Beyond the Law: The Evidentiary Making of the Darfur Genocide

Philippe Gout[1]

Abstract: The Darfur genocide is a highly contested legal fact in the context of the International Criminal Court. However, it became an evidenced truth for the international humanitarian community. This paper investigates the parallel translation processes of indeterminate acts of annihilation that occurred in Darfur respectively within the contexts of the ICC and of humanitarian activism. Although humanitarian actors produced evidence of genocide per se, the ICC merely produced evidence of genocidal intent. The ontological closure of the legal context ultimately determines the untranslatability of the humanitarian evidence of genocide into the ICC context, despite the attempts of its former prosecutor.

Keywords: Genocide, Darfur, Translation Theory, International Criminal Court

Introduction

What can confirm that an international crime such as genocide was actually perpetrated? Why was the International Criminal Court (ICC) unsuccessful in proving genocide in Darfur to date? A straightforward legal answer would underline that crimes exist only once a final binding judicial decision has been issued on the matter. The layperson unsatisfied with this answer could ask further why that is so. That is because a crime is factual conduct – performed either by action or omission – criminalized by law, in line with the general principle *nullum crimen, nulla poena sine lege.* It might then be necessary to specify that the judicial trial is the setting in which both parties debate according to codified proceedings, articulated either in an adversarial or inquisitorial procedural system, and directed at the crafting of weighed and challenged *legal facts* potentially corresponding to the incriminated conduct. Even more so, it may be necessary to specify that the existence of such legal facts is self-sufficient and valid beyond the realm of legal ontology. If these answers were satisfactory, then governments, inter-state organizations, international NGOs, academics, global media, artists, and public opinion would refrain from alluding to the allegation of genocide in Darfur as a proven truth. The appropriate answer might be found in the way evidence is sourced and recontextualized; a process which I refer to as translation.

To date, the only proven "truth" is that Omar al-Bashir, the recently deposed president of Sudan, has been indicted by the International Criminal Court (the ICC) on three counts of

[1] Philippe.Gout@u-paris2.fr

genocide established on *prima facie* evidence; and that the pending criminal case is still at the pre-trial stage, preceding the appearance of the indicted president and before the actual trial being held.[2] The Rome Statute defines genocide in terms similar to those of the 1948 United Nations Genocide Convention (article 2). The Statute of the ICC and the Genocide Convention define the concept of genocide as any act "committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group". These acts can be characterized by: "killing", "causing serious bodily or mental harm", "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", "imposing measures intended to prevent births within the group", and "forcibly transferring children of the group to another group".

As the belief that genocide was perpetrated in Darfur grew in various non-legal *fora*, it correspondingly appeared that the actual criminal case in the ICC lost its momentum.[3] It is therefore important to address the translation process by which a highly challenged criminal fact became an evidenced truth, specifically among the American humanitarian community working on Darfur. This is because the American federal normative framework facilitated the classification of undetermined acts of annihilation into acts of genocide, thus departing from the very strict evidence-making process of criminal proceedings, namely that of the ICC. This normative backdrop facilitated the evidencing of genocide by American humanitarian activists. I group under the latter category, private American institutions whose statutory purpose was either to provide material and logistical assistance to people in need in order to strengthen their basic human rights in times of armed conflicts, or to reflect on the state of these rights through analytical reports. The main object of this contribution is hence to investigate, from a legal science register, the parallel translation processes of indeterminate acts of annihilation within the context of humanitarian activism and within the ICC's criminal proceedings respectively. The resulting translation differs in the two contexts: American humanitarian actors produced evidence of genocide *per se* whereas the ICC produced evidence of al-Bashir's genocidal intent only. The secondary yet essential object is to assess the untranslatability, in the ICC context of evidence, of genocide produced by the humanitarian activists. This failed process echoes American unilateralism in the crafting of the globalized register of criminal justice. Although the United-States is not a member of the ICC, the American humanitarian community served as proxy to convey to the ICC a rather

[2] Notwithstanding the horror of the crimes committed in Darfur, the qualification of such crimes as genocide is an outstanding legal problem. The goal here is neither ignore the gravity of the crimes committed in Darfur nor to disculpate those responsible for such crimes, but rather to highlight that the path chosen by the ICC to evidence the crime of genocide is deceptive.

[3] The current chief prosecutor of the ICC, Fatou Bensouda, announced in December 2014 that investigations in Darfur were coming to a halt because of the lack of support from the United Nations Security Council and from the United Nations-African Union Mission in Darfur. However, since al-Bashir was deposed in April 2019, the ICC seems to be regaining its strength and requesting al-Bashir's extradition. Yet, the national criminal investigation al-Bashir is undergoing on charges of corruption prevents this by asserting Sudan's sovereign jurisdiction over criminal matters. This refusal to comply was made unequivocal when the Transitional Military Council set up after al-Bashir's deposition publicly stated it wouldn't hand him over.

large and inclusive American classification of acts of genocide. This raises questions as to what and whose criminal justice the ICC is meant to perform, and about the immunity the United-States secures for itself in the face of the postcolonial instrumental misuse of the institution – an issue that eventually resulted in a confrontation between a large coalition of member states of the ICC and some of the latter's organs.

The concept of translation used in this contribution is borrowed from the work of Lawrence Venuti (namely his understanding of pragmatist philosopher Charles Peirce) and, later in the text, Donald Davidson.[4] Of paramount importance is Venuti's dichotomy between an instrumental (empiricist) and a hermeneutic (materialist) model of translation.[5] The former model assumes that "language is direct expression or reference" and sees translation as "the reproduction or transfer of an invariant which the source text contains or causes". This invariant is described as the "form, meaning or effect" of the source text or the source "token".[6] The latter hermeneutic model suggests that translation is "… an interpretation of the source [token] whose form, meaning and effect are seen as variable, subject to inevitable transformation" in the translation process.[7]

As a legal concept, genocide is an institution *per se*, consisting of a crime defined by texts – such as the Genocide Convention and the Rome Statute – and contextualized thanks to their interpretation mechanisms.[8] This legal institution involves proceedings, the triggering of legal regimes of evidencing, the awarding of legal status of perpetrator and victim and regimes of redress and retribution. The existence of such "legal concepts or institutions"[9] stems from legal ontology, where the legal phenomenon appears as a "real" object – rather than a mere *logos* –expressed in propositional content that amounts to a "standardized terminology".[10] The "standardized terminology" of international criminal law could stand for the "semantic invariant" specific to the instrumental model of translation.[11] However, Venuti underlines that the transposition of standardized terms from the source token to the translation is "an interpretative choice" of the translator. Therefore, translating acts of annihilation within the ICC's ontological frame necessarily relies on the hermeneutic model.

---

[4] Donald Davidson, "On the Very Idea of a Conceptual Scheme", *Proceedings and Addresses of the American Philosophical Association,* Vol. 47 (1974), 5-20; Lawrence Venuti, "Genealogies of Translation Theory: Jerome", *The Translation studies Reader*, ed. Lawrence Venuti (London & New York: Routledge, 2012 [2000]), 483-502.

[5] Lawrence Venuti, "Genealogies of (…), *op. cit.,* 483-486.

[6] Matthias Kaufmann & Richard Rottenburg, "Translation and Cultural Identity", *Civiltà del Mediterraneo,* XII n.s. 23-24 (2013), 229.

[7] Ibid.

[8] Denis Alland, *L'interprétation du droit international public*, *CCHAIL,* vol. 362 (Leiden & Boston: Brill, 2013), 394.

[9] Carlo Santulli, *Le statut international de l'ordre juridique étatique. Étude du traitement du droit interne par le droit international* (Paris: Pedone, 2001), 540. According to Santulli, the concept or institution is a legal representation, in the realm of legal ontology, of a given indeterminate "object" – living or thing – resulting in the granting of a determinate legal status and regime (p.30).

[10] Paul Amselek, "Ontologie du droit et logique déontique", *Cahiers de philosophie politique et juridique de l'Université de Caen* 27 (1995)*,* 115-159 ; Lawrence Venuti, "Genealogies of (…), *op. cit.,* 484.

[11] Ibid.

Conversely, the humanitarian activists assume – though wrongly[12] – that their translating process is empiricist, that is – a direct reference, as opposed to an indexical one – thus facilitating the evidencing of genocide. Finally, the failed attempt of the ICC prosecutor to take on the evidence produced by humanitarian actors illustrates the untranslatability of genocidal violence produced by the humanitarian activists in the ICC context.

This untranslatability stems from the failure to fulfill Davidson's "principle of charity" through which equivalence can be drawn between the concept of genocide in its original and receiving contexts.[13] The first corollary of this principle states that the mediators of both contexts of translation would assume that their respective beliefs and interests are intersubjectively bound to each other and objectively anchored in reality. The resulting second corollary states that the mediators of both contexts would presume a resemblance between action and motives for action from each other.[14] The ICC – specifically some of its member states – deviated from the second corollary by resisting receiving back the concept of genocide as reshaped by American federal institutions and following humanitarian actors.

Outline

I will first describe how, during the pre-trial phase, genocide was used as a univocal procedural tool. Confronted with the utter lack of evidence, some organs of the ICC – the Office of the Prosecutor (OTP) and the Pre-Trial Chamber – had to resort to criminal facts established by humanitarian activists so as to compel member states to cooperate in the arrest of the indicted President. The hermeneutic translation of these facts led by the two organs consisted in the production, through interpretation, of evidence of al-Bashir's genocidal intent rather than of genocide *per se*. The *intention* of genocide is not an international crime in and of itself. The evidencing of intention is an act of translation taking the *form* of an arrest warrant (I). This evidencing was however partly based on another instrumental evidencing process carried out by certain American humanitarian organizations, on the basis of a loose interpretation of genocide by the US federal Congress.[15] Following this state of affairs, evidencing of genocide by American humanitarian activists became of paramount importance for the further procedural steps of the prosecution. These humanitarian activists performed what they perceived to be an empirical translation process. In this process, indeterminate acts of annihilation are the invariant "source-meaning"[16] reproduced in this humanitarian context into the concept of genocide and are translated into instrumental evidence consisting of new tokens of different forms unrelated to legal ontology. The causal "effect"[17] of the translation tokens in the new context is nevertheless similar to that of the ICC – to determine sets of perpetrators and victims and relations of criminal responsibility between them. This is

[12] *Ibid.,* 485-6.
[13] Donald Davidson, "On the Very Idea (…), *op. cit.,* 19-20; Matthias Kaufmann & Richard Rottenburg, "Translation (…), *op. cit.,* 229-348.
[14] Donald Davidson, "On the Very Idea (…), *op. cit.,* 17-20.
[15] Lawrence Venuti, "Genealogies of (…), *op. cit.,* 483.
[16] Ibid.
[17] Ibid

how the indecisive legal evidence for "genocidal intent" turned into definitive humanitarian "evidence of genocide" in Darfur (II). The OTP's late attempt to expand the effects of this empiricist translation into the context of ICC met with the strong opposition of member states. I will show in the last part that Ocampo fulfilled Davidson's principle of charity in his interaction with the American humanitarian network, only to see his plan fading in the face of member states' strong opposition to a key element in the success of this strategy: the extended binding effect of UNSC's referrals. (III).

The hermeneutic translation: genocide as a procedural tool in the al-Bashir case

Contrary to the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the ICC has no coercive means of its own to apprehend indicted persons and has to rely on state cooperation. Sudan is not a state party to the ICC and the waiver of immunity for head of states organized by the Rome Statute did not work against al-Bashir until recently, considering he was an elected President meant to represent the nation as a whole and whose immunity is guaranteed under Article 60 of the Sudanese constitution.[18] ICC member states are hence under no obligation to apprehend him.[19] The OTP and the Pre-Trial Chamber I (hereafter the Chamber) had to find ways to circumvent this statutory pitfall and I will show that the Genocide Convention helped to do so. I shall first describe the Chamber's sudden interest in genocide regarding al-Bashir. Following Charles S. Pierce's pragmatic semiotics, an interpretant is "a mediating representation" binding together a "sign" (*representatem*) to its "object".[20] The variable interpretants bind together unsettled signs and objects. The OTP and the Chamber facilitated the making of an "intertextual and interdiscursive" institutional context in which a chain of "interpretants" and "signs" was directed at bringing the criminal proceedings to the next step, that is: the trial phase.[21] In this process the two organs of the ICC had no need to evidence

[18] Article 58 of the Sudanese Constitution states the functions of the head of States, where it does not appear that he is the Commander in Chief of the armed forces unlike in most Republics. However, article 65 of the Constitution, part of the "interim provisions for the presidency of the republic", categorized the President of Sudan as the "commander-in-chief of the armed forces". The latter provision fell into disuse after the independence of South Sudan in 2011.

[19] It has been argued that member states are under such obligation on the basis of UNSC resolution 1593 of 2005 by which the Darfur *situation* was referred to the ICC prosecutor. This interpretation is based on the absolute binding legal effect over all UN member states – including Sudan – of the UNSC's resolutions adopted upon Chapter VII of the UN Charter. Therefore, resolution 1573 would turn the ICC into a kind of *de facto* subsidiary organ of the UNSC and extend the opposability of the Rome Statute to the Sudan. Yet, this interpretation on the effect of the UNSC referral voluntarily fails to acknowledge the distinction between a criminal *case*, which rests on the discretion of the prosecution, and the broader criminal *situation* in which a specific case can be opened, investigated and eventually prosecuted. The UNSC can only refer situations in which crimes listed in the Statute might have been committed (art. 13§b). This implies that the chief prosecutor of the ICC remains free to investigate the referred situation and eventually open and prosecute a specific case (Yee 2009).

[20] Charles S. Peirce, *The Writings of Charles S. Peirce: A Chronological Edition, 1867-1871,* ed. Edward C. Moore, vol. 2 (Bloomington: Indiana University Press, 1984), 53-54.

[21] Lawrence Venuti, "Genealogies of (…), *op. cit.,* 476.

genocide but more modestly tried to evidence the genocidal *intent* of al-Bashir. As a result, the acts issued by the Chamber indicting al-Bashir for genocide constitute acts of translation – and interpretation – of a source text belonging to another context and whose form, meaning and effect were foreign to criminal processes of indictment.

Welcoming the crime of genocide in the al-Bashir case

On March 4th, 2009 the Chamber issued its "First Decision" on the application for a warrant of arrest and excluded all counts of genocide. Following an appeal requested by the Chief Prosecutor, on February 3th 2010, the Appeals Chamber reversed the First Decision with regard to the exclusion of counts of genocide "… in view of an erroneous standard of proof" and remanded the substance of the matter back to the Chamber.[22] On July 12th 2010 the Chamber issued a "Second decision" by which it re-examined the remanded matter – namely, al-Bashir's genocidal intent – in light of a lower standard of proof. The Chamber published straightaway the second arrest warrant containing three counts of genocide. These counts were: 1) genocide by killing, by causing serious bodily or mental harm, 2), by causing serious bodily or mental harm, and 3) by deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part.[23]

During the pre-trial phase at the ICC, the sign "genocide" does not yet refer to an ascertained act of annihilation and its guilty party. At this early stage of the criminal proceedings the purpose of an interpretant will be to bind (index) the sign "genocide" – or any statutory crime – to another object that is nothing more than a criminal intent. This specific mediating representation explains why the Appeals Chamber decided to lower the evidentiary threshold in order to pass the pre-trial phase and start the trial. For such a purpose, there is no need to prove criminal intent "beyond reasonable doubts" but merely to assert that there are "reasonable grounds to believe" that the target individual acted on the basis of a criminal intent.[24] This evidencing mechanism merely refers to *prima facie* genocidal intent – *mens rea* – to secure indictment and issue arrest warrants, but it does not require evidencing genocide once and for all. It therefore secures indictment while remanding the decision on the guilt of the indicted and on the crafting of legal facts evidencing genocide to a further step of the proceedings. The mediating representation here does not link up the sign "genocide" with an act of annihilation but with a probable criminal intent.

Indictment on the basis of genocide was the only legal means to secure cooperation from member states in the arrest of the Sudanese President. It relates to a 2007 judgment of the International Court of Justice (ICJ) in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide.* The ICJ referred therein to article VI of

[22] Appeals Chamber (ICC), *Judgement 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*", 3 February 2010 (ICC-02/05-01/09-OA), §30 & 41.
[23] Pre-Trial Chamber I (ICC), *Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir,* 12 July 2010 (ICC-02/05-01/09), 8.
[24] Appeals Chamber (ICC), *Judgement on the appeal* (…), *op. cit.*, §30.

the Genocide Convention, according to which a competent international criminal tribunal whose jurisdiction is accepted by member states might try any person charged with genocide. The ICJ surmised from this article an obligation for state parties to the Genocide Convention to cooperate in the arrest and transfer of criminals located on their territory to any international criminal tribunal whose jurisdiction is accepted by these states.[25] Sudan is a state party to the Genocide Convention and the aforementioned obligation is hence watching over relations between Sudan and other states party *both* to the Genocide Convention and the Rome Statute – insofar as al-Bashir happens to be on their territory. On the basis of this reasoning the Second Warrant of Arrest imposes the cooperation of member states in the arrest and transfer of al-Bashir to the ICC. Therefore, the OTP and the Chamber facilitated the making of an "intertextual and interdiscursive" institutional context in which various texts are called upon to stabilize the mediating interpretation of genocide.[26] The Genocide Convention and the related ICJ interpretative judgment are "mediating representation" devices invoked by the ICC organs to assign genocide a procedural object related to the arrest of the indicted person.

Acts of translation: inscribing reported acts of annihilation into evidence for indictment

The Second Decision and arrest warrant stand as acts of interpretation by which humanitarian reporting of acts of annihilation in Darfur are translated into al-Bashir's specific genocidal intent – *dolus specialis* – to destroy in whole or in part the Fur, Masalit, and Zaghawa ethnic groups, and finally serves as evidence for indictment.

At the pre-trial phase the OTP didn't order its own field investigation regardless of the Rome Statute (article 54§2). As a result, the second warrant substantiates its findings on many external source-texts reporting on the humanitarian situation in Darfur between 2003 and 2008.[27] These reports are tokens establishing acts of violence in Darfur. The reports can thus be considered as factually establishing indeterminate acts of annihilation, through field interviews conducted in refugee camps, statistical data, cross-referencing with other reports, or direct and crowdsourced field observation. Although some of these reports relate to a legal register, they are not concerned with categories of international criminal law. Moreover, the two most important reports – those that helped the Chamber establish genocidal intent – are foreign to the legal context and were produced by humanitarian organizations: *PHR* and *HRW*.[28] In all these reports, however, acts of violence are ascribed a limited set of signs approaching criminal conduct such as cruel, inhumane and degrading treatment, rape or torture, mass murder or killing and as destruction or privation of property, among other

[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgement, I.C.J. Reports 2007, §184, §§ 442-446.
[26] Lawrence Venuti, "Genealogies of (…), *op. cit.,* 495-6.
[27] Pre-Trial Chamber I (ICC), *Second Warrant* (…), *op. cit.,* footnotes 17-18.
[28] Physicians for Human Rights, Report, Darfur *Assault on Survival, A call for Security, Justice and Restitution* (2006), available at <https://s3.amazonaws.com/PHR_Reports/darfur-assault-on-survival.pdf>, accessed on 15 March 2018; Human Right Watch, Report, Sudan "*They Shot Us as We Fled". Government Attacks on Civilians in West Darfur,* May 2008, 21.

things.[29] Interestingly the two humanitarian reports have diverging practices as to mediating representation. Although *PHR* resorts to an instrumental translation to suggest that these signs invariably denote acts of annihilation through the legal interpretant "genocide" (*PHR,* 1, 3 and 7), the *HRW* report remains cautious not to infringe upon the interpretative function of criminal tribunals.[30]

As the acting translator, the Chamber, however, "decontextualized" the humanitarian source-tokens by "dismantling, rearranging and abandoning features of [their] signifying process" so as to ascribe them "meaning, form and effect" specific to the host context.[31] References to these humanitarian sources are made not in the operative provisions of the second warrant but in the preceding reasoning part. This stresses that what is to be evidenced in the two contexts is distinct. In the *PHR* report, genocide worked as an interpretant of reported violent conduct by which acts of annihilation were evidenced. By "inscribing" this interpretant in the warrant, the Chamber downgraded its semiotic value and turned it into a sign.[32] The criminal intent became the mediating representation – or the interpretant – of this sign, evidencing or justifying the indictment.[33] The second warrant is thus an interpretative act of the various criminal conduct into al-Bashir's indictment. Especially, the conduct related to forced displacement, and the resettlement of other groups in the taken lands.[34]

A shaky instrumental translation: The humanitarian evidencing of the Darfur genocide

Given that the ICC context described above interprets genocide as a mechanism for indictment, the presumption of al-Bashir's criminal intent presupposes the evidencing of the very genocide on which the guilt is supposed to be based. The performance of the ICC organs thus leads back to one question, which is not: *"Is al-Bashir guilty of genocide?"* but rather: *Has genocide been perpetrated in Darfur?"* For the Chamber to answer this question al-Bashir first has to stand before the court (articles 61, 63 and 64 of the Rome Statute) and the OTP needs above all to secure member states' cooperation in his arrest by addressing in priority al-Bashir's genocidal intent. The OTP and the Chamber are thus trapped in a tautological

[29] Physicians for Human Rights, (…), *op. cit.,* 10, 12 and 23; Human Right Watch, Report, Sudan "*They Shot Us* (…), *op. cit.,* 4-6;

[30] Physicians for Human Rights, (…), *op. cit.,* 1, 3 and 7: "the GOS and Janjaweed have created conditions calculated to destroy the non-Arab people of Darfur in contravention of the "Convention on the Prevention and Punishment of the Crime of Genocide"; "Under international law, the fact that most of those forced from their homes did not die does not mitigate the responsibility of the GOS and Janjaweed forces for their genocidal actions"; "PHR called the actions of the perpetrators genocide, and identified indicators of genocide, including consistent patterns of targeting non-Arabs, etc.". HRW broadly refers to "international crimes" or "crimes in violation of international law", or the need to bring "crime suspects" before the ICC.

[31] Lawrence Venuti, "Genealogies of (…), *op. cit.,* 486.

[32] Jacques Derrida, "Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas", in *Writing and Difference,* transl. A. Bass (Chicago: University of Chicago Press), 115.

[33] Pre-Trial Chamber I (ICC), *Second Warrant* (…), *op. cit.,* footnotes 17-18.

[34] Ibid.

deadlock, unable to answer either question without referring back to the other one. This situation led the OTP and the Chamber to resort to humanitarian reporting of acts of annihilation in Darfur. This manifested in the second warrant for arrest. The warrant relies explicitly on *PHR* reporting of genocide conduct in Darfur. However, this finding itself results from an instrumental translation of reported indeterminate acts of annihilation into the source-meaning "genocide", as broadly characterized by a 2004 resolution of the US Congress.

Though legal in nature, the US federal institutions fulfill a political function. The necessity to distinguish between the evidencing of criminal intent and of genocidal conduct before these institutions is not as critical as at the ICC. Notably, the US Congress facilitated the making of an intertextual and interdiscursive institutional context by which the meaning, form and effect of the concept genocide, as consolidated by the Genocide Convention, were readjusted in the Resolution 467 of July 2004: the meaning was broadened by means of a loose translation in order to encompass a greater number of situations.[35] Indeed, the resolution's recitals 3 to 4 fail to characterize the criminal conduct constituting genocide in Darfur according to the categories of Article 2 of the Convention. In other words, the formal requirements of genocide are not met. Moreover, the same recitals omit to specify the chief charges listed in Article 3 of the Convention. Simply put, the meaning of genocide was muddled, its distinctive features were not met, and its scope was widened to cover a greater number of categories of international crimes. In such a context, genocide comes close to a generic term, synonymous with international crimes and amounting to unspecified mass atrocities in the course of armed conflict. This resolution, though a political act, is a legal text establishing the existence of genocide in Darfur on the basis of the Genocide Convention. It is expressly on the basis of this broadened meaning of genocide, as crafted in the US Congress Resolution 467, that *PHR* carried out its instrumental translation – that the reported set of signs indexing criminal conduct invariably denote acts of annihilation through the legal interpretant "genocide". By resorting to *PHR*'s instrumental translation to issue the second warrant for arrest, the Chamber paved the way for a dialogue with American humanitarian activism.

A network of American humanitarian activists took up this broad interpretation of "genocide" crafted by the US Congress and recontextualized it in the humanitarian context by means of a two-fold translation to affirm the positive answer to the question: *"Has genocide been perpetrated in Darfur?"* The capacity of this network to emancipate itself from the strict legal concept of genocide results partly from the fact that most of its participating institutions have their head offices in the United States, which is not a member to the ICC. This network was consolidated by a tight and interconnected group of leading interventionists. The sociologist Sara Dezalay offers a striking account of the role of various

[35] US Congress Resolution 467, July 22, 2004, available at <https://www.congress.gov/bill/108th-congress/house-concurrent-resolution/467/text/eh?>, accessed on 15th March 2018.

members of this network in the evidencing of Darfur genocide.[36] Samantha Power, a former journalist and American lawyer, was the conceptual engineer behind the evidencing model of the Darfur genocide. Samantha Power was awarded the Pulitzer Prize for her book *'A Problem from Hell': America and the Age of Genocide.*[37] In this book, published in 2003 with the support of George Soros' *Open Society Institute*, Power campaigned for a loose and inclusive understanding of the notion of genocide and incited electoral constituencies to compel American political leaders to embrace humanitarian interventions. She retained some degree of influence over the Clinton, Bush and Obama administrations.[38] Through journal publications she nurtured the political belief that genocide was perpetrated in Darfur. The Pulitzer Prize and the praise published by mainstream magazines – such as *Men's Vogue* or *The New Yorker*[39] – both before and after the issuing of the second arrest warrant for al-Bashir, reinforced her repeated assertion of the Darfur genocide. Power's policy could not have been achieved without the financial support of George Soros' funding institutions, John Prendergast's institutions for implementing the model, and Sam Bell's student crowdsourcing. The first step carried out by this network was that of the crowdsourced students' initiative, which took the reins of the hermeneutic translation conducted by Congress and presented it as evidence of genocide in the eyes of the American activist context and the American population at large. The humanitarian organization of John Prendergast furthered this translation by producing additional humanitarian evidence of the Darfur genocide. This is how the legal provisional evidence of "genocidal intent" produced by the ICC was translated into definitive humanitarian "evidence of genocide" in Darfur. This latter evidence was eventually to be made available to the criminal prosecution and specifically to the ICC prosecutor as a means to circumvent the tautological deadlock standing in the way of prosecution.

Crowdsourcing advocacy initiatives as instrumental evidence making

Swarthmore College students Mark Hanis and Sam Bell, the latter a member of Enough Project, initiated the *Genocide Intervention Network* (GI-Net) in October 2004, in Philadelphia. In line with Samantha Power's doctrine, GI-Net aimed at "empowering citizens" with adequate tools to support initiatives protecting Darfuri civilians from genocide.[40] This initiative followed the acknowledgment of the Darfur genocide by the US Congress in July, and relied on the same catchall understanding of this category of crime. It is sufficient to mention one crowdsourcing initiative supported by GI-Net called "Students Taking Action

[36] Sara Dezalay, « Crimes de guerre et politiques impériales. L'espace académique américain entre droit et politique », *Actes de la recherche en sciences sociales* (2008), 44-61
[37] *Ibid*., at 46.
[38] Ibid.
[39] Ibid.
[40] See <https://www.globalhand.org/en/browse/disasters/176/all/organisation/25012>, accessed on 15th January 2019.

Now: Darfur" (STAND), notably supported by *Enough Project*.[41] STAND started as a group of students from Georgetown University to create tools focusing on genocide prevention and campaign against the Darfur genocide.[42] It organized technologies and resources, and offered educational information and advocacy training in order to activate grassroots networks of students. These networks would then be able to lobby their elected officials in the United States, and campaign in their schools, cities or states to end genocide in Darfur and elsewhere. STAND also used innovative media technologies to start campaigns asking the US Government to act against mass atrocities and genocide worldwide.[43] The digital campaigns #EasyAsAPB (APB) and "Less Veto More Action" are good examples of the use of digital technologies for generating political pressure through crowdsourcing. The APB campaign was intended to enable grassroots activists to pressure the American federal agencies to make prevention against genocide a priority.

For its part, the *Save Darfur Coalition,* of which the *Genocide Intervention Network* was a member, was an advocacy organization founded at the CUNY Graduate Center in Manhattan, concomitantly to the adoption of the 2004 US Congress resolution.[44] The coalition initiated a number of crowdsourcing projects to reinforce the conviction that genocide was perpetrated in Darfur.[45] Following Samantha Power's model, the 1-800-GENOCIDE program was a toll-free number allowing any individual to address elected officials with concerns of genocide in Darfur. This simple crowdsourcing device allowed callers to enter their zip codes with a choice to connect either with their representative, senators or the White House. The selected official would then receive "customized talking points before being connected".[46] This dialogic mechanism not only created the political need to act against purported genocide in Darfur, it also stabilized the general public's opinion and reinforced the belief that genocide was actually going on in Darfur.[47] Likewise, the *Save Darfur Coalition* initiated the DarfurScores.org, which was another bottom-up mechanism for pressuring Congress to take action. As David Lanz puts it (2009), the coalition therefore appeared as a "platform through which norm entrepreneurs have promoted their ideas of global governance", notably regarding criminal justice and the instrumental characterization of genocide.[48] By means of these participatory and bottom-up initiatives every single individual contribution constitutes a token of its own, each reinforcing the conviction that the Darfur

[41] See <https://enoughproject.org/blog/stand-launches-easyasapb-campaign>, accessed on 15th January 2019.
[42] Jonathan P. Doh and Nicolas M. Dahan, "Social Movements and Social Networks: An Evolutionary Perspective on Contemporary U.S. Student Advocacy Campaigns", Conference paper, EGOS, 2010, 17-18.
[43] See <https://standnow.org/resources/>, accessed on 15th January 2019.
[44] Sara Dezalay, « Crimes de guerre (…), at 49; David Lanz, « Save Darfur: A Movement and its Discontents », *African Affairs,* 2009, 669-677.
[45] See: <http://savedarfur.org/>, accessed on 15th March 2018.
[46] GI-Net, Annual Report (2008) at 17, available at <http://endgenocide.org/wp-content/uploads/sites/4/2013/02/GI-NET-Annual-Report-Final.pdf>, accessed on 15th January 2019.
[47] It is worth noting that the 1-800-GENOCIDE program played a crucial role in convincing the federal constituency to pass the 2007 Sudan Divestment and Accountability Act following the pressure of 15,000 calls made through this outline at the time. Ibid.
[48] David Lanz, « Save Darfur (…) », *op. cit.,* at 670.

genocide is evidenced, in the context of American humanitarian activism.[49] It is thus important to underline that the translation process indirectly extends to these crowdsourcing activist initiatives. Here again, the instrumental translation process performed by the activists ultimately took the reins of earlier hermeneutic translation conducted by the US federal Congress and aimed at legitimizing the latter's broadened and loosened meaning of genocide while forcing the legislature to act.

These student initiatives undoubtedly emerged from a sincere commitment to ethical concerns regarding human rights protection. Yet, in the long run, building on the presupposed Darfur genocide – and other presupposed genocides – also allows these initiatives to pragmatically create a new niche by making new technologies indispensable to the evolving practices of human rights protection, and to advance such activist networks into professionalized institutions. The *Genocide Intervention Network* and the *Save Darfur Coalition* merged in 2011 into a unique NGO called *United to End Genocide*.[50] Therefore, these initiatives search for a role to play in the genocide discourse on Darfur. To that end, these initiatives answer positively to the question: *"Has genocide been perpetrated in Darfur?"* However, this evidencing process is limited to the United States, foreign to the Rome Statute, where activists had the largest unrestricted freedom to evidence genocide in Darfur in a non-legalistic way by departing from a formal and judicial making of evidence. Besides this, these activist initiatives do not reflect any kind of scientific analysis or expertise conducted within and subject to the critique of an academic format. Here, university and colleges were the location where these initiatives started and from which they departed once they became successful. In this sense, GI-Net and *United to End Genocide* were not dramatically different from new social media such as *Facebook*, whose capacity to exponentially reinforce unchallenged political convictions was criticized in the aftermath of the 2016 American presidential elections.[51]

Humanitarian instrumental evidencing of the Darfur genocide

A close collaborator of Samantha Power's, humanitarian activist John Prendergast, probably best embodies her doctrine.[52] After coming to the fore under Clinton's presidency, he joined the International Crisis Group under the Bush administration as the Director for Africa. He managed to mobilize the media, to lobby the two main American political parties, and to gain support from major Hollywood figures in his quest to "end genocide in Darfur".[53] After leaving

[49] GI-Net, Annual Report (2008), *op. cit.,* at 17.
[50] See <http://endgenocide.org/who-we-are/programs/genocide-intervention-network/>, accessed on 15th January 2019.
[51] Hunt Allcot and Matthew Gentzkow, "Social Media and Fake News in the 2016 Election", *Journal of Economic Perspectives*, (2017), 211-236; Katharine Dommett and Luke Temple, "Digital Campaigning: The Rise of Facebook and Satellite Campaigns, Britain Votes (2017), 189-202.
[52] Ibid., p. 49.
[53] Don Cheadle & John Prendergast, *Not on Our Watch: The Mission to End Genocide in Darfur and Beyond*, (New York: Hyperion, 2007), 252. On the use of publicity to generate empathy for Darfur in

ICG in 2007 and with support from Soros' *Center for American Progress*, he created the *Enough Project*, the aforementioned organization meant to work as a strategic compass for all the other American institutions sharing the same concern as Prendergast, namely: "to create real consequences for the perpetrators and facilitators of genocide and other mass atrocities (…)".[54] Relying on a racial discourse to depict the conflict in Darfur, *Enough Project* repeatedly refers to the Darfur genocide in its reports. Already in 2007, before the issuing of the al-Bashir arrest warrants, several of *Enough Project'*s reports were focused on genocide, such as: *Echoes of Genocide in Darfur and Eastern Chad,* or *Don't Quit Now: Bringing the Darfur Genocide to an End*.[55] The latter report, published in December 2007, is a call to support the *Enough Project* initiative in line with traditional political activism. Nowhere in the report did the authors elaborate on the assertion of genocide in Darfur. Instead, the report presumes genocide with statements such as: "[this] represents the first popular movement against a real-time genocide (…)", or as: "(…) over four years after the [Darfur] genocide began (…)". Another report of 2014 states the following: "10th year after Darfur's genocide was *recognized*, the rhetoric of commitment to the prevention of mass atrocities has never been stronger" (emphasis mine). Quite evidently the reports refer to the assessment of genocide by the aforementioned US Congress Resolution 467. The George W. Bush administration followed suit shortly after in September. The dual nature of the resolution – political and legal – facilitated the recontextualization of genocide in this humanitarian network, where the evidencing of this crime is performed through a translation that ought to be instrumental. Genocide is the invariant source-meaning crafted by the American federal institutions and reproduced in this humanitarian context in various formal tokens – testimony, forensic or statistical evidence, reports of criminal events, interview, satellite imagery, etc. This invariant source-meaning is the mediating representation that binds together signs – the tokens and their object – to acts of annihilation in Darfur. The strength of the *Enough Project* rests on its purported transparency in reporting on genocide. The discourse is nevertheless weakened by the fact that it assumes that genocide was somehow proven elsewhere. *Enough Project* is trapped in a circular reference to evidence. To resolve this hardship, Prendergast, together with his well-known collaborator George Clooney, created the *Satellite Sentinel Project* in 2010 as a technological advancement in the fight against genocide. The NGO offers its own evidential tokens in the form of satellite imagery of mass atrocities taking place in Sudan. These images and the interpretation given thereof are the tokens evidencing genocide and supporting the discourse articulated by humanitarian institutions such as *Enough Project*.

The *Satellite Sentinel Project* (*SSP*) works on images collected by DigitalGlobe: an

---

support of humanitarian activism, see: Amal Hassan Fadlalla, "Humanitarian Dispossession: Celebrity Activism and the Fragment-Nation of the Sudan", *Humanity* (2016), 7-26.

[54] Sara Dezalay, « Crimes de guerre (…) », *op. cit.*, p. 49 ; See :
<https://enoughproject.org/about>, accessed on 15th March 2018

[55] John Prendergast, *Echoes of Genocide in Darfur and Eastern Chad* (2007), available at <https://enoughproject.org/reports/echoes-genocide-darfur-and-eastern-chad>;
John Prendergast, *Don't Quit Now: Bringing the Darfur Genocide to an End* (2007), available at <https://enoughproject.org/reports/dont-quit-now-bringing-darfur-genocide-end>, accessed on 15th March 2018.

American private company created in 1992 and specialized in spatial imagery. Together, the two institutions select satellite images possibly revealing mass atrocities and corroborate the likelihood of criminal conduct in light of selected grass-roots sources of information. These composite investigations result in the production of findings of mass atrocities. However, considering that the *SSP* decides what images are selected as well as the source of grass-roots information used to substantiate the findings, the objectivity of the evidence-making process is compromised from the start. The bias is brought to light in an additional and underlying translation process through which the findings of the *SSP* are made accessible to the larger public in tokens of another sort consisting in newspaper articles or interviews.[56] This is where Prendergast brands its rather neutral findings under the genocide category. The process therefore consists in a translation involving a series of different humanitarian tokens. The first set of tokens is the selected satellite images evidencing mass violence perpetrated in Sudan. A second set of tokens consists of newspaper articles or interviews. The latter are interpretive acts by which the mass violence captured in the images is called genocide, in line with the unspecific definition given by the US Congress. This surely consists in an instrumental translation considering that the source-meaning "genocide" travels unchanged from the context of US federal institutions to a humanitarian one. However, as underlined above, this source-meaning is itself the result of a hermeneutic translation. The decision to call the mass violence evidenced in the satellite imagery a genocide is moreover also an "interpretative choice" by the translators. This two-fold process illustrates Venuti's argument that there can be no empiricist translation.

Two illustrations of this two-fold process can be given. The New York Times published an article written by the two activists in February 2015 under the headline: "George Clooney on Sudan's Rape of Darfur".[57] The article briefly describes the images captured by the *SSP* and the way crowdsourcing investigations were conducted to corroborate the pertinence of the data. After this, it concludes that the mass rape perpetrated in the Darfur town of Tabit in 2015 falls under the category of "torture rape", as defined by the jurisprudence of international criminal tribunals. Therefore, the responsible individuals could be indicted and prosecuted under charges of genocide. However, as with the American federal institutions, the authors don't specify under what charge listed in the Genocide Convention or the Rome Statute this torture rape could be prosecuted as acts of genocide. One can assume that it would be either "Causing serious bodily or mental harm to members of the group" or "forcibly transferring children of the group to another group". They could just as well have referred to the landmark international jurisprudence on this issue, such as that of *Anto Furundžija* (ICTY).[58] Accordingly, the legal grounds defining "torture rape" as genocide are missing, which pertains to the loosened understanding of genocide they rely on.

A more striking example is found in an older interview of the two activists published

[56] Amal Hassan Fadlalla, "Humanitarian Dispossession (…), *op. cit.,* at 10.
[57] George Clooney, John Prendergast and Akshaya Kumar, "George Clooney on Sudan's Rape of Darfur" (2015), available at <https://www.nytimes.com/2015/02/26/opinion/george-clooney-on-sudans-rape-of-darfur.html>, accessed on 15th March 2018.
[58] ICTY, Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 dec. 1998.

in 2014 by Vice News, a New York based worldwide news channel and website. The paper is published under the headline: "Sudan's Silent Suffering is Getting Worse".[59] Although the two activists state that they rely on the widely accepted notion of genocide as consecrated in international law, they rather rely on the American Congress's understanding of it. According to their investigation, the Darfur genocide of the last decade – ascertained only by the Congress resolution to date – is being revivified. On the basis of selected satellite imagery collected in 2011, they assert that militia fighters of Darfur internationally known under the catchall name "Janjaweed" resumed fighting. They specifically state that: "… the Janjaweed are back with a vengeance under the banner of the regime's newly launched Rapid Support Forces". The two authors also brush aside the complex and changing ethnic nomenclature of Darfur and conclude in a truistic remark that: "… specific ethnic groups are today being targeted in spectacularly destructive ways in … Darfur".[60]

Many reports have instead shown that the creation of the Rapid Support Forces (RSF) is evidence that the racial and ethnic – and therefore genocidal – interpretation of the Darfur Conflict of the past decade is off the mark.[61] The RSF, a recently created regular force made of border guards and formerly scattered pro-governmental militias that went through regularization, was in large part created as a response to the nationwide rebel coalition initiative of 2011 known as the Sudan Revolutionary Front which united rebels across racial and ethnic lines.[62] Originally, the RSF were recruited in Darfur, stationed in Greater Khartoum, and they seasonally attacked the trans-tribal and religious rebels in South Kordofan. After generally failing to put these rebels to flight, RSF troops made their way back to Khartoum through Darfur, where they claimed their dues by burning villages and conducting chaotic atrocities. Arab tribes also suffer from this criminal conduct. Therefore, an analysis of conflict in terms of racial and ethnic categories alone is not sufficient. Besides, it has been documented that the federal government started to recruit militia fighters amongst "African tribes" after 2010.[63] These recent changes have raised obstacles to an analysis of the Darfur conflict in terms of genocide.[64]

More importantly, the 2014 interview illustrates the possible genocidal conduct of the RSF in Darfur on the basis of satellite images showing the destruction of a village conducted by this paramilitary force. Yet, quite oddly, the SSP's database describes these images as a

[59] George Clooney, John Prendergast, "Sudan's Silent Suffering Is Getting Worse" (2014), available at <https://news.vice.com/article/sudans-silent-suffering-is-getting-worse>, accessed on 15th March 2018.
[60] Ibid.
[61] HSBA, Remote-Control breakdown. Sudanese paramilitary forces and pro-government militias, *Small Arms Survey* (Issue Brief), April 2017, at 5 ; ICG, *Out for Gold and Blood in Sudan*, May 2014, available at <https://www.crisisgroup.org/africa/horn-africa/sudan/out-gold-and-blood-sudan>, accessed on 15th January 2019 ; Andrew McCutchen, The Sudan Revolutionary Front : Its Formation and Development, Small Arms Survey, October 2014.
[62] HSBA, *Remote-Control breakdown* (…), *op. cit.*, at 5
[63] GRAMIZZI (C.) & TUBIANA (J.), *Forgotten Darfur: Old Tactics and New Players,* Small Arms Survey Report, 2012, at 70-73.
[64] Interview with Jérôme Tubiana (2015).

time-lapse of the destruction of a school at Tilo, east of Kadugli, in South Kordofan State.[65] This city is located about 400 miles away from the nearest town of Darfur, known as Adiela and itself still far away from what could be described as the beginning of the Sahara desert. Yet the two activists state that: "There, as the Sahara encroaches and climate change presents grave challenges to survival, a new form of genocide by attrition could unfold as the government blocks humanitarian aid".[66] The *SSP* has hence produced evidence of genocide on the basis of this geographical vagueness and the poor analytical framework of the Darfur conflicts. The *Genocide Intervention Network* and the *Save Darfur Coalition* reinforce this watered-down understanding of genocide.

The untranslatability of humanitarian evidence of genocide within the ICC

One should not underestimate the possible evidentiary weight of the humanitarian tokens described above in criminal proceedings. International criminal tribunals take judicial notice of such tokens under the label of "facts of common knowledge". The latter are most often historical, political, journalistic or even artistic accounts of criminal conduct reported by victims or individuals who witnessed or observed parts of the events, as expressed in the tokens they produce. The growing admissibility of such evidence in international criminal tribunals shows common law lawyers supplant civil law lawyers in their argumentative jousting in the due process of law.[67] Once a tribunal takes judicial notice of these facts, they are deemed to be irrefutable evidence. Such evidentiary facts trump the rights of the defense to cross-examine the pieces of evidence and, ultimately, to benefit from the right to a fair trial. This circular evidentiary process goes back-and-forth between legal and non-legal translators in constant patterns of reciprocal referencing. In such practices, the translation process is meant to be instrumental. The Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the ICTY and the ICTR (article 94 of the respective Rules of Procedure and Evidence), sometimes after a long hesitation, have all resorted to this legal technique and so can the ICC (article 69 §6 of the Rome Statute).[68]

The prosecution engaging in the instrumental translation of genocide

The former Chief Prosecutor of the ICC, Luis Moreno Ocampo, most likely engaged in the instrumental translation of genocide specifically to facilitate the judicial notice of facts of

[65] See: <https://www.flickr.com/photos/enoughproject/6074855654> (2011), accessed on 15th March 2018.
[66] George Clooney, John Prendergast, "Sudan's Silent (…)", *op. cit.*
[67] Denis Alland, « La communauté internationale malade de la peste. Quelques notes conclusives (?) sur la souveraineté 'pénale' de l'État », *in* Colloque de la SFDI, *La souveraineté pénale de l'État au XXIe siècle* (2017), 517.
[68] ECCC, *Decision on IENG Sary's Motions Regarding Judicial Notice of Adjudicated facts from Case 001 and Facts of Common Knowledge Being Applied in Case 002*, Trial Chamber, 4 April 2011; STL, *Motion Seeking Judicial Notice of Reports of the United Nations International Independent Investigation Committee and the Fact Finding Mission to Lebanon*, Trial Chamber, 8 December 2015.

common knowledge. Ocampo interacted with Prendergast to make the most of the translation process carried out by the humanitarian network resulting in evidence of genocide in Darfur. In this sense, the strong cooperation between Prendergast and the former Chief Prosecutor instead suggests that the humanitarian network complemented the work of the OTP, specifically by answering the question the latter could not address, that is: *"Has genocide been perpetrated in Darfur?"* The complementarity between the two individuals manifested outside the ICC context, in their common participation in several workshops serving as a platform for the dramatization of their cooperation through reflexive talks, speeches, and improvised photo calls capturing hand shaking and smiles. *Enough Project* published a series of photographs on its website capturing the complicity between the two individuals and therefore their respective institutions during these workshops. One was taken during a conference hosted by the International Peace Institute in New York and related to the implementation of ICC's arrest warrants. During this workshop Prendergast stressed the need to support the prosecution's strategy in securing the arrest of al-Bashir. Another was taken during an award ceremony organized in Los Angeles during which Ocampo and Prendergast were interviewed together on the accomplished work of the ICC and the ways to overcome obstacles.[69]

These workshops were organized at the end of Ocampo's mandate to discuss how to improve the work of the ICC in prosecuting genocide. At this point the two characters acted as mediators, implicitly referring to a shared understanding of genocide at the expense of its legal conceptualization. This manifests in the topic of the conferences, by which Prendergast answered the problematized question the Chief Prosecutor could not address in his institutional framework: *"Has genocide been perpetrated in Darfur?"* They showed a common belief and interest in what stands as genocide as objectively manifested in Darfur. In this process they thus fulfilled the first corollary of Davidson's principle of charity. By calling to support the OTP in the arrest and prosecution of al-Bashir, Prendergast demonstrated that the two mediators of both contexts assumed similarity of action and of motives for action from each other (second corollary of Davidson's principle). The success of this translation was guaranteed by Prendergast's wider activist network, notably by the *Genocide Intervention Network* and the *Save Darfur Coalition.*

Failing the principle of charity

This strategy however did not succeed. The main reason is that the ICC apparatus is not only made up of judicial bodies *per se*, but also of member states and their Assembly. Member states have started to show disapproval for the ICC prosecution policy, mostly concerned with

[69] See: <https://enoughproject.org/blog/icc-chief-prosecutor-prendergast-discuss-court-challenges-and-progress> (2012) and <https://enoughproject.org/blog/video-former-icc-chief-ocampo-discusses-court-enough-john-prendergast> (2012), accessed on 15th March 2018.

Africa at large, as being suffused with colonial thinking.[70] The al-Bashir case in particular is afflicted by a paradox, by which the Prosecution's evidencing strategy relies on the American unilateral modeling of global criminal justice; a country strongly hostile to the Hague institution and yet seemingly in position to influence the ICC's prosecution agenda by way of UNSC's referrals.[71] An explanation for the prosecution's failure to date is that it never clearly expressed its strategic move based on the Genocide Convention and instead implicitly relied on the highly questionable general binding effect of the UNSC's 2005 referral. Only if the referral is binding regarding Sudan will the prosecution be entitled to turn to the instrumental translation of genocide provided by the American humanitarian activist network. Yet, the opposition between the judicial bodies and member states comes to light precisely through the tense debate on the legal effect of UNSC's referrals, revealing the challenge of fulfill Davidson's principle of charity in the translation of the humanitarian understanding of genocide. It is, for instance, worth looking at the Pre-Trial Chambers' decisions on the failure of member states, and third-states, to arrest and surrender al-Bashir to the court.[72]

This opposition reached a dramatic point on two occasions - Initially, when the High Court of Justice in Pretoria failed to arrest al-Bashir and to eventually surrender him to the ICC during his participation in the African Union Summit in South Africa in June 2015.[73] While the South African federal Government obviously opposed the obligation to cooperate with the ICC in the arrest of al-Bashir, the judicial body restored balance by showing the good faith of state institutions and reaffirmed the responsibility of the South African state in the failure to arrest the indicted person. In their procedural performance the state institutions of South Africa resisted the OTP. This opposition was revealed in the later decision of the South African Constitutional Court of March 2016.[74] In this litigation the applicant incidentally asked the court to determine if the UNSC's referral or the Genocide Convention waived this immunity according to the provisions of the Rome Statute. Although the court found it unnecessary to answer the incidental question, it nonetheless reminded the applicant that the argument of the extendible binding effect of the UNSC referral is "hotly contested" and stressed that the

[70] Res Schuerch*, The international Criminal Court at the Mercy of Powerful States*, (New York: Springer, 2017), 305; Sara Dezalay, « L'Afrique contre la Cour pénale internationale ? Éléments de sociogenèse sur les possibles de la justice internationale », *Politique Africaine* (2017), 165-18; Patryl I. Labuda, « Perceptions of Sovereignty, Colonialism and Pan-African Solidarity », AYIL (2013-2014), 289-321; Denis Alland, « La communauté internationale(…), *op. cit.*, 501-513.

[71] On the fact that Africa was chosen as a playground for the ICC for lack of obstacle from the US, see: Adam Branch, « Dominic Ongwen on Trial: The ICC's African Dilemmas », IJTJ (2017), 30-49, spec. At 37.

[72] Between 15 July 2013 and 23 January 2015 only, the Pre-Trial Chamber II issued nineteen decisions related to al-Bashir's travels, restating states' obligation to arrest him, with no success to date. ICC-02/05-01/09, *The prosecutor v. Omar Hassan Ahmad Al Bashir,* Situation in Darfur (Sudan), Public Court Records – Pre-Trial Chamber II. <https://www.icc-cpi.int/Pages/crm-refined.aspx?case=ICC-02/05-01/09>, accessed on 15th March 2018.

[73] On June 15th, 2015, after the Attorney of the South African Government stated he had reliable information that al-Bashir left the country, the High Court of Justice in Pretoria decided too late that the Government was under an obligation to arrest him.

[74] *The Minister of Justice and Constitutional Development v. The Southern African Litigation Center* (867/15) [2016] ZASCA 17.

argument based on the Genocide Convention is rather "limited" and should not receive much attention.[75] After this, the South African State engaged proceedings to repeal its membership to the ICC. In a statement released in October 2016 the South African Justice minister again expressed opposition to the OTP strategy by stating that "ICC's obligations are inconsistent with domestic laws". According to some sources, more African states could join the initiative, such as Kenya, Uganda or Namibia.[76]

The highly contentious question of the binding effect of UNSC's referral was recently decided on by the Appeals Chamber of the ICC confirming Jordan's non-compliance with the Court's request to arrest al-Bashir[77]. The appeal filed by the Jordanian government against the Pre-Trial Chamber's decision was followed by a number of important submissions (notably *amicus curiae*) by other member states and organizations, such as the African Union, all discussing the extent of the binding effect of UNSC's referrals.[78] The possibility for the prosecution and the ICC at large to rely on the instrumental translation of genocide performed by American humanitarian activists therefore depends on the capacity of the UNSC's referral to be accepted in the ICC's framework as an act of translation. The Appeals Chamber recognised this translation in its judgment in the case of the Jordan Referral, shortly after the deposing of al-Bashir in April 2019. It notably confirmed Jordan's non-compliance with a debatable newly proclaimed international customary norm rejecting immunity before international tribunals partly on the basis of the UNSC's referral.[79] The Appeals Chamber moreover took an opposite view to the Pre-Trial Chamber by deciding not to refer the matter of the binding effect of the UNSC's referrals to the Assembly of States Parties, obstructing any formal objection by member states.[80]

The al-Bashir case appeared to be the seat of an ontological experiment conducted by the OTP. Instead of evidencing genocide in Darfur using his own field investigation methods, the OTP resorted to non-legal actors and their making of evidence of genocide. This choice was motivated by the intention to shortcut the evidencing process by taking judicial notice of non-legal evidence as "facts of common knowledge". This shift in the making of genocide resulted in a highly unstable translation of what stands as evidence outside legal ontology.

---

[75] Ibid.

[76] The Guardian, "South Africa to quit international criminal court" (2016), <https://www.theguardian.com/world/2016/oct/21/south-africa-to-quit-international-criminal-court-document-shows>; Euractive, "Future of ICC in doubt after African countries Withdraw" (2016) <https://www.euractiv.com/section/global-europe/news/future-of-icc-in-doubt-after-african-countries-withdraw/>; Peace Palace Library, "Africa and withdrawal from the ICC (2016), <https://www.peacepalacelibrary.nl/2016/10/africa-and-icc-withdrawal/>, accessed on 15th March 2018 ; Newsweek, "African Leaders Back ICC Mass Withdrawal Plan" (2017) <http://www.newsweek.com/african-leaders-back-icc-mass-withdrawal-plan-551113>, accessed on 15th March 2018.

[77] Appeals Chamber (ICC), *Judgment in the Jordan Referral re Al-Bashir Appeal*, 6 May 2019 (ICC-02/05-01/09-OA).

[78] See < https://www.icc-cpi.int/Pages/crm-refined.aspx?case=ICC-02/05-01/09>, accessed on 15th January 2019.

[79] Appeals Chamber (ICC), *Judgment in the Jordan Referral* (…), *op. cit.,* at 5, 52-60 and 66-73.

[80] *Ibid.,* at 89-97.

The former chief prosecutor made the bold choice to step outside legal ontology in a post-modern impulse and the Appeals Chamber just decided to follow suit.[81] Acting as a prosecutor, Ocampo made the bet that the law does not have to be seized as a comprehensive ontological object of its own but as a mere *logos* giving way to an empiricist interpretation of social and historical *phenomena*. There would be no real boundary between legal reality and other social realities. This audacious attempt has not been successful to date: al-Bashir still has to be brought before the Court and member states may still oppose the Court in many other ways than by means of the Assembly of State Parties. Considering the forcing through of the Appeals Chamber, it remains difficult for the loose humanitarian evidence of genocide to translate into the criminal proceedings of the ICC. This unsettled situation reflects the failure of the Court to understand that institutional apparatus sometimes impedes ontological choices.

[81] Jean De Munck, "Controverses autour de l'ontologie du droit", *Revue de Métaphysique et de Morale* (1990), 415-423.