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## **Genocide in Darfur:** *A Rebuttal of the UN Commission of Inquiry*

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The words ‘Darfur’ and ‘Genocide’ have been synonymous for quite some time now. The crisis in Darfur began in February 2003 when the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), composed mainly by the Fur, Zaghawa and Masalit tribes, started accusing the Sudanese Government of oppressing the black Africans and being in favour of the Arab Africans. These two groups began attacks against the government and to counter this, the Sudanese Government military together with some African Arabs known as the Janjaweed militias, launched their own attacks. As in many conflicts, the civilians suffer the most. Whereas reports vary, the death toll is said to be about 300,000 people.<sup>1</sup>

International response from advocacy organizations was almost immediate. In June 2003, Amnesty International was already calling for an ‘International Commission of Inquiry to examine the factors behind the deteriorating situation in Darfur, investigate abuses and suggest mechanisms to bring to justice the perpetrators of human rights violations’.<sup>2</sup> On September 9, 2004, the then United States Secretary of State Colin Powell, referred to the situation in Darfur as Genocide in a statement to the Senate Foreign Relations Committee. The question since then was centred on whether what was happening in Darfur was truly Genocide. The reason why some scholars are so ready to refer to the situation in Darfur as Genocide is simple, Genocide is considered by some as the highest crime. Indeed, the ICTR has referred to Genocide as the ‘Crime of Crimes’<sup>3</sup> and the ICTY Prosecution referred to genocide as the ‘ultimate crime.’<sup>4</sup> Additionally, Schabas has contended that there is a school of thought within the United States government that considers Genocide as an open invitation for humanitarian intervention even without Security Council authorization.<sup>5</sup>

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<sup>1</sup> Noëlle Quénivet, “The Report of the International Commission of Inquiry on Darfur: The Question of Genocide”, *Human Rights Review*, Vol. 7, No 4 (2006) 40

<sup>2</sup> Amnesty International, “Darfur: Looming Crisis in Darfur”, June 30, 2003 retrieved from <http://www.amnesty.org/en/library/info/AFR54/041/2003/en> on April 15, 2010

<sup>3</sup> *Kambanda* ICTR 97-23-S, Trial Chamber Judgement, 4 September 1998, Para 16 and *Serushago* ICTR 98-39-S, Trial Chamber Judgement, 5 February 1999, Para 15. It should be noted however, that the ICTR Appeals Chamber in the Prosecutor v. *Kayishema and Ruzindana*, said that ‘the Trial Chamber erred in finding that genocide is the “crime of crimes” because there is no such hierarchical gradation of crimes.’ ICTR-95-1-A, Appeals Chamber, 21 October 1999, Para. 367.

<sup>4</sup> *Karadžić and Mladić* ICTY Trial Chamber transcript of hearing, 27 June 1996, 15-16 where the ICTY Prosecution said that ‘(Genocide) should be reserved only for acts of exceptional gravity and magnitude which shock the conscience of human kind and which, therefore, justify the appellation of genocide as the ultimate crime.

<sup>5</sup> William A. Schabas, “Genocide, Crimes against Humanity and Darfur: The Commission of Inquiry’s findings on Genocide,” *Cardozo Law Review*, Vol. 27, No 4 (2006) 1718. The argument that the United States advances according to Schabas is that genocide is a jus cogens norm, and it therefore takes precedence over the United Nations Charter.

However, some scholars including the United Nations have refused to call it Genocide<sup>6</sup> and the debate between the terms ‘Ethnic Cleansing’ and ‘Genocide’ is still raging.<sup>7</sup> To quell these debates, the Security Council acting under Chapter VII of the UN Charter adopted resolution 1564 on September 18, 2004 which requests, *inter alia*, the Secretary-General ‘rapidly establish an international commission of inquiry in order immediately 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’.<sup>8</sup>

This essay aims to examine the findings of the Darfur Commission of Inquiry in relation to its approach to the crime of genocide. This will be done by analysing the purpose based approach used by the Commission to come to its conclusion. The essay will also attempt to prove genocidal intent in the Darfur case and it concludes by stating that the Commission erred in its findings and that Genocide was and is taking place in Darfur.

## ***Genocide***

‘*Who remembers the Armenians?*’<sup>9</sup>

This sentence is often cited to remind us of days when Genocide went unpunished. The international community keeps saying ‘never again’ over and over again and thus prevention of Genocide is lacking. Prosecution of Genocide has however made large strides. The term ‘Genocide’ was coined in 1944 by Raphael Lemkin. It was later defined in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide as 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.

The biggest examples of Genocide in our time are that of the Armenians, the Jews, the Tutsis and most recently, the question of whether Genocide has been committed in Darfur.

## ***The International Commission of Inquiry***

The International Commission of Inquiry on Darfur (ICID or the Commission) was made up of five individuals, Antonio Cassese, Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott, who assembled in Geneva and began work on October 25, 2004.<sup>10</sup> Although the Commission’s approach was much like a judicial body, it clearly stated that it was

<sup>6</sup> Noëlle Quénivet, *Supra* note 1, at 38

<sup>7</sup> This debate is beyond the scope of this paper but it is well illustrated by Schabas, *Supra* note 5, at 1708.

<sup>8</sup> UN Security Council Resolution 1564 on 18 September 2004, Document S/RES/1564 (2004)

<sup>9</sup> Hitler at Obersalzberg on the eve of the Polish invasion, William Schabas, *Genocide in International Law: The Crime of Crimes*, (2009) 1

<sup>10</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005, Page 9, Para 1

not a judicial body.<sup>11</sup> This means that they did not have to prove beyond reasonable doubt.<sup>12</sup> Instead, they felt that ‘the most appropriate standard was that of requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.’<sup>13</sup>

For this, the Commission interviewed witnesses, officials and other persons of authority, those detained and also visited places where the alleged crimes had taken place.<sup>14</sup> Additionally, the Commission investigated the Sudanese Criminal Justice system on its ability and willingness to prosecute the alleged perpetrators.<sup>15</sup> Just like many other Commissions set with such a difficult task, they had their roadblocks.<sup>16</sup> However, despite this, they managed to complete their investigations and their report came out on January 25, 2005.

### ***The Commission’s Report***

The second section of the Commission’s report deals with whether acts of Genocide occurred in Darfur. To do this, the Commission referred to the Genocide Convention of 1948 which gives objective and subjective elements to adduce individual criminal responsibility for genocide.

#### **Article 2 of the Genocide Convention**

To emphasize how important this article is, it has been replicated in the ICTY Statute (Article 4), the ICTR Statute (Article 2) and the ICC Statute (Article 6). In regards to this category of objective elements, the Commission agreed that indeed there were ‘systematic killings of civilians belonging to particular tribes, large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part.’<sup>17</sup> The Commission chose not to dwell on this but for the purposes of this essay, article 2 of the Genocide convention will be dissected to prove genocidal intent in Darfur.

### ***The Objective Elements***

The objective element is twofold. First, the Commission must establish that the conduct is prohibited by the Genocide convention and that the victims are targeted because of belonging to a particular “national, ethnical, racial or religious group”.

#### **Killing Members of the Group**

The Commission rightfully agreed that there were systematic killings of civilians belonging to particular tribes. These tribes, the Fur, Zaghawa and Masalit, have been unfortunately targeted by the Government and the Janjaweed militia. Human Rights Watch found that from between September 2003 and February 2004, there had been about 14 incidences

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<sup>11</sup> *Ibid.*, at Page 11, Para 14

<sup>12</sup> *Ibid.*, at Page 12, Para 15

<sup>13</sup> *Ibid.*,

<sup>14</sup> *Ibid.*, at Para 16

<sup>15</sup> *Ibid.*, Para 17

<sup>16</sup> The Commission was under serious time constraints and their investigations were hampered by *inter alia* budget and personnel constraints.

<sup>17</sup> The Commission Report *Supra* note 10, at Page 129, Para 507

of large scale killings in Dar Masalit alone.<sup>18</sup> One of the incidences reported is the attack on Mororo village, close to the Masalit-Fur border where 40 people were killed and one of the attackers' allegedly shouted: "We must get these people out of this place!"<sup>19</sup> Other instances documented are for example the killings in Wadi Saleh where the state minister of the interior from Khartoum (Ahmed Haroun), allegedly told the Janjaweed and the army in a speech to "kill the Fur".<sup>20</sup>

### **Causing serious bodily or mental harm to members of the group**

The ICTY Trial Chamber in the *Krstic* Judgement said that the "actus reus is an intentional act or omission causing serious bodily or mental suffering."<sup>21</sup> The outcome of this act does not need to be permanent but it needs to be inflicted in a way that has a long term disadvantage to the person.<sup>22</sup> "Causing serious bodily or mental harm" has come to include, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and 'harm that damages health or causes disfigurement or injury'.<sup>23</sup> It is of course difficult to deduce where we draw a line that includes or excludes some acts. What is clear however, is that the Government of Sudan and the Janjaweed militia have engaged in some of the above acts. Rape for example is very rampant in conflicts and Darfur is no exception. Amnesty International has reported many Fur and Zaghawa witness testimonies of rape and other forms of sexual violence.<sup>24</sup> The UN Darfur Task Force Situation stated in its report on March 11, 2004 that a survey done by UNICEF confirmed large numbers of rape cases including gang rapes.

### **Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part**

The acts envisaged here are for example 'subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services. Also included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion'.<sup>25</sup> Human Rights Watch has talked about villages burned to the ground with the militias even taking with them emergency relief items.<sup>26</sup> Similarly, there have been accounts of the militia destroying food stocks<sup>27</sup> and throwing dead bodies in wells to contaminate the water.<sup>28</sup>

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<sup>18</sup> "Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan", *Human Rights Watch*, Vol. 16, No 6A (2004) 9

<sup>19</sup> *Ibid.*, at 10

<sup>20</sup> "Entrenching Impunity: Government Responsibility for International Crimes in Darfur", *Human Rights Watch*, Vol. 17, No 17A (2004) 27

<sup>21</sup> *Krstic*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, Para 513

<sup>22</sup> *Blagojevit & Jokic*, IT-02-60-T, Trial Chamber Judgment, 7 January 2005, Para 645. See also, *Brdanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, Para 690, the Trial Chamber also said that the harm does not need to be permanent but it needs to be serious. See also, *Stakic*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, Para 516 "The harm inflicted need not be permanent and irremediable."

<sup>23</sup> *Stakic*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, Para 516

<sup>24</sup> "Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences", *Amnesty International*, (2004) 11

<sup>25</sup> *Brdanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, Para 691. See also *Stakić* Trial Judgement, Para 517, *Akayesu* Trial Judgement, Para 505-506, *Rutaganda* Trial Judgement, Para. 50 and *Kayishema* Trial Judgement, Para 115-116

<sup>26</sup> "Darfur Destroyed: *Supra* note 18, at 2

<sup>27</sup> *Ibid.*, at 26

<sup>28</sup> Jennifer Trahan, "Why the Killing in Darfur is Genocide", *Fordham International Law Journal*, Vol. 31 (2007-2008) 1052

## The So Called ‘Protected Groups’

These groups as enumerated by the Genocide convention are national, ethnical, racial or religious groups. The Commission questioned whether tribal groups were part of the protected groups. Quoting the Australian Federal Court ruling of 1999, the Commission felt that a tribe may be targeted for genocide only if it constitutes a racial, ethnic or religious group.<sup>29</sup> Using the objective test of whether the Fur, Zaghawa and Masalit make up distinct ethnic groups, the Commission decided that they speak the same language as their attackers (Arabic) and are from the same religious group (Islam). Additionally, factors such as intermarriages were said to have blurred distinctions between the groups.<sup>30</sup>

However, after consideration of the subjective test, on whether the groups perceive themselves and each other as distinct groups, the Commission saw that the rift between the tribes was evident due to *inter alia* the ‘1987-1989 conflict over access to grazing lands and water sources between nomads of Arab origin and the sedentary Fur.’<sup>31</sup> Additionally, the terms *nuba* (slave) and *zurga* (blacks) as used by the militias indicate a perception of two different groups.<sup>32</sup> For those reasons, the Commission concluded that the three tribes indeed fall under protected groups.

The question of protected groups is an unclear one. Frank Chalk and Kurt Jonassohn say that ‘the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it.’<sup>33</sup> Indeed this limited scope creates a lacunae that can only be filled by customary norms.<sup>34</sup> In Rwanda for example, the only way one could differentiate a Hutu from a Tutsi at first glance was by checking their identity cards. Some International Courts rulings therefore seem to favour a purely subjective test.<sup>35</sup> It should however be noted that both tests should be applied and that determination should be made on a case by case basis.<sup>36</sup>

### *The Subjective Elements*

Just like the Objective element, the subjective element is also twofold. The Commission must establish the ‘the criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.) and the intent to destroy, in whole or in part the group as such.’<sup>37</sup>

### **Intent**

Again on the subjective element, the Commission erred in not investigating the general intent (*mens rea*) on its own, choosing to focus its attention on the specific intent (*dolus*

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<sup>29</sup> The Commission Report *Supra* note 10, at Page 126, Footnote 181 on the Australian Federal Court in 1999 ruling in *Nulyarimma v. Thompson and Buzzacott v. Hill*, with regard to Aboriginal groups or tribes. Some Aboriginal persons had claimed that conduct engaged in by certain Ministers of the Commonwealth or Commonwealth parliamentarians were contributing to the destruction of the Aboriginal people as an ethnic or racial group. The Court dismissed the claim.

<sup>30</sup> *Ibid.*, at Page 129, Para 508.

<sup>31</sup> *Ibid.*, at Page 130, Para 510.

<sup>32</sup> *Ibid.*, at Para 511.

<sup>33</sup> William Schabas, (2009) *Supra* note 9, at 117

<sup>34</sup> *Ibid.*, at 118

<sup>35</sup> In *Kayishema and Ruzindana* the ICTR Trial Chamber noted that an ethnic group could be ‘identified as such by others including the perpetrators of the crime.’ *Supra* note 3, at Para 98. Similar approaches have been taken in *Rutaganda* and *Jelisić*

<sup>36</sup> *Brdanin*, *Supra* note 25, at Para 684

<sup>37</sup> *Supra* note 10, at Page 124, Para 491.

*specialis*). Case law on the mental elements of genocide has been varied with some jurisprudence differentiating between the general intent and the specific intent and others mixing the two. However, as Triffterer points out, this decision to mix the two, as done by the Commission, is not only misleading but *contra legem*,<sup>38</sup> ‘To guarantee the rule of law and respect for the principle *nullum crimen sine lege*, the two ‘intents’ ought to be strictly separated when it comes to prove the facts necessary to establish the innocence or guilt of an accused.’<sup>39</sup>

### Mens Rea

Article 30 of the Rome Statute of the International Criminal Court has codified the mental elements of genocide as knowledge and intent. Intent is where in relation to conduct, that person means to engage in the conduct and in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.<sup>40</sup> This mental element is thus established with regards to the *actus reus* of the crime.<sup>41</sup> Statements from the militia such as ‘kill the fur’<sup>42</sup> ‘the Fur are slaves, we will kill them’ and ‘we are here to eradicate blacks (*nuba*)’<sup>43</sup> are evidence of the intent required for genocide. What is controversial however is the knowledge requirement. Claus Kress talks about a purpose based approach and a knowledge based approach.<sup>44</sup> Alexander K. A. Greenawalt defines the knowledge based approach in the following way:

‘In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.’<sup>45</sup>

Spanish scholar Alicia Gil Gil holds that an ‘individual perpetrator of genocide must, first, know of the existence of a genocidal campaign and, secondly, act with at least *dolus eventualis* as regards the occurrence of the destructive result.’<sup>46</sup> On his part, Swiss Jurist Hans Vest reasoned that ‘If an actor knows that his conduct will inevitably lead to a certain result which is connected with the purpose pursued, he may, nevertheless, feel that it does not correspond to his real desire. But the knowledge of the certainty of this connection constitutes an integrated part of his consciousness while performing the determined act.’<sup>47</sup> What one can infer from this is that the perpetrator does not need to have the intent to destroy but if he is aware that his actions might destroy a group in whole or in part, then he is guilty of the crime of genocide.<sup>48</sup> The Commission should have given this concept full consideration before dismissing it. It

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<sup>38</sup> Otto Triffterer, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such,” *Leiden Journal of International Law*, Vol. 14, No 2 (2001) 400. Triffterer says that ‘both (*mens rea* and *dolus specialis*) may in practice come closely together or even partly overlap’ but it would be misleading to treat them as one.

<sup>39</sup> *Ibid.*, at 401.

<sup>40</sup> Article 30 of the Rome Statute of the International Criminal Court (2002)

<sup>41</sup> Otto Triffterer, *Supra* note 38, at 403

<sup>42</sup> “Entrenching Impunity: *Supra* note 20, at 27

<sup>43</sup> The Commission Report, *Supra* note 10, at Page 65, Para 245

<sup>44</sup> Claus Kress, “The Darfur Report and Genocidal Intent,” *Journal of International Criminal Justice*, Vol. 3, No. 3 (2005) 565

<sup>45</sup> *Ibid.*, at 566

<sup>46</sup> *Ibid.*, at 567

<sup>47</sup> Hans Vest, “A structure-based concept of genocidal intent,” *Journal of International Criminal Justice*, Vol. 5, No. 4 (2007) 4

<sup>48</sup> As explained, this is a very controversial concept. Werle for example says that ‘it is not enough for the perpetrator to merely anticipate the possibility that his or her conduct would cause the consequence. This follows from the words “will occur” and not “may occur”’ Gerhard Werle, *Principles of International Criminal Law* (2005) 104

however chose to investigate *dolus specialis* with regards to state responsibility, using the purpose based approach.

### **Dolus Specialis**

The *Akayesu* Trial Chamber said that ‘Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*.’<sup>49</sup> The *Kambanda* Trial Chamber also characterised Genocide as a unique crime because of its ‘elements of *dolus specialis* (special

intent) which requires that the crime be committed with the intent “to destroy, in whole or in part, a national, ethnical or religious group, as such.”<sup>50</sup> Unlike individuals, states have policies rather than intent<sup>51</sup> and this is what the Commission investigated - whether the Government of Sudan had a policy on Genocide.

### **Intent (policy) to destroy**

When defining Genocide, Raphael Lemkin adopted a very broad view that Genocide ‘not only encompasses physical or biological destruction but involves all forms of destruction of a group as a distinct social entity, such as the destruction of political institutions, economic life, language and culture.’<sup>52</sup> However, the International Law Commission (ILC) discussing the *travaux préparatoires* of the Genocide Convention said that ‘the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.’<sup>53</sup> The Commission on Darfur seems to have adopted this very restrictive definition. This can be seen from the words they chose to use, such as ‘annihilate’, ‘eradicate’ and ‘extinction’.<sup>54</sup>

The Commission looked at a number of case studies and decided that they did not show genocidal intent on the part of the Sudanese Government. An example used by the Commission is that of Wadi Saleh where about 205 people were killed and about 800 spared and taken to the Mukjar Prison.<sup>55</sup> This, according to the Commission, showed that the ‘intent of the attackers was not to destroy an ethnic group as such.’ However, what the Commission failed to take into account is that what the perpetrator intends might not always be so easy to achieve and it therefore needs a continuing process to attain the wanted destruction.<sup>56</sup> Another reason given by the Commission is that the ‘persons forcibly dislodged from their villages are collected in IDP camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government.’ Indeed the *Stakić* Trial Chamber (and *Krstić* Appeals Chamber) stated that ‘It does not suffice to deport a group or a part of a group... The expulsion of a group or part of a group does not in itself suffice for genocide.’<sup>57</sup> However, the *Krstić* Appeals

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<sup>49</sup> *Akayesu*, ICTR 96-4-T, Trial Chamber Judgment, 2 September 1998, Para 498

<sup>50</sup> *Kambanda*, *Supra* note 3, at Para. 16.

<sup>51</sup> William Schabas, (2009) *Supra* note 9, at xiv

<sup>52</sup> Mathilde K. van Haren, “The Report of the International Commission of Inquiry on Darfur and Genocidal Intent – A critical Analysis,” *Netherlands International Law Review*, Vol. 53, No. 2 (2006) 224

<sup>53</sup> Report of the International Law Commission, Forty-Eight Session, 6 May-26 July 1996, UN Doc. A/51/10, Page 44, Para 4. The ICTY in the *Krstić* and *Jelisić* trials adopted the same definition. See *Krstić* IT-98-33-T, Trial Chamber Judgment, 2 August 2001 Para 580; *Jelisić* IT-95-10-T, Trial Chamber Judgment, 14 December 1999 Paras. 78-83

<sup>54</sup> The Commission Report, *Supra* note 10, at Paras 515-520

<sup>55</sup> *Ibid.*, at Page 131, Para 514

<sup>56</sup> Triffterer however uses these words to show that one can be prosecuted for intending Genocide without having committed the act. *Supra* note 38, at 402.

<sup>57</sup> *Stakić* *Supra* note 23, at Para 519. See also *Krstić* ICTY IT-98-33-A Appeals Chamber Judgment, 19 April 2004, Para 33

Chamber also stated that ‘forcible transfer could be an additional means by which to ensure the physical destruction...’<sup>58</sup>

Lastly, sexual violence as seen in Darfur could also infer genocidal intent to destroy. The *Akayesu* Trial Chamber stated that ‘Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.’<sup>59</sup>

### ***In Whole or in Part***

This is a very controversial aspect as the questions arises, how many people make up a substantial part of a group? Indeed scholars have opined that the *Krstic* findings show how hard it is to answer this question.<sup>60</sup> The *Krstic* Appeals Chamber held that ‘if a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.’<sup>61</sup> The Commission asserted that the killings targeted groups of young men who were suspected to be *tarabora* (rebels).

‘However, there are other more indicative elements that show the lack of genocidal intent. The fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element.’<sup>62</sup>

This seems very reminiscent of the *Krstic* case where 7000 – 8000 men were killed whereas the women and children were transferred from the area. Additionally, notwithstanding the killing of young men, the Commission did not refer to other case studies where the killings happened indiscriminately or where witnesses testified of ‘derogatory epithets’.<sup>63</sup> In the *Brdanin* Judgement, the Trial Chamber held that

‘According to the 1991 census, there were 2,162,426 Bosnian Muslims and 795,745 Bosnian Croats in BiH. Of these, 233,128 Bosnian Muslims and 63,314 Bosnian Croats lived in the relevant (targeted) ARK municipalities. Numerically speaking, the Bosnian Muslims and Bosnian Croats of the relevant ARK municipalities, on their own, constituted a substantial part, both intrinsically and in relation to the overall Bosnian Muslim and Bosnian Croat groups in BiH.’<sup>64</sup>

With this in mind, one can infer that out of about six million Fur, Masalit and Zaghawa population, the about 300,000 people killed and millions displaced forms a substantial number.<sup>65</sup> This shows ‘selective killing of certain segments of a group as evidence of intent to destroy the group as a whole.’<sup>66</sup>

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<sup>58</sup> *Krstic* Appeals Chamber Judgement, *Ibid.*, at Para 31

<sup>59</sup> *Akayesu*, *Supra* note 49, at Para 29

<sup>60</sup> Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *International Criminal Law and Procedure* (2007) 180

<sup>61</sup> *Krstic* Appeals Chamber Judgement, *Supra* note 57, at Para 12

<sup>62</sup> The Commission Report, *Supra* note 10, at Page 130, Para 513

<sup>63</sup> *Ibid.*, at Page 130, Para 511

<sup>64</sup> *Brdanin*, *Supra* note 25, at Para 967.

<sup>65</sup> The *Krstic* Trial Chamber also held that ‘the number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group’ Para 12

<sup>66</sup> William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006) 171

## *Critique of the Commission's methodology*

### **State Policy**

It is very difficult to ascribe a states intent and thus difficult to characterize state acts as genocide.<sup>67</sup> The Commission thus investigated the existence (or lack thereof) of a state policy to commit genocide. With regards to state policy, the Appeals Chamber in the *Jelisić* trial was of the opinion that the existence of a policy or plan may be important but is not a 'legal ingredient'.<sup>68</sup> The Commission had a lot of information to investigate but admitted that some government documents were not made available.

However, one issue must be raised regarding the minutes of the meetings of the Security Committees at the locality and State levels. In a meeting with the First Vice-President Ali Osman Mohammed Taha held in Khartoum on 10 November 2004, the Commission asked to review the records of the various Government agencies in Darfur concerning decisions relating to the use of armed forces against rebels and measures concerning the civilian population... First Vice-President Taha assured the Commission that it would be able to have access to and examine the minutes of the meetings of the Security Committees in the three States of Darfur and their various localities. However, when requested to produce those minutes, each of the Governors of the three States asserted that no such minutes existed and instead produced a selected list of final decisions on general issues.<sup>69</sup>

It seems then, that any conclusion the Commission came to would be inconclusive. Additionally, the Commission stated its mandate as i) to establish whether those violations (in Darfur) amount to genocide, and (ii) to identify the perpetrators.<sup>70</sup> The second part indicates that the Commission was to investigate individual criminal responsibility and not state policy.<sup>71</sup>

### **Persons as Instruments of State**

The *Jelisić* Trial Chamber was of the view that an individual working alone could commit Genocide. Although Schabas has dismissed the idea of the lone *génocidaire*, it is one worth investigating. On the other side of the coin is an individual acting on behalf of the state, whether as state policy or under control of the state. Indeed 'crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'<sup>72</sup> Additionally, Article 58 on State Responsibility for International Wrongful Acts of the ILC states that 'these articles are without

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<sup>67</sup> Andrew B. Loewenstein and Stephen A. Kostas, "Divergent approaches to determining responsibility for genocide: the Darfur Commission of Inquiry and the ICJ's judgment in the Genocide case", *Journal of International Criminal Justice*, Vol. 5, No 4 (2007) 842

<sup>68</sup> *Jelisić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, Para 48. Schabas however notes that 'evidence of a plan or policy has proven to be of fundamental importance in all convictions for genocide by the International Tribunals...' William Schabas, *Genocide in International Law: The Crime of Crimes*, (2009) 248

<sup>69</sup> The Commission Report, *Supra* note 10, at Page 16, Para 33

<sup>70</sup> *Ibid.*, at Page 9, Para 4

<sup>71</sup> Andrew B. Loewenstein and Stephen A. Kostas, *Supra* note 67, at 844

<sup>72</sup> Pierre-Marie Dupuy, quoting the Trial of the Major War Criminals, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in A.Cassese, P.Gaeta, and John R.W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol.II (2002), at 1085

prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State'. This is the approach the ICJ took in its Genocide Case.

Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.<sup>73</sup>

To determine this, the ICJ first looked at whether the acts committed were perpetrated by state organs (persons or entities attributable to the state). If this question was answered in the negative, the ICJ would then determine whether the acts were committed by persons who, while not organs of the state, nevertheless acted 'on the instructions of, or under the direction or control of,' the state.<sup>74</sup>

### ***The Acts in Darfur***

This section will determine whether the acts in Darfur were perpetrated by persons or entities attributable to the state. Andrew B. Loewenstein and Stephen A. Kostas state that to do this raises some questions: "Which leaders are the proper loci of a state's intention? How high-ranking must a state official be to qualify as a 'leader'? How many such leaders must share the intention for it to be attributed to the state?"<sup>75</sup> These are not easy questions to answer but in the Darfur case there are instances discussed in the Commission's report like the First Vice President<sup>76</sup> and the Defence Minister's<sup>77</sup> lack of cooperation in handing over essential documents - a conspiracy of sorts.

There is also a documented instance of the State Minister of the Interior from Khartoum, Ahmad Harun, allegedly telling the Janjaweed and army in a speech to "kill the Fur".<sup>78</sup> Ahmad Harun was also in charge of the management of the "Darfur Security Desk" and thus coordinated the Police, the Armed Forces, the National Security and Intelligence Service and the Janjaweed. Because of this central role, he must have known and encouraged the crimes committed in Darfur.<sup>79</sup> These are definitely high level leaders in Sudan.

### ***Conclusion***

After analysing the Darfur Commission report it is evident that they erred in their conclusion. It seems odd that they chose to concentrate on the few elements that indicated no genocidal intent when there was much more evidence to the contrary. From the onset, the methodology the Commission used was flawed. It should have at the very least addressed the knowledge based approach. A conclusion from this approach would have been more widely

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<sup>73</sup> ICJ Judgment, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, Para 401

<sup>74</sup> *Ibid.*, at Para 384

<sup>75</sup> Andrew B. Loewenstein and Stephen A. Kostas, *Supra* note 67, at 844

<sup>76</sup> The Commission Report, *Supra* note 10, at Page 16, Para 33

<sup>77</sup> *Ibid.*, at Para 34

<sup>78</sup> "Entrenching Impunity: *Supra* note 20, at 27

<sup>79</sup> ICC Case Information Sheet, Situation in Darfur, The Prosecutor v. Ahmad Harun and Ali Kushyad, ICC-01/05-01/08

accepted as knowledge is much easier to prove than purpose. Hans Vest has opined that the latter, purpose, is rather ‘emotional and open to a very subjective evaluation of evidence.’<sup>80</sup>

The Commission does not explain why it chose to concentrate on state responsibility when they had stated that their mandate was to find the perpetrators. It would seem more logical to focus on individual criminal responsibility. This would have led to a more conclusive report as there were high level government officials as well as other members of the janjaweed and the Sudanese Army who clearly had the requisite *mens rea* for the act of Genocide.

The Commission also states that some of the people were not killed but were transferred to Government controlled IDP camps. They conclude that

... although (the camps are) open to strong criticism on many grounds, (they) do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong. Suffice it to note that the Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance (construction of hospitals, cooking facilities, latrines, etc).<sup>81</sup>

What the Commission failed to take into account is the destruction of food stocks and water sources and the pillaging of emergency relief items.<sup>82</sup> This falls under Article 2 (c) of the Genocide Convention: deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The issue of Genocide in President Al Bashir’s arrest warrant at the International Criminal Court presents an interesting question on procedural law i.e. if genocidal intent needs to be proven at the arrest warrant stage.<sup>83</sup> However, this essay focused on whether the methodology employed by the Commission to determine Genocide was sound. The answer is a resounding no and thus the results as elaborated in the Commission’s report cannot be taken as the reality on the ground.

All in all, as crimes in Darfur continue, it is important to remember that no matter the name we attach to the crimes, ‘a war crimes investigation makes moral sense only if the context of international action is to halt the killing there. Otherwise, it is just a self-satisfied fig leaf.’<sup>84</sup>

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<sup>80</sup> Hans Vest, *Supra* note 47, at 7

<sup>81</sup> The Commission Report, *Supra* note 10, at Page 131, Para 515

<sup>82</sup> “Darfur Destroyed: *Supra* note 18, at 2

<sup>83</sup> The ICC’s first issuance of an arrest warrant against the Sudanese president, Omar Hassan Al Bashir, contained three charges of Genocide committed against the Fur, Zaghawa and Masalit. On 4 March 2009, the Pre-Trial Chamber 1 decided not to issue a warrant of arrest in respect of the charge of Genocide. On February 3, 2010, the Appeals Chamber directed Pre-Trial Chamber 1 to decide anew on the Genocide charge.

<sup>84</sup> Tod Lindberg, “ICC Offers Darfur Hope,” *The Washington Times*, 15 March 2005. Can also be found in <http://todlindberg.net/?p=376> retrieved on 20 April 2010

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