

# DARFUR, SUDAN

## As the cat naps the mice wreak havoc

RONLI SIFRIS

**A**mina Abaker Mohammed occupies a simple mud hut with a thatched roof outside a refugee camp in northern Chad. Amina is a member of the Zaghawa tribe, one of the largest non-Arab ethnic groups in Darfur. Her village in Darfur was attacked and burned to the ground in January 2004 by Sudanese soldiers and Arab militiamen. During the attack, Amina fled and hid in a red-rock hillock. When the gunfire and screaming had faded, she returned to look for her son. All that she found was his head. Her ten year old son had been beheaded.<sup>1</sup>

This is one of many stories which illustrate the horrific abuses of human rights committed in Darfur. The International Commission of Inquiry on Darfur (International Commission) has found that war crimes and crimes against humanity have been perpetrated. The United Nations has consistently condemned the violence and has recently established a UN Mission to Sudan and referred the matter to the Prosecutor of the International Criminal Court. This article considers both the violations of international criminal law committed by government-sponsored militiamen in Darfur and the response of the United Nations to the crimes.

### The facts

The UN has described the conflict in Darfur, Sudan, as the world's worst humanitarian crisis.<sup>2</sup> In March 2003, Mukesh Kapila, the UN's humanitarian coordinator for Sudan, stated that 'the only difference between Rwanda and Darfur is the numbers involved of dead, tortured, and raped.' He asserted that 'this is ethnic cleansing ... and I don't know why the world is not doing more about it.'<sup>3</sup> Essentially, the government of Sudan has armed and funded Arab militiamen, known as *Janjaweed*, who have carried out much of the pillaging, raping and killing of non-Arabs in Darfur in their efforts to 'Arabise' Sudan. For those who doubt the Sudanese government's support of the attacks, the statement of Musa Hilal, coordinator of the *Janjaweed* in Darfur, that 'the government call to arms is carried out through the tribal leaders' is instructive.<sup>4</sup> It is estimated that, as at September 2004, approximately 70,000 people have lost their lives.<sup>5</sup> This is believed by some to be a gross underestimate of the number of people killed in the conflict.<sup>6</sup>

In July 2004 the UN Security Council passed a resolution implicitly threatening to impose sanctions if the government of Sudan failed to stop the atrocities being committed in Darfur within 30 days. In the words of one of the principal humanitarian agencies

in Sudan, 'the only thing the UN Security Council has delivered is yet another month-long delay.'<sup>7</sup> Indeed, the 30 days elapsed and the perpetration of atrocities continued. As a result, the UN Security Council passed another resolution in September 2004, 'expressing grave concern at the lack of progress with regard to security and the protection of civilians'. The resolution went on to declare that should this situation continue, the Security Council 'shall consider taking additional measures ... such as actions to affect Sudan's petroleum sector'.<sup>8</sup>

On 25 January 2005 the International Commission presented its report to the UN Secretary-General. The International Commission found that government forces and militias engaged in violent, indiscriminate attacks targeting civilians belonging to African tribes as well as their property.<sup>9</sup> According to the February Report on Sudan of the UN Secretary-General, there had been no evidence of disarmament despite diplomatic efforts to end the violence. Attacks on civilians continued, and the government refrained from prosecuting the perpetrators. In fact, in his 4 March 2005 report to the Security Council on Sudan the Secretary-General stated that '[t]he *Janjaweed*'s boldness, be it in regard to theft, attacks on civilians or armed movements, is a direct consequence of inaction by the Government to rein in, let alone disarm or arrest, these groups.'

Throughout March 2005, the UN Security Council passed a number of resolutions dealing with the situation in Darfur. For example, on 24 March 2005 the Security Council decided to establish the United Nations Mission in Sudan (UNMIS) and to authorise UNMIS to 'take the necessary action ... to protect civilians under imminent threat of physical violence.' On 29 March 2005 the Security Council decided to adopt various non-military measures to help resolve the dispute. Such measures include establishing a Committee of the Security Council; appointing a Panel of Experts; preventing certain designated individuals from travelling and freezing the funds and assets of such individuals. In its 31 March 2005 resolution relating to this conflict, the Security Council decided 'to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.'

#### REFERENCES

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2. Australian Red Cross, *Australians lead relief effort in the world's worst humanitarian crisis in Darfur, Sudan* (2004) <<http://1.redcross.org.au/fuseaction=NEWSROOM.archive&sub=310>> at 14 October 2005.
3. Power, above n 1.
4. Ibid.
5. CRS Issue Brief for Congress; Foreign Affairs, Defense and Trade Division, 'Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and US Policy', *The Library of US Congress*, 19 January 2005, 8.
6. See for example AFP 'African leaders wrap up summit on Sudan's Darfur crisis in Chad' (2005) *Sudan.Net* <<http://www.sudan.net/news/posted/11074.html>> at 16 March 2005, Katharine Houreld 'Women and girls in Darfur raped, jailed then fined' *The Age* (Victoria) 14 March 2005, 9.
7. Jonathan Wald, 'U.N. council OKs resolution to act on Sudan crisis', 31 July 2004, *CNN International* <<http://edition.cnn.com/2004/WORLD/africa/07/31/unvote.sudan/>> at 14 October 2005.
8. It should be noted that the African Union dispatched a small number of soldiers to the region but this has been largely ineffectual in halting the violence.
9. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005, 3, 160 <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)> at 14 October 2005.
10. Antonio Cassese, *International Criminal Law* (2003) 47.

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## Violations of international law

### War crimes

War crimes are serious violations of international humanitarian law as it relates to armed conflict.<sup>10</sup> Article 8 of the *Rome Statute of the International Criminal Court* ('*Rome Statute*') contains an extensive definition of 'war crimes' in the case of an armed conflict not of an international character, that is, an internal armed conflict. In the context of an internal armed conflict, such as that occurring in Darfur, war crimes include acts of violence to life and person and outrages upon personal dignity committed against persons taking no active part in the hostilities. Intentionally directing attacks against the civilian population, pillaging a town or place, committing rape or ordering the displacement of the civilian population for reasons related to the conflict are also included in the definition.

The International Commission found that 'Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.' In addition, the International Commission found that the *Janjaweed*, with at least the tacit support of the government, destroyed villages and deliberately targeted civilian objects thereby committing war crimes.<sup>11</sup>

According to a report released by Amnesty International, '[w]ar crimes committed in Darfur include: murder, torture, rape and intentional attacks against civilians and civilian objects.' In one example, the report describes an attack on the town of Tawila where civilians were killed, property was looted and women were raped. In the local school alone the *Janjaweed* attacked at least 41 schoolgirls and their female teachers, some were gang-raped by at least 14 members of the *Janjaweed*.<sup>12</sup> Thus it seems clear that war crimes have been committed in Darfur.

### Crimes against humanity

Crimes against humanity were first recognised in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. They are prohibited regardless of whether or not they are committed as part of an armed conflict.<sup>13</sup> Article 7 of the *Rome Statute* lists a number of acts which constitute crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with

knowledge of the attack. These acts include murder, extermination, enslavement, deportation, torture, rape and persecution against any identifiable group in a discriminatory manner.

According to a report released by Amnesty International, crimes against humanity such as murders, forced displacement and rape have been committed in Darfur.<sup>14</sup> As an example of such crimes committed in Darfur, the report describes an incident in March 2004 when 135 men from West Darfur were arrested and shot by a force of about 45 members of the military intelligence and *Janjaweed*. All those arrested belonged to the Fur, the largest ethnic group in Darfur.<sup>15</sup>

The International Commission found that the acts of murder, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement were carried out on civilians on a widespread and systematic basis throughout Darfur and may therefore amount to crimes against humanity.<sup>16</sup> The International Commission reported that government forces and *Janjaweed* were responsible for the mass killing of civilians and concluded that the large number and pattern of the killings indicated that they were conducted in a widespread and systematic manner.<sup>17</sup> The International Commission refers to the systematic abduction of women and their rape in circumstances of captivity as an example of acts committed which constitute crimes against humanity.<sup>18</sup> Another example of such crimes referred to by the International Commission is the arrest, detention and torture of persons by state security apparatus and the military intelligence in a widespread and systematic manner. The nature of the acts discussed above, and the means of their perpetration, leave little doubt that they amount to crimes against humanity.

### Genocide

Genocide was first envisaged merely as a subcategory of crimes against humanity. However, it acquired autonomous significance as a specific crime in 1948, when the UN General Assembly adopted the *Genocide Convention*.<sup>19</sup> According to art 6 of the *Rome Statute*, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction; imposing measures

11. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, above, n 9, 3, 159.

12. Amnesty International, 'Sudan: Who will answer for the crimes?' (2005) <<http://web.amnesty.org/library/print/ENGAFR540062005>> at 14 October 2005.

13. *Report of the Secretary-General under Security Council Resolution 808 Doc S/2504*, 3 May 1993 reprinted in 14 Hum Rts L J 198 (1993).

14. Amnesty International, above n 12.

15. *Ibid.*

16. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, above n 9, 3.

17. *Ibid.*, 159.

18. *Ibid.*, 160.

19. Cassese, above n 10, 96.

20. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, above n 12, 4.

21. Charles W. Corey, 'U.S. Congress Terms Situation in Darfur "Genocide"', 23 July 2004) Global Security.org <<http://www.globalsecurity.org/military/library/news/2004/07/mil-040723-usia01.htm>> at 14 October 2005.

22. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 above n 12, 4.

23. SC Res 1593, UN SCOR 5158th mtg, UN Doc S/RES/1593 (2005).

intended to prevent births within the group; or forcibly transferring children of the group to another group.

The International Commission concluded that the perpetrators of the criminal conduct in Darfur targeted a group of people. In addition, it found that such conduct included murder; the causing of serious bodily and mental harm and the deliberate infliction of conditions of life likely to bring about physical destruction. However, the International Commission ultimately determined that the Government of Sudan 'has not pursued a policy of genocide' and that 'the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned'.<sup>20</sup> The Commission reached this conclusion in spite of the fact that on 22 July 2004 both chambers of the US Congress unanimously passed a resolution condemning the mass-killings in Darfur as 'genocide'.<sup>21</sup> However, it should be noted that the International Commission was at pains to assert that

The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.<sup>22</sup>

## The international response

Article 42 of the *Charter of the United Nations* allows the UN Security Council to 'take such action ... as may be necessary to maintain or restore international peace and security'. On this basis, the Security Council has the power to authorise the use of force in the name of humanitarian intervention. However, rather than acting speedily to halt the violence in Sudan, the UN has prevaricated, procrastinated and delayed any intervention of substance which would actually put a stop to the violence, murder, raping and pillaging which is occurring in Darfur. Sudan can be added to the list of Rwanda, Bosnia and the numerous other countries where thousands of civilians were subjected to the most horrific crimes without the UN coming to their rescue. The situation in Darfur serves as yet another reminder of the fact that the UN is comprised of member states who each act in their own self-interest. Further, the structure of the Security Council gives rise to a situation where the veto of even one permanent member prevents the passing of a resolution. Thus the bureaucracy, diplomacy and political undercurrents

which flow between UN member states, prevent the UN from taking a firm stance. The failure to halt the crimes in Darfur is symptomatic of the political nature of the UN, particularly the Security Council, and the failure of member states to act where such action does not serve their own self-interest.

Whilst NATO's 1999 intervention in Kosovo is a possible exception to the general rule that countries act on the basis of self-interest, it is interesting to note the absence of any meaningful intervention by NATO or any other single state or multilateral organisation in Darfur. Unlike in Iraq where the 'coalition of the willing' acted out of a fear (however fanciful) of weapons of mass destruction and a desire to crush all enemies in the 'war on terror', the only basis for an intervention in Darfur was humanitarian intervention. This was clearly not sufficient to give rise to another call to arms by a coalition of willing interventionists.

Thus the politics and bureaucracy inherent in international relations and the UN system have meant that whilst egregious breaches of human rights in Darfur have been occurring for years, it has taken the UN Security Council until 24 March 2005 to pass a resolution establishing a UN Mission in Sudan and authorising UNMIS 'to take the necessary action ... to protect civilians under imminent threat of physical violence.' Even this resolution, which should have been passed years ago, is manifestly inadequate. The very fact that it only authorises UNMIS to take the necessary action where civilians are under 'imminent threat of physical violence' is evidence of this inadequacy. If UN personnel wait until a threat is *imminent* to protect civilians, it is unlikely that they will be able to organise themselves in time to actually prevent the violence from occurring.

It is submitted that the UN, founded after World War II with a system of collective security established to ensure that the world would never again bear witness to another Holocaust, has failed in its duty. By the time the conflict in Darfur draws to an end there will be hundreds of thousands of dead and wounded, of people without homes, of bodies with shattered souls. And the remaining question will be: will the perpetrators be brought to justice?

## The International Criminal Court

On 31 March 2005 the UN Security Council decided 'to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court'.<sup>23</sup>

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Article 13 of the *Rome Statute* empowers the Security Council to refer such a matter to the Prosecutor. Prima facie, it seems that the court has the requisite jurisdiction to try those who have perpetrated war crimes and crimes against humanity in Darfur. However, pursuant to the principle of complementarity which accords priority to national courts, if the government of Sudan investigates or prosecutes a case; investigates a case and decides not to prosecute the person concerned; or tries the person concerned for conduct which is the subject of the complaint, the International Criminal Court shall determine that the case is inadmissible.<sup>24</sup> Nevertheless, the International Criminal Court shall retain jurisdiction despite the principle of complementarity if Sudan is unable or unwilling to genuinely instigate an investigation or prosecution. The definition of 'unwillingness' in art 17 of the *Rome Statute* includes instigating proceedings in order to shield a person from criminal responsibility, delaying proceedings to an unjustified extent or conducting proceedings which are not independent or impartial. Accordingly, it seems that the International Criminal Court will have jurisdiction to prosecute the perpetrators of human rights abuses in Darfur absent the unlikely scenario that the government of Sudan genuinely decides to investigate and prosecute the perpetrators in Sudan's domestic courts.

### Conclusion

Years have passed since government sponsored human rights abuses first became evident in Darfur. And while the non-Arab people of Darfur have been hideously victimised and oppressed, the UN, skilled in the art of diplomacy, has paid much lip service to the need to halt the violence in Darfur but has been characteristically slow to act. It is clear that both war crimes and crimes against humanity have been committed in Darfur, and it is unclear when the perpetration of violations of international law will cease. Perhaps the establishment of a UN Mission in Sudan will aid in resolving the conflict. Perhaps only the potential eventual prosecution of the perpetrators by the International Criminal Court will convey a strong enough message to influence the government of Sudan to halt the commission of human rights abuses. Unfortunately for the hundreds of thousands of victims of this conflict, there will be no true justice. Those who survive will not survive unscarred, they will forever be 'seared in the flames of injustice'<sup>25</sup> roaring out of a fire that was lit by the government of Sudan, fueled by the *Janjaweed* and allowed to rage out of control by the international community.

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24. See art 13 of the *Rome Statute*.

25. Martin Luther King, 'I have a Dream' (Speech delivered on 28 August 1963).



## MENTIONS

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