Genocide and Jurisdiction: Methods for Achieving Justice Domestically for the International Crimes in Darfur

Matthew N. Thomas
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Abstract

The international community as a whole has been reluctant to take action against Sudan for the international crimes being committed in Darfur. However, individual nations, including the United States, have expressed a strong interest in taking proactive measures to achieve justice for those atrocities. Victims of the Sudanese conflict may achieve justice through the domestic courts of the United States. Civilly, the Alien Tort Statute provides a cause of action to foreign citizens for torts committed against them in violation of international law, while the exceptions to the Foreign Sovereign Immunity Act permit personal jurisdiction over individuals acting on behalf of the Sudanese government engaged in genocide. The principles of Universal Jurisdiction also permit the criminal prosecution of genocide in domestic courts. The history of the international crime indicates that the atrocities committed in Darfur qualify as genocide, and, thus, individual nations may take legal action against Sudan.
Introduction

An international crisis is occurring in Darfur, Sudan, one has brought to the forefront the debate over the ambiguous crime of genocide. By treaty, the established venue to seek justice for the crime of genocide is the International Criminal Court (the “ICC”). However, the reluctance of the international community, particularly the United Nations, to officially label this crisis “genocide,” as the term is defined by international conventions, and the fact that the United States is not a signatory to the Rome Statute, raises doubts as to whether justice is forthcoming on the international arena. The United States does provide certain mechanisms for seeking remuneration for international crimes, through both civil and criminal channels, in domestic courts which apply principles of international law. This article discusses possible methods for achieving jurisdiction over claims that may arise out of the genocide in Darfur.

Darfur

In Darfur, between five and ten thousand people are dying every month. Darfur is a region in western Sudan, a nation that has been controlled by the military and Islamic governments since it gained independence from the United Kingdom and Egypt in 1956.

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2 The Rome Statute establishes the jurisdiction of the ICC.
Since the establishment of an Islamic theocracy following a coup d’état in 1989, the Sudanese Government has forcibly converted the Christians and zurga populating the Darfur region, and permitted any Arab or Muslim from around the world to reside within the country. Sudan became home to terrorists, including Osama bin Laden and al Qaeda, and the United States labeled Sudan as a State-sponsor of terrorism in 1993. In furthering these militant Islamic goals, Sudan has consistently engaged in human rights violations, including the rape of women, extrajudicial detention and killing, torture, relocation, and denial of basic freedoms.

The current crisis arises from the Sudanese government’s response to rebellions by the Sudanese Liberation Army (the “SLA”) and the Justice and Equality Movement (the “JEM”) in 2003. The Sudanese government deployed a trained, Arab militia called Janjaweed to subdue these rebellions, and commenced a campaign of ethnic cleansing and relocation against the non-Arab and non-Muslims living in the region.

Approximately 20,000 Janjaweed, primarily Arab nomads from the Darfur region, have received materiel, salaries, and prosecutorial immunity from the Sudanese government in fulfilling the policy of ethnic cleansing in the region. The Sudanese military often uses its own personnel and hardware, including aircraft and helicopter gunships, to “soften”

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5 Zurga are African animists who populate the Darfur region.
7 Id.
8 Throughout this paper, the word “State” refers to a foreign sovereign government, whereas the word “state” refers to a subdivision of the government.
12 The Sudan Report, supra.
villages inhabited by non-Muslims before the Janjaweed commence a ground assault and remove the villagers.\textsuperscript{14} Exact figures are unknown, but estimates place the death toll between 140,000 and 500,000,\textsuperscript{15} with several million more displaced from villages burned by the Janjaweed and forced to live in refugee camps.\textsuperscript{16} Fully one-third of the population of Darfur may succumb to famine resulting from political instability, missed planting seasons, and drought.\textsuperscript{17} While two million people have been displaced within Sudan and another two hundred thousand have fled to Chad, humanitarian aid is available to less than half of them.\textsuperscript{18}

The situation in Sudan was first formally brought to the attention of the United Nations by Médicins Sans Frontières (“MSF”), members of which had witnessed firsthand the acts in Darfur while performing their humanitarian duties in the region.\textsuperscript{19} The question as to whether the crisis in Darfur rises to the level of genocide, as the term is defined by the United Nations and various multilateral treaties, is one of statutory language, and not a question of fact or opinion as to the actual acts occurring in Sudan.\textsuperscript{20}

\begin{thebibliography}{99}
\bibitem{1} Sudan Report, \textit{supra}, at 4.
\bibitem{2} Kelly Hearn, \textit{Darfur Death Toll is Hundreds of Thousands Higher than Reported, Study Says}, \textit{NAT. GEO. MAGAZINE} (Sept. 14, 2006).
\bibitem{3} The Sudan Overview \textit{supra} note 13, at 166; see also Glenn Kessler, \textit{Rice Visits Darfur Camp, Pressures Sudan}, \textit{WASH. POST}, July 22, 2005, at A19. The World Health Organization estimated that 70,000 civilians were killed, 1.5 million persons were internally displaced, and 200,000 refugees fled to Chad as a result of these campaigns. See the Sudan Report, \textit{supra} note 15, at 1. Estimates of the number of civilians killed as a result of the campaigns of the Sudanese military and Janjaweed are as high as 400,000. However, the U.S. State Department has estimated the number of dead between 63,000 and 146,000. Glenn Kessler, \textit{Rice Defends U.S. Response to Ethnic Violence in Sudan}, \textit{WASH. POST}, July 21, 2005, at A19. In any event, the crisis in Darfur has contributed significantly to the population of internally displaced persons in Sudan which, at six million people, is the largest such population in the world. The Sudan Overview, \textit{supra}, at 169. The United States has estimated the number of displaced persons at 4.3 million. The Sudan Report, \textit{supra}, at 1, 7.
\bibitem{4} The Sudan Overview, \textit{supra}, at 169.
\bibitem{7} Michael Feher, \textit{Constancy in Context}, 24 \textit{Wis. INT’L L. REV.} 773 (Fall 2006).
\end{thebibliography}
The primary concern is whether the Khartoum regime has demonstrated the intention “to destroy, in whole or in part, a national, ethnical, racial, or religious group” as required by the Convention on the Prevention and Punishment of Genocide.\textsuperscript{21}

The definition of “genocide” poses significant difficulties because the United Nations charter requires that member States react wherever and whenever genocide is found. From Rwanda to Darfur, this requirement has dissuaded nations, including the United States, from recognizing these atrocities and actively intervening.\textsuperscript{22}

Commentators on international events have even remarked that “[t]he publishing industry manages to respond more quickly to genocide than the U.N. and world leaders do.”\textsuperscript{23}

The E.U. has come the closest of any of the international organizations to labeling the war in Sudan genocide, but still fell short when it issued a statement that the acts committed there could be “construed as tantamount to genocide.”\textsuperscript{24} The United Nations, through the creation of the International Commission of Inquiry on Darfur in Security Council Resolution 1564, came to a contrary conclusion by explicitly stated that “the government of Sudan has not pursued a policy of genocide.” Concurrently, the U.N. admits the possibility that “in some instances individuals, including Government officials, may commit acts with genocidal intent,” but “genocidal intent” alone are not

\textsuperscript{22} See Samantha Power, “A PROBLEM FROM HELL:” AMERICA IN THE AGE OF GENOCIDE, 329-90 (2002) (discussing the reluctance during the Clinton administration to use the term “genocide” for fear that the Unites States would be obligated by treaty to intervene.”
\textsuperscript{23} Nicolas D. Kristof, Genocide in Slow Motion, N.Y. REV. OF BOOKS, Feb. 9, 2006 at 14 (reviewing Julie Flint & Alex de Waal, Darfur: A Short History of a Long War (2005)).
sufficient to trigger international action. The Security Council has further modified its usual practices of dealing with similar humanitarian crises by passing the issue to the ICC, rather than handling the matter directly itself. The assignment of jurisdiction itself is not unusual; in fact, it is often considered an integral part of the relationship between the ICC and the Security Council. However, unlike in other instances where human rights issues have been referred to the ICC, the Security Council limited its jurisdiction to peacekeepers in the region who have signed the Rome Statute and not including those who are actively involved in the atrocities. When Uganda was referred to the ICC, it initially tried to limit the ICC’s jurisdiction to the Lord’s Resistance Army, a request that was firmly rejected by the prosecutor. The unusually restrictive referral by the Security Council, some commentators have speculated, indicates the motivation of the United Nations to define the actions in Darfur as anything other than genocide as prohibited by the U.N. Charter. Still, to date, the situation in Darfur is the only instance where a State has been involuntarily referred to the ICC for investigation.

While, initially, the United States recognized the situation in Darfur as “genocide,” that interpretation fell out of favor upon the commencement of the war on
terror. No longer subscribing to President George W. Bush’s “not on my watch” mentality regarding the commission of genocide abroad, the United States itself tried to distance itself from the conflict in Darfur, most notably by abstaining from the Security Council Resolution referring the issue to the ICC for investigation. However, that policy is changing in response to the reluctance of the international community to react to the situation.

One of the first steps taken on a domestic level to address the situation in Darfur occurred in the context of a state pension plan. Illinois Senate Bill 23, called the “Act to End Atrocities and Terrorism in the Sudan,” was signed into law on June 25, 2005. This law prohibited any funds controlled or handled by the state of Illinois from being invested in any enterprise or investment associated with Sudan. Illinois legislature expressly passed the bill as a reaction to the ongoing genocide in Darfur, made in hopes of demonstrating outrage and creating an economic impact on the atrocities in Sudan.

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32 Elizabeth Rubin, If Not Peace, Then Justice, NY TIMES MAGAZINE 42 (Apr 2, 2006).
34 Illinois Governor Ends State Investment in Sudan, STAT. NEWS SERV., (June 25, 2005).
35 15 ILL. COMP. STAT. ANN. 520/0.01-23; 40 ILL. COMP. STAT. ANN. 5/1-101-20.
36 Illinois Governor Ends State Investment in Sudan, supra. Illinois State Senator Jacqueline Collins stated that “[t]his is a piece of legislation that really grew out of my belief that we have a moral obligation to stand against oppression when we see it . . . . Our humanity diminishes whenever we profit from the slaughter and suffering of others.” Illinois State Representative Lovana Jones stated that the divestment was intended to “uphold[ing] our pact with the people to defend human rights and safeguard their tax dollars.”
Due to domestic pressure, the international community, including the United States, has attempted to stem the tide using similar statements of concern about the ongoing conflict through the N’Djamena Agreement. The European Union, the African Union, Chad, and the United States arranged a cease-fire agreement between the Sudanese government, the SLA and the JEM in April, 2004. However, this Agreement included no timetable, nor any method for seeking restitution or restoration for crimes already committed. The United States enacted the Comprehensive Peace in Sudan Act in December, 2004. The measure set forth the goals of protecting human rights, maintaining the flow of humanitarian aid into Darfur, furthering attempts to come to a diplomatic solution, and requesting the assistance of the international community and the imposition of sanctions. After becoming involved in the wars in Afghanistan and Iraq, however, the White House requested that Congress limit its funding for foreign aid to Sudan in order to free up money for the defense budget. A series of protocols and other diplomatic ventures to control the situation in Sudan failed, prompting former Secretary-General of the United Nations, Kofi Anan, to state that “the Darfur political process has not succeeded so far in bearing the hoped-for fruits.”

The United States now is returning to its more aggressive stance regarding Darfur. In a speech at the United States Holocaust Museum on April 18, 2007, the President

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37 April 2004 Humanitarian Ceasefire Agreement on the Conflict in Darfur, Apr. 8, 2004, http://www.darfurinformation.com/cf_ceasefire_agreement.asp (last visited Dec. 19, 2005) (the N'Djamena Agreement); see also Darfur Destroyed, supra, at 51-52 (discussing the "humanitarian ceasefire agreement"); see also the Sudan Overview, supra, at 166.
38 N'Djamena Agreement.
40 Mark Leon Goldberg, Zoellick's Appeasement Tour, AMERICAN PROSPECT 4 (Apr, 2005) (describing Apr. 25, 2005 letter from the White House's Office of Management and Budget to Rep. Jerry Lewis); Nicholas D. Kristof, Day 113 of the President's Silence, NY TIMES, A25 (May 3, 2005) (stating that the author has a copy of President Bush's letter to Congressional leaders "instructing them to delete provisions about Darfur from the legislation").
41 Report of the Secretary-General on the Sudan, supra note 83, ¶ 35.
threatened sanctions and more punitive actions against Sudan if Sudanese President Omar Hassan al-Bashir did not adhere to the international pressures and treaties by taking steps towards stopping the violence in Darfur. The President further renewed the rhetoric of genocide, and directed the international community, particularly the United Nations, to take a more active role in enforcing international law in Sudan. With this revival of the “not on my watch” mentality, it is more likely that the United States will attempt to take further action on a national level against Sudan, including the possibility of civil and criminal action against those responsible.

Achieving Civil and Criminal Liability

The responsibility for engaging in and regulating foreign affairs typically rests in the federal government. However, while it may be a fundamental principle of the Constitution, no one clear provision states the responsibilities of the federal government on this issue. Through this power, Congress, with selected judicial support, has adopted laws that permit the application of international law in the federal court system for the purpose of achieving domestic justice for international claims.

Civil Liability: The Alien Tort Statute

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43 Id.
44 See Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575 (1840) (holding that ”[i]t was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people and one nation”).
45 The Foreign Affairs Power is often inferred from other provisions, including the President’s power as commander-in-chief, U.S. Const. Art. 11 §2 cl. 1, and his ability to enter into treaties with the consent of Congress, U.S. Const. Art. 11 §2 cl. 2. Likewise, Congress has the power to regulate foreign commerce, define and punish offenses against international law, and declare war. U.S. Const. Art. 1 § 8, cl. 3, 10-12.
The Alien Tort Statute (the “ATA”) was passed in 1789 as part of the Judiciary Act so that federal courts could achieve jurisdiction over foreign nationals. It states, in part, that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The statute permits suits in federal courts against foreign nationals, even if the underlying cause of action did not occur within the jurisdiction of the United States and did not involve United States citizens.\(^46\) In order to achieve this jurisdiction, however, the courts must determine whether there is an applicable rule of international law.

When determining whether a particular rule of international law applies, “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. . . .”\(^47\) The Second Circuit explained that “[t]he United Nations Charter . . . makes it clear that in this modern age a state’s treatment of its own citizens is a matter of international concern,” citing:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.\(^48\)

Plaintiffs must demonstrate three elements in order to bring suit under the ATA: 1) that they are not citizens of the United States, 2) that the underlying cause of action lies in tort, and 3) that the tort is also a violation of international law.\(^49\) As the victims of the Darfur violence are not citizens of the United States, and as the conduct occurring in Sudan is tortuous, the only question is to whether the tortuous conduct of genocide is in

\(^{46}\) *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that the appellee’s claim that the locus of parties to the underlying cause of action prohibited jurisdiction was without merit).

\(^{47}\) *Id.*

\(^{48}\) *Id.*

\(^{49}\) *Id.*, at 887.
violation of international law. While the law of nations is derived from “‘consulting the
works of jurists, writing professedly on public law; or by the general usage and practice
of nations; or by judicial decisions recognizing and enforcing that law.’”\textsuperscript{50}

For an action in tort arising out of a foreign jurisdiction to survive, the tortuous
conduct must have occurred within a territory governed by a recognized sovereign.\textsuperscript{51}
Similar language is used in the Federal Tort Claims Act, which includes a waiver of
sovereign immunity; however, this waiver does not apply to “[a]ny claim arising in a
foreign country.”\textsuperscript{52} While the statute does not define “foreign country,” the Supreme
Court has defined it the same as “sovereign state.”\textsuperscript{53} As Sudan is recognized as a
sovereign State and is represented in the United Nations, this requirement is clearly met.

One primary question applicable to a possible lawsuit arising out of the Darfur
violence is whether the ATA could apply to non-state tortfeasors. Some members of the
judiciary have opined that non-state actors are not bound by the “law of nations” in the
same way that a sovereign government is.\textsuperscript{54} The Second Circuit has already addressed
this problem through the lens of the Bosnian-Serb conflict in \textit{Kadic v. Karadžić}.\textsuperscript{55} In that
case, the appellee argued that, as the actors were private and not acting under color of
State law, they were not subject to the laws of nations, and could not be brought into U.S.
jurisdiction under the ATA.\textsuperscript{56} The Second Circuit disagreed, holding that “certain forms
of conduct violate the law of nations whether undertaken by those acting under the

\begin{itemize}
\item \textsuperscript{50} \textit{Filartiga}, 630 F.2d at 880 (quoting \textit{United States v. Smith}, 18 U.S. 153, 160-61 (1820)).
\item \textsuperscript{51} \textit{Smith v. United States}, 507 U.S. 197, 204-05 (1993).
\item \textsuperscript{52} 28 U.S.C. § 2680(k).
\item \textsuperscript{53} \textit{Smith v. United States}, 507 U.S. at 201.
\item \textsuperscript{54} \textit{See Tel-Oren v. Libyan Arab Republic}, 726 F.2d at 774 (J. Edwards, concurring) (“I do not believe the
law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does
on states and persons acting under color of state law.”).
\item \textsuperscript{55} 70 F.3d 232 (2d Cir. 1995).
\item \textsuperscript{56} \textit{Kadic}, Brief for Appellee at 19.
\end{itemize}
auspices of a state or only as private individuals.”

The Circuit distinguished *Filartiga* by explaining that the Court had focused on the state-actor aspect, and not put forth any conclusion regarding private actors subject to jurisdiction under the ATA. In its *amicus* brief, the U.S. government vigorously stated that private citizens could be held liable in U.S. courts “for acts of genocide, war crimes, and other violations of international humanitarian law.”

As the ATA is entirely a domestic statute, there is a strong presumption against granting jurisdiction over claims occurring outside the United States. “It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” While the ATA is specifically designed to apply to causes of actions occurring outside of the United States, this presumption does not become moot. In fact, the Supreme Court has said that the language of the statute demands extra vigilance in preventing the unnecessary assertion of United States jurisdiction in foreign lands.

Still, in accordance with the tortuous nature of genocide, discussed *infra*, the federal court system may present a likely venue for seeking damages resulting from acts of genocide.

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57 *Kadic*, 70 F.3d at 239.
58 *Id.*
59 *Id.; see Kadic*, Statement of Interest of the United States, at 5-13.
60 *Smith v. United States*, 507 U.S. at 203-04.
62 *United States v. Spelar*, 338 U.S. 217, 222 (1949) (“That presumption, far from being overcome here, is doubly fortified by the language of the statute and the legislative purpose underlying it”).
With the exception of the crime of piracy, personal criminal liability for violations of international law is a twentieth-century development.\textsuperscript{63} Universal Jurisdiction is the principle of international law that permits one nation to exercise jurisdiction over cases with no minimum contacts within its national jurisdiction; in other words, it would permit a district court to preside over a case in instances where it has neither personal jurisdiction over the parties nor traditional subject matter jurisdiction over the underlying cause of action.\textsuperscript{64} When Universal Jurisdiction is applied, subject matter jurisdiction is acquired under international criminal law rather than domestic sources.\textsuperscript{65} While there are certain treaties which enumerate certain international crimes, Universal Jurisdiction is a creature of customary international law.\textsuperscript{66} These international crimes are defined in international law, and those definitions are compared to the possible applications of the law of the forum.\textsuperscript{67}

The fact that a particular act is prohibited under the concept of \textit{jus cogens} norms is typically evidence that that same act may be subject to Universal Jurisdiction.\textsuperscript{68} The reasoning behind this follows the philosophy of \textit{jus cogens} norms: there are crimes that so shock the conscience of the world that the perpetrators are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”\textsuperscript{69} The very nature of these norms indicate that they are customary and not considered

\textsuperscript{63} Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pincochet Ugarte (No. 3), 1 A.C. 147 (1999).
\textsuperscript{64} Anthony J. Colangelo, \textit{The Legal Limits of Universal Jurisdiction}, 47 VA. J. INT’L L. 149, 150-51 (Fall 2006); \textit{see also} Restatement (Third) Foreign Relations Law of the United States § 404 (1987).
\textsuperscript{65} \textit{Id.}, at 160.
\textsuperscript{66} \textit{See Yousef}, 327 F.3d at 96 n. 29; \textit{see also} Colgano, \textit{supra}, at 567.
\textsuperscript{67} \textit{See Yousef}. In Yousef, the district court applied Universal Jurisdiction based upon violation of the international crime of terrorism, even though Yousef was actually being prosecuted for the federal crime of planting an explosive device on an aircraft.
\textsuperscript{68} \textit{See Pinochet} (stating that torture is a violation of \textit{jus cogens} norms and is thus subject to universal jurisdiction).
\textsuperscript{69} Demjanjuk v. Petrovsky, 603 F. Sipp. 1468 (1985).
“hard” international law, but some commentators have suggested that when a *jus cogens* norm is expressed in a treaty, the terms of that treaty ought to be applied as strictly as though they themselves had such universal application.\(^{70}\)

Particularly pertinent to this application of Universal Jurisdiction is the prosecution of the crime of genocide. In 1962, Israel exercised Universal Jurisdiction when it prosecuted Adolf Eichmann for his participation in the Holocaust.\(^{71}\) The Israeli court stated its reasons for the prosecution of a foreign individual for crime occurring in another country as being due to “the universal character of the crimes in question which vests in every state the power to try those who participated in the perpetration of such crimes and to punish them therefore.”\(^{72}\) The court explained that a State may exercise criminal jurisdiction whenever it is “the agreed vital interest of the international community that justifie[s] the exercise of the jurisdiction.”\(^{73}\) When a court is exercising this Universal Jurisdiction, it is acting as a member of the international community righting an international wrong, rather than as a domestic sovereign extending jurisdiction beyond its borders.\(^{74}\)

The practice of Universal Jurisdiction also raises another philosophical oddity peculiar to international criminal law. There exists within the scope of the law of nation the maxim *aut dedere aut punire*, or “extradite or prosecute.” Under this philosophy, a State harboring an individual who has committed crimes against the international

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\(^{70}\) *See Colangelo, supra* at 170-71 (“It goes beyond accepting that genocide is prohibited as a matter of international law because the Genocide Convention prohibits it--treaties are the source of most if not all international human rights norms in this regard to contend that the substantive definition of the crime is reflected in the treaty provisions and, in line with Part II of this Essay, that it is a definition to which courts must adhere in exercising universal jurisdiction.”).


\(^{72}\) *Id.*, ¶ 12.

\(^{73}\) *Id.*, ¶ 12(b).

\(^{74}\) *Id.*
community must initiate criminal proceedings or allow extradition to another nation that will prosecute the individual.\(^{75}\) It was under this principle that Israel justified its prosecution of Eichmann far from the site of the Holocaust.\(^{76}\) Following this international case law, it is clear that there exist principles of jurisdiction that would apply to claims arising from Darfur. However, there are also possible defenses to this assertion of jurisdiction.

**Personal Liability: Foreign Sovereign Immunity**

Yet another problem arises in the calculus of the Darfur conflict. As discussed *supra*, the Janjaweed are operating at the behest of and with the support of the official government of the Sudan. Under the principles of international law,\(^{77}\) organs of a sovereign State are generally immune from suit unless a plaintiff can show that this philosophy does not apply for cases involving the international crime of genocide.

“It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state . . . .”\(^{78}\) Accordingly, there is a general, Westphalian philosophy that foreign sovereigns enjoy both civil and criminal immunity for any acts they commit.\(^{79}\) However, when this principle conflicts with the international interests to preserve human life, it is typically the interests in preventing human rights violations that wins out.\(^{80}\) In *Ex Parte Pinochet*, a Spanish court analyzed

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\(^{75}\) *Id.*, ¶ 12(d).

\(^{76}\) *Id.*

\(^{77}\) As the relevant means of obtaining jurisdiction discussed *supra* apply international law, this jurisprudence on sovereign immunity is presented. For a more detailed discussion of the domestic law of Foreign Sovereign Immunity, see Matthew N. Thomas, *Sovereign Terrorists? – Applying the FSIA to Cases of International Terrorism*, THE NEW YORK LITIGATOR (Winter, 2007).

\(^{78}\) *Pinochet*.

\(^{79}\) *Id.*

\(^{80}\) See *id.*
the prospective prosecution of a head of state for torture committed in his home country. First, the court examined the nature of the crime and the crime’s relationship with the foreign State. Second, the court weighed principles of equity, determining whom it would prosecute for the crime compared with those responsible. This balancing test permitted the court satisfy both a desire for justice and the need to conform to principles of comity.

Other international courts have similarly recognized the limits on immunities for heads of state when they commit acts contrary to international human rights. The International Court of Justice (the “ICJ”) has limited when those immunities should be granted, stating that “the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.” The court explained how such immunity may be overcome by the nature of the act: “immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect to any crimes they might have committed, irrespective of their gravity . . . .” The ICC applies a similar standard when it comes to the crimes enumerated in the Rome Statute, stating that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the

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81 Id.
82 Id. “[A]n essential feature of the international crime of torture is that it must be committed by or with the acquiescence of a public official or other person acting in an official capacity.” (internal quotations omitted).
83 Id. “Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention [of the Torture Convention].” As discussed infra, this question of determining who can be liable for the separate acts of genocide is a difficult obstacle for international prosecutors to overcome.
85 Id., at ¶ 60.
Court from exercising its jurisdiction over such a person.\textsuperscript{86} As the crime of genocide is explicitly mentioned in the Rome Statute, and, as described \textit{supra}, is a violation of \textit{jus cogens} norms, members of the Sudanese government involved in the genocide would not enjoy immunity under international principles.

\textit{Persons Subject to Liability}

In the case of international crimes, often the individuals responsible for the commission of genocide are not the ones directly engaged in its commission, \textit{i.e.} the individual acts that together constitute the overall crime.\textsuperscript{87} However, those individual responsible for creating the genocidal scheme may be liable under a Joint Criminal Enterprise (a “JCE”\textsuperscript{88}) theory.\textsuperscript{88} This theory would be applied to any individual sharing the requisite \textit{mens rea} participating in a common plan or scheme to commit genocide.\textsuperscript{89} Three requirements must be met to find liability for a JCE: 1) there must be multiple actors involved, including government organizations;\textsuperscript{90} 2) all individuals involved must be have the \textit{mens rea} to engage in the same criminal act;\textsuperscript{91} and 3) the individual must participate in some role in perpetrating the crime.\textsuperscript{92} These elements may be met when an individual systematically planned, instigated, or ordered the particular crime to occur.\textsuperscript{93}

\textsuperscript{86} Rome Statute, Art. 27, ¶ 2.
\textsuperscript{88} David Neressian, \textit{Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes}, 30 FLETCHER F. WORLD AFF. 81, 82 (Summer, 2006).
\textsuperscript{89} See Prosecutor v. Krnojelac, Case No. ICTY-97-25-A (finding liability for accomplices to the genocide and war crimes in the former Yugoslavia).
\textsuperscript{90} Prosecutor v. Elizaphan and Gérard Nakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment, ¶ 4.
\textsuperscript{91} Id.
\textsuperscript{92} Prosecutor v. Vasilije, Case No. ICTY-98-32-A, Appeals Judgment ¶ 100 (Feb. 25, 2004). This element does not require that the individual play a significant role in the genocide. \textit{See} Prosecutor v. Semanza, Case No. ICTR-97-20-A, Appeals Judgment, ¶ 260 (May 20, 2005).
International law recognizes constructive liability in two situations. The first, “extended” joint criminal enterprise extends liability to a member of a JCE when it was foreseeable that other members of the same JCE would commit a particular act.\textsuperscript{94} These theories are not alien to U.S. domestic law. In \textit{Pinkerton v. U.S.}, the Supreme Court held that a member of a gang was liable for crimes committed by other gang members.\textsuperscript{95} The second situation is referred to in the United States as felony murder, where all individuals engaged in the commission of felony are liable if any one of them engages in conduct deemed “reckless under circumstances manifesting extreme indifference to human life.”\textsuperscript{96} In either of these cases, the head of a State government, much like the head of a crime family, could be liable for the actions committed by his or her organization when it is engaged in criminal activity.

A further reason for prosecuting government officials of States where genocide is occurring is under the theory of command responsibility. Under this theory, those with the power to control certain individuals, including military personnel and heads of state, are liable, not for committing international crimes, but for failing to prevent it.\textsuperscript{97} Command liability arises from three elements: 1) a superior-subordinate relationship; 2) the superior had knowledge that the crimes were being committed by subordinates; and 3) the superior did not take reasonable steps to prevent the crime, nor did the superior punish the wrong doers.\textsuperscript{98} In order to determine whether a command ought to be held

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\item[94] See, e.g., Prosecutor v. Milosevic, Case No. ICTY-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ ¶ 246, 248 (Jun. 16, 2004).
\item[95] 328 U.S. 640, 646-48 (1946). This theory of liability is often applied when prosecuting cases against members of multiple mobs, and is referred to as a \textit{cosa nostra} theory.
\item[97] \textit{See Kajelijeli}, ¶ 81.
\item[98] \textit{Prosecutor v. Blagojevic and Jokic}, Case No. ICTY-02-60-T, Judgment, ¶ 790 (Jan, 17, 2005).
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liable for acts committed by his or her troops, a gross-negligence theory is applied.\textsuperscript{99} To meet this standard, a commander must have demonstrated “a personal neglect amounting to wanton, immoral disregard . . . amounting to acquiescence” in the commission of the crime.\textsuperscript{100} Under these broad terms, individuals from any level of government who not only participated in, but also neglected to stop, the genocide occurring in Darfur would be subject to liability within the United States.

**Applying Jurisdictional Principles to the Crime of Genocide**

The crime of genocide was created specifically for prosecution of Nazi leadership during the Nuremberg Tribunal following the Second World War.\textsuperscript{101} Jurists and politicians both felt that there existed no crime that could sufficiently shock the conscience of the world appropriately in light of the atrocities committed during the Holocaust.\textsuperscript{102} The underlying philosophy was expressed by Raphael Lemkin just as the world was coming to know the horrors occurring in Germany:

[N]ations are essential elements of the world community. The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world. Genocide impoverishes the world in the same way that losing an entire distinctive species--the pandas, the Siberian tigers, the rhinos-- impoverishes the world over and above the loss of the individual pandas or tigers or rhinos.\textsuperscript{103}

\textsuperscript{100} Prosecutor v. von Leeb, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 543-544 (U.S. Mil. Trib. at Nuremberg--Case No. 12) (1948).
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Raphael Lemkin, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 91 (Carnegie 1944).
In 1946, one of the first acts taken by the newly founded United Nations was to establish liability for the perpetrators of genocide under international law, be they “private individuals, public officials or statesmen.”\footnote{G.A. Res. 96(I).} While the crime has existed since 1946, its scope was defined in the Convention on the Prevention and Punishment of Genocide (the “Genocide Convention”) by including:

[A]ny of the following acts committed with the 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 destructing in whole or in part;
d) Imposing measures intended to prevent births within the group;

The Convention is clear that anyone, irrespective of whether they are operating under color of state law, is liable for committing these acts, stating that “[p]ersons committing genocide . . . shall be punished whether they are constitutionally responsible rulers, public officials, or private individuals.”\footnote{Id., Art. IV.} Under this treaty, it is clear that private actors engaging in genocide would be subject to the rule of international law, and, thus, subject to jurisdiction under the ATA.\footnote{See \textit{Kadic v. Karadžić}, 70 F.2d 232 (holding that the district court had jurisdiction over a private actor alleged to have directed the genocide of Muslims in Bosnia).} However, the Genocide Convention includes a curious clause that imposes no obligation upon signatory states to engage in any form of affirmative action to prevent the crime.\footnote{Genocide Convention, Art. 6. “Persons charged with genocide or any of the other acts enumerated in article II shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted this jurisdiction.” While commanding that action be taken, this clause grants the host States the option of deferring action to the international community. While Art. 5 of the Geneva Conventions may appear to direct preventive action by the host States, the language is merely a mechanism for State execution of the convention itself without requiring any further affirmative action.} This distinction between preventative and
remedial action only servers to fuel the debate over the application of the term “genocide.”

Though the international community agrees as to the nature of the crime and the global desire to prevent it, there is little consensus on a strict definition of the crime. Most of the problems arise from the definition of the mens rea element “intent,” which the international community typically interprets as narrowly as possible. In fact, international courts that have been unable to prove that a defendant had the specific intent to commit genocide have instead prosecuted individuals for the lesser charge of aiding and abetting genocide to avoid proving the more difficult element.

It was this very problem of finding intent that prevented the United Nations from declaring the situation in Darfur as genocide. Oddly enough, the international obsession over the intent requirement goes against the philosophy that framed the crime at the Nuremberg Tribunal, where the focus was not on the extermination of a specific group, but the systematic elimination of civilians even when those populations were heterogeneous. The United States Congress has gone so far to say that the intentional destruction of the specific group must be such that “the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is part.”

The Yugoslavia War Crimes Tribunal found that there was sufficient intent to justify prosecution for genocide for the crime occurring in that region in the 1990’s. In

109 Whoops, I Committed Genocide, supra.
112 Nuremberg Charter, Art. 6(c) explains that the crime occurs against “any civilian population” irrespective of their religious or ethnic make up.
Krstić, the tribunal found that the intent requirement was satisfied, even though the intention was to kill only Bosnian Muslim men of military age and not Bosnian Muslims as a whole.\(^{115}\) This intention, coupled with forcible segregation and relocation of members of the group, sufficiently amounted to an intention to commit genocide.\(^{116}\) The United Nations attempted to distinguish this in the Darfur Report by explaining that the Janjaweed would occasionally spare women, children, and their villages after exterminating the men.\(^{117}\) These facts are virtually indistinguishable from the acts in Yugoslavia, yet the United Nations comes to a conclusion antithetical to that of the Yugoslavia International War Tribunal. The primary justification for this is the U.N.’s distinction between targeting a village where members of a group live and targeting the group itself in accordance of modern interpretations of the term “crimes against humanity” as opposed to the treaty definition for genocide.\(^{118}\) This is a distinction that has been used in the past to distinguish the mass killings in Cambodia as crimes against humanity, instead of genocide, based upon the fact that the majority of the victims were targeted because they were members of a political organization and not an ethnic or religious group.\(^{119}\) This argument may erode as the past definitions included, or, in this case, excluded, from the terms of the Genocide Convention evolve in light of customary international practice.\(^{120}\)

\(^{115}\) Id.
\(^{116}\) Id.
\(^{117}\) UN Darfur Report at 130-31, ¶¶ 513-14.
\(^{118}\) Id at 131, ¶ 514
\(^{120}\) Conangelo, at 171 (“We can say, for instance, that if the consistent and widespread practice of states prosecuting the international crime of genocide deems intent to destroy a group based on its political self-identification to satisfy the mens rea component of the crime, the customary definition of genocide has expanded to include within its victim class political groups along with the national, ethnic and racial groups carved out by the Genocide Convention.”)
A more recent case where individuals were prosecuted for genocide occurred as a result of the war in the former Yugoslavia.\textsuperscript{121} The government of Bosnia-Herzegovina petitioned the ICJ to enforce the international prohibitions on genocide after the death of thousands of Serbs within their country.\textsuperscript{122} The ICJ held that Bosnia-Herzegovina was responsible for preventing the genocide occurring within its own borders, including the use of military force.\textsuperscript{123} In Spain’s prosecution of Pinochet for the crime of genocide, it applied a definition which included the targeting of any “national human group, a differentiated human group, characterized by some trait, and integrated into the larger collectivity.”\textsuperscript{124}

In Rwanda, the International Criminal Tribunal for Rwanda (the “ICTR”) required three elements to prove genocide: “(1) the defendant committed the \textit{actus reus} of the crime, such as killing or causing serious bodily harm; (2) the victims of the crime were members of a national, ethnical, racial, or religious group; and (3) the defendant acted with the necessary \textit{mens rea}--the specific intent to destroy the national, ethnical, racial, or religious group as such.”\textsuperscript{125} While the ICTR applied the language of the Genocide Convention, it also broadened its scope, stating that “a nationwide genocidal campaign is not an element of the crime.”\textsuperscript{126} Following this language, it would appear that the ICTR was loosening the intent element of the crime of genocide by applying it to specific acts and not requiring that all acts of genocide committed within a conflict be

\textsuperscript{121} Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro), 1993 I.C.J. 325, ¶3(1)
\textsuperscript{122} Id., ¶ 4.
\textsuperscript{123} Id., ¶ 6(4).
\textsuperscript{124} THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 255, 268 (Reed Brody & Michael Ratner, eds., 2000) at 103.
\textsuperscript{125} Prosecutor v. Karemera, Ngitumpaste, \\& Nzirorera, Case No. ICTR-98-44-AR73(c), 101 Am. J. Int’l L. 157, at 159.
\textsuperscript{126} Id.
compared side-by-side in determining whether the crime itself has been committed. The United Nations determination does not conform with this philosophy, and the crisis in Darfur does meet the generally accepted international definition of the international crime of genocide.

Conclusion

The situation in Darfur requires some form of judicial action, action which the international community as a whole has neglected to provide. It is clear from the history of international criminal, and its prosecution, that the situation in Darfur does amount to a violation of the *jus cogens* norm against genocide. Courts within the United Sates may exercise jurisdiction and assign liability to those in Sudan who are responsible, both civilly, through the Alien Tort Statute, and criminally, through the principle of Universal Jurisdiction. Furthermore, international law provides no shield behind which the perpetrators of this crime may hide. Accordingly, the United States does provide a possible forum for justice for those who have suffered in Sudan.