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Ending Corporate Impunity for Genocide: The Case Against China’s State-Owned Petroleum Company in Sudan

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[In Darfur, Sudan i]t’s the political situation that gives the Chinese government political and economic advantage. A typical Western firm would find it difficult to operate there and Chinese firms do not have qualms about that.

— Prof. Ming Wan, George Mason University¹

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¹ Kristina Nwazota, *China-Sudan Trade Relations Complicate Darfur Crisis*, PBS ONLINE NEWSHOUR, Apr. 25, 2006, http://www.pbs.org/newshour/updates/china-darfur_04-25-06.html.

INTRODUCTION

Companies take advantage of favorable business climates all the time. That's the nature of business. But when a company helps engineer genocide in order to create that favorable business climate, it should be called to account. This is precisely what the Chinese National Petroleum Corporation (CNPC) has done in the Darfur region of Sudan. This Article calls them to account. No company should be able to get away with assisting in the commission of genocide by hiding behind the legal construct that it is not a natural person.

Genocide is the crime of crimes.² The Holocaust is the historical benchmark. It is, quite simply, the eradication of a people. The horror of the Holocaust moved the world to outlaw genocide in 1948.³ People have been convicted by a variety of tribunals for committing genocide and for complicity in genocide for many years. One of the bedrock principles to emerge from the Nuremberg and Tokyo trials after World War II was that individuals could be prosecuted for violations of international law. And, although that principle was made clear with respect to natural persons like Nazi leaders and Japanese generals, the principle was less clear with respect to legal persons like corporations.⁴

The treaty criminalizing genocide holds "persons" accountable for committing genocide—it does not distinguish between natural or legal persons.⁵ Indeed, nothing in the *travaux préparatoires* to the Genocide Convention accords corporations impunity in this regard. But impunity is what companies have historically enjoyed with respect to criminal wrongdoing—especially in the area of international law.⁶ While rights tend to clarify themselves quickly, it

² John Hagan, *Darfur and the Crime of Genocide*, 20 RESEARCHING LAW: AN ABF UPDATE, Winter 2009, at 1, 2, available at http://www.americanbarfoundation.org/uploads/cms/documents/abf_rl_win_09_final.pdf; Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6 WASH. U. GLOB. STUD. L. REV. 621, 629 (2007).

³ See Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

⁴ KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 253 (2011).

⁵ See Genocide Convention, *supra* note 3, at art. IV.

⁶ W. Cory Wanless, *Corporate Liability for International Crimes Under Canada's Crimes Against Humanity and War Crimes Act*, 7 J. INT'L CRIM. JUST. 201, 202 (2009).

often takes decades for unambiguous obligations to similarly emerge from international law's murky depths.⁷

That is not to say that corporations cannot be held civilly liable for wrongdoing.⁸ Companies have already been sued, albeit unsuccessfully, for doing business in Sudan where human rights abuses are implicated.⁹ In the United States, this involves litigation under the Alien Tort Statute, which has recently been interpreted rather restrictively.¹⁰ But criminal sanctions have not been forthcoming.

This is true no matter whether the company is involved in war crimes, crimes against humanity, or genocide. To the extent corporations are involved in any of these "big three" types of prohibited *jus cogens* conduct, their involvement in the first two are typically more direct.¹¹ And it would be safe to assume that most corporations would be loath to actively commit genocide because of the stigma associated with that crime. So, to the extent a company

⁷ "[T]he issue of corporate criminal liability for international law violations remains unresolved." Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 955 (2008).

⁸ Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 905 (2008).

⁹ *Alien Torts: Trial Trails*, ECONOMIST, Oct. 9, 2010, at 87.

¹⁰ See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (noting that "customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations" and that "offenses against the law of nations . . . for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations").

¹¹ "Private military companies engaging in direct combat are perhaps the most notorious for committing atrocities." Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 153 (2005).

According to a former UN special rapporteur, the presence of mercenaries "is a factor which tends to increase the violent and cruel nature of specific aspects of the conflict in which they are involved." Adventurer mercenaries fighting in the postcolonial wars in Africa, for example, engaged in human rights abuses on a massive scale. The French mercenary Costas Giorgiu, who led a band in the Angolan civil war in the 1970s, regularly fired on civilians and summarily executed many of his own group when he believed they might desert. More recently, during the conflict in Sierra Leone, officers of Executive Outcomes, working under contract with the government, reportedly ordered employees carrying out air strikes against rebels to "[k]ill everybody," even though the employees had told their superiors they could not distinguish between civilians and rebels. Neither the Executive Outcomes employees, nor the company itself, has been held legally accountable.

Id. (alteration in original) (footnotes omitted).

finds itself involved in genocide, that involvement will usually be passive,¹² typically discovered after the fact, and quietly allowed to continue if the investment already made is large enough to induce continued support.¹³

As international trade expanded during the Cold War and beyond, the extensive rights accorded multinational corporations were not checked with coextensive obligations.¹⁴ And even though international criminal law began to develop and congeal around individual and state responsibility, the idea of corporate responsibility slipped through the net.¹⁵

Throughout the past half century, states and international organizations have continued to expand the codification of international human rights law protecting the rights of individuals against governmental violations. Parallel with increasing attention to the development of international criminal law as a response to war crimes, genocide, and other crimes against humanity, attention to individual responsibility for grave human rights abuses has grown. “The creators of this ever-larger web of human rights obligations, however, failed to pay sufficient attention to some of the most powerful nonstate actors in the world, that is, transnational corporations and other business enterprises.”¹⁶

This state of affairs suits companies’ interests.¹⁷ But corporate entities increasingly find themselves enmeshed in atrocities that demand judicial redress and greater public scrutiny. And no crime justifies more scrutiny than genocide.

Nevertheless, defenders of corporate impunity would argue that prosecuting corporations for genocide is bad policy, often resting such

¹² Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL’Y REV. (forthcoming Summer 2012).

¹³ Wim Huisman & Elies van Sliedregt, *Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity*, 8 J. INT’L CRIM. JUST. 803, 818 (July 2010).

¹⁴ Larissa van den Herik and Jernej Letnar Čerňič, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. INT’L CRIM. JUST. 725, 737 (July 2010).

¹⁵ DESISLAVA STOITCHKOVA, TOWARDS CORPORATE LIABILITY IN INTERNATIONAL CRIMINAL LAW 95 (2010).

¹⁶ David Weissbrodt & Muria Kruger, *Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 901 (2003).

¹⁷ See ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 29 (4th ed. 2008). “It almost seems as though a certain level of corporate crime is just assumed as a real-life ‘cost of doing business.’” *Id.*

arguments on economic grounds. But defenders would also make an array of procedural and jurisdictional arguments against corporate criminal liability for genocide under international law:

1. Corporations are not subjects of international law generally;
2. Corporations are not subject to the Genocide Convention in particular;
3. Corporations do not commit crimes, people do;
4. Even if corporations can commit crimes, no theory of vicarious criminal liability applies to corporations under international law:
 - a. Command responsibility is used only in the military context;
 - b. *Respondeat superior* is recognized only domestically;
 - c. Joint criminal enterprise is not used against corporations;
5. Genocide requires specific intent—which corporations cannot form, and, in any case, proving complicity does not relieve prosecutors of this *mens rea* standard;
6. No international criminal tribunal has jurisdiction to try a corporation for genocide.

I analyze and rebut these arguments in the second portion of this paper, which appears in vol. 6:2 of the *Harvard Law & Policy Review* (forthcoming 2012).¹⁸ By agreement, and to their credit, the editors of the *Oregon Law Review* elected to run this case study earlier in order to bring attention to the grave situation in Darfur and register the importance of corporate liability for genocide as the International Criminal Court continues its work on the Sudan situation.¹⁹

This case study explores the involvement of China's National Petroleum Corporation (CNPC) in the Sudan tragedy, or "as *New York Times* columnist Nicholas Kristof and others have put it, that 'Beijing is financing, diplomatically protecting and supplying the arms for the first genocide of the 21st century' in Darfur."²⁰

¹⁸ See Kelly, *supra* note 12.

¹⁹ See Press Release, Int'l Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur (Jan. 25, 2005), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur?lan=en-GB>.

²⁰ Gary J. Bass, *Human Rights Last*, FOREIGN POL'Y, Mar./Apr. 2011, at 81.

I

CHINA'S STATE OIL COMPANY AND THE SUDANESE GENOCIDE

Any discussion of evolving legal theories requires a fact pattern. The situation in the Sudan is but one example of how corporate complicity in genocide²¹ has driven hundreds of thousands to their deaths and millions into exile. Scholars and politicians may quarrel about whether particular atrocities qualify as genocide. That was certainly the case with respect to ethnic cleansing in Kosovo by Serbian forces,²² and it is true with respect to the situation in Darfur.

That determination is not inconsequential, as the label "genocide," affixed to a certain atrocity, carries with it the legal obligation undertaken by contracting parties in the 1948 Genocide Convention to prevent genocide.²³ In the context of corporate involvement in genocide, that means the state in which the company is chartered would have an international legal obligation to prohibit that company from doing business in the afflicted country once the atrocity in question qualifies as genocide.

This, of course, has never happened. And it is certainly one reason that China is eager to avoid having the Darfur catastrophe officially declared genocide. As a party to the Genocide Convention, that puts China in a very difficult political and legal position. In other words, as members of the Chinese Foreign Ministry have observed with respect to categorizing Darfur as the site of genocide, "We have some doubts."²⁴

In his June 2010 report to the U.N. Security Council, the Prosecutor of the International Criminal Court, Luis Moreno-

²¹ The question of whether the atrocities committed in the Sudan rise to the level of genocide or are war crimes and crimes against humanity is at once a political and legal question. The United States and many states consider the ongoing violence against the black population by the Arab-led government in Khartoum to be genocide. However, a high-level commission of inquiry dispatched by the United Nations determined that it was not technically genocide because there was no proof of intent to exterminate the population. The International Criminal Court has reconsidered this question and issued an arrest warrant for the President of Sudan on charges of genocide. *See* Appendix. For purposes of this discussion, and in the legal opinion of this author, the situation in the Sudan is genocide. For more on this debate, see JOHN HAGAN & WENONA RYMOND-RICHMOND, *DARFUR AND THE CRIME OF GENOCIDE* (2009).

²² MICHAEL J. KELLY, *NOWHERE TO HIDE: DEFEAT OF THE SOVEREIGN IMMUNITY DEFENSE FOR CRIMES OF GENOCIDE AND THE TRIALS OF SLOBODAN MILOSEVIC AND SADDAM HUSSEIN* 98 (2005).

²³ Genocide Convention, *supra* note 3, at art. I.

²⁴ Bass, *supra* note 20, at 84.

Ocampo, reiterated the level of continuing and unabated violence perpetrated by the Sudanese government against its own people:

Sadly, the crime of extermination against millions displaced into camps continues. Acts aimed at inflicting inhumane conditions of life continue. Under-Secretary General Holmes reported to this Council last week the difficulties to access many areas, the problems of finding interlocutors in Khartoum to address those issues. Those are not technical issues resulting from disorganization. The decision to expel humanitarian organizations, and the accumulation of obstacles is a policy of identified Sudanese officials with the aim of committing the crime of “extermination.”²⁵

Mr. Ocampo then asked the court to issue an arrest warrant for Sudanese President al-Bashir on charges of genocide—which it did.²⁶

The Sudanese government undertook a radical policy of land clearing in 2003 in order to divvy up the southern and western regions for oil development. The racially black residents of the southern and western regions resisted the encroachments of the Arab-led and Muslim-dominated national government located in the north.²⁷ The residents began to organize rebel groups to fight back against the government. That’s when things turned to genocide. The government organized and armed militias called *janjaweed* that, with military support, eradicated vast swaths of black villages in the Darfur region—massacring countless civilians and driving survivors into refugee camps in neighboring Chad.²⁸

The figures below starkly demonstrate why the genocide was carried out—money. This initial motive, once a company is invested, can migrate to allow the commission of crimes like genocide and, over time, more emphasis can come to be placed on mitigating losses rather than pushing for more gains:

While commercial and financial interests seem to be the main motive [for corporate involvement in international crime], financial interests can take different forms. In most cases, rather than profit maximization, loss minimization seems to be the dominant motive. Especially in the capital intensive extraction of natural resources,

²⁵ Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593 (2005), Office of the Prosecutor, Int’l Criminal Court, at ¶ 35 (June 11, 2010) (Luis Moreno-Ocampo), *available at* http://www.iccnw.org/documents/Speech_UNSC_11062011.pdf.

²⁶ *See infra* Appendix.

²⁷ INT’L CRISIS GRP., ASIA REPORT NO. 153: CHINA’S THIRST FOR OIL 23 (2008), *available at* http://www.crisisgroup.org/~media/Files/asia/north-east-asia/153_china_s_thirst_for_oil.pdf.

²⁸ *Id.* at 25–26.

such as oil and gold, the risk of loss of investments that were already made appears to be the most important reason for corporations to stay in a certain country or area and as a result become involved in international crimes.²⁹

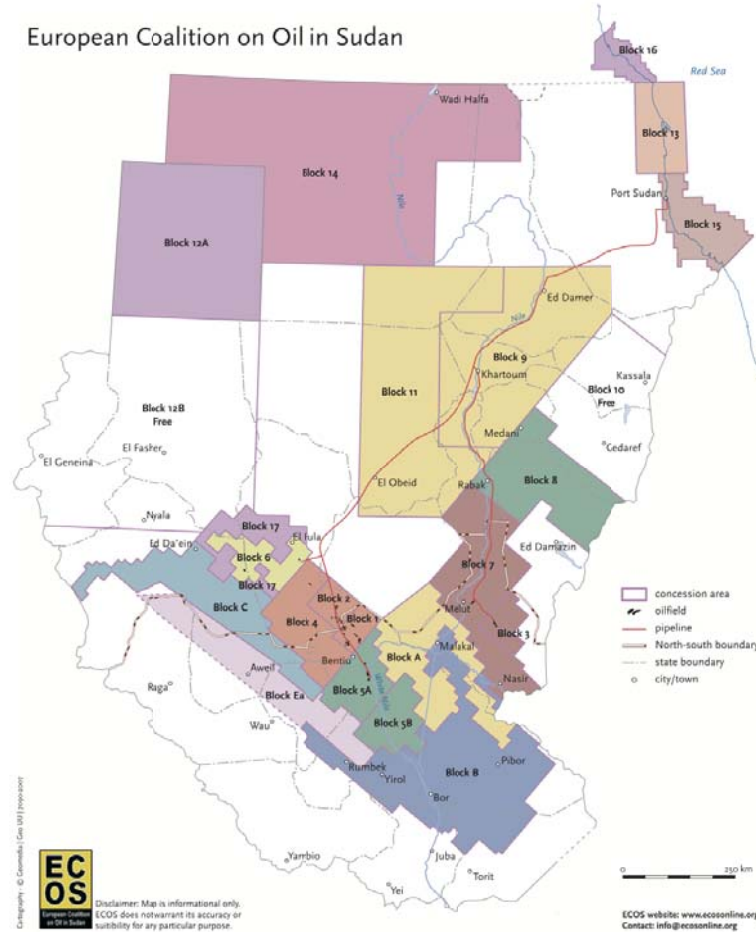
The award of petroleum exploration and development blocks by the Sudanese government to Chinese companies demonstrates such a linkage. Figure 1 depicts Sudan's oil concessions in seventeen blocks. Blocks C, 6, 17, 12A, and 12B are in the Darfur region. Block 6 is the only block in serious production,³⁰ and the CNPC, controls ninety-five percent of that concession. CNPC is also angling for the as-yet-to-be-awarded block 12A—which encompasses the entirety of the rest of the Darfur region.³¹

²⁹ Huisman & van Sliedregt, *supra* note 13, at 818.

³⁰ See Maram Mazen, *Sudan Plans to Start Pumping Oil in Darfur, Petroleum Minister Deng Says*, BLOOMBERG, Dec. 1, 2010, <http://www.bloomberg.com/news/2010-12-01/sudan-plans-to-start-pumping-oil-in-darfur-petroleum-minister-deng-says.html>.

³¹ See *id.*

European Coalition on Oil in Sudan



<p>Block 1,2,4, GNPOC - 40% CNPC - 30% Petronas - 25% ONGC Videsh - 5% Sudapet</p> <p>Block 3,7, PDOC - 41% CNPC - 40% Petronas - 8% Sudapet - 6% Sinopet - 5% Al Thani</p> <p>Block 5A, WNPOC-1 - 68,87% Petronas - 24,12% ONGC Videsh - 7% Sudapet</p> <p>Block 5B, WNPOC-2 10% awarded to GOSS; composition to be renegotiated - 39% Petronas - 24,5% Lundin - 23,5% ONGC Videsh - 13% Sudapet</p>	<p>Block 6, CNPCIS - 95% CNPC - 5% Sudapet</p> <p>Block 8, WNPOC-3 - 77% Petronas - 15% Sudapet - 8% Hi Tech</p> <p>Block 9,11, Sudapak I - 85% Zahir - 15% Sudapet</p> <p>Block 10, Free</p> <p>Block 12A, Qahtani & Others - 33% Qahtani - 20% Ansan - 20% Sudapet - 15% Dindir Petroleum - 7% Hi Tech - 5% A.A. In.</p>	<p>Block 12B, Free</p> <p>Block 13, CNPC, Pertamina & Sudapet - 15% Pertamina - 15% Sudapet - 10% Dindir Petroleum - 10% Express Petroleum & Gas - 10% Africa Energy</p> <p>Block 14, Petro SA - 80% Petro SA - 20% Sudapet</p> <p>Block 15, RSPOC - 35% Petronas - 35% CNPC - 15% Sudapet - 10% Express Petroleum & Gas - 5% Hi Tech</p> <p>Block 16, Lundin</p>	<p>Block 17, Ansan - 66% Ansan - 34% Sudapet</p> <p>Block A, Sudapak II - 83% Zahir - 17% Sudapet</p> <p>Block B, Total - 32,5% Total - 27,5% Kufpec - 10% Sudapet - 10% GOSS - 20% open</p> <p>Block C, APCO - 65% Hi Tech - 17% Sudapet - 10% Khartoum State - 8% Hegleig</p> <p>Block Ea, Free</p>
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Fig. 1. Oil Concessions in the Sudan by Block.³²

³² ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, COUNTRY ANALYSIS BRIEF: SUDAN (2010) (citation omitted), available at <http://205.254.135.24/countries/country-data.cfm?fips=SU>.

[I]n August 2008 Darfuri rebel groups accused the government of mounting a military offensive in the north of block 12A. At the time, a Sudan Liberation Army commander (from the Abdel Wahid faction) alleged that Chinese oil workers had arrived in the area and a spokesperson for the Sudan Liberation Army (Unity faction) alleged that the government was trying to clear the rebels out of the area in order to make way for oil exploration.³³

CNPC, lurking in the background of all this, is, in fact, one of the key corporate players in the atrocities that have unfolded in the Sudan and that continue. In 1997, CNPC acquired a forty-percent share of the Greater Nile Petroleum Operating Company (GNPOC), “a consortium that presently dominates oil production in Sudan.”³⁴ China, operating through CNPC’s stake in GNPOC, has

transformed Sudan from a nation dependent on foreign energy supplies into an oil exporter. These developments . . . coincided with Sudanese military attacks on unarmed civilians to clear a 100-kilometer *cordon sanitaire* around Sudanese oil fields. CNPC and GNPOC . . . contract[] with Khartoum to secure their oil operations and allow[] Sudanese military forces to use the companies’ air strips, landing pads, and mechanical support.³⁵

But to understand that complicity, one must understand that the Chinese government and the People’s Liberation Army (PLA) are working in tandem with CNPC to drive this process. The government in Beijing provides political cover to the Sudanese government on multiple fronts—often simultaneously.³⁶ China trains Sudanese

³³ *Global Witness Uncovers Evidence of Oil Exploration in Darfur*, EUR. COALITION ON OIL SUDAN (June 3, 2010), http://www.ecosonline.org/news/2010/evidence_of_oil_exploration_in_Darfur.

³⁴ Russell P. McAleavey, Note, *Pressuring Sudan: The Prospect of an Oil-for-Food Program for Darfur*, 31 *FORDHAM INT’L L.J.* 1058, 1061 (2008).

³⁵ *Id.* at 1061–62 (internal footnotes omitted).

³⁶ For instance, after the International Criminal Court indicted the President of Sudan, China’s envoy to Sudan flew to Western capitals seeking amelioration of the charges. He then returned to Sudan:

“I am here for consultations with the government of Sudan and to give them our advice and to make a few concrete suggestions,” said China’s special envoy, Liu Guijin, fresh from talks in London, Paris and Washington.

“I used those opportunities . . . to have consultations with our partners there in the West as to how could we work together to seek a kind of soft landing of the charge,” he said.

China Wants Sudan War Crimes Crisis ‘Soft Landing’: Envoy, AGENCE FRANCE-PRESSE (Oct. 26, 2008), <http://afp.google.com/article/ALeqM5hF1LKZ0GA6bDmiMIF9C0uWEZIFJA>.

military pilots, who then strafe villages to clear land.³⁷ China is also the main supplier of weapons used in the genocide.³⁸ *The New York Times* reported in 2009 that

88 percent of Sudan's imported small arms come from China—and those Chinese sales of small arms increased 137-fold between 2001 and 2006. China has also sold military aircraft to Sudan, and the BBC reported this week that two Chinese-made A-5 Fantan fighter aircraft were spotted on a Darfur runway last month. The BBC also said that China is training Sudanese military pilots in Sudan.

Likewise . . . Chinese engineers supervise arms production at the Giad industrial complex outside Khartoum. Chinese military companies have also helped set up arms factories outside Khartoum at Kalakla, Chojeri and Bageer.³⁹

Thus, an iron triangle of Chinese components is inextricably involved in the Sudanese genocide: the international *political power* of the government in Beijing welded together with the *economic power* of CNPC and the *military power* of the PLA. This triangle creates a vortex the genocidal government in Khartoum cannot resist. Shunned by the Western world and indicted by the International Criminal Court, Sudan seeks political protection from the Chinese government—which often shields them with the threat of China's veto at the U.N. Security Council and successfully waters down relevant resolution and sanctions language.⁴⁰ Sudan depends on Chinese military expertise and training.⁴¹ And, finally, Sudan has economically become a client state of the Chinese.

³⁷ Nicholas D. Kristof, Op-Ed., *A President, a Boy and Genocide*, N.Y. TIMES, Mar. 4, 2009, at A31.

³⁸ Nicholas D. Kristof, Op-Ed., *Prosecuting Genocide*, N.Y. TIMES, July 17, 2008, <http://www.nytimes.com/2008/07/17/opinion/17kristof.html?scp=15&sq=Kristof&st=nyt>. Embarrassingly for China, as a U.N. Security Council member, it is in blatant violation of a U.N. arms embargo on Sudan. See Eric Reeves, *Arming Khartoum: China's Complicity in the Darfur Genocide*, SUDAN TRIB., Oct. 18, 2010, <http://www.sudantribune.com/Arming-Khartoum-China-s-complicity,36644>.

³⁹ Kristof, *supra* note 38; accord HUMAN RIGHTS FIRST, INVESTING IN TRAGEDY: CHINA'S MONEY, ARMS, AND POLITICS IN SUDAN 11–16 (2008), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080311-cah-investing-in-tragedy-report.pdf>.

⁴⁰ See Editorial, *The Power of Protest*, INDEPENDENT, Feb. 15, 2008, at 34.

Turning a blind eye to ethnic cleansing would be one thing. But China goes further, and uses its influence in the United Nations Security Council to protect its Sudanese client. China has helped to water down resolution 1769, which calls for the deployment of a joint United Nations and African Union peacekeeping force to protect the inhabitants of Darfur.

Id.

⁴¹ See Letter to the Editor, *Call on China to Influence Sudan*, L.A. TIMES, Dec. 28, 2007, at A30 (stating that China offers significant “military aid to Sudan”); Kenneth Roth,

As the chief Chinese economic actor in the Sudan, CNPC is perhaps in more of a position to influence Khartoum than the other two components of the iron triangle. “As a result of its efforts to develop Sudan’s oil industry, CNPC has become Sudan’s largest foreign investor, with approximately US\$5 billion invested in oil field development and US\$7-8 billion in total assets in Sudan.”⁴²

In fact, many foreign policy experts contend that economic power has outstripped political and military power in the last decade overall. Leslie Gelb, former president of the Council on Foreign Relations, recently acknowledged this transition:

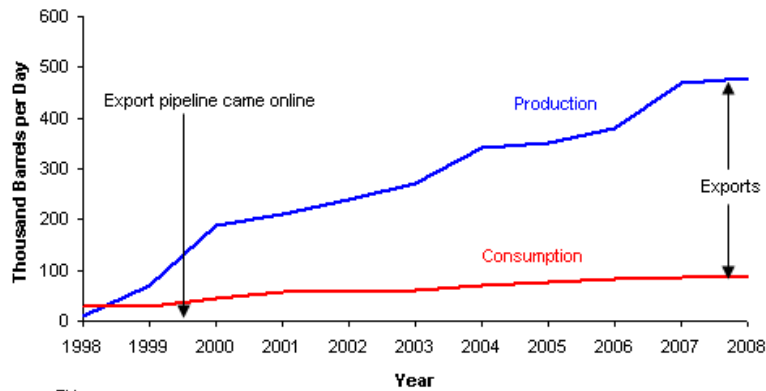
Now, what has changed is the composition of power in international affairs. For almost all of history, international power was achieved in the form of military power and military force. . . . [P]articularly in the last fifty years or so, it has become more and more economic. So power consists of economic power, military power, and diplomatic power, but the emphasis has shifted from military power . . . to now, more economic power.⁴³

Figure 2 illustrates the rise in oil production that Sudan experienced, even as Sudanese consumption remained largely static, during the genocide. Figure 3 explains where the oil is going. It goes in large part to China, though Japan consumes just over one quarter. And, while Indonesia and India are growth economies seeking new sources of petroleum, China takes the lion’s share (over half) of Sudanese oil.

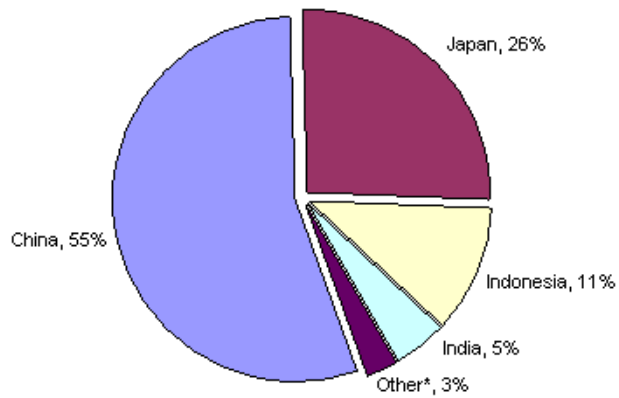
Op-Ed., *China’s Silence Boosts Tyrants*, INT’L HERALD TRIB., Apr. 20, 2006, at 7 (stating that China’s investment in oil from Sudan helped purchase weapons and finance the military in Darfur).

⁴² McAleavey, *supra* note 34, at 1062 (citations omitted).

⁴³ *Fashioning a Realistic Strategy for the Twenty-First Century: A Conversation with Leslie H. Gelb*, 34 FLETCHER F. WORLD AFF., Summer 2010, at 5, 5.

Sudan's Oil Production and Consumption, 1998-2008

Source: EIA

Fig. 2. Oil Production During the Darfur Genocide.⁴⁴**Sudan's Oil Exports by Destination, 2008**

*Other includes: South Korea, Taiwan, Thailand, and Malaysia

Source: Global Trade Atlas

Fig. 3. Sudan's Oil Exports by Destination (2008).⁴⁵

So if China is an essential culprit driving the genocide in Darfur, how can it be made accountable for those actions? It cannot.⁴⁶ China

⁴⁴ ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, SUDAN ENERGY DATA, STATISTICS AND ANALYSIS—OIL, GAS, ELECTRICITY, COAL (2009), available at <http://www.eia.doe.gov/cabs/Sudan/Full.html>.

⁴⁵ *Id.*

is a sovereign state—and a veto-wielding member of the U.N. Security Council. It enjoys immunity from prosecution. This holds true for the PLA as a component of the government. The only way to pierce the PLA's veil would be to find it a criminal organization as the International Military Tribunal (IMT) at Nuremberg did with respect to the SS or the Gestapo.⁴⁷

Which leaves CNPC. And, although CNPC is a corporation, the prospects for prosecuting it would be dim. CNPC is a state-owned company, which raises questions of sovereign immunity. It spun off most of its liabilities to a subsidiary, PetroChina, but Beijing controls over eighty-six percent of its shares.⁴⁸ As such, it can make a colorable argument for sovereign immunity—although that would not likely stand in jurisdictions that recognize the market-participant exception to immunity. Alternatively, CNPC can negotiate variable degrees of immunity from prosecution in the relevant states where it does business. This is a common practice of large foreign corporations and often a condition of doing business in a developing country with immature, and often corrupt, justice systems.

But when CNPC's economic enterprise and legal impunity is set against personal stories of genocide survivors, the injustice becomes starkly apparent:

Suad Ahmed[is] a 25-year-old mother of two from Darfur. She lives . . . in the Goz Amir refugee camp, and last month she was collecting firewood with her . . . little sister, Halima, when a band of janjaweed ambushed them.

The janjaweed regularly attack women and girls—part of a Sudanese policy of rape to terrorize and drive away black African tribes—and Ms. Suad knew how brutal the attacks are. A 12-year-old neighbor girl had been kidnapped by the janjaweed and gang-raped for a week; the girl's legs were pulled so far apart that she is now crippled.

But Ms. Suad's thoughts were only for her sister, who is just 10. "You are a virgin, and you must escape," she told her. "Run! I'll let myself be captured, but you must run and escape."

The local culture is such that if the little girl were raped, she might never be able to marry. So Ms. Suad made herself a decoy

⁴⁶ See Moira Herbst, *Oil for China, Guns for Darfur*, BLOOMBERG BUS.WEEK, Mar. 14, 2008, http://www.businessweek.com/globalbiz/content/mar2008/gb20080314_430126.htm.

⁴⁷ See Beth Stephens, *The Amoralities of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 76–77 (2002).

⁴⁸ PETROCHINA CO. LTD., ANNUAL REPORT 9 (2009), available at [http://www.petrochina.com.cn/Resource/pdf/xwygg/2009ANNUALREPORT\(e\).pdf](http://www.petrochina.com.cn/Resource/pdf/xwygg/2009ANNUALREPORT(e).pdf).

and allowed herself to be caught, while her sister escaped back to the camp.

Ms. Suad . . . was five months pregnant. . . .

. . . [T]he janjaweed beat Ms. Suad, and seven of them gang-raped her despite her pregnancy. “You black people have no land,” she recalls them telling her. “This land is not for you.”

People from the camp found Ms. Suad in the hills that evening, too injured to walk, and carried her back. Ms. Suad said she didn’t seek medical treatment, because she wanted to keep the rape as much of a secret as possible and didn’t even tell her husband, although he eventually found out along with a few others. He accepted that it was not her fault.⁴⁹

Does Suad Ahmed not deserve justice because she is a poor black African woman? She is Sudanese, run off her land by government-backed forces so the land can be exploited. Such refugees are kept from returning by marauding militias who murder and terrorize them. If this is done so the genocidal government in Khartoum can make millions from oil concessions, then shouldn’t the petroleum companies providing the economic incentives for this cruelty be held responsible?

Like most corporations, CNPC shaves off assets and liabilities on a regular basis—the motivation for doing so is often a mystery, but possibly it is to avoid some responsibility or another. As noted earlier, CNPC spun off most of its assets and liabilities to a subsidiary dubbed PetroChina in 1999. This company was designed to attract foreign investment in China’s petroleum sector. PetroChina then took a fifty-percent stake with CNPC in yet a new company, the CNPC Exploration and Development Company.⁵⁰ The argument can be

⁴⁹ Nicholas D. Kristof, Op-Ed., *A Sister’s Sacrifice*, N.Y. TIMES, Nov. 26, 2006, <http://www.nytimes.com/2006/11/26/opinion/26kristof.html?scp=42&sq=Kristof&st=nyt>.

⁵⁰ See Amy Deen Westbrook, *What’s in Your Portfolio? U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism*, 59 DEPAUL L. REV. 1151, 1189–90 (2010).

PetroChina was a wholly-owned subsidiary of the China National Petroleum Company (CNPC), and it was created for the purpose of attracting foreign capital through an initial public offering (IPO) in the U.S. markets.

There was considerable controversy surrounding the PetroChina offering because CNPC held a minority joint venture position in Sudan’s Greater Nile Oil Project, which was accused of human rights abuses. Various anti-slavery, religious, and conservative national security groups, as well as the AFL-CIO and several members of Congress, therefore objected to the PetroChina offering.

The question was whether the proceeds from PetroChina’s U.S. offering would be used by the parent company (CNPC) to fund operations in Sudan. CNPC promised to segregate the PetroChina offering funds and to create separate accounts for the IPO proceeds so that they would not be used for the Sudanese joint venture. Critics considered this a restructuring scheme that was designed to

made that PetroChina is the alter ego of CNPC, sharing many of the same board members, officers, and even the red and gold rising sun logo.⁵¹ Indeed, industry research experts agree that “investors should treat CNPC and PetroChina as if they were a single entity.”⁵²



CNPC is involved with other national petroleum companies through consortium agreements in Sudan.⁵³ Still other companies have been involved in the Sudanese genocide and some have even been taken to court in civil actions. Most recently, the Canadian petroleum corporation Talisman Energy was sued in U.S. federal court under the Alien Tort Statute.⁵⁴

avoid U.S. sanctions on Sudan, and they charged that CNPC created PetroChina to access the U.S. capital markets while protecting itself from negative public reaction to its operations in Sudan.

There was no legal prohibition, however, on offering the PetroChina shares to U.S. investors. OFAC issued an opinion that the shares could be purchased without violating the U.S. sanctions in place against Sudan, as long as “there was no ‘clear statement’ that CNPC would use the proceeds to retire Sudan-related debt.” Groups objecting to the offering had to content themselves with the fact that CNPC’s involvement in Sudan was disclosed at all.

Id. (footnotes omitted).

⁵¹ KLD Research, *Public Companies Operating in Sudan: The Relationship of PetroChina Company Ltd. to China National Petroleum Corporation* (May 9, 2007) available at http://www.kld.com/newsletter/archive/press/pdf/KLD_Analysis_of_PetroChina_Company.pdf. Drawing the conclusion that PetroChina is, in fact, the alter ego of CNPC requires piercing the corporate veil and showing a commingling of funds, undercapitalization of the subsidiary and lack of observance of legal formalities—all of which are beyond the scope of this paper. See FRANKLIN A. GEVURTZ, CORPORATION LAW § 1.5 (2d ed. 2010).

⁵² *Id.* at 5.

⁵³ See *Glittering Towers in a War Zone*, ECONOMIST, Dec. 7, 2006, at 27.

⁵⁴ Among Talisman Energy’s more questionable conduct was “allegedly allow[ing] the Sudanese government to land bombers on company-owned airstrips as part of air raids that

On the question of how far to pursue prosecutions against corporations, the chief argument will be this: where does complicity to genocide stop? At some point, the line of complicity becomes tenuous. And it is at this point that prosecutorial discretion kicks in and removes the question from the legal realm to the political and economic realm. For instance, on the question of CNPC's complicity in the Sudan genocide, does a prosecutor who is frustrated in bringing a case against CNPC then go after its key investors? How about going after PetroChina—CNPC's subsidiary and alter ego? How about PetroChina's investors? That may be a bridge too far.

As Nicholas Kristof, the *New York Times* columnist who has served as America's public conscience on the Sudan, notes:

The biggest U.S. investor in Class H shares of PetroChina, a Chinese oil concern whose parent company is active in Sudan, is Warren Buffett's Berkshire Hathaway. I have huge respect for Mr. Buffett, and he may be thinking: My obligation is to make money for shareholders, not to use their investments in a dubious attempt to save the world. But surely if Berkshire Hathaway and Fidelity mutual funds saw lucrative opportunities in selling bayonets to the janjaweed, they would balk at that. We do have limits; the question is where we draw them.⁵⁵

How can one say that Berkshire Hathaway, led by Warren Buffett, the mild-mannered octogenarian billionaire of Omaha, Nebraska, is responsible for the genocide in Sudan? A prosecutor would find the investment connections too tenuous. The knowledge base of Berkshire Hathaway is insufficient and too difficult to prove. But not so for CNPC (or possibly PetroChina), which is actually complicit in the genocide that clears the land for safe oil exploration in the concession blocks awarded to it by the Sudanese government.

The *mens rea* applicable to a complicity charge is knowledge. "It is sufficient that the accused had knowledge of the principal offender's intention to commit a crime of the type that was in fact committed."⁵⁶ Large corporations would always argue that, whatever atrocities their employees or agents were complicit in undertaking, the company did not have the knowledge required to secure a criminal conviction. And CNPC would certainly argue this with respect to the

targeted civilians." Wanless, *supra* note 6, at 204 (citing GEORGETTE GAGNON ET AL., DECONSTRUCTING ENGAGEMENT 40 (Jan. 2003), available at <http://www.law.utoronto.ca/documents/Mackin/DeconstructingEngagement.pdf>).

⁵⁵ Nicholas D. Kristof, Op-Ed., *Death by Dollars*, N.Y. TIMES, Feb. 11, 2007, <http://www.nytimes.com/2007/02/11/opinion/11kristof.html?ref=nicholasdkristof>.

⁵⁶ Clough, *supra* note 8, at 911.

massacres by the *janjaweed* militias orchestrated by the Sudanese government.

But that argument is a fleeting one in the modern world of the multinational corporation, as Thomas Friedman deftly pointed out in his interview with IBM's vice president for business consulting services, Laurie Tropicano:

What Tropicano and her team at IBM do is basically X-ray your company and break down every component of your business and then put it up on a wall-size screen so you can study your corporate skeleton. Every department, every function, is broken out and put in a box and identified as to whether it is a cost for the company or a source of income, or a little of both, and whether it is a unique core competency of the company or some vanilla function that anyone else could do possibly—cheaper and better.

“A typical company has forty to fifty components,” Tropicano explained . . . , as she displayed a corporate skeleton up on her screen, “so what we do is identify and isolate these forty to fifty components and then sit down and ask [the company], ‘How much money are you spending in each component? Where are you best in class? Where are you differentiated? What are the totally nondifferentiated components of your business? Where do you think you have capabilities but are not sure you are ever going to be great there because you’d have to put more money in than you want?’”

When you are done, said Tropicano, you basically have an X-ray of the company, identifying four or five “hot spots.” One or two might be core competencies; others might be skills that the company wasn’t fully aware that it even had and that should be built up. Other hot spots on the X-ray, though, might be components where five different departments are duplicating the same functions or services that others outside the company could do better and more cheaply and so should be outsourced⁵⁷

Major companies today, the ones most likely to be involved in transnational trade that supports genocide, cannot reasonably claim that they don’t know what they’re doing. Myriad internal and external economic and financial pressures practically mandate that all sectors of a corporation justify themselves along cost-benefit lines. And that path reveals to the company exactly what is happening as it conducts business.

But at some point along the knowledge spectrum a line must be drawn beyond which it becomes unreasonable to presume knowing participation. Without knowing what a company knows, perhaps the prosecutor draws the line along a set of objective criteria like scale,

⁵⁷ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* 461–62 (2007).

impact, and consequence. While it is true that Berkshire Hathaway was the second-largest investor in PetroChina which is, in turn, owned by CNPC, which is the largest investor in the Sudanese oil industry and the winner of concessions that are developing oil in the Darfur region, it cannot be said that PetroChina's support of CNPC would be significantly hampered without Berkshire Hathaway's support. Indeed, Berkshire divested from PetroChina in 2007 and what happened? Aside from a momentary drop in stock price, other investors filled the gap and PetroChina went about expanding its business just as its parent company, CNPC, went about expanding its business in the Sudan.

So, in this scenario, while scale of investment could have impacted the company that was linked to the company that was complicit in the genocide, it did not. There was no impact, and, one could argue, Berkshire was incapable of having *any* impact on CNPC's Sudan operations via its PetroChina holdings. Moreover, there was no consequence of Berkshire's withdrawal from PetroChina. Thus, even Berkshire Hathaway was impotent to affect any of CNPC's activities.

But, while the convergence of scale, impact, and consequence is perhaps where the line should be drawn for legal purposes, political, social, and economic pressure to encourage divestment work well—particularly in the West. Mr. Buffett's shareholders confronted him at his company's annual meeting in May 2007, after Berkshire Hathaway's investment in PetroChina became widely known.⁵⁸ Investors insisted that Berkshire divest due to PetroChina's link to CNPC and the Sudan genocide. Subsequently, Berkshire Hathaway began divesting from PetroChina—completing the process in October 2007. Ever the businessman, Mr. Buffett regretted this action, observing that, in his opinion, the sell-off would not benefit the Sudanese people, and noting, “If [PetroChina stock] went down a lot, I'd buy it back” and that “[w]e still sold it too soon. I left a lot of

⁵⁸ Josh P. Hamilton, *Buffett Confronts Darfur Protests at Annual Meeting*, BLOOMBERG NEWS, May 4, 2007, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aXTJOYueW8fA&refer=us>.

money on the table.”⁵⁹ Berkshire Hathaway earned about \$3.5 billion on a \$500 million investment.⁶⁰

Beyond the West, however, companies rely much less on the goodwill of shareholders or the citizens in the countries where they are based. One could no more imagine Russians pestering Gazprom to divest from a questionable enterprise than one could imagine Chinese protesting the activities of CNPC or PetroChina. The political, social, and economic leverage that can be effective against non-Western corporations is scant.

Boiled down to an elemental statement of liability, Professor Andrew Clapham proposes this succinct statement:

Where a corporation assists another entity, whether it be a state, a rebel group, another company, or an individual, to commit an international crime, the rules for determining responsibility under international law will be the rules developed in international criminal law. The corporation will be responsible as an accomplice, whether or not it intended a crime to be committed, if it can be shown that (a) the corporation carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific international crime and this support has substantial effect upon the perpetration of the crime; and (b) the corporation had the knowledge that its acts would assist the commission of the specific crime by the principal.⁶¹

This encapsulation incorporates both the substantial-effect notion articulated above and the assistance notion, together with the knowledge test.

Yet defenders of corporate impunity would maintain that to prosecute companies is, nonetheless, bad policy because it would result in regular harm to innocent bystanders.⁶² If a company closes as a result of criminal prosecution (or even just as the result of a criminal indictment like Arthur Andersen),⁶³ regardless of the verdict,

⁵⁹ Stephanie Tong, *Buffett Offloads All PetroChina Shares*, STANDARD, Oct. 20, 2007, available at http://www.thestandard.com.hk/news_detail.asp?pp_cat=1&art_id=55432&sid=15900695&con_type=1. Fidelity also coincidentally reduced its stock holdings in PetroChina in May 2007. Ross Kerber, *Fidelity Denies It Sold PetroChina Stock as a Political Gesture*, N.Y. TIMES, May 17, 2007, <http://www.nytimes.com/2007/05/17/business/worldbusiness/17iht-fidelity.1.5752678.html>.

⁶⁰ Tong, *supra* note 59 (alteration in original).

⁶¹ ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 265–66 (2006).

⁶² STOITCHKOVA, *supra* note 15, at 179–82.

⁶³ See Jonathan A. Bush, Essay, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1239 (2009); Allan Sloan, *KPMG Partners Lucked Out—Thanks to Enron and Arthur*

then the lower-level employees in the copy room or the cleaning offices in the basement, who had nothing whatsoever to do with the criminal activity, lose their jobs. If a company's stock plunges upon its indictment, then elderly pensioners who invested all their savings in that stock are suddenly destitute.

Although this "might be the inevitable fallout of corporate criminal responsibility,"⁶⁴ the fact is that such prosecutions will be rare, and the multinational corporations likely involved would be huge and able to withstand the charges. Moreover, one cannot assume that all shareholders or employees are not cognizant of what the company is doing, nor can one "condone impunity for the sake of economic and social development."⁶⁵

Finally, there is the question of economic development. All of the financial and banking apparatus of the West and the international community encourage investment in the developing world. How can a multinational corporation avoid the chilling effect of possible indictment when investing or doing business in a developing country? Won't this possibility discourage that much-sought-after infusion of funds, technology, and jobs? The answer is simple. Don't commit genocide, and you won't be prosecuted.

Clearly, a more definite causal chain between CNPC and Khartoum's decision to commit genocide is needed. Those facts would never come to light without a prosecution—or perhaps even with one. Intent is difficult enough to prove with respect to individuals, let alone corporate entities. Nevertheless, without an effort to thwart corporate impunity for complicity in genocide, the impunity will remain indefinitely.

II

THE CASE AGAINST CNPC

The legal definition of genocide is met in the case of the Darfur tragedy in Western Sudan.⁶⁶ The 1948 Genocide Convention defines the crime thus:

Andersen, WASH. POST, Sept. 6, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501333.html>.

⁶⁴ STOITCHKOVA, *supra* note 15, at 182.

⁶⁵ *Id.* at 180.

⁶⁶ See Samuel Totten, *The UN International Commission of Inquiry on Darfur: New and Disturbing Findings*, 4 GENOCIDE STUD. & PREVENTION 354 (2009).

In the present Convention, genocide means any of the following acts committed *with intent to destroy*, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁶⁷

Whether corporations are covered as potential defendants that can be charged under the Genocide Convention is an open question. Some scholars argue this was not intended,⁶⁸ while others argue that it is allowed.⁶⁹ Nothing in the negotiating history of the treaty points definitively to carving out an exception for corporations, and legal definitions of the term “person” used in the treaty language during

⁶⁷ Genocide Convention, *supra* note 3, at art. II. (emphasis added).

⁶⁸ Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 *FORDHAM INT’L L.J.* 286, 290 (1999).

[The treaty] provides that “[p]ersons” committing genocide, or any of the other acts included in the Genocide Convention’s proscriptions, shall be punished. Although “persons” as a juridical concept includes natural as well as juristic persons, the Article expressly refers to “responsible rulers, public officials or private individuals” as examples of persons who might be punishable. Restrictive interpretation of this provision—the general norm of construction that applies to punitive provisions—and in particular application of the *eiusdem generis*-rule, would suggest that an accused under the Genocide Convention, ought to be confined to those who have something in common with “responsible rulers, public officials or private individuals:” that is, natural persons to the exclusion of juristic persons, including the state as a corporate body with legal subjectivity.

Id. (alteration in original) (footnotes omitted); see also Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 *COLUM. HUM. RTS. L. REV.* 565, 596 (2001).

International human rights law presently recognizes the implied recognition of correlative duties owed to facilitate the exercise of specific rights. Yet many early human rights treaties were “silent as to the roles of other or alternative addressees in regard to promoting and protecting specific rights.” For example, the Genocide Convention envisaged only the punishment of natural “persons,” and was silent on the responsibility of governments, corporations, media entities, or political parties.

Id. (footnotes omitted).

⁶⁹ Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 *J. INT’L ECON. L.* 263, 266 (2004).

that period specifically include “legal person” or corporation in the construction.⁷⁰

Beyond definitional considerations, the *actus reus* elements are not so difficult and can be objectively verified. In Darfur, the *janjaweed* militia committed genocide, the Khartoum government orchestrated genocide, and CNPC was complicit in genocide. Note, however, that these are different charges that carry differing burdens of proof—some more problematic than others for a prosecutor to show.

For instance, witness testimony and satellite evidence could easily verify the case against the *janjaweed* militia. The case against the government would likely require seizing internal government documents, turning government officials into witnesses, or securing intercepted communications. The case against CNPC would rest on internal corporate documents like meeting minutes, cross-investment activity, inter- and intra-corporate communications, and witnesses who translated CNPC-Khartoum conversations and assurances.

In short, the more attenuated the actor from the actual genocide, the more difficult the case is to prove. Thus, even though the deal between CNPC and Khartoum comes down to a simple *quid pro quo* (Khartoum clears the land and China drills the oil⁷¹), the evidence to demonstrate this will be hard to come by and compounded by the *mens rea* burden on the prosecution.

The higher threshold for the *mens rea* element on charges of genocide requires a showing of specific intent to commit the crime.⁷² CNPC would argue that its specific intent was to make money—killing people was an antecedent by-product. But recent case law allows a prosecutor to infer the requisite intent from the acts.⁷³ The International Criminal Tribunal for Rwanda (ICTR) determined in *one case* that specific intent to commit genocide can be successfully inferred through context.⁷⁴ And on a charge of complicity, it is

⁷⁰ Michael J. Kelly, *The Status of Corporations in the Travaux Préparatoires of the Genocide Convention: The Search for Personhood*, 43 CASE W. RES. J. INT'L L. 483, 484 (2010).

⁷¹ Peter S. Goodman, *China Invests Heavily in Sudan's Oil Industry*, WASH. POST, Dec. 23, 2004, at A1.

⁷² Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT'L L. 467, 474, 485, 506–07 (2001).

⁷³ KARIM A.A. KHAN & RODNEY DIXON, ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 1104 (3d ed. 2009).

⁷⁴ See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment ¶ 523 (Sept. 2, 1998).

[I]t is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically

enough to show that the main actor possessed the requisite intent, not the complicit actor. All that must be shown for complicity is knowledge.⁷⁵

Consequently, if it could be demonstrated that the Sudanese government shared the specific intent of the *janjaweed* militia to eradicate the people of Darfur, CNPC was aware of that intent and knew of the genocide (it was hard to ignore given the widespread press accounts), and CNPC supported the government anyway, then CNPC could be found complicit in the genocide.⁷⁶

While the legal analysis might be straightforward, the question of jurisdiction presents an almost insurmountable roadblock to prosecuting corporations like CNPC. On both the international and domestic sides of the equation, courts would face significant procedural difficulty asserting jurisdiction even though genocide, a *jus cogens* crime, triggers universal jurisdiction,⁷⁷ theoretically allowing any court anywhere in the world to hear the case.

Realistically, jurisdiction over CNPC is hard to come by. On the international side, no currently constituted tribunal would have

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.

Id.

⁷⁵ Stacy Sullivan, *Has the Prosecution Made the Case?*, FOREIGN POL'Y FOCUS, Oct. 2, 2005, http://www.fpiif.org/articles/has_the_prosecution_made_the_case.

⁷⁶ Flavia Zorzi Giustiniani, *Stretching the Boundaries of Commission Liability*, 6 J. INT'L CRIM. JUST. 783, 797 (2008) ("While it is uncontested that instigating [genocide] necessarily implies that the accused acted with the required intent, for aiding and abetting and complicity in genocide it suffices that the accomplice had knowledge of the principal's (specific) intent." (emphasis omitted)); Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 HARV. HUM. RTS. J. 241, 264 (2008); see also KELLY, *supra* note 22, at 118.

[T]he *mens rea* for aiding and abetting as a form of complicity in genocide would only be knowledge of the elements of the crime of genocide, including the genocidal intent of superiors or other persons, and acceptance of the course of events, taking into account the foreseeable consequences of providing substantial support.

Daryl A. Mundis, *Current Developments at the Ad Hoc International Tribunals*, 1 J. INT'L CRIM. JUST. 520, 521 (2003) (quoting Prosecutor v. Stakić, Case No. IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of Acquittal (Oct. 31, 2002)).

⁷⁷ See generally Caroline Fournet, *The Universality of the Prohibition of the Crime of Genocide, 1948–2008*, 19 INT'L CRIM. JUST. REV. 132 (2009).

jurisdiction over CNPC. The existing *ad hoc* criminal tribunals enjoy jurisdiction only over natural persons,⁷⁸ as does the permanent International Criminal Court (ICC)⁷⁹—although the ICC’s Chief Prosecutor, Luis Moreno Ocampo, would like to change that and allow for coverage of corporations.⁸⁰ Their jurisdiction is statutorily limited. And the International Court of Justice (ICJ) has jurisdiction over states only in contentious cases.⁸¹

But the ICJ is empowered by its organic statute to issue advisory opinions put to it by one of sixteen approved U.N. bodies.⁸² This type of jurisdiction has been utilized three times since the turn of the century: in 2010 the International Fund for Agricultural Development requested an opinion on a judgment of the International Labor Organization,⁸³ in 2008 the General Assembly requested an opinion on the independence of Kosovo,⁸⁴ and in 2003 the General Assembly requested an opinion on the legality of a wall erected by Israel in the Palestinian territories.⁸⁵

Although seldom used, one of the U.N. bodies, even the General Assembly, could pose the question to the ICJ whether corporations are covered by the 1948 Genocide Convention. The treaty itself, in Article IX, requires disputes about interpretation and application to be resolved by the court.⁸⁶ At the very least, an opinion from the ICJ would put to rest the question of whether companies can commit genocide—just as the ICJ put to rest the question of whether states

⁷⁸ Rome Statute of the International Criminal Court arts. 5–6, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 4, NS/RKM/1004/006 (Oct. 27, 2004).

⁷⁹ Rome Statute, *supra* note 78, at art. 6.

⁸⁰ James Podgers, *Corporations in Line of Fire*, A.B.A. J., Jan. 2, 2004, http://www.abajournal.com/magazine/article/corporations_in_line_of_fire.

⁸¹ Statute of the International Court of Justice art. 35, June 26, 1945, 33 U.N.T.S. 993.

⁸² *Id.* at art. 65.

⁸³ Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development, Order, (Apr. 29, 2010), *available at* <http://www.icj-cij.org/docket/files/146/15931.pdf>.

⁸⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (July 22, 2010), *available at* <http://www.icj-cij.org/docket/files/141/15987.pdf>.

⁸⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

⁸⁶ Genocide Convention, *supra* note 3, at art. IX.

can commit genocide in the 2007 Serbia case.⁸⁷ This might add pressure for amending the Rome Statute of the ICC to allow for corporations to be prosecuted for genocide.

On the domestic side, whether corporations can be prosecuted depends largely upon their amenability to the criminal jurisdiction of the domestic courts. In the United States, this is possible,⁸⁸ but that is not necessarily the case in all countries—although the trend is clearly in that direction. In Canada, the necessary statutory framework is now in place for asserting criminal jurisdiction over corporations for complicity in genocide.

Canada adopted a statute in 2000 implementing key provisions of the ICC's Rome Statute. The Canadian Crimes Against Humanity and War Crimes Act⁸⁹ (CAHWCA) vests jurisdiction in Canadian federal courts to try individuals for the crimes comprehended in the Rome Statute. "Specifically, CAHWCA employs the Canadian definitions for both the 'persons' that can be tried, and for the relevant modes of commission to which liability will attach. In so doing, the Act has created space for corporate liability for violations of international law that previously did not exist."⁹⁰

Thus, for example, a domestic prosecution in Canada against CNPC for genocide in Sudan could potentially move forward under Canadian and international law if there is a demonstrable connection between that situation and Canada. Mechanically, this means the jurisdictional provisions of CAHWCA could be employed using universal jurisdiction for *jus cogens* crimes together with Canadian law on aiding and abetting, which allows for criminal prosecution of companies (assuming CNPC would not enjoy immunity as a state-owned enterprise).

The *actus reus* of the crime . . . will be an act that aids or abets the commission of a war crime, crime against humanity or genocide as defined by both CAHWCA and international customary law. Canadian courts have taken a broad understanding of what sort of act will constitute 'aiding', holding generally that any act that assists or helps in the commission of the offence will be sufficient. Abetting is similarly widely defined and includes 'encouraging, instigating, promoting or procuring the crime to be committed'.

⁸⁷ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

⁸⁸ See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909).

⁸⁹ Crimes Against Humanity and War Crimes Act, R.S.C. 2000, c. 24 (Can.).

⁹⁰ Wanless, *supra* note 6, at 206.

. . . .

While the *mens rea* required to commit war crimes, crimes against humanity or genocide is not specifically defined by CAHWCA, the seriousness of the crimes demands that the *mens rea* meets constitutional standards. As a result, *mens rea* will only be fulfilled if the accused was aware of or wilfully blind to the facts that would define the act as a war crime or crime against humanity [or genocide] Thus, if a corporation knew or was wilfully blind to the fact that their actions aided or abetted the commission of a war crime or crime against humanity [or genocide] by a third party, it would have fulfilled the *mens rea* requirement. Under Canadian law, knowledge of specific details of the crime is not required so long as one is aware of the type of crime to be committed.⁹¹

Canada has, therefore, effectively amended the Rome Statute via domestic legislation to allow for the prosecution of corporate *genocidaires* in Canadian courts. This, it seems, is the proper paradigm to emulate for developed states interested in holding companies accountable for genocidal conduct.⁹² At least this is the one currently open until jurisdiction is expanded at international tribunals.

As promising as the Canadian model is, yet one final hurdle remains—sovereign immunity. Even if corporations can be charged with genocide, and even if the knowledge threshold can be met for complicity, and even if jurisdiction can be asserted by a court in the case, CNPC could argue that it is an extension of the Chinese government and, as such, shares that government's sovereign immunity from court jurisdiction. And with respect to jurisdiction in the host state, foreign companies extract promises of immunity from developing countries in which they do business, shielding them from the courts of that state.

A sovereign immunity barrier also exists for state-owned companies like CNPC with respect to civil proceedings. Statutes like the Foreign Sovereign Immunities Act⁹³ (FSIA) in the United States limit the jurisdiction of domestic courts over foreign states. American

⁹¹ *Id.* at 207–08 (footnotes omitted).

⁹² Unfortunately, and admittedly unfairly, there is a preference here for developed (or industrialized) states taking on domestic prosecution of companies for complicity in genocide as developing states are, by and large, (as a practical matter) not likely to have similarly well-developed common law or civil law notions of due process and evidentiary rigor.

⁹³ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

courts have interpreted the FSIA's provisions extending sovereign immunity to "agenc[ies] or instrumentalities"⁹⁴ of a foreign state to include state-owned corporations, such as CNPC, when the majority of the shares of the corporation are held by the government.⁹⁵ However, FSIA contains several exceptions to its jurisdiction-limiting rule—the most important of which is the commercial activity exception. Essentially, if the foreign state or company engages in purely commercial activity (similar to any other private actor in the marketplace), then the presumption against jurisdiction could be rebutted.⁹⁶

Similarly, Canada's State Immunity Act⁹⁷ prevents courts from asserting jurisdiction over foreign states or their agencies unless the commercial-activity threshold is cleared. CNPC has certainly engaged like any other private actor in the Sudanese petroleum industry, albeit aided immeasurably by the heft of the Chinese government and the military aid of the People's Liberation Army. But to move into the realm of civil litigation⁹⁸ dampens the impact of criminal sanctions and the stigma of a prosecutor holding a company criminally accountable for what it has done.

"Criminal liability assumes an advantage over civil law and other less stringent mechanisms in that penal sanctions have stigmatising side effects. The publicity alone of standing trial in the spotlight for international crimes carries unique censure."⁹⁹ If the threat of indictment by a court with jurisdiction is enough to cause even one corporation to reconsider its economic relationship with a particular dictator or general, then this entire effort would have been worthwhile. Of course, state-owned companies like CNPC are more impervious to public pressure than private companies, but China may want to avoid such a spotlight—thereby indirectly influencing CNPC's actions.

⁹⁴ 28 U.S.C. § 1603(a) (2006).

⁹⁵ *Dole Food Co. v. Patrickson*, 538 U.S. 468, 485 (2003).

⁹⁶ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

⁹⁷ State Immunity Act, R.S.C. 1985, c. S-18 (Can.).

⁹⁸ Other roadblocks like the U.S. Alien Tort Statute, recently interpreted as not allowing for litigation against foreign companies, exist along the civil lawsuit route as well. Roger Alford, *Second Circuit Adopts Purpose Test for ATS Corporate Liability*, OPINIO JURIS, Oct. 2, 2009, <http://opiniojuris.org/2009/10/02/second-circuit-adopts-purpose-test-for-ats-corporate-liability>.

⁹⁹ STOITCHKOVA, *supra* note 15, at 190 (footnote omitted).

CONCLUSION

What justice is there for victims of genocide in Darfur if low-level gunmen or even government actors are tried but the companies that were complicit in driving the process go free? Women like Suad Ahmed did nothing wrong. But she was black, and she was living in the wrong place at the wrong time. Should CNPC care what the Sudanese government does to these people? Arguably it would care more if it faced the possibility of prosecution for complicity in genocide.

Treaties now criminalize corporate participation in bribery, corruption, and environmental degradation.¹⁰⁰ If companies can be held criminally liable for environmental pollution or bribery, then why not for genocide—when millions may perish? Justice demands holding companies like CNPC and PetroChina accountable when they are complicit parties to genocide. International legal theory provides the tools for doing so even if international jurisdiction is not yet available.

The International Court of Justice should issue an advisory opinion that unequivocally holds corporations accountable when they participate in genocide, just as it has done for states. Until international criminal tribunal jurisdiction is forthcoming, the Canadian model of statutory incorporation of international criminal law, with the prospect for prosecuting corporate actors domestically, is the most promising one to follow.

The time has come for corporate impunity to stop. The basic premise of corporate responsibility must be expanded. Being a “good corporate citizen” in Omaha, Nebraska, means little if the company is doing business with other corporations backing genocide in Africa. For CNPC, it means more than building schools in Beijing if its agents are tearing them down in Sudan. And, as we have seen with respect to the attention generated on behalf of victims in Darfur, the wired, twenty-first-century world is watching. Companies will be held to account for what they do in the developing world. The blinders are off and our eyes are open.

China needs to learn this lesson now.

¹⁰⁰ Stephens, *supra* note 47, at 76–77.

APPENDIX

ARREST WARRANT FOR PRESIDENT AL-BASHIR ON CHARGES OF
GENOCIDE

Original: English No.: ICC-02/05-01/09

Date: 12 July 2010
PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge
 Judge Sanji Mmasenono Monageng
 Judge Cuno Tarfusser

**SITUATION IN DAFÜR, SUDAN
 IN THE CASE OF
 THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR
 (“OMAR AL BASHIR”)**

PRE-TRIAL CHAMBER I of the International Criminal Court (“Chamber” and “Court” respectively);

HAVING EXAMINED the “Prosecution’s Application under Article 58” (“Prosecution’s Application”), filed by the Prosecution on 14 July 2008 in the record of the situation in Darfur, Sudan (“Darfur situation”) requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad Al Bashir (hereinafter referred to as “Omar Al Bashir”) for genocide, crimes against humanity and war crimes;¹⁰¹

HAVING EXAMINED the supporting material and other information submitted by the Prosecution;¹⁰²

NOTING the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (“First

¹⁰¹ ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anxsl-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxsl & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.

¹⁰² ICC-02/05-161 and ICC-02/05-161-Conf-Anxsa-J; ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxsl-5; ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-Anxsa-E.

Decision”)¹⁰³ issued on 4 March 2009, in which the Chamber decided:

(i) to issue a warrant of arrest against Omar Al Bashir for his alleged responsibility under article 25(3)(a) of the Statute for the crimes against humanity and war crimes alleged by the Prosecution;¹⁰⁴ and

(ii) not to include the counts of genocide listed in the Prosecution’s Application—genocide by killing (count 1); genocide by causing serious bodily or mental harm (count 2); and genocide by deliberately inflicting conditions of life calculated to bring about the group’s physical destruction (count 3)—among the crimes with respect to which the warrant of arrest was issued;¹⁰⁵

NOTING the “Judgment on the Appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” (“Appeals Decision”) dated 3 February 2010,¹⁰⁶ in which the Appeals Chamber reversed the First Decision to the extent that the Chamber “decided not to issue a warrant of arrest in respect of the crime of genocide in view of an erroneous standard of proof(. . .)”,¹⁰⁷ and decided not to consider the substance of the matter¹⁰⁸ remanding it to the Pre-Trial Chamber “for a new decision, using the correct standard of proof”;¹⁰⁹

NOTING the “Second Decision on the Prosecution’s Application for a Warrant of Arrest”,¹¹⁰ (“Second Decision”) in which the Chamber held that it was satisfied that there were reasonable grounds to believe that Omar Al Bashir was criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for the charges of genocide under article 6 (a), 6 (b) and 6 (c) of the Statute, which were found in that decision to have been committed by the GoS forces as part of the GoS counter-insurgency campaign, and that his arrest appeared to be necessary under article 58(1)(b) of the *Rome Statute* (“the Statute”);

NOTING articles 19 and 58 of the Statute;

¹⁰³ ICC-02/05-01/09-3.

¹⁰⁴ ICC-02/05-01/09-3, page 92.

¹⁰⁵ Judge Anita Ušacka partly dissenting.

¹⁰⁶ ICC-02/05-01/09-73.

¹⁰⁷ ICC-02/05-01/09-73, page 3.

¹⁰⁸ ICC-02/05-01/09-73, para. 42.

¹⁰⁹ *Ibid.*

¹¹⁰ ICC-02/05-01/09-94.

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution's Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court;¹¹¹

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution's Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir;¹¹²

CONSIDERING that there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the Government of Sudan ("GoS") issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counter-insurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008;

CONSIDERING that there are reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that villages and towns targeted as part of the GoS's counter-insurgency campaign were selected on the basis of their ethnic composition and that towns and villages inhabited by other tribes, as well as rebel locations, were bypassed in order to attack towns and villages known to be inhabited by civilians belonging to the Fur, Masalit and Zaghawa ethnic groups;

¹¹¹ As found by the Chamber in the First Decision, see ICC-02/05-01/09-3, paras. 35-45, and reiterated in the Second Decision, para. 41.

¹¹² As found by the Chamber in the First Decision, see ICC-02/05-01/09-3, para. 51, and reiterated in the Second Decision, para. 41.

CONSIDERING that there are reasonable grounds to believe that the attacks and acts of violence committed by GoS against a part of the Fur, Masalit and Zaghawa groups took place in the context of a manifest pattern of similar conduct directed against the targeted groups as they were large in scale, systematic and followed a similar pattern;

CONSIDERING that there are reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;¹¹³

CONSIDERING that there are reasonable grounds to believe, as well, that as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, (i) thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of rape;¹¹⁴ (ii) civilians belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of torture;¹¹⁵ and (iii) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer;¹¹⁶

¹¹³ Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.

¹¹⁴ Including in *inter alia* (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.

¹¹⁵ Including in *inter alia*: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality in West Darfur in February 2008.

¹¹⁶ Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South

CONSIDERING that that there are also reasonable grounds to believe that in furtherance of the genocidal policy, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces throughout the Darfur region (i) at times, contaminated [sic] the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked;¹¹⁷ (ii) subjected hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of forcible transfer;¹¹⁸ and (iii) encouraged members of other tribes, which were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups;¹¹⁹

CONSIDERING therefore that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport at least until the date of the Prosecution's Application, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed the crimes of genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6 (a), (b) and (c) respectively of the Statute, against part of the Fur, Masalit and Zaghawa ethnic groups;

Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008.

¹¹⁷ Physicians for Human Rights, Report, *Darfur Assault on Survival, A call for Security, Justice, and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679 which mentions three incidents of destruction of water sources.

¹¹⁸ UN Security Council Press release, 22 April 2008 (Anx J38) DAR-OTP-0147-0859 at 0860; UN Security Council 5872 meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061; UNCOI Material, (Anx J72) DAR-OTP-0038-0060 at 0065; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604; United Nations Inter-agency Report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0067; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 35, 39, 44; United Nation Human Rights Council, Report on Human Rights Situations that require the Council's attention (A/HRC/6/19) (Anx 78) at D AR-OTP-013 8-0116 at 0145- 0146; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0300, 0291-0296; Ninth periodic report of the United Nations High Commissioner for Human Rights. Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0374.

¹¹⁹ Witness statement (AnxJ47) DAR-OTP-0125-0665 at 0716, para.255.

CONSIDERING that there are reasonable grounds to believe that Omar Al Bashir has been the *de jure* and *de facto* President of the Republic of the Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 until at least the date of the Prosecution's Application 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the above-mentioned GoS counter-insurgency campaign;

CONSIDERING, further, that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the Republic of the Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan;

CONSIDERING that, on the basis of the standard of proof as identified by the Appeals Chamber, there are reasonable grounds to believe that Omar Al Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups;

CONSIDERING that, for the above reasons, there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator, under article 25(3)(a) of the Statute, for:

- i. Genocide by killing, within the meaning of article 6(a) of the Statute;
- ii. Genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute; and
- iii. Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6(c) of the Statute;

CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS,**HEREBY ISSUES:**

A WARRANT OF ARREST for **OMAR AL BASHIR**, a male, who is a national of the Republic of the Sudan, born on 1 January 1944 in Hoshe Bannaga, Shendi Governorate, in the Sudan, member of the Jaáli tribe of Northern Sudan, President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Beshir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Béshir.

Done in English, Arabic and French, the English being authoritative.

Judge Sylvia Steiner
Presiding Judge

Judge Sanji Mmasenono Monageng

Judge Cuno Tarfusser

Dated this Monday 12 July 2010

At The Hague, The Netherlands
No. ICC-02/05-01/09 9/9 12 July 2010