RESTRICTIONS ON HUMANITARIAN AID IN DARFUR: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

From Iraq to Palestine to Sudan, recent armed conflicts around the world have focused international attention on the suffering of innocent civilians. While much of the problem stems from direct, physical attacks perpetrated against civilians and their locales, a less obvious, but equally great concern is the lack of vital necessities such as food, water, and medicine reaching those in need.\(^1\) Much of international humanitarian law is based on the premise that armed conflicts will inevitably reoccur but that certain measures can be taken by all parties involved to minimize the hardships posed to civilians caught up in the chaos.\(^2\) Nevertheless, parties involved in conflicts continuously fail to live up to their obligations to civilians and may even deliberately attempt to restrict humanitarian aid from reaching those in need.

Many factors play a role in hampering the ability of humanitarian aid to reach those in need. Physical insecurity resulting from ongoing conflict proves to be a leading factor.\(^3\) Oftentimes, restrictions imposed by the parties to the conflict also prevent humanitarian groups from carrying out their services.\(^4\) These policies can consist of travel restrictions, arrests of relief staff, blockades, and various bureaucratic tactics of delaying or denying access.\(^5\) More disturbingly, aid organizations themselves have been targeted with attacks on relief convoys, looting of supplies, and even the killing of relief personnel.\(^6\)


\(^4\) Id. ¶ 30.


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While the motives for denying access may vary, some recent conflicts suggest that such restrictions are being used as part of a deliberate policy to target civilians.\(^7\) This is especially the case in situations of internal conflict where ethnic cleansing is involved.\(^8\) In these situations, providing aid to a targeted civilian population would run contrary to the military and political goals of the party.\(^9\)

Such a crisis can currently be found in the strife-ridden area of Darfur in Western Sudan.\(^10\) Amidst an ongoing civil war between rebel groups and government backed militia forces, Sudanese officials have been accused of purposefully restricting and impeding access to humanitarian groups trying to provide relief to the civilian population.\(^11\) Many view this as a government campaign of ethnic cleansing to purge certain groups from Darfur.\(^12\)

International humanitarian law does not clearly explain how such actions are to be treated. Various treaties and conventions, in addition to notions of customary international humanitarian law, provide that states have a responsibility to protect and provide for their civilians, and to condemn any purposeful actions to restrict humanitarian aid from reaching them.\(^13\) However, much debate remains over the implications of this obligation and the extent to which a state can be punished for imposing restrictions and impeding access. Nevertheless, many call for making deliberate restrictions on aid an express crime under international law.\(^14\)

The International Criminal Court (ICC) was established by treaty in 1998 to try individuals accused of war crimes, crimes against humanity, and

\(^7\) See Human Rights Watch, supra note 5, at 15.


\(^9\) Id.


\(^12\) Q&A: Sudan’s Darfur Conflict, supra note 11; Human Rights Watch, Q&A: Crisis in Darfur, http://www.hrw.org/english/docs/2004/05/05/darfur8536.htm (last visited Sept. 18, 2007).


Many of the provisions of the ICC Statute clearly refer to deliberate restrictions on humanitarian aid as a crime, and many other provisions can be interpreted as implying the same. Darfur serves as a prime example for showing how deliberate restrictions on aid can constitute crimes under the ICC statute. The UN Security Council referred Sudan to the ICC in March of 2005 for alleged crimes committed in Darfur. In February of 2007, the Prosecutor presented evidence on crimes in Darfur to the ICC, and, in May, the ICC issued arrest warrants for two Sudanese officials for alleged war crimes and crimes against humanity. The case is still pending, and at this stage it remains unclear whether charges will be brought against anyone with respect to restrictions on humanitarian aid. Nevertheless, analyzing a specific example such as Darfur shows the potential of prosecuting such individuals under the ICC statute in the future.

This Note will examine the restrictions on humanitarian aid in Darfur in the context of the ICC's categories of crimes. Part II will consider what rights and duties exist under international law regarding humanitarian aid, how humanitarian aid has been restricted by parties in Sudan and elsewhere, and how the ICC characterizes international crimes. Part III will then examine if and how Sudanese individuals can be prosecuted for restricting humanitarian aid as war crimes, crimes against humanity, and genocide under the ICC statute. The Note will conclude with a discussion of the role of Sudan in the ICC and the need for setting precedent for future cases involving denials of access.

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16 See Rome Statute, supra note 15, art. 8 § 2(b)(xxv).

17 See id. arts. 7 § 1(K), 8 § 2(a)(iii).


II. BACKGROUND

A. Humanitarian Assistance Under International Law

Humanitarian assistance under international law can be viewed from two vantage points: (1) the right of the civilian population to receive aid, and (2) the right of humanitarian groups to provide that aid. These rights are generally derived from a variety of sources such as international treaties and covenants as well as notions of customary international law. In terms of civilian rights, the Universal Declaration of Human Rights and the later binding International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR) specifically mention an individual's right to survival and development, including the right to food, medical treatment, and shelter. They also provide for the right to freedom of movement for all, including for humanitarian personnel.

The Geneva Conventions are frequently cited as guaranteeing rights of humanitarian access. Specifically, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter the Convention) and the two Additional Protocols of 1977 relate to humanitarian access in the context of armed conflicts. The Convention and the Additional Protocol I
generally apply to international armed conflicts, whereas Article 3 of the Convention and the Additional Protocol II extend to conditions of non-international (or internal) armed conflict.26

According to the Convention, each state has the primary responsibility to protect its civilians and ensure their basic needs for survival.27 If the state is unable to do so, then the provisions of the Convention require that it allow impartial relief organizations (such as the International Red Cross) the ability to provide their services.28 Moreover, the state is required to permit and facilitate the free passage of relief supplies and personnel and to guarantee their protection.29 However, these provisions come with conditions; the state has the ability to check relief supplies to ensure that they will not be diverted or used advantageously by the opposing party and also to regulate the time and method of distribution.30 Additionally, Protocols I and II state that all relief actions are subject to the consent of the parties to the conflict.31

The principle of consent is premised on the notion of state sovereignty.32 Particularly in the case of non-international armed conflicts, the international community has been historically more reluctant to interfere with state sovereignty.33 However, many scholars argue that sovereignty does not always limit the ability of outside forces to intervene.34 In the International Committee of the Red Cross (ICRC) Commentaries on the Additional Protocols, the authors argue that the consent requirement does not give state parties unfettered discretion to allow or not allow relief actions.35 According to the Commentaries, if the survival of a population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-

28 Fourth Geneva Convention, supra note 25, art. 59; Protocol I, supra note 25, art. 70, Protocol II, supra note 25, art. 18.
29 Fourth Geneva Convention, supra note 25, arts. 23, 30, 59; Protocol I, supra note 25, arts. 70–71, 81; Protocol II, supra note 25, art. 18.
30 Fourth Geneva Convention, supra note 25, arts. 23, 59.
31 Protocol I, supra note 25, arts. 70, 81; Protocol II, supra note 25, art. 18.
32 G.A. Res. 46/182, supra note 27, ¶ 3.
35 See Dungel, supra note 33.
discrimination is able to remedy the situation, then a denial of relief actions would amount to a violation of the rule prohibiting starvation of civilians as a method of combat.\textsuperscript{36} On the other hand, some argue that the consent requirement cannot be ignored.\textsuperscript{37} At most, the Convention and its protocols preclude a state from refusing to allow relief on "arbitrary or capricious" grounds.\textsuperscript{38}

Although tension between state sovereignty and the right of unimpeded access continues to exist, no one denies that a state should be prohibited from restricting access in such a way as to subject its civilian population to extreme suffering and death. Yet, time and again, states knowingly continue to deny humanitarian aid from reaching civilians in need with the foreseeable consequence of mass, unnecessary casualties.

International law has taken measures to deal with such behavior. The Fourth Geneva Convention and Additional Protocol I require that state parties take steps to repress "grave breaches" of the Convention.\textsuperscript{39} The acts listed as grave breaches have been included in the ICC Statute as war crimes and will be discussed in greater detail later.\textsuperscript{40}

\textbf{B. Restrictions on Humanitarian Access}

\textit{1. Overview}

The ability of humanitarian groups to access civilians (and of civilians to access humanitarian aid) in times of conflict has been obstructed in a variety of ways. While this Note focuses on the situation in Darfur, an examination of the broader range of restrictions in various global conflicts helps to illustrate the recurrence of such acts and the need for prevention and punishment.

Restrictions on access can take a variety of forms. For example, a government might prevent aid workers from entering the country, or it may prevent aid from reaching civilians by imposing roadblocks, airport closures, or sea blockades.\textsuperscript{41} The parties to the conflict may usurp their right to supervise the passage of relief supplies by searching convoys for an excessive

\textsuperscript{36} Id.
\textsuperscript{37} Dinstein, supra note 20; Dungel, supra note 33.
\textsuperscript{38} Dinstein, supra note 20.
\textsuperscript{39} Fourth Geneva Convention, supra note 25, arts. 146-47; Protocol I, supra note 25, art. 85.
\textsuperscript{40} Rome Statute, supra note 15, art. 8.
\textsuperscript{41} Rottensteiner, supra note 14.
length of time, or by unnecessarily confiscating the supplies themselves.\textsuperscript{42} The government might also impose arbitrary "bureaucratic measures . . . such as cumbersome registration processes for humanitarian organizations."\textsuperscript{43}

Not only have relief efforts been hampered, but relief supplies, convoys, and personnel have been the direct target of physical attacks.\textsuperscript{44} In some cases, civilians have been attacked on their way to collect relief supplies.\textsuperscript{45} These security threats hinder aid groups from carrying out their activities and even force some to withdraw from the state altogether.\textsuperscript{46} Many view this as part of a deliberate strategy by the parties to the conflict to obstruct humanitarian access.\textsuperscript{47} In cases where civilians are being directly attacked or expelled from their homes as part of a campaign of ethnic cleansing, providing assistance to them would conflict with such a goal.\textsuperscript{48}

For example, the recent International Criminal Tribunal for the Former Yugoslavia (ICTY) found that government officials in Yugoslavia, as part of a campaign of ethnic cleansing, had taken part in calculated efforts (such as blocking convoys of food and medical supplies) to restrict humanitarian aid from reaching the civilian Muslim population.\textsuperscript{49} The ICTY indicted several officials for their involvement in war crimes and crimes against humanity, including restriction of humanitarian aid.\textsuperscript{50}

Regardless of the motives behind them, restrictions on humanitarian access can result in severe consequences for a civilian population. Armed conflicts generally create unstable situations with respect to obtaining vital resources such as food, water, medicine, fuel, and shelter. Humanitarian groups are thus critical in assisting civilians in obtaining adequate resources. However, restrictions on access greatly exacerbate already deteriorating conditions and thereby lead to growing problems of malnutrition, spread of disease, and even death.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{SG Report 2005, supra} note 3, ¶ 30.
\item \textsuperscript{44} \textit{SG Report 1998, supra} note 2, ¶ 26.
\item \textsuperscript{45} Rottensteiner, \textit{supra} note 14.
\item \textsuperscript{46} \textit{Top French Aid Group Pulls Out of Darfur, CBS NEWS,} Jan. 29, 2007, \url{http://www.cbsnews.com/stories/2007/01/29/world/main2406511.shtml}.
\item \textsuperscript{47} Reeves, \textit{supra} note 10.
\item \textsuperscript{48} OCHA, \textit{supra} note 8.
\item \textsuperscript{49} Prosecutor v. Tolimir, Case No. ICTY 04-80-1, Initial Indictment, ¶ 39(b) (Feb. 8, 2005).
\item \textsuperscript{50} \textit{Id.} ¶¶ 1–3.
\end{itemize}
2. Situation in Sudan

The restrictions on humanitarian aid access in Sudan have been taking place amidst a wider conflict in which millions of civilians have been displaced from their homes and hundreds of thousands have been killed.\(^{52}\) In 2003, in response to attacks by Sudanese rebel groups on government targets for alleged government oppression of black Africans, the Sudanese government began mobilizing militia groups to quell the uprising.\(^{53}\) In particular, an Arab militia group known as the Janjaweed has been pillaging towns and villages in what has been described as a campaign of ethnic cleansing to rid the territory of black Africans.\(^{54}\) These militia forces have been responsible for mass killings, rapes, destruction of villages and food supplies, and attacks on aid workers.\(^{55}\) Although the government denies being in control of the Janjaweed, much evidence exists of its involvement in arming, recruiting, and financially supporting the Janjaweed.\(^{56}\)

In response to the crisis, various international humanitarian groups have tried to access parts of Sudan to help the civilian population.\(^{57}\) Beyond facing daily threats to their security, aid groups have also been subjected to numerous restrictions imposed by parties to the conflict, which have severely crippled their ability to help those in need.\(^{58}\)

The Sudanese government has used a wide array of tactics to obstruct humanitarian access, including flight bans, denials or delays in processing travel permits, limitations on the number of staff, and arbitrary bureaucratic limitations on the passage of relief supplies.\(^{59}\) The government has tried to

\(^{52}\) Q&A: SUDAN'S DARFUR CONFLICT, supra note 11.
\(^{53}\) Id.
\(^{56}\) Koerner, supra note 54.
\(^{58}\) HUMAN RIGHTS WATCH, supra note 5, at 3; Reeves, supra note 10.
\(^{59}\) HUMAN RIGHTS WATCH, supra note 5, at 15.
intimidate and harass aid workers with threats, detainment, and arrests.\textsuperscript{60} In fact, some international as well as national organizations were suspended from performing relief operations in the country.\textsuperscript{61} To make matters worse, the Sudanese parliament has recently passed legislation which imposes further undue restrictions on non-governmental organizations operating throughout Sudan.\textsuperscript{62}

Various rebel and militia groups have also been responsible for obstructing relief efforts.\textsuperscript{63} Their tactics range from harassing checkpoints to outright denials of access.\textsuperscript{64} Bandits and militias have frequently attacked relief workers or looted relief supplies.\textsuperscript{65} Some aid groups accuse the Sudanese government of complicity in these attacks by not taking any serious steps to provide security for the passage of relief workers and supplies or to disarm militia groups.\textsuperscript{66} They also accuse the government of spreading xenophobic propaganda among the population, thus encouraging armed groups to target outsiders.\textsuperscript{67}

Perhaps causing more lasting devastation, militia groups have been responsible for destroying sources of food and water for the civilian population.\textsuperscript{68} This includes the destruction of water pumps and wells, the wrecking of food processing equipment, the burning down of trees and crops, and the looting of livestock and medical supplies.\textsuperscript{69} In addition, government forces have been responsible for aerial bombing of villages prior to militia forces moving in to loot and pillage.\textsuperscript{70} Such actions strongly point to a deliberate policy of targeting and destroying civilian groups in Darfur by cutting off their sources of survival.

\textsuperscript{60} Id. at 16.
\textsuperscript{62} Id.
\textsuperscript{63} HUMAN RIGHTS WATCH, supra note 5, at 17, 22.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 23.
\textsuperscript{67} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. ¶ 243.
Numerous aid agencies and human rights groups have decried the tactics employed by the Sudanese government and other rebel groups to obstruct access and have called on all parties to abide by their obligations under international law. As a party to the four Geneva Conventions, Sudan has a duty to abide by the terms of those instruments, particularly with respect to ensuring and facilitating humanitarian access. In mid 2006 Sudan acceded to Additional Protocols I and II. Many of the terms of these instruments, including those relating to internal armed conflicts, are now considered part of customary international law and thereby binding on Sudan. In addition, Sudan is party to numerous human rights treaties such as the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights.

This obstruction of access has taken a toll on the civilian population of Darfur. Various agencies report that restrictions on access have led to thousands of deaths from malnutrition and disease, and these numbers are rising. A recent UN report indicated that as much as seventy percent of the conflict affected population was food insecure and as many as four million were in need of humanitarian assistance. The problem has been compounded by the deliberate destruction of cultivated farmland and looting of livelihoods. Furthermore, some reports indicate that hundreds of thousands of internally displaced people could soon die from cholera, malaria, dysentery,
polio, and other diseases. This dire situation demands the facilitation of access to humanitarian aid, yet the Sudanese government and militia forces continue to deny civilians the ability to survive. These abuses have thus spurred the call for punishing those responsible and deterring such behavior from reoccurring.

C. The International Criminal Court

The International Criminal Court (ICC) was established pursuant to the Rome Statute of the International Criminal Court, an international treaty adopted on July 17, 1998. As of January 2007, 104 countries have become parties to the Rome Statute; Sudan is not a party. The ICC is an independent court of last resort that tries individuals accused of war crimes, crimes against humanity, and genocide. The ICC remains complimentary to national criminal jurisdictions as states still have the primary responsibility under international law to prosecute those responsible for such crimes.

Unlike previous ad hoc tribunals like those of Yugoslavia and Rwanda, which exercised jurisdiction in certain limited years, the ICC has permanent jurisdiction with respect to crimes committed after July 1, 2002, when the Rome Statute came into force (but not before that time). The court may exercise its jurisdiction when a situation is referred to the ICC prosecutor either by a state party, by the UN Security Council acting under Chapter VII of the Charter of the United Nations, or when the prosecutor has initiated his own investigation on the basis of information which he believes provides a

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80 Rome Statute, supra note 15; International Criminal Court, supra note 15.


82 Rome Statute, supra note 15, art. 5; International Criminal Court, supra note 15.


reasonable basis to proceed. Furthermore, the court has jurisdiction only if: 
(a) the accused is a national of a state party to the Rome Statute or a national of a non-party state that has accepted the court’s jurisdiction; (b) the crime took place on the territory of a state party or a non-party state otherwise accepting the court’s jurisdiction; or (c) the UN Security Council has referred the situation to the Prosecutor irrespective of the nationality of the accused or the location of the crime.

Even if the court meets these jurisdictional requirements, a case may still be inadmissible if it has been or is being investigated or prosecuted by a state with jurisdiction. In such a situation, the ICC can only proceed if the state “is unwilling or unable to genuinely . . . carry out the investigation or prosecution.” For example, if a state undertook national proceedings in order to shield an individual from criminal responsibility, then the case would be admissible to the ICC.

With respect to the crimes, Articles 6, 7, and 8 of the Rome Statute give a precise description of the definition of genocide, crimes against humanity, and war crimes. Pursuant to Article 9 of the statute, the “Elements of Crimes” shall be used by the court to assist in the interpretation of Articles 6, 7, and 8. For an individual to be held criminally responsible, he or she must have committed the material elements with intent and knowledge. The statute explains intent to be present when a person “means to engage in the conduct” and “means to cause the consequence or is aware that it will occur in the ordinary course of events.” Knowledge is described as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.” The “Elements of Crimes” further explains that intent and knowledge can be “inferred from relevant facts and circumstances.”

86 Jurisdiction & Admissibility, supra note 83.
87 Id. This is known as the principle of “complementarity.”
88 Id.
89 Id.
90 Rome Statute, supra note 15, arts. 6–8.
92 Rome Statute, supra note 15, art. 30.
93 Id. art. 30, ¶ 2.
94 Id. art. 30, ¶ 3.
95 Elements of Crimes, supra note 91, at Gen. Intro. ¶ 3.
III. ANALYZING THE DARFUR SITUATION UNDER THE ICC

A. Jurisdictional and Procedural Issues

As mentioned previously, the UN Security Council referred Sudan to the prosecutor of the ICC, who decided to open an investigation into the matter. Even though Sudan is not a party to the Rome Statute, the court nevertheless has authority to exercise jurisdiction in this case because of the Security Council's referral. This authority to refer any case to the ICC stems from the U.N. Charter which mandates that the Security Council determine the existence of any threats to peace, breaches of peace, or acts of aggression and decide what measures shall be taken to restore international peace and security. The Security Council has wide discretionary power in determining the existence of such threats.

Despite the referral of the Security Council, Sudan has persistently argued that the ICC lacks jurisdiction. Basing its argument primarily on the principle of complementarity, Sudan states that it is capable of and is currently undertaking its own investigation and prosecution of crimes committed in its territory. Sudan instituted various ad hoc mechanisms such as a Committee of Inquiry and Committees Against Rape to investigate such matters. However, critics accuse the government of not taking any real measures to deal with the Committee findings and recommendations.

Soon after the Prosecutor's decision to open an investigation, the Sudanese government, in an apparent effort to show its ability to handle the prosecutions domestically, set up the Special Criminal Court on the Events in Darfur (SCCED) to try the alleged perpetrators of crimes in Darfur. However, the

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99 Id.


101 Id.


103 Id. ¶¶ 464, 481.

104 HUMAN RIGHTS WATCH, LACK OF CONVICTION: THE SPECIAL CRIMINAL COURT ON THE
SCCED has also been subject to much criticism for its lack of effectiveness in carrying out such prosecutions. Human Rights Watch reports that Sudanese authorities lack a genuine willingness to ensure prosecution of the perpetrators before the SCCED and that the SCCED lacks the capacity to effectively try the cases. The few cases brought before the SCCED as of yet involved ordinary crimes as opposed to the major atrocities alleged by the ICC prosecutor. Furthermore, some have expressed concerns about certain aspects of the SCCED, such as the provisions granting all police and military officers immunity from prosecution, the absence of fair trial guarantees, stringent evidentiary burdens, the lack of protection for victims, among other issues relating to the substantive jurisdiction of the court.

The ICC Prosecutor, in his report to the Security Council, declared that, based on his current assessment, the Sudanese authorities do not appear to have investigated or prosecuted cases that are or will be the focus of his office’s attention, such as to render those cases inadmissible to the ICC. However, the prosecutor has stated that his office will continue to examine national proceedings to determine whether or not the ICC will be able to proceed.

Besides the problem of jurisdiction, the ICC also faces procedural issues in prosecuting Sudanese individuals. The ICC Prosecutor has a duty to carry out effective and thorough investigations of all relevant facts and evidence. The Prosecutor may conduct investigations on the territory of the state itself. While states party to the ICC Statute have a treaty obligation to cooperate, non-party states also have an obligation, arising from Chapter VII of the U.N. Charter, to take all necessary steps for the implementation of Security Council Resolutions. Thus, the government of Sudan must assist the ICC in its

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105 Id.
106 Id.
107 The International Criminal Court and Sudan: Access to Justice and Victims’ Rights, supra note 84.
110 Rome Statute, supra note 15, art. 54.
111 Id.
112 Wenqi, supra note 97, at 108.
process of investigation, whether for arresting alleged perpetrators or for gaining access to victims, records, and witnesses.

From the beginning, Sudan has remained hostile to the ICC’s investigation. Immediately after the court announced the commencement of investigations into alleged crimes committed in Sudan, the Sudanese government announced that it would never turn over Sudanese citizens for trial abroad. Although the ICC has now issued arrest warrants for two suspects, Sudan has refused to turn them over. Furthermore, the government passed various domestic legislation intended to provide immunity from prosecution for members of the armed forces and law enforcement.

Besides government unwillingness to cooperate, general physical insecurity has prevented investigators from gaining full access to parts of Sudan, especially Darfur. This lack of security as well as the lack of protection for victims and witnesses forced much of the investigation to take place outside of Darfur. Nevertheless, the ICC proceeded with its investigation, screening hundreds of potential witnesses in various countries.

The evidence presented to the ICC in February of 2007 concluded that there were reasonable grounds to find at least two suspects guilty of war crimes and crimes against humanity. Although the evidence does not clearly indicate whether restrictions on humanitarian aid will be considered by the court when and if the case proceeds to trial, the accusations nevertheless present the possibility of finding such actions to constitute crimes under the ICC statute.

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114 Mariner, supra note 113.


118 Id.

119 Id.

120 The potential crimes include: “rape and other forms of sexual violence, murder, persecution, torture, forcible transfer, destruction of property, pillaging, inhumane acts, outrage upon personal dignity, and severe deprivation of liberty.” Id.
B. Genocide, Crimes Against Humanity, and War Crimes

Articles 6, 7, and 8 of the Rome Statute enumerate those acts that constitute genocide, crimes against humanity, and war crimes, respectively. While genocide and crimes against humanity do not have to take place in the context of an armed conflict, war crimes do. However, genocide and crimes against humanity require a higher evidentiary burden to meet than war crimes because of specific intent requirements. The following analysis will show how restrictions on humanitarian aid access in Sudan can be construed as genocide, crimes against humanity, and war crimes, thus allowing for the prosecution of those persons involved in such crimes.

1. Genocide

Under Article 6 of the Rome Statute, acts of genocide must be committed with an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” While no nexus to an armed conflict is required, the Statute does impose a higher evidentiary burden for proving genocide than crimes against humanity or war crimes because of the requisite “intent to destroy” and the condition of targeting a specific group, thus making genocidal intent much more difficult to establish. This section will first examine the specific acts listed under genocide in the ICC Statute which relate to restrictions on humanitarian aid access and then explore the issues of genocidal intent with respect to the perpetrators in Sudan.

The following categories of crimes listed under genocide may be considered applicable in the context of restricting humanitarian aid: “[k]illing members of the group,” “[c]ausing serious bodily or mental harm to members of the group,” or “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” The “Elements of Crimes” explain that the conduct of the perpetrator must have taken place “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”

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121 Rome Statute, supra note 15, arts. 6–8.
122 Id.
123 Id. arts. 6–7; see also Elements of Crimes, supra note 91, arts. 6–7.
124 Rome Statute, supra note 15, art. 6.
125 Id.; see also Elements of Crimes, supra note 91, art. 6.
126 Rome Statute, supra note 15, art. 6; see also Rottensteiner, supra note 14.
127 Elements of Crimes, supra note 91, art. 6(a)(4).
In Sudan, the evidence indicates the possibility of satisfying the *actus reus* element of "killing," "causing serious bodily or mental harm," and "deliberately inflicting conditions of life likely to bring about physical destruction of civilians." The various actions taken to prevent humanitarian aid from reaching those civilians evidently in dire need represents the "guilty act." According to the evidence, these restrictions on humanitarian aid access have led to severe malnutrition, disease, and even death among the civilian population.

The "Elements of Crimes" explain that "killed" is synonymous with "caused death." Thus, restrictions on humanitarian access may qualify as "killing" under the statute if the causal nexus between the withholding of necessary relief and the deaths of civilians can be established. Moreover, the direct killing of humanitarian workers would clearly qualify as "killing" under the statute.

In addition to "killing," the deniers of aid could also be liable for "causing serious bodily or mental harm." In that case, the harm need not be of such a nature as to actually threaten the destruction of the group; however, some debate exists over how serious the harm must be. If one considered the debilitating effects of malnutrition and diseases such as cholera, malaria, and polio on a person's long-term health, the harm to the body and mind appears quite severe, especially when left untreated for long periods of time. Moreover, the long-term effects of having to face near starvation, to suffer life-threatening diseases without access to proper medicine, and even to watch loved ones die from conditions of depravity can all pose serious injury to one's mental and physical health.

The withholding of humanitarian aid resources can also be characterized as "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Generally, the conditions

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129 *See discussion supra* Part II.B.2.

130 *See discussion supra* Part II.B.2.

131 *Elements of Crimes, supra* note 91, art. 6(a) n.2.

132 *See discussion supra* Part II.B.2.

133 *Rome Statute, supra* note 15, art. 6(b).


135 *Rome Statute, supra* note 15, art. 6(c).
inflicted must aim to cause death, but can also include “slow death measures” such as lack of proper housing, clothing, hygiene, and medical care. Evidence indicates that thousands of civilians in Sudan are facing a “slow death” from lack of adequate food, water, medicine, and shelter. The difficulty will be in proving that this was the result of deliberate action.

Given a finding of the actus reus element of genocide, the intent element must also be proved in order for such actions to constitute a crime. With regard to intent, not only must the perpetrators possess a general criminal intent for the underlying offense, but they must also have a specific intent to destroy a group in whole or in part. Establishing a link between the denial of aid and the intent to annihilate a particular group presents a difficult hurdle. For example, the Sudanese government may very well claim that its actions were primarily aimed at countering rebel insurgent groups rather than for destroying an entire group of people. This could then serve as a defense to an accusation of genocidal intent.

Furthermore, several aid agencies and Non-Governmental Agencies (NGOs) have indeed been granted access, albeit limited, to parts of the country to carry out their relief operations. This limited access may undercut the assertion that the government intends to destroy the population. However, one reason for the limited access which does not preclude a finding of genocidal intent is that the government has chosen to allow limited access to some groups in order to thwart off pressure from the international community to take action. Thus, an intent to destroy a group in part may still exist. The evidence will have to show that the limitations on access were intended to destroy a particular group, at least in part.

Even if the government were to deny improper motives, genocidal intent could nonetheless be inferred from various presumptions of fact such as the overall pattern of violence against the same group, systematic targeting of victims to the exclusion of other ethnic groups, and a pattern of words and actions that indicate an intent to destroy the pertinent group in whole or part. In Sudan, the evidence points to a consistent pattern of violence against the

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136 BOOT, supra note 134, at 446.
137 See discussion supra Part II.B.2.
138 BOOT, supra note 134, at 410.
139 See HUMAN RIGHTS WATCH, supra note 5, at 18.
140 Rome Statute, supra note 15, art. 6; see also BOOT, supra note 134, at 422 (noting that the complete extermination of a group is not necessary to prove genocidal intent, although the number of victims may be of evidentiary value with respect to proving requisite intent).
civilians of Darfur in particular. Denials of aid access have been directed primarily at those civilians displaced from Darfur. Many aid organizations working in Sudan have described such restrictions as following a "systematic" pattern.  

Genocidal intent requires the specific targeting of a "national, ethnical, racial, or religious group." The attacks by the Janjaweed and other government-backed militia groups in Sudan have been frequently characterized as being the deliberate targeting of a specific group: non-Arab and African tribal groups. These groups could fall under the categories of specific racial or ethnic groups. Although the majority of those displaced from Darfur are black Africans as opposed to the mainly Arab composition of the government and the Janjaweed, some argue nonetheless that the conflict does not necessarily target specific ethnic or racial groups but involves more complex issues. Thus, it is not clear how and if the targeted individuals would fit under the distinct categories listed under the article on genocide (national, ethnical, racial, religious). The statute does not explicitly define their meaning, and some debate exists as to their exact meaning.

For example, some have characterized the targeted groups in Sudan as merely "tribal" groups, and argue against their inclusion in the categories of genocidal victims. On the other hand, others argue that tribal groups clearly fall within the scope of the four categories. However, this type of objective analysis may be avoided if the court decides to take a subjective approach. In that case, it would be enough that the perpetrators perceived their victims as a distinct national, ethnic, racial, or religious group in order for the court to find an intent to target a specific group.

Thus, the evidence from Sudan shows that the ICC may be able to find that actions taken to restrict humanitarian aid access fall within the list of enumerated acts of genocide in the statute. These acts, taken together with the

142 HUMAN RIGHTS WATCH, supra note 5, at 15; Reeves, supra note 10.
143 Rome Statute, supra note 15, art. 6.
144 Koerner, supra note 54.
146 Elements of Crimes, supra note 91, art. 6(a).
147 Id.; see also WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 106–14 (2000).
148 Commission Report, supra note 68, ¶¶ 495–496.
149 SCHABAS, supra note 147, at 112 (also noting that political and gender groups do not fall within that scope).
150 BOOT, supra note 134, at 435.
151 Id.
perceived targeting of a specific ethnic or racial group, could constitute genocide if the requisite intent to destroy that group, in whole or in part, can be proven. While evidence exists to implicate a pattern of systematic targeting of a specific group, it is not clear whether it will be enough to establish genocidal intent.

2. Crimes Against Humanity

For a crime against humanity to take place, the perpetrator must have committed the act "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." No connection to an armed conflict is required as with war crimes. However, the act must have been part of a "course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." Thus, an isolated act which did not occur in the context of a broader plan or policy to commit such attacks would not amount to a crime against humanity.

Denying humanitarian aid access to those in need may be characterized as the crimes of "[m]urder," "[e]xtermination," "[t]orture," "[p]ersecution," and "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." This section will first look at whether restrictions on access in Sudan could constitute one of the "acts" of crimes against humanity and then look to the intent and knowledge aspect.

In looking at the specific acts under the category of crimes against humanity, "murder" means the killing of one or more persons, and the "Elements of Crimes" explain that "‘kill[ing]’” can be interchangeable with "‘caused death.’” The analysis here follows that of "‘killing” in the context of genocide. In Sudan, the evidence indicates that restrictions on access to

152 Rome Statute, supra note 15, art. 7.
153 Drafters of the Rome Statute debated this question and ultimately agreed not to require a nexus to an armed conflict, but instead included "widespread or systematic attack" as a compromise. BOOT, supra note 134, at 477–78.
154 Elements of Crimes, supra note 91, art. 7, Intro. ¶ 3 (noting that attack need not constitute a military attack).
155 BOOT, supra note 134, at 479.
156 Rome Statute, supra note 15, art. 7; see also Rottensteiner, supra note 14.
157 Elements of Crimes, supra note 91, art. 7(1)(a) n.7.
158 See discussion supra Part III.B.1.
humanitarian aid have led to hundreds, if not thousands, of deaths among the civilian population, thus providing a causal link necessary to categorize these acts as murder.159 Moreover, relief workers and other staff of various international agencies have been killed outright.160

"'Extermination'" under the statute involves mass killings of civilian persons, including "by inflicting conditions of life calculated to bring about the destruction of part of a population."161 Killing can thus be direct or indirect, and may include the deprivation of access to food and medicine.162 The deprivation of access to food and medicine has been blatant in Sudan. Thousands of people displaced from their homes and languishing in various camps suffer from a lack of food, water, and medicine, and yet the government and rebel groups continue to prevent sufficient aid from reaching those groups.163 Furthermore, militia forces destroyed many of the sources of survival for these civilians by burning crops, contaminating wells, and stealing livestock.164 However, the difficult task of proving that the deprivation of access was calculated to bring about the destruction of part of a population remains. This will be discussed more below with the intent element for crimes against humanity.

"Torture" is defined as the "intentional infliction of severe pain and suffering, whether physical or mental, upon a person in the custody or under the control of the accused. . . ."165 Here, "in the custody or under the control of the accused" could apply in the situation where a person is being held in a prison camp or other detainment facility.166 In Sudan, hundreds of thousands of civilians displaced from their homes have been, in a sense, forced into various camps around the country, which are controlled by government forces.167 These forces have oftentimes restricted access of relief agencies trying to reach these camps, even though malnutrition, disease, and death are

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159 See discussion supra Part II.B.2.
160 See discussion supra Part II.B.2.
161 Elements of Crimes, supra note 91, art. 7(1)(b).
162 Id. art. 7(1)(b) nn.8–9.
163 See discussion supra Part II.B.2.
164 See discussion supra Part II.B.2.
165 Rome Statute, supra note 15, art. 7(2)(e).
166 Rottensteiner, supra note 14.
rife in the camps.\textsuperscript{168} Thus, deprivation of access to food and medicine may amount to "torture" under the category of crimes against humanity.

"'Persecution' " is defined as "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."\textsuperscript{169} The targeting of a group could be on political, racial, ethnic, cultural, religious, gender, or other grounds.\textsuperscript{170} Access to food, water, medicine, and other elements of survival are fundamental human rights embodied in various international treaties to which Sudan is a party, and the obstruction of access to such aid constitutes a violation of international law.\textsuperscript{171} Furthermore, a specific group, black African civilians, has been the target of such persecution.\textsuperscript{172} The requirement of targeting a specific group poses a less exacting standard here than in the case of genocide due to the broader range of classes mentioned together with the variable phrase "or other grounds."\textsuperscript{173} However, the difficulty again here may be in proving that the denials of humanitarian aid happened "by reason of" this identity.\textsuperscript{174} Yet, as mentioned before, intent can be implied from the surrounding facts and circumstances;\textsuperscript{175} here, the main group displaced from their homes and suffering from lack of essential needs consists mainly of the black African civilians of Darfur.

Another category in which such violations may fit is "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."\textsuperscript{176} Past tribunals have suggested that depriving civilians of their means of subsistence and endangering their health and welfare may constitute inhumane acts.\textsuperscript{177} Again, this problem appears in the case of Sudan because hundreds of thousands of civilians lack the means of survival and face death from starvation and disease, mainly as a result of restrictions on humanitarian access and destruction of food sources.

In order to constitute a crime against humanity, all of these acts must have been committed as part of a "widespread or systematic attack directed against

\textsuperscript{168} Id.
\textsuperscript{169} Rome Statute, supra note 15, art. 7(2)(g).
\textsuperscript{170} Id. art. 7(1)(h).
\textsuperscript{171} Fourth Geneva Convention, supra note 25, art. 23, ICCPR, supra note 22, arts. 5, 6.
\textsuperscript{172} Koerner, supra note 54.
\textsuperscript{173} Rome Statute, supra note 15, art. 7(1)(h).
\textsuperscript{174} Id. art. (7)(2)(g).
\textsuperscript{175} Elements of Crimes, supra note 91, at Gen. Intro. ¶ 3.
\textsuperscript{176} Rome Statute, supra note 15, art. 7(1)(k).
\textsuperscript{177} Rottensteiner, supra note 14.
any civilian population, with knowledge of the attack." 178 The "Elements of Crimes" explain that there must be a "course of conduct involving the multiple commission of [such] acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." 179 This requires the state or organization to "actively promote or encourage" such acts. 180 This policy may include, in exceptional circumstances, a deliberate failure to take action, which is consciously aimed at encouraging such attacks. 181

In Sudan, the destruction of food sources, the hampering of access, and the attacks on relief workers and supplies have occurred repeatedly over the past few years. 182 In the face of a dire need to improve civilian access to humanitarian aid, the government has instead opted to impose various bureaucratic restrictions on relief agencies. 183 The recently passed NGO law similarly aims to limit humanitarian aid access by imposing greater hurdles for relief organizations trying to work in Sudan. 184 All of this tends to support an inference of a deliberate policy to deny civilian access to humanitarian aid.

Furthermore, the government has been accused of taking few measures to stop the continuing attacks on civilians and relief workers, as well as the looting of relief supplies and vehicles. 185 Aid organizations trying to reach civilians cite security on the roads in Sudan as a major obstacle to their relief efforts. 186 Moreover, the government has been accused of allowing militia forces to burn and destroy villages, including sources of food and water. 187 Even if it cannot be proven that the government directed such attacks, its complicity in allowing such attacks to take place strongly evinces a deliberate failure to act, with a conscious aim of encouraging such attacks.

Individual perpetrators do not necessarily have to possess knowledge of all characteristics of the attack or even the precise details of the plan or policy of the State. 188 Rather, if the perpetrator merely intended to further such an

178 Rome Statute, supra note 15, art. 7.
179 Elements of Crimes, supra note 91, art. 7, Intro. ¶ 3.
180 Id.
181 Id. art. 7, Intro. ¶ 3 n.6.
182 See discussion supra Part II.B.2.
183 See discussion supra Part II.B.2.
184 HUMAN RIGHTS WATCH, supra note 5, at 21–22.
185 Weissman, supra note 66.
186 Id.
188 Elements of Crimes, supra note 91, art. 7, Intro. ¶ 2.
attack, that will be enough to satisfy the mental element.\textsuperscript{189} This presents a less stringent evidentiary burden for proving intent under crimes against humanity. Generally, a discriminatory intent based on the identity of the group is not necessary (except for "persecution").\textsuperscript{190} Thus, if an accused perpetrator was generally aware of attacks targeting civilians in Darfur and participated in furthering such attacks, he could be held accountable.

3. War Crimes

The war crimes category is the broadest and includes acts committed "as part of a plan or policy or as part of a large-scale commission of such crimes."\textsuperscript{191} The war crimes section specifically creates a distinction between international and non-international armed conflict, whereas no specific distinction exists with respect to the categories of genocide and crimes against humanity.\textsuperscript{192} Certain "[g]rave breaches" of the Geneva Conventions constitute war crimes without regard to the international or non-international nature of the conflict, whereas others are limited to international armed conflicts.\textsuperscript{193}

The actions carried out can be directed against one or more civilian persons or other protected persons or objects and need not take place on a mass scale.\textsuperscript{194} However, the conduct must occur in the context of an armed conflict.\textsuperscript{195} The perpetrator must further be aware of the "factual circumstances that established the existence of an armed conflict"\textsuperscript{196} and also the existence of the protected status of the person or object.\textsuperscript{197}

The situation in Sudan has been described by the parties to the conflict and outside observers as a non-international, or internal, armed conflict.\textsuperscript{198} Thus, certain parts of the war crimes categories apply in the context of Sudan while

\begin{itemize}
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. art. 7(1)(a)–(k).
\item \textsuperscript{191} Rome Statute, supra note 15, art. 8.
\item \textsuperscript{192} Id. arts. 6–8.
\item \textsuperscript{193} Id. art. 8.
\item \textsuperscript{194} Elements of Crimes, supra note 91, art. 8(2)(a)(ii)(1) n.35; Fourth Geneva Convention, supra note 25, art. 3.
\item \textsuperscript{195} Elements of Crimes, supra note 91, art. 8, Intro.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id. art. 8(2)(a)(i)(3).
\item \textsuperscript{198} See HUMAN RIGHTS WATCH, supra note 5, at 28. Note that the concept of "internal" conflict does not necessarily imply that conflict occurs entirely within one state since most conflicts have spillover effects in neighboring countries, not to mention the involvement of the international community.
\end{itemize}
others do not. For example, the statute lists "[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies" as a war crime only under international armed conflict and not under non-international armed conflict.199 Thus, this provision would, unfortunately, not apply in the context of Sudan. However, increased lobbying efforts have sought to add intentional starvation to the list of crimes committed in internal armed conflicts.200

Nevertheless, other possibilities exist in categorizing obstructions of humanitarian access under war crimes. Under the categories that apply regardless of the international or non-international nature of the conflict, denial of aid could fit under "wilful killing," "[t]orture," "[w]ilfully causing great suffering, or serious injury to body or health," and "[e]xtensive destruction and appropriation of property."201

As before, in the case of willful killing, the term "‘killed’" is interchangeable with "‘caused death.’"202 Willful killing can be committed either by act or by omission.203 Thus, in the case of Sudan, denials of humanitarian assistance which are in violation of international law and which result in death could constitute willful killing.204 Also, failing to provide assistance (an omission) to civilians in desperate need could also amount to willful killing, particularly if their survival is being threatened. In addition to showing the act, one must also prove the omission was "willful." Willful has been construed to imply "recklessness," but not "ordinary negligence."205 If the death is a foreseeable consequence of a failure to act, then willfulness can be inferred.206

In the case of torture and inhumane treatment, the perpetrator must have "inflicted severe physical or mental pain or suffering upon one or more persons."207 In the case of torture, the perpetrator’s purpose must have been "obtaining information or a confession, punishment, intimidation or coercion

199 Rome Statute, supra note 15, art. 8(2)(b)(xxv).
200 Rottensteiner, supra note 14.
201 Rome Statute, supra note 15, art. 8(2)(a); see also Rottensteiner, supra note 14.
202 Elements of Crimes, supra note 91, art. 8(2)(a)(i) n.31; see also DORMANN, supra note 83, at 39 (explaining that "caused death" was included to make it clear that conduct such as reducing rations for prisoners of war that results in their starvation and ultimate death is also covered by this crime).
203 DORMANN, supra note 83, at 40–41.
204 See discussion supra Part III.B.1.
205 DORMANN, supra note 83, at 43.
206 Id.
207 Elements of Crimes, supra note 91, arts. 8(2)(a)(ii)–1(i).
or for any reason based on discrimination of some kind."\textsuperscript{208} Various international courts and agencies have included deprivation of food and water as an example of what might constitute torture.\textsuperscript{209} Such deprivations have been faced by the civilian population of Darfur, especially those who have been corralled into camps for the internally displaced.\textsuperscript{210} Furthermore, limitations on accessing humanitarian aid have been specifically targeting black Africans from Darfur.\textsuperscript{211} This may amount to discrimination under the elements of torture. Similarly, "wilfully causing great suffering or serious injury to body or health" could also apply in the case of Sudan, as the injury to civilian health from malnutrition and disease has been, and continues to be, quite severe. Again, one must prove the act or omission was "wilful."

The category of "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" can also apply in Sudan.\textsuperscript{212} The Janjaweed and other militia forces have been responsible for destroying villages, crops, wells, food processors, as well as stealing utensils, livestock, and other such items.\textsuperscript{213} Such tactics seem excessive and unlikely to fall under the category of being "justified by military necessity." Furthermore, such property is protected under the Geneva Conventions.\textsuperscript{214}

As for war crimes applying specifically to non-international armed conflict, the following categories could fit in the context of Sudan: "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"; "[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law"; "[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations"; "[p]illaging a town or place"; and "[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict."\textsuperscript{215}

\textsuperscript{208} Id. arts. 8(2)(c)(i)-4(2).
\textsuperscript{209} DÖRMANN, supra note 83, at 54–55 (citing list of examples from Human Rights Committee, Inter-American System, and 1986 Special Rapporteur on Torture).
\textsuperscript{210} See discussion supra Part II.B.2.
\textsuperscript{211} See discussion supra Part II.B.2.
\textsuperscript{212} Rome Statute, supra note 15, art. 8(2)(a)(iv).
\textsuperscript{213} See discussion supra Part II.B.2.
\textsuperscript{214} See Fourth Geneva Convention, supra note 25, art. 33.
\textsuperscript{215} Id. art. 3(i)(a); Rome Statute, supra note 15, art. 8(2)(e)(ii), (iii), (v), (xii).
First, the category of "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" concerns serious violations of article 3 common to the four Geneva Conventions.216 "Murder" is viewed in the same light as "wilful killing" and would therefore follow the same analysis mentioned previously.217 "Cruel treatment" and "torture" also correspond to the previous analysis, so they will not be discussed further here.218

The remaining categories refer to "[o]ther serious violations of the laws and customs applicable in [non-international armed conflicts]."219 The category of "[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law" may apply to anyone or anything bearing the distinctive emblem of a red cross, red crescent, or red lion and sun on a white background.220 Similarly, "[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations" would include any other non-Red Cross humanitarian missions and therefore broadens who or what may be targeted in order to constitute a war crime.221 In Sudan, relief personnel (from the Red Cross and other humanitarian organizations) have been attacked and killed while carrying out their services.222 Furthermore, relief convoys and warehouses have been attacked and robbed of supplies.223 Such actions could come under the purview of war crimes.

"[P]illaging a town or place" and "[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict" would include the actions of the Janjaweed and other militia groups who have burned and pillaged numerous villages in Darfur. These attacks have involved the destruction of food sources such as crops, trees, wells, food processors, and other such effects.224 In addition,
militia members have been responsible for looting villages and stealing everything from livestock to cooking utensils.\textsuperscript{225} Taking such items hardly appears "imperatively demanded by the necessities of the conflict." Instead, the attackers knew that they were destroying food sources that were necessary for the survival of the civilian population.

Under all of these categories of war crimes, the intent requirement is minimal. The perpetrator must merely be aware of the factual circumstances that established the existence of an armed conflict.\textsuperscript{226} He need not be aware of the precise nature of the conflict as international or non-international.\textsuperscript{227} In some cases, the perpetrator must be aware of the protected status of the person or thing towards which his actions are directed.\textsuperscript{228} Armed conflict has persisted in Sudan for several years now and the perpetrators are likely aware of the factual circumstances establishing the existence of such a conflict, even if they would not consider it an armed conflict under international legal standards. Furthermore, as Sudan is a party to the Geneva Conventions and the Additional Protocols, the parties to the conflict should likely be aware of the protected status of civilians and their property as well as that of relief workers, supplies, and vehicles.

This analysis has shown that restrictions on humanitarian access, the deprivation of basic necessities, the attacks on relief organizations, and the destruction of sources for survival may all constitute war crimes under the ICC Statute. Furthermore, if certain intent elements are met, then these actions could constitute crimes against humanity and even genocide.

\textbf{C. The Importance of Trying Sudan in the ICC}

Widespread atrocities have been and continue to be committed against the civilian population of Darfur. Referring Sudan to the ICC was one key step toward ending the "'culture of impunity'"\textsuperscript{229} that has run rampant in that country for so long and in bringing the perpetrators to account for their crimes. Many hope that the ICC's involvement will bring some semblance of peace and justice to the people of Sudan. Although prosecuting individuals in the ICC will not bring an immediate end to the ongoing conflict, it may send a

\begin{itemize}
  \item \textsuperscript{225} See discussion supra Part II.B.2.
  \item \textsuperscript{226} \textit{Elements of Crimes}, supra note 91, art. 8, Intro.
  \item \textsuperscript{227} \textit{Id.}
  \item \textsuperscript{228} \textit{Id.} art. 8(2)(a)(i)-(e)(xi).
  \item \textsuperscript{229} \textit{Secretary-General Gives List}, supra note 18.
\end{itemize}
strong message to those who brazenly violate international law and will perhaps serve as a mechanism of deterrence in future conflicts.

Despite this optimism, the referral of Sudan to the ICC has not been met with unanimous agreement.\textsuperscript{230} Some suggest using other judicial mechanisms to try Sudanese individuals such as a hybrid specialized tribunal like the Special Court in Sierra Leone.\textsuperscript{231} However, that court has suffered financial and credibility problems owing to half-hearted support from the international community.\textsuperscript{232} In the case of Sudan, forming an agreement between the government and the UN in order to try members of the government itself may pose additional difficulties.\textsuperscript{233} Furthermore, such a court may face complications in relying on national rather than international laws particularly with respect to criminal procedure.\textsuperscript{234} In any case, setting up such a tribunal would take a considerable amount of time in a situation where time is of the essence.

On the other hand, trying the Sudanese perpetrators in an internationally recognized court like the ICC may promote a greater sense of legitimacy and fairness as well as provide a more effective means of ensuring lasting justice. For example, the ICC proceedings would be conducted in a neutral environment and be less prone to stirring up political and ideological passions.\textsuperscript{235} Moreover, the ICC will likely be more effective in compelling government figures and rebel leaders to submit to investigations and to criminal proceedings.\textsuperscript{236} Lastly, as an established institution, the ICC possesses the financial and procedural capabilities to handle these matters in a quicker and more efficient manner.\textsuperscript{237}

As one of the initial cases being tried by the recently formed ICC, Sudan will play a key role in setting precedent for future cases brought before the court. In particular, trying Sudan for violations of international law with respect to humanitarian aid access will ensure that such actions are considered crimes within the meaning of the ICC Statute. While the ICC Statute is not explicit in defining how denials of humanitarian access fit within each

\textsuperscript{231} Id. at 10.
\textsuperscript{232} Id.
\textsuperscript{233} Commission Report, supra note 68, ¶¶ 576–582.
\textsuperscript{234} Id. ¶ 580.
\textsuperscript{235} Id. ¶ 572.
\textsuperscript{236} Id.
\textsuperscript{237} Id.
category, this Note has shown the possibilities of trying such actions within the current categories of war crimes, crimes against humanity, and genocide. Thus, Sudan can be an ideal precedent setting case for similar types of situations in the future.

In addition to setting future precedent, trying Sudanese perpetrators of such violations may serve as a deterrence mechanism in other armed conflicts by reminding individuals that impunity will no longer prevail for denying humanitarian aid groups access to civilians and civilians access to humanitarian aid. This will hopefully discourage officials from taking actions that may jeopardize the lives of their civilians, and encourage them to facilitate relief efforts.

IV. CONCLUSION

Thousands of civilians around the world unnecessarily suffer in various armed conflicts by being deprived of food, water, medicine, shelter, and other resources for survival. The region of Darfur in Sudan stands as one among many war-torn areas where civilians have been the direct target of brutalities carried out by parties to the conflict. In particular, government and rebel groups have implemented various measures to obstruct access by relief agencies and to prevent civilians from getting the aid they need. These tactics range from imposing arbitrary bureaucratic restrictions to destroying food and water sources to attacking relief workers and supplies. Moreover, such actions have specifically targeted black African tribal groups in Darfur and tend to indicate a deliberate policy of inflicting harm on the civilian population.

All persons have a right to receive that which is necessary to their survival such as food, water, and medicine. International law, through treaty instruments and customary law, imposes an obligation on states to provide adequately for their civilian populations. If they are unable or unwilling to do so, then they must allow outside aid. Furthermore, in the context of an armed conflict, all parties must facilitate the passage of such aid and ensure its

238 See discussion supra Part III.B.2.
239 See discussion supra Part III.B.2.
240 See discussion supra Part III.B.2.
241 See discussion supra Part III.A.
242 See discussion supra Part III.A.
protection, including relief personnel and vehicles.\textsuperscript{243} International law also prohibits the destruction of food and water sources during times of conflict.\textsuperscript{244}

Despite these requirements of international law, countries continue to obstruct access to humanitarian aid. In response to such actions, the international community has taken various measures to coerce or to punish the perpetrators. The recent creation of the International Criminal Court is one example of the growing call to end the "culture of impunity."\textsuperscript{245}

The International Criminal Court, set up through a treaty between various states, serves as a permanent court for trying individuals accused of war crimes, crimes against humanity, and genocide.\textsuperscript{246} Because of the court's recent creation and limited number of cases, it remains to be seen what precedents the court will set and how effective it will be in establishing justice. Moreover, the ICC faces the difficult task of getting non-party states like Sudan to comply with its jurisdiction and investigations.

Nevertheless, the recent referral of Sudan to the ICC is one step toward establishing peace and justice in that war torn country. While various other atrocities have taken place and will likely be tried when the case goes to court, the ICC could also try individuals for denying access to humanitarian aid groups and for depriving civilians the basic necessities for survival. This Note has sought to examine how and if such actions in Sudan fit within the category of war crimes, crimes against humanity, and genocide. The analysis has shown that the actions taken by Sudanese government and militia leaders could constitute any one of these crimes. The most significant obstacles remain in proving the various intent elements required by the ICC statute for such crimes. However, significant amounts of evidence have been collected that show an intent to "systematically" target the black African groups of Darfur.\textsuperscript{247} This evidence may also point to a genocidal intent to destroy such groups in whole or in part. Depending on what evidence is collected and how the Prosecutor seeks to proceed, the deprivation of humanitarian access could play an important role in establishing an overall intent to commit such atrocities in Darfur.

Armed conflicts will inevitably reoccur in the future. However, the international community can take measures to protect and alleviate the

\textsuperscript{243} See discussion supra Part III.A.
\textsuperscript{244} See discussion supra Part III.A.
\textsuperscript{245} See discussion supra Part III.C.
\textsuperscript{246} See discussion supra Part III.C.
\textsuperscript{247} See discussion supra Part IV.B.2.
conditions of innocent civilians caught in the midst of these conflicts. By ensuring that adequate necessities for survival reach civilian populations, either through action by the parties to the conflict themselves or by outside actors, much of the suffering of civilians can be averted. Furthermore, prosecuting individuals for denying humanitarian aid in the ICC will help apply pressure on the parties involved to abide by international law now and in the future. While the ICC is not the final or only solution to this continuous problem, it is a step in the right direction toward establishing justice and promoting the humanitarian ideals of the international community.