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"Darfur and the International Criminal Court"

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On March 31, 2005, the United Nations issued another response to the vast crisis in the Darfur region of far western Sudan, referring various conspicuous violations of international law to the International Criminal Court. Though there have been five previous UN Security Council resolutions bearing on Darfur, the response contained within Resolution 1593 has gained far and away the most public notice because it seemed, at first glance, to have teeth. Major human rights organizations welcomed the possibility that perpetrators of the mass killings and displacement plaguing the Sudanese region since February 2003 could face trial and eventual punishment. Germany and other Western governments were gratified that the United States, long hostile to the Court, had stopped its obstruction of such an international justice effort. Given the extremely limited relevance of Resolution 1593 to the task of ending the destruction and human suffering in Darfur, however, the initial sighs of relief at the resolution's passage are grimly ironic.

The ongoing disaster in western Sudan deserves the name of genocide. The concerted military campaigns of the Khartoum government and its janjaweed militia allies have clearly included several of the acts stipulated in the 1948 UN Convention on the Prevention and Punishment of the Crimes of Genocide, in particular "killing members of [ethnic or racial] groups [as such]" and "deliberately inflicting on the groups conditions of life calculated to bring about their physical destruction in whole or in part." Acts of the latter sort, exemplified in the case of Darfur by such tactics as razing of villages, burning of crops and looting of livestock, constitute what might be described as "genocide by attrition."

According to a recent study by the Coalition for International Justice and independent research, state-directed violence and the resulting public health crises have claimed as many as 400,000 lives in Darfur since February 2003, overwhelmingly among the non-Arab or "African" tribal populations of the region. Available data suggest that an additional 2.5 million people have been displaced by the conflict, either within Darfur or as refugees to Chad. This displacement continues at an alarming rate. Three million people -- approximately half of Darfur's population -- are now "conflict-affected" and Jan Egeland, the UN's chief aid official, has indicated this number may grow to 4 million during the impending June-September rainy season. Famine conditions are already evident in parts of rural Darfur; food shortages and a collapsed agricultural economy (including spiraling food price inflation) ensure that the dying is far from done. The final death toll from this engineered catastrophe may exceed that of Rwanda's genocide.

The National Islamic Front regime in Khartoum, along with the notorious janjaweed, bears overwhelming responsibility for the current dimensions of the crisis. Indeed, Khartoum's strongmen long ago settled upon a strategy of genocide by attrition in responding to the Darfuri insurgency movements that emerged in February 2003. Rather than address long-time grievances over political and economic marginalization, a decayed judiciary and growing inter-ethnic violence, Khartoum sought to deal with the insurgency militarily. When direct military measures failed badly, the regime switched to a policy of destroying the civilian population base for the insurgents, chiefly the Fur, Masalit and Zaghawa tribal groups.

To date, the international response to Darfur's crisis has been mainly to provide humanitarian relief. Even so, humanitarian aid is presently only about half what is required -- and needs will go up dramatically during the rainy season. Moreover, deteriorating security throughout Darfur is attenuating both the reach and the capacity of aid efforts. The international response to this insecurity has been greatly inadequate. While the African Union (AU) has deployed about 2,300 personnel to monitor a largely non-existent ceasefire in the region, it has been unable to secure a mandate to protect either humanitarian aid workers or civilians. The force on the ground has attempted to expand this mandate, but is far too small and poorly equipped to address the manifold security needs of a region the size of France. This fact is obvious to all international actors, though for political reasons few will speak of more than augmenting the AU force -- a process that will take additional months.

PRODUCING AMBIGUITY WHERE THERE IS NONE

Debates within and outside the UN over the advisability of referring crimes committed in Darfur to the International Criminal Court (ICC) occurred within this larger context of humanitarian emergency. The investigative basis for this referral is a report submitted to the UN Secretary-General on January 25, 2005 by an International Commission of Inquiry (COI), which found evidence of numerous and massive "crimes against humanity," thus clearly reaching the threshold for sending the case to the ICC prosecutor in The Hague. The commissioners wrote that those crimes "may be no less serious and heinous than genocide," but (for the present) cleared Khartoum of having committed "genocide," on the grounds that the regime's "specific intent to annihilate" a particular ethnic or tribal group could not be established. Thus the report circumvented the UN's obligation to act under Article 1 of the 1948 Genocide Convention.

The final report of the COI, appointed by the UN Secretariat, was not only clearly politicized, but also quite poorly reasoned. It failed to distinguish intelligibly between "motive" and "intent" in assessing evidence of genocide. After correctly stating that "special intent must not be confused with motive, namely the particular reason that may induce a person to engage in criminal conduct," the report goes on to say that "genocidal intent" is lacking because regime forces and militias seem to have attacked and depopulated Darfur villages "primarily for purposes of counter-insurgency warfare." The purpose, or motive, of the crimes is irrelevant to the determination of intent. The COI report raised but failed to explore the issue of Khartoum's "complicity in genocide," a category of crime also covered by the 1948 convention. This shortcoming is especially troubling given what the COI establishes as Khartoum's clear responsibility for the actions of the janjaweed. Additionally, the report offered misleading and inaccurate generalizations about the realities of human displacement in Darfur and Chad, suggesting that forced movement of displaced persons into the camps was somehow a mercifully planned rescue from violent destruction in rural areas.

Perhaps most consequentially, the COI report failed to conduct forensic investigations at some of the most infamous sites of ethnically targeted mass executions, including Wadi Salih in the province of South Darfur, location of a widely reported massacre of Fur men and boys. Both Amnesty International and Human Rights Watch focused in particular on events at Wadi Salih in 2004. Here it is important to remember that the Genocide Convention twice stipulates that acts of genocide may have as their intent the destruction of a protected group "in whole or in part." Not all genocidal acts must be wholesale, though such has clearly been the intent in countless attacks throughout the Darfur region. By failing to consider the evidence of ethnically targeted human destruction in the austere context of the Genocide Convention, the COI has produced ambiguity where there is none and has conveyed the sense that something other than the ultimate human crime is being committed.

Even so, the COI was explicit in recommending UN Security Council referral to the ICC for "crimes against humanity," a phrase that frequently punctuates the report's conclusions. The report also refers explicitly to "senior government officials" as responsible for these crimes. This reference set the stage for a highly consequential UN debate and eventual passage of Resolution 1593 on March 31. But, in the end, the

debate and the referral were significant not so much for Darfur as for the politics surrounding the ICC.

STAKEHOLDERS IN THE DEBATE

The United States, as represented by the Bush administration, was caught in a bind by the COI's recommendation of an ICC referral. Although both President George W. Bush and former Secretary of State Colin Powell had formally declared that the realities in Darfur constituted genocide, the administration had long and strenuously opposed the ICC out of fear that US officials or soldiers might someday face prosecution for bad acts pursuant to overseas interventions. Bush's pending nominee for ambassador to the UN, John Bolton, is one of several hawks who bitterly opposed President Bill Clinton's grudging signature upon the 1998 Rome Statute establishing the Court and backed a bill in Congress that would have authorized use of force to free any US citizen who might have wound up in custody in The Hague. Having finally "unsigned" the Rome Statute in April 2002 with a three-sentence letter from Bolton to Annan, the Bush administration was now loath to do anything that might legitimize the ICC.

Their poorly conceived alternative for Darfur was an ad hoc tribunal, perhaps to be held in Arusha, Tanzania. Washington found no significant support for this proposal. In the end, the US abstained from the 11-0 Security Council vote approving the ICC referral -- despite a clause in Resolution 1593 exempting "personnel from a contributing state outside Sudan which is not a party to the Rome Statute" from the jurisdiction of the Court's Darfur investigations.

At the same time, a number of human rights organizations had sought with equal fervor to create precisely the legitimacy for the ICC that the US sought to avoid, and wasted little time pouring very significant advocacy efforts into supporting the referral. Two criticisms of these advocacy efforts seem warranted in retrospect. First, they too clearly came at the expense -- at a critical moment in international debate -- of demands for greater efforts at civilian protection. So exclusively was the focus on achieving an ICC referral that the morally more immediate and compelling need for humanitarian intervention and civilian protection received only an advocacy nod. Second, in arguing for an ICC referral, human rights groups made claims made for its deterrent effect that became increasingly tendentious, even disingenuous. Claims by Human Rights Watch that an ICC referral offered the people of Darfur "real hope of protection" had no basis in fact or logic, and would soon be undermined by events.

The other major stakeholders in the debate over an ICC referral were the senior members of the National Islamic Front (NIF) regime in Khartoum, who came under what is effectively an indictment with the report of the COI. Fifty-one names were referred under seal to the chief prosecutor at the ICC, Luis Moreno-Ocampo. While the "list of 51" remains under UN seal, it is clear from the COI report who is implicated by virtue of clearly delineated reporting hierarchies and chains of command and authority. Establishing these hierarchies and chains, with explicit confirmation from Khartoum, is the major positive achievement of the UN investigative commission. According to a January 29 Los Angeles Times report, the COI met after its report was completed, but before it was released, because some commissioners wanted to name the names of those on the "list of 51" who are involved in talks with rebels in Darfur and the south of Sudan.

Certainly on the list, then, is First Vice President Ali Osman Taha, presently the most powerful member of the NIF. It is widely known that Taha has taken primary responsibility for Khartoum's Darfur policy, even as he was chief NIF negotiator (and concession-maker) in the peace talks with the southern Sudan People's Liberation Movement that concluded in Nairobi, Kenya on January 9. Interior Minister Abd al-Rahim Muhammad Hussein is also surely on the list, as he is, among other things, the primary architect of forced removals of internally displaced persons from camps of refuge in Darfur. So, too, is the director of security and intelligence within the NIF regime, Maj. Gen. Salih Gosh. Given the prominence of these men in regime policy generally, any assessment of the "deterrent" effects of an ICC referral must take account of their likely actions and motives.

"LIST OF 51"

Not surprisingly, the response of the NIF to passage of Resolution 1593 was immediate and categorical rejection. Not only did senior regime officials denounce the measure, but so did a great many of those politically beholden to the NIF regime, including Musa Hilal, who has been identified repeatedly as the most notorious of the janjaweed leaders and is also assumed to be on the "list of 51." Hilal, who denies having committed crimes, said that in any case: "I do not accept that I be prosecuted outside of Sudan." For his part, President Omar Bashir took an oath "thrice in the name of Almighty Allah that I shall never hand any Sudanese national to a foreign court." Information Minister Abd al-Basit Sabdarat promised "an extensive diplomatic campaign" explaining Khartoum's refusal to cooperate with the ICC, while Sudan's Ambassador to the UN al-Fatih Erwa called the Court "a tool to exercise the culture of superiority and impose the culture of superiority." Sudan's Arab neighbors, Egypt and Libya, have publicly supported the line from Khartoum that an international justice effort would wrongly violate Sudan's national sovereignty.

Far from providing a deterrent effect, the ICC referral poses readily discernible dangers to both civilians and humanitarian aid workers. How could it be otherwise when those effectively indicted, and thus faced with extradition, still control Sudan? Who could imagine that senior members of the NIF would ever subject themselves to the authority of international justice? To be sure, the answers to these questions do not compromise the appropriateness of an ICC referral: under the circumstances, there was no other option that offered the prospect of international justice in a timely fashion. But the justice represented by conviction is one thing; extradition of those convicted and subsequent punishment are another. Deterrence in Darfur's current environment is quite another matter altogether.

Knowledgeable Darfuris in exile and regional intelligence sources speak urgently of the strong sense within the humanitarian aid community that, in the event of an ICC referral, the janjaweed will be encouraged by Khartoum to escalate attacks on foreigners, especially aid workers. These concerns were partly confirmed in an April 25 Washington Post dispatch from the Nyala region.

Even before the UN Security Council vote, the distinguished Refugees International had made clear that Khartoum officials regarded the prospect of an ICC referral with a "combination of annoyance and arrogance." The group cited a comment by Foreign Minister Mustafa Osman Ismail that a referral would pose "a direct threat to the foreign presence.... Darfur may become another Iraq in terms of arrests and abductions." An official of Khartoum's paramilitary Popular Defense Forces warned Refugees International of "an explosion" if persons referred to the ICC were punished in criminal proceedings.

CALLOUS CALCULATIONS

The "explosion" may have begun. In his April report to the Security Council, Annan noted a troubling increase in attacks on aid workers over the preceding month and offered an ominous explanation: "The possibility cannot be excluded that those who may believe that they are on the commission's sealed list of war crimes suspects will resort to direct attacks against...international personnel, or will try to destabilize the region more generally through violence."

Annan knows full well the names on the "list of 51," and thus is clearly pointing to senior genocidaires in the NIF regime. While his statement alerts Ali Osman Taha, Abd al-Rahim Hussein, Salih Gosh and others to their potential vulnerability were they ever to be extradited to The Hague, such extradition is of course impossible while these men hold the reins of power. Indeed, the most likely consequence of the ICC referral is to encourage a sense that there is nothing for the NIF to lose in pursuing present policies in Darfur. Given the nature and extent of the de facto indictments rendered by the COI report, this calculation is likely accurate.

That likelihood would account for the brazen attack on Khor Abeche, traditional capital of the Birgid

people, northeast of Nyala. On April 7, a week after the passage of Resolution 1593, and after several days of intense international negotiations in the region to avoid violent assault, the janjaweed "ramped through the village [of Khor Abeche], killing, burning and destroying everything in their paths and leaving in their wake total destruction." This language comes from an extraordinary Joint Statement by the AU Mission in Sudan and the UN Mission in Sudan, issued on April 7, which takes the unprecedented step of naming the militia commander.

But most significant about the attack on Khor Abeche was the futile effort to prevent it. Both the AU and the UN had been negotiating for several days with the wali (governor) of South Darfur, Khartoum's senior functionary in this part of Darfur. Timely deployment of AU observers might have forestalled the clearly impending attack. Khartoum's representative refused, certainly at the regime's behest, leading to an assault characterized by the AU and UN as "savage," "premeditated" and ultimately a function of "deliberate official procrastination."

This is unusually frank language coming from either the UN or the AU; coming in a joint public statement, it bespeaks the utter frustration with Khartoum's intransigent refusal to halt attacks by the janjaweed. These attacks are the most consequential source of insecurity in Darfur, and have produced the staggering numbers of displaced and conflict-affected people. Janjaweed-created insecurity prevents people from returning to their lands and resuming agriculturally productive lives. The threat of janjaweed predations also defines the lives of more than 2 million internally displaced persons, presently seeking to eke out existence in the squalid and dangerous camps that have sprung up throughout the region. According to Human Rights Watch and press reports, women and girls leaving the camps face rape at the hands of the janjaweed, many of whom have been recycled into the ranks of Khartoum's "police" and security forces. Men and boys leaving the camps risk execution.

These terrible realities show no sign of abating or being halted by international humanitarian intervention. Indeed, despite Deputy Secretary of State Robert Zoellick's early April trip to Sudan, there is good reason to believe that the US and its European allies are content with an all too measured response to the ongoing genocidal destruction. The AU announced on April 29 that it will expand its force of monitors to 7,700 by September, but the force's mandate will not be strengthened. Though NATO (and perhaps the European Union) appears ready to increase AU logistical capacity in the medium term, there is no evidence of urgency appropriate to the emergency. Indeed, Zoellick did a good deal to diminish a sense of urgency by refusing to reiterate Powell's previous determination of genocide and offering a preposterously low global assessment of mortality (60,000 to 160,000) for the conflict. None of this is lost on the NIF regime.

A previous UN response to the Darfur disaster, Resolution 1556 passed on July 30, 2004, "demanded" that Khartoum disarm the janjaweed and bring its leaders to justice. More than nine months later, Khartoum has done nothing at all to comply with this singular UN "demand." If we are to understand what the ICC referral contained in UN Security Council Resolution 1593 means -- and does not mean -- we can do no better than reflect on this unmistakable impotence, now so long in evidence on the part of the UN and its member states. The canny survivalists in Khartoum have certainly calculated that the international community will be no more committed to Resolution 1593 than to Resolution 1556. They will assume that those with the power to demand compliance will be no more willing to bring the "list of 51" to justice than to see that these same brutal men disarm their primary instrument of genocidal destruction. In such a callous judgment, history is on their side.

For background on the crisis in Darfur, see Peter Verney, "Darfur's Manmade Disaster," Middle East Report Online , July 22, 2004.

See also Dan Connell, "The Politics of Slaughter in Sudan," Middle East Report Online , October 18, 2004.

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