likely that the Pre-Trial Chamber will find that the Fur, Masalit and Zaghawa constitute ethnical groups within the meaning of Article 6 of the Statute.

3. The Requisite Elements of Genocide

The filing of an application for a warrant of arrest with the Pre-Trial Chamber is the beginning of a formal legal process which, if successful, leads to the issuance of warrants, the confirmation of charges, and ultimately, a criminal trial. For genocide, as with any criminal offence, the traditional method of analysis involves decoupling the acts of the defendant and their consequences from the required mental state of the defendant.¹⁷ The *actus reus* and *mens rea* of the crimes create the legal framework relied on by the Pre-Trial Chamber and Trial Chamber in determining what charges should comprise the warrant of arrest, which should be confirmed and ultimately at a trial what facts must be proven in order to secure a conviction.¹⁸ Even at this preliminary stage of the *Darfur* case, the Prosecutor should have in mind that the standard of proof at trial is proof of guilt beyond reasonable doubt. If, at trial, the defence casts a doubt on even one element of the offence of genocide or any other, then the accused is entitled to an acquittal.¹⁹

15 Al Bashir Application, at 27.

16 *Ibid.*, at 79–80.

17 As Schabas emphasizes, genocide is a criminal infraction like any other, *supra* note 10, at 151.

18 *Ibid.*

19 *Ibid.*

A. The Physical Elements of the Offence of Genocide

The Al Bashir Application describes acts which *could* provide reasonable grounds to believe that the *actus reus*, or the physical elements, of genocide have taken place. The Application alleges that the GoS committed genocide by:

- (1) killing one or more members of each targeted group;
- (2) causing serious bodily or mental harm to one or more members of each targeted group; and
- (3) deliberately inflicting conditions of life calculated to bring about the physical destruction of the group, in part.

It is now beyond debate that the forces of the GoS, and the Janjaweed/militia proxies over which the GoS exercised some degree of control,²⁰ have during their attacks in Darfur targeted and killed many thousands of civilians.²¹ Evidence also attests to acts such as rape, torture and forcible displacement. Similar acts such as these have been found by other international tribunals to be an evidential basis for the genocidal act of serious bodily or mental harm.²² The Al Bashir Application provides numerous examples of instances where members of the targeted groups were killed²³ or subjected to other acts causing serious bodily or mental harm.²⁴ However there is much dispute over the precise numbers of civilian dead in the conflict. In April 2008, the United Nations estimated that since April 2003 the number of deaths in Darfur was 300,000.²⁵ The Prosecutor has estimated that between September 2003 and January 2005, 35,000 people have been killed as a consequence of the conflict.²⁶ Al Bashir has publicly stated that the dead amounts to no more than

20 The evidentiary question of whether Al Bashir had effective control over the Janjaweed/militia forces remains, for legal purposes, open. The author does not explore this evidence in the Prosecutor's Application, which alleges that Al Bashir recruited, funded, armed and organized the proxy groups. This assumption comports with widespread public perception in this matter.

21 Al Bashir Application, at 34, alleges that 35,000 such killings took place between September 2003 and January 2005. This estimate encompasses direct killings resulting from such methods as shootings, aerial bombardments and beatings. It does not include 'killings' resulting from indirect causes such as slow death caused by starvation or lack of sanitation or medical care.

22 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 731 (stating that 'rape and sexual violence certainly constitute infliction of serious bodily and mental harm'); Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, *Karadžić and Mladić* (IT-95-5-R61), 11 July 1996, § 93 (including torture and inhuman or degrading treatment within the ambit of serious bodily or mental harm). The ICTR Chamber in *Akayesu* may, however, have defined more narrowly than many commentators realize the instances where sexual violence amounts to genocide. The Chamber specifically noted that the intent of the sexual violence was to make the victims 'suffer and to mutilate them before killing them, the intent being to destroy the Tutsi group'. It might then be argued that sexual violence only qualifies as genocide where it is accompanied by an intent to kill sometime thereafter, with the intent to kill being significant in establishing genocidal intent.

23 Al Bashir Application, at 32–37.

24 *Ibid.*, at 37–50.

25 *Ibid.*, at 34.

26 *Ibid.*

10,000.²⁷ On 20 June 2008, the Prosecutor stated in an interview on Al Jazeera television: ‘It is not my role to have a total number of figures but we evaluate the numbers, and there is a series of studies saying at least 40,000 people were killed directly and 100,000 people died as an indirect consequence, of the removal, from starvation and diseases . . .’²⁸ While of course there is no requirement to prove any dead at all, the Court will look to the numbers of dead in order to draw inferences regarding the intent requirement for genocide: ‘Since the acts in Article 4(2) of the Statute are only required to be committed with an intent to destroy the protected group, it is clear that the actual destruction of the group need not take place. *However, the extent of the actual destruction, if it does take place, will more often than not be a factor from which the inference may be drawn that the underlying acts were committed with the specific intent to destroy, in whole or in part, a specific group as such.*’²⁹ Judges have a duty to wrestle with findings in respect of intent particularly when that finding could implicate a conviction for genocide. They will wish to rely on solid mortality figures which they can trust. It is only to be expected that the Sudanese will not accept the figures being quoted by the international community but it is perplexing that the United Nations and the ICC disagree about the number of dead and, even more so, that the Prosecutor’s office itself cannot commit to a more certain set of figures.

The third count of genocide alleges ‘deliberately inflicting conditions of life calculated to bring about the physical destruction of the group, in part’. This count relies on four separate forms of conduct by the GoS.³⁰ The second form of conduct describes the forcible displacement of the targeted civilian population by the GoS into harsh desert conditions where many allegedly succumbed to starvation, dehydration, disease and death.³¹ Jurisprudence has recognized the imposition of conditions by the perpetrator bringing about the ‘slow death’ of a group.³² Previous cases have concerned conditions which were established by the perpetrator and then imposed on the victims — for example starvation diet and inadequate medical care. Here, the Prosecutor holds the perpetrator responsible for forcing the victims into very harsh conditions in the natural world. The fourth form of conduct on which this count relies refers to the treatment, by the GoS, of the displaced targeted population in refugee camps in Darfur.³³ The failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities will not amount to

27 See interview of President Al Bashir with David Frost on Al Jazeera Television, 20 June 2008, available at <http://english.aljazeera.net/programmes/frostovertheworld/2008/06/200862384837263451.html> (visited 23 October 2008).

28 See interview of Luis Moreno Ocampo by David Frost on Al Jazeera Television, 20 June 2008, available at <http://english.aljazeera.net/programmes/frostovertheworld/2008/06/200862384837263451.html> (visited 23 October 2008).

29 Decision on Motion of Acquittal, *Milošević* (IT-02-54-T), Trial Chamber, 16 June 2004, § 125. (Emphasis added.)

30 Al Bashir Application, at 51–60.

31 *Ibid.*, at 52.

32 Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, § 691.

33 Al Bashir Application, at 53.

genocide if the deprivation is not so severe as to contribute to the destruction of the group. Living conditions, which may be inadequate by any number of standards may, nevertheless, be adequate for the survival of the group.³⁴ The Al Bashir Application alleges that while such acts do not immediately kill members of the targeted groups,³⁵ they ultimately seek the groups' physical destruction.³⁶ The application describes in detail evidence of the mistreatment of the internally displaced by the GoS in camps in Darfur.³⁷ The former *Médecins sans Frontières* President Rony Brauman, with much experience on the ground in Darfur, described the Prosecutor's assertion that the camps are the site of ongoing genocide as 'insane'.³⁸

Such harsh criticism relates to the characterization of the facts by the Prosecutor. Brauman does not suggest that the camps are easy or comfortable places in which to live. He just makes the case that conditions are not as bad as the Prosecutor suggests. The word 'calculated' in Article 6(c) of the Rome Statute dictates that the conditions in the camps be the 'principal mechanism used to destroy the group, rather than some form of ill-treatment that accompanies or is incidental to the crime'.³⁹

The Prosecutor seeks to show that the camps for the internally displaced in Darfur are nothing more than death camps where the displaced population is deliberately starved, attacked and murdered.⁴⁰ Demonstrating Al Bashir's intent to destroy the targeted groups, through conditions *calculated* to bring about their partial destruction, via this avenue requires a fairly extreme interpretation of the evidence related to the camps.

The Al Bashir Application alleges that GoS forces singled out villages based on their ethnic makeup and then indiscriminately attacked within those villages.⁴¹ It is difficult to find meaningful comparisons for what has taken place in Darfur. While the examples of Nazi Germany or Rwanda offer little

34 Judgment, *Krajišnik* (IT-00-39-T), Trial Chamber, 27 September 2006, § 863; *Akayesu*, *supra* note 22, § 505; *Kayishema and Ruzindana*, *supra* note 11, n 123.

35 Schabas, *supra* note 10, at 167, citing *Attorney General of Israel v. Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem), at 340, § 196. Note that, since victims dying due to any deliberate infliction would fall under the 'killing' charge, this allegation only pertains to those Fur, Masalit and Zaghawa who survived the violence committed by the Sudanese government.

36 *Akayesu*, *supra* note 22, § 505; *Kayishema and Ruzindana*, *supra* note 11, n 123. It should be noted that, though encompassing the 'systematic expulsion from homes', this allegation does not equate to ethnic cleansing. Ethnic cleansing aims to displace a population in order to change the ethnic composition of a given territory, rendering the area ethnically homogeneous or 'pure'. Ethnic cleansing is not a crime itself but usually includes the crimes of forced displacement or deportation and persecution. Genocide, on the other hand, seeks to destroy the group completely. Schabas, *supra* note 10, at 199–200, referring to *Attorney General of Israel v. Eichmann*, § 80.

37 Al Bashir Application, at 88.

38 R. Brauman, 'The ICC's Bashir Indictment: Law against Peace', *World Politics Review*, 23 July 2008, available at <http://www.worldpoliticsreview.com/Article.aspx?id=2471> (visited 23 October 2008).

39 Schabas, *supra* note 10, at 243.

40 Al Bashir Application, at 52, 88.

41 *Ibid.*, at 32–37.

assistance, the crimes committed in Bosnia-Herzegovina between 1991 and 1995 offer a closer precedent.⁴² However even this comparison is imperfect. In Bosnia-Herzegovina, larger cities enjoyed a mixed population of the three ethnic groups which constituted the population. The villages and smaller settlements, in the countryside, tended to be occupied by a single ethnic group.⁴³ In Darfur, however, the villages and smaller settlements tended to be ethnically mixed although in some villages one ethnic group would predominate.⁴⁴ As a result, the Prosecutor's Application is limited to the general allegation that settlements 'predominantly inhabited by' the target groups are more likely to be attacked than those that are 'Arab' or 'ethnically mixed'.⁴⁵

Conclusive evidence of a planned genocidal campaign is not necessarily demonstrated by attacks on villages with mixed populations. These attacks may simply be part of a cruel counter-insurgency campaign. Moreover, it is not surprising that villages populated by Arab groups, aligned with the government, are less likely to become the object of GoS attacks than those populated by tribes who are more likely to support the cause of the rebel forces.

If certain ethnic groups were being targeted for destruction, it seems illogical that the GoS forces would attack villages that were 'ethnically mixed' or 'Arab'. Yet, the Al Bashir Application refers to 21 villages that were attacked, none of which contained a predominance of any of the targeted groups.⁴⁶

In a similar vein, to the extent that the JEM and SLA rebel movements emerged from particular geographic areas of Darfur, it is to be expected that a counter-insurgency operation would focus on those areas. The undisputed fact is that the GoS has targeted its counter-insurgency campaign against those villages from which the rebels recruit and secure finance and supplies. This fact weighs against finding the required evidential indicia for the specific intent to commit genocide.

Lastly, the Prosecutor's approach does not explain the indiscriminate killing — the aerial bombardments, shooting into crowds and house-to-house massacres — that took place during attacks by the GoS and Janjaweed/militia.⁴⁷ Once the GoS and its proxies decided to attack a village, they made no distinction between rebel combatants and civilians. This indiscriminate form of attack in heterogenous villages often caused civilians of non-targeted groups or tribes to suffer alongside the Fur, Masalit and Zaghawa. Again this weighs against the assertion that only Fur, Masalit and Zaghawa were targeted by the GoS.

42 This is the case, despite the Prosecutor's attempts to associate the GoS' tactics in Darfur with those of the Nazi Regime in Europe. See, e.g. BBC News, 'Sudanese regime likened to Nazis', 5 June 2008, available at: <http://news.bbc.co.uk/2/hi/africa/7436472.stm> (visited at 23 October 2008).

43 Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 7 May 1997, § 64.

44 Al Bashir Application, at 29.

45 *Ibid.*, at 32.

46 *Ibid.*, at 29.

47 *Ibid.*, at 32–37.

B. Mental Elements of the Offence of Genocide

The Prosecutor's evidence seeks to demonstrate that Al Bashir himself had the specific intent (*dolus specialis*) to 'destroy, . . . in part, a national, ethnical, racial or religious group, as such'.⁴⁸ In the context of the Rome Statute this requirement refers 'to the specific intention to destroy more than a small number of individuals who are members of a group'.⁴⁹ Where this specific intent is not established the physical elements of a genocide charge remain potentially punishable as a crime against humanity or war crime.

Upon announcing the Al Bashir Application, the Prosecutor of the ICC declared that Al Bashir's 'motive was largely political, but his intent was genocide'.⁵⁰ Strictly speaking, the crime of genocide does not require the establishment of any specific motive.⁵¹ Nonetheless, if the Prosecutor hopes to hew close to the prototypical cases of genocide, such as those committed in Nazi Germany and Rwanda, he must show that the acts were collectively 'motivated by hatred of the targeted groups'.⁵²

Genocidal intent is most easily established through unambiguous statements, such as public speeches or declarations. Al Bashir's statements, while certainly militant, are subject to varying interpretations.⁵³ If accurately repeated to the Prosecutor, by the witnesses relied on, some of Al Bashir's public statements manifest a mental state which could be interpreted as being genocidal. In *Krajišnik* the ICTY Trial Chamber stated that: 'When reviewing speeches and statements . . . in search of evidence of genocidal intent, utterances must be understood in their *proper context*'.⁵⁴ Al Bashir's statements, viewed in the context of the time, could also arguably reflect the tough stance of a militarily trained head of state confronting an armed rebellion. There seems to be little reliable documentary evidence in the form of transcripts or minutes of meetings recording what Al Bashir has said. The Al Bashir Application relies mainly on the recollection of witnesses in respect of Al Bashir's utterances. The oral interpretation of what a witness says, from Arabic (or local dialect) into English, produces another layer of uncertainty. The GoS allege that the rebel forces in Darfur have selected witnesses for the ICC to interview.⁵⁵ True or not it would seem inconceivable that the Prosecution has not had contact with the rebel groups in the course of their investigation of the *Darfur* case.

Absent clear expressions of intent, genocidal intent can be inferred from the context in which the crimes take place. This context can include the massive

48 *Ibid.*, at 100.

49 Schabas, *supra* note 10, at 219, citing UN Doc. A/AC.249/1998/CRP.8, at 2.

50 Al Bashir Application, at 96.

51 This may be attributable to the view that desiring the destruction of an entire people is inherently irrational and that no explicable motive could exist for pursuing such a goal.

52 Schabas, *supra* note 10, at 255.

53 Al Bashir Application, at 78–79.

54 *Krajišnik*, *supra* note 34, § 1092 (emphasis added).

55 President Al Bashir interview with David Frost, *supra* note 27.

scale of the acts as well as elements of their perpetration that suggest hatred of the group and a desire for its destruction.⁵⁶ As the magnitude of atrocities increases, a deduction regarding the acts' systematic nature becomes more plausible. Significantly, in using the facts and context to prove intent, any inference about an accused's intent must be 'the only reasonable inference available on the evidence'.⁵⁷

The Prosecutor has framed all eight charges around Article 25(3)(a) of the Rome Statute. Thus for the three charges of genocide the alleged basis of liability is co-perpetration or perpetration by means.⁵⁸ In the ad hoc tribunals, co-perpetration is the form of liability most commonly described as participation in a joint criminal enterprise.⁵⁹ The doctrine of joint criminal enterprise has previously been relied on as a basis of liability for genocide.⁶⁰ The *mens rea* requirement differs according to the form of joint criminal enterprise. The basic form of joint criminal enterprise requires the shared intent of the co-perpetrators.⁶¹ In the instant case, this would require evidence of both Al Bashir's specific intent and evidence of the physical perpetrator's specific intent to commit genocide.

The UNCOI concluded that: 'One should not rule out the possibility that in some instances *single individuals*, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group.'⁶² The third or extended form of joint criminal enterprise requires the intention to participate in the criminal purpose and further it and to contribute to the commission of a crime by a group.⁶³ Responsibility for a crime which was not part of the common purpose arises if the commission of this crime was foreseeable and (the accused) willingly took the risk that the crime would be committed. In *Brđanin*, the Appeals Chamber of the ICTY stated that a participant in this extended form of joint criminal enterprise could be found guilty of genocide even without having the specific intent to destroy a protected group.⁶⁴ If the UNCOI's determination of where genocidal intent is to be found is correct, then the legal characterization offered by *Brđanin* would appear to more accurately reflect the facts on the ground in Darfur. It seems plausible and certainly easier to prove that Al Bashir may have pursued a slash-and-burn counter-insurgency campaign, knowing that the Janjaweed/militia proxies would employ genocidal tactics to carry out his

56 Schabas, *supra* note 10, at 222.

57 *Ibid.*, at 165, citing *Brđanin*, *supra* note 32, § 704.

58 It is not the case that Al Bashir was a direct or immediate perpetrator. See O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court - Observers Notes, Article by Article* (2nd edn., Oxford: Hart Publishing, 2008), at 749.

59 *Ibid.*

60 *Milošević*, *supra* note 29, § 144 *et seq.*

61 Triffterer, *supra* note 58, at 751.

62 UNCOI, Report to the Secretary-General, *supra* note 13, § 520.

63 Triffterer, *supra* note 58, at 751.

64 Decision on Interlocutory Appeal, *Brđanin* (IT-99-36-A), Appeals Chamber, 19 March 2004, § 6.

desired political goal.⁶⁵ If this characterization is accurate, while Al Bashir did not possess specific intent, he could still be found liable for genocide under an extended form of joint criminal enterprise within Article 25(3)(a) of the Statute.⁶⁶

Judge Shahabuddeen dissented in *Brđanin* stating that with genocide: 'specific intent always has to be shown.'⁶⁷ William Schabas makes the point that it flies in the face of the authorities to argue that specific intent is not required for genocide. He argues that often times the physical perpetrator is ignorant of any genocidal plan while the guiding mind behind the physical perpetrator is the individual more likely to possess the specific intent required.⁶⁸

The UNCOI found that the attacks on villages in Darfur reflected an intention by GoS forces and their proxies to kill the men thought to be rebels and then expel the population to prevent the provision of resources and eliminate safe haven for the remaining rebels.⁶⁹ Moreover, the UNCOI found that while the living conditions in camps for the internally displaced civilians warranted strong criticism, those conditions were not sufficiently bad to lead to the extinction of those living there.⁷⁰ The Prosecutor has a different view and, to be fair, his observations extend far beyond the time period examined by the UNCOI.⁷¹ However, it should be emphasised that almost all of the UNCOI's observations were gathered while on the ground in Darfur. All of the enquiries of the Prosecutor have taken place outside Darfur.

Ultimately in a case where the proof of intent heavily relies on inferences drawn from the physical elements of the crimes, there will be disagreement on what inferences can be fairly drawn. The UNCOI rightly took a cautious approach to intent and found, examining all the facts together, that there was not a Sudanese genocidal policy.⁷² The Prosecutor comes to a different conclusion. Ultimately this issue is for the Pre-Trial Chamber to determine by examining the actual evidence underlying the summaries provided in the Al Bashir Application. Without sight of that evidence it is difficult to properly assess and balance the Prosecutor's conclusions. Of some interest is the fact that the Prosecutor acknowledges that he relies on witnesses and materials

65 Arguments about the precise nature of Al-Bashir's political goal continue. If he sought to ensure the unity of the Sudanese state, by suppressing the current rebellion and discouraging others in the future, then his goal can only be described as *realpolitik*. If his goal was to force out all non-Arabs from the region of Darfur, then his goal was ethnic cleansing. An intent to ethnically cleanse the region comes closer to the required specific intent, but differs in its lack of a desire to destroy an entire group.

66 The Prosecutor has only charged Al Bashir under Art. 25(3)(a) of the Rome Statute: see Al Bashir Application, at 20–23.

67 *Brđanin*, *supra* note 64, Dissenting opinion of Judge Shahabuddeen, § 4.

68 Schabas, *supra* note 10, at 259, 286 ('The "accomplice" is often the real villain and the "principal offender" a small cog in the machine.')

69 UNCOI, Report to the Secretary-General, *supra* note 13, § 524.

70 *Ibid.*, § 515.

71 Al-Bashir Application, at 52–53 and §§ 392–393.

72 UNCOI, Report to the Secretary-General, *supra* note 13, § 522.

from the UNCOI. Thus the Prosecutor has come to a contrary conclusion relying, at least in part, on the same evidence.⁷³

4. Conclusion

The crimes perpetrated by Al Bashir's regime are proven facts. Serious disagreement remains, however, as to whether Al Bashir and the Sudanese government intended actually to destroy, in part, the Fur, Masalit and Zaghawa peoples of Darfur. Some have termed this mere speculation. It is difficult to cry government-led genocide in one breath and then explain in the next why 2 million Darfuris have sought refuge around the principal army garrisons of their province. One million Darfuris live in Khartoum where they have never been bothered during the entire course of the war. As Rony Brauman of *Médecins sans Frontières* points out, 'Can one seriously imagine Tutsis seeking refuge in areas controlled by the Rwandan army in 1994 or Jews seeking refuge with the Wehrmacht in 1943?'⁷⁴ The Pre-Trial Chamber will have to address these issues. It will do so under Article 58 of the Rome Statute and later, at least in theory, under Article 61, where counsel for the Defence will be able to challenge the evidence and present evidence of its own. For now, the Pre-Trial Chamber must rely on the Prosecutor's presentation and characterization of the facts to decide whether a warrant should be issued for President Al Bashir and, if so, which charges should form a part of it.

⁷³ Al Bashir Application, § 68(7).

⁷⁴ Brauman, *supra* note 38.