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Darfur, Genocide, the Security Council and the International Criminal Court

In September 2004, the Security Council adopted resolution 1564 which among other things requested that the Secretary General “rapidly establish an international commission of inquiry in order to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable”. The resulting International Commission of Inquiry on Darfur (COI) reported to the Council on January 25, 2005. The report generated controversy which obscured its other important conclusions by finding that the Government of Sudan has not pursued a policy of genocide, but has committed crimes against humanity.

This paper describes the meaning and consequences of this conclusion. However, to put this issue in context from the beginning, it is important to emphasize that the report determined that government officials and others had committed many and various international atrocity crimes just as gross and heinous as genocide. The COI has given the United Nations Secretary-General a sealed list of 51 persons it considers guilty of these crimes. The Secretary-General will forward this list to the international prosecutor who may be entrusted with the case of Darfur. This prosecutor will be free to make his or her own determination on genocide there. The COI report recommended that the Security Council refer Darfur to the International Criminal Court (ICC).

A. Commission’s Conclusion

I. Did acts of genocide occur?

The definition of genocide under the Genocide Convention of 1948 as well as in the Rome Statute for the ICC and other customary international rules is as follows:

Genocide is any of the following acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

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

A crime always constitutes of two elements, an objective and subjective one. The objective element is the actual acts required by the definition of the crime and the subjective part requires the will to commit these acts. In the case of genocide both the objective and subjective element have two dimensions.

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1) Objective element

This element consists of the prohibited conduct and the existence of a targeted group.

a) Prohibited conduct

There has to be an act of the prohibited conduct stated in the definition of the crime.

The COI reported that undoubtedly acts have been committed such as killing members of the black African tribes in the Darfur region, and causing serious bodily or mental harm. The government and the militia also inflicted conditions of life calculated to bring about the physical destruction of these people by destroying their livelihood by killing livestock, pillaging and burning villages and depriving people of their land. Militias would sometimes hide for weeks in villages that they had attacked to kill and injure the inhabitants as they tried to return to their homes after the attack was over.

b) Targeted group

As the definition provides, there has to be a distinct “racial, national, ethnical or religious” group. Tribes can only constitute such a group if they fit these criteria.

The question is now whether the tribal groups in Darfur belong to one of these categories of distinction. The commission cites some of the case law established in the Rwanda tribunal which found that a clear distinction in one of these four categories between the Tutsi and Hutu was not possible. So in order to give the rule its greatest effectiveness in terms of international law, the tribunal established a wider interpretation of the term “group.” It said that a protected group already exists if it meets a “subjective standard of perception and self-perception as a member of a group”. So what is important is whether persons are perceived by outsiders as members of a distinct group and treated as such, and whether they consider themselves members of that group.

In the Darfur case the commission found it hard to just rely on the objective criteria in determining whether the Arab militia and the African tribes make up groups that are distinct in an objective way. Both tribes are Muslim and speak Arabic. The groups have also mixed through marriage and settlement to a point where it is hard for an outsider to make a distinction. While there are slight differences between the two it is arguable whether these constitute an objective difference.

In the subjective perspective, the report names examples of attacks where the Arab militia used terms such as “slaves” or “blacks”. The witnesses always described the attackers as “Janjaweed”, which in this context was used to describe “militias of Arab tribes on horseback or on camelback”. This led the commission to conclude that the victims saw their attackers as belonging to a hostile group that is different from themselves. This fulfilled the requirement of a distinct group.

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2) Subjective element

The two parts of the subjective element are intent to commit the prohibited acts of the objective part and genocidal intent, which means the “requisite special intent to destroy a group”.

While according to the Commission there is no question as to the intent to commit such acts of the Sudanese government, it did not see the intent specifically to commit genocide behind those acts. Thus the COI concluded that the Sudanese Government did not pursue a policy of genocide. As an explanation for this conclusion the report names several examples of situations where the attackers of villages only killed part of the population, mainly men in military age who they thought to be rebels. This is especially significant since the attackers in most situations had the means to kill everyone living in an attacked village since they were backed up by air operations.

One example is that of the attack on Wadi Saleh in 2004, where after the attack the militia and Government Commissioner gathered the survivors into a large area and read out a list with the names of 15 persons whom they then executed on the spot but did not kill the rest of the survivors.

Another reason the Commission gives why it cannot see a genocidal intent behind the Government’s actions is that it collects fugitives from the destroyed villages into camps for internally displaced persons. According to the report this means the Government does not want to destroy these people but wants to have them live in a government controlled area. This is also seen as the reason it names for the large scale destruction of villages, not to annihilate the population but to prevent rebels from using those villages as hiding spots.

While on one hand the commission sees no genocide policy on behind the acts of the Sudanese Government it leaves it open for a competent court to decide on a case by case basis whether there was genocidal intent in some individual cases.

II. Consequences

The decision of the commission not to classify the atrocities in Darfur as genocide has led to a good deal of confusion.

1) **Is there still a chance that the attackers and Sudan government officials can be charged with genocide?**

As stated above the ICC might still come to the conclusion that in some individual cases, also in the case of some Government officials, the attackers acted with genocidal intent. The prosecutor at the ICC is also free to charge individuals or even those responsible in the Government of Sudan with genocide if he sees enough evidence of their intent. The Commission’s conclusions do not represent a final decision nor do they represent the

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opinion of the whole UN. The report represents the opinion of the individuals on the commission.

2) Atrocities constitute other crimes recognized under international law

Although the Government of Sudan cannot be charged with genocide according to the commission, the COI found that it had committed other crimes against humanity which constitute heinous crimes according to international law that the ICC can try. These crimes against humanity in the Darfur region are murder and persecution. The report gives as a reason for persecution that the Government did not want to annihilate the African tribes of the Fur, Masaalit and Zaghawa, but wanted to drive these people out of a certain area by attacking civilian villages, burning them down and forcefully displacing civilians from those villages. So the criticism that the Commission did not find the Government of Sudan or the militia responsible for any crimes is not true. It just does not define them as genocide but as crimes against humanity and war crimes on a large scale.

3) Are these crimes considered to be less grave than genocide?

While many think that genocide is the most serious of all crimes, the ICTR Appeals Chamber that dealt with the crimes committed in Rwanda stated that “there is no hierarchical gradation of crimes”. Thus some categories of crimes against humanity can be similarly grave. According to the Appeals Chamber a court may give the same sentence to these different serious violations of international humanitarian law.

Even though the Commission states that the Government of Sudan did not pursue a policy of genocide, it found that it clearly committed other crimes against humanity as grave and with the same sentences as genocide. The commission strongly recommends the Security Council refer these crimes to the ICC.

B. A Prosecutor’s Case for Genocide

A prosecutor could argue that the Commission’s interpretation of the term “genocidal intent” is too narrow and technical. Even within the report there are many parts where the description of the events in Darfur lets the reader conclude that there was the specific intent to destroy a group as such in whole or in part. Many of these descriptions of atrocities in the report make it clear that it is at least arguable whether the government pursued a policy of genocide.

Originally the Arab nomadic tribes and the black African tribes of the Darfur region lived alongside each other peacefully. When over time drought and less pasture became problems, tension grew between these two groups. They started making clear distinctions between each other and became more and more hostile. When the government called the Arab nomadic tribes for help in their fight against the rebels, it was obvious that this would encourage them to fight their opposing group, consisting of the black African tribes the Fur, Masaalit and Zaghawa.

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The main attacking forces were the Janjaweed, so an important question is whether they acted with the intent to destroy the tribes. The imminent driving force for the Janjaweed was to gain power over the land where the African tribes were living in villages with their cattle. The only way to finally gain this power without the risk of the displaced returning to their villages is to totally eliminate them. The testimonies of witnesses who describe the attackers and what they said during the attacks are a clear proof of this goal. The report names the following examples: “This is your end. The government armed me.”; “Allah Akbar, we are going to evict you Nyanya.”; “Destroy the Torabora.”; “You are very cheap people, you have to be killed.”; “Where are your fathers, we would like to shoot and kill them.”; “You are Massalit, why do you come here, why do you take our grass? You will not take anything today.”; “You are Zaghawa tribes, you are slaves.”

In these expressions it is evident that the Arab attackers wanted to extinguish the African tribes of that area in order to gain the land and in some parts the cattle of the tribes living in the villages. That the motive for their action was something other than simply the killing of the population in that area could be irrelevant in terms of the existence of a genocidal intent.

These threats to the black Africans show the strong hatred of the militia for these tribes. They wanted to make sure that these people never return to their land and their actions prove they believed the only way to secure this was to kill them. The survival of a part of the village population does not mean that the Arab militias lacked the genocidal intent. Maybe they did not think that complete killing was necessary, because they made sure that it was impossible for the refugees to ever come back to their villages or in some cases even made it impossible for them to get access to necessary supplies such as water. This clearly leaves the African tribes unable to live in the region anymore.

They would chase the survivors of an attack into a certain area which they would surround and whenever someone came out of their hiding spots to get water they would shoot them. One example given by the commission is that of two brothers, both of whom had their cattle with them while fleeing an attack. Only the one who refused to leave his cattle with the attackers was shot, while the other one was hit with the butts of the guns of the Arabs but not shot. A prosecutor could conclude that this is such an isolated example that it does not prove the lack of a genocidal intent. The actions as well as the exclamations during the attack show the will to exterminate the black African population of that region in its entirety, which for the Janjaweed was a necessary step in order to reach their goal of getting the land from these tribes. So in the case of the Arab militias there may well be the necessary intent in order to be charged with genocide.

The clear intent of the militia may lead to the Government’s intent. The report itself gives the information that areas were specifically targeted because of the “ethnic composition of the population that inhabits these areas” and not so much because of their “proximity to or the locus of rebel activity”. The government would have had the capacity to step in and prevent more militia attacks from happening but did quite the contrary by arming, paying and supporting them

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during their attacks. The intent to extinguish the black African tribes is clearly shown in this systematic behavior on the side of the government.

Regarding the Government of Sudan there is no question that it knew of the tensions between the two rival parties in that region. It played on the long desire of Arabs for the land in question and encouraged the Arabs with arms and military support to achieve it. The government supported the Arab recruitment efforts by paying recruiters depending on their success. As a result, the awareness of the government and failure to prevent more atrocities committed by the militia could constitute superior knowledge of genocide by the Government. It knew exactly what was happening with its support. For example, the report mentions that government forces cited orders not to interfere when they refused to help a village against militia attacks. This superior knowledge constitutes a legal responsibility on the part of the Sudanese government. Moreover, when the government actively supported the militia attacks through air attacks or with troops a prosecutor could decide that it did pursue a policy of genocide.

The Commission's arguments why the Government did not have a policy of genocide that are stated under the subjective element of the crime (A.I.2) might well not convince a prosecutor... While the installation of IDP camps serves as an argument in favor of the Government, in other parts of the report there are descriptions of how military forces or militia tried to scare those living in the IDP camps and threatened to kill them if they should try to return to their villages. In some incidents people in these camps were shot under the excuse that they were rebels trying to hide in these camps.

Another point the Commission emphasizes is that the main target of the militia and military were men of military age since they might have been rebels. But during the attacks so many women and children were killed, raped and tortured that the target strongly appears to have been the black tribal population of Darfur as a whole.

There are thus strong arguments for finding a genocidal policy by the Government and genocide in action by the militia (Janjaweed). A prosecutor could therefore very well come to the conclusion that the atrocities committed in the Darfur region amount to the international crime of genocide.

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