


## **Report of the International Commission of Inquiry on Darfur: A critical analysis (Part I), February 2, 2005**

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The report of the International Commission of Inquiry on Darfur, delivered to UN Secretary-General Kofi Annan on January 25, 2005 (the date of record for the document), is of immense importance. This report offers us by far the most complete and compelling picture of massive criminality in the Darfur conflict, and establishes beyond any reasonable doubt the vastly disproportional culpability of Khartoum's regular military forces and its Janjaweed militia allies.

Though unsparing in its criticism of the Darfur insurgency groups, particularly the Sudan Liberation Army/Movement and the Justice and Equality Movement, the report should put to an end to the expedient and deeply distorting language of "moral equivalence" by which various international actors have equated the behavior of Khartoum and the Janjaweed on the one hand and the insurgencies on the other ("Although attacks by rebel forces have also taken place, the Commission has found no evidence that these are widespread or that they have been systematically targeted against the civilian population. Incidents of rebel attacks are mostly against military targets, police or security forces" [Paragraph 240 of the Report].)

At the same time, the report is badly compromised in its tendentious and poorly reasoned conclusion about the absence of evidence of "genocidal intent" on the part of Khartoum in Darfur. Indeed, so egregiously poor are the legal and factual arguments about the issue of "genocidal intent" that we must conclude this Commission did not feel politically free to make a determination of genocide. The nature of the most likely political constraints are assessed later in this analysis; but it is important to register here the largest implication of this signal failure. For inevitably, given the relatively low quality of journalism devoted to this report and the larger issues it raises, there has been a glib and misleading fastening upon the Commission's finding that there is no "genocidal intent" on Khartoum's part.

Such simplistic journalism also obscures both the extraordinary volume of authoritative research in this 176-page document, fully establishing Khartoum's responsibility for "crimes against humanity" on an extremely wide scale, as well as the cogency of the Commission's arguments for a UN Security Council referral to the International Criminal Court (ICC). To the extent that journalistic accounts have treated the issue of such an ICC referral as an occasion for highlighting tensions between the Bush administration and the vast majority of the international community, this has also detracted from appropriate attention to the issues of substance in the report. This is of course not the fault of the Commission, but must be deeply lamented on an occasion calling for much more substantive reporting on these compelling findings of monstrous criminality.

This present analysis is divided into three main sections (and into two parts, to be transmitted separately): a critique of the paragraphs that treat the question of "genocidal intent" (Section II, Para. 489-522 of the Report); an overview account of the evidence assembled of massive crimes against humanity (Section I, Para. 73-488); and an analysis of the recommendation that the UN Security Council immediately refer these crimes to the International Criminal Court (Section III, Para. 523-649; this will entail discussion of the decision by the Commission publicly to withhold the names of criminal suspects in the Khartoum government and the Janjaweed).

**THE COMMISSION'S FINDING THAT THERE IS NOT EVIDENCE OF "GENOCIDAL INTENT" ON THE PART OF THE KHARTOUM REGIME**

In Section II ("Have Acts of Genocide Occurred?"---Para. 489-522), the Commission authors are responding to explicit terms of reference defining their mandate, as established by UN Security Council Resolution 1564 (September 18, 2004): "To determine whether or not acts of genocide have occurred" (Para. 2). In making this determination, the Commission authors conclude, appropriately, that the non-Arab/African tribal groups of Darfur (primarily the Fur, the Massaleit, and the Zaghawa, but others as well) "who were victims of attacks and killings subjectively make up a protected group" (i.e., a "protected group" per the language of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article 2).

Moreover, the reports concludes that:

"Some elements emerging from the facts, including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent." (Para. 513)

This is one of "two elements of genocide [that] might be deduced from the gross violations of human rights perpetrated by Government [of Sudan] forces and the militias under their control" (Para. 518) the other being "the actus reus consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction" (from the Introduction) to this "protected group" of non-Arab/African tribal groups.

But then, in a manner dismayingly incompetent and tendentious, the report continues by attempting to demonstrate that, "there are other more indicative elements that show the lack of genocidal intent" (Para. 513):

"One crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare." (Para. 518)

Here the Commission authors have, in most conspicuous fashion, destroyed the essential distinction with which they themselves appropriately begin their discussion of genocide:

"From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group." (Para. 493)

It matters not whether we decide that the Commission authors are correct in arguing that Khartoum's primary motive in orchestrating ethnically-targeted civilian destruction is "counter-insurgency warfare," or (as many would argue) is rather an effort to reshape the demographic and political realities of Darfur, favoring specific Arab tribal populations as a means of consolidating central political power. The issue is not, as the authors themselves explicitly state, Khartoum's "motive" but rather whether there is an "intent to destroy a group," whatever the motive.

Such intellectual failing is so fundamental as to vitiate any conclusion deriving from this line of reasoning. But even when we follow the tortured reasoning of the Commission authors further, we find only more examples of fallacious logic, a highly skewed selection of evidence, as well as an inexplicable and disturbing failure to cite evidence that contradicts assertions made.

As a first example of an "indicative element showing the lack of genocidal intent," the Commission authors declare:

"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." (Para. 513)

But of course there have been many a great many "villages attacked and burned by both militias and Government forces" in which the whole population was in fact killed or forced into flight that held clear risk of death. Why is this not, by the same evidentiary logic, indication of "genocidal intent"?

Moreover, we must recall that the language of the Genocide Convention twice refers to destruction of a protected group "in whole or in part." The selective sparing of life, in some circumstances, hardly diminishes the obvious fact that the ethnically-targeted destruction of the non-Arab/African tribal populations of Darfur has been achieved in very substantial part---certainly meeting all the "substantiality" criteria for what constitutes a "part" in the Genocide Convention. Instancing particular examples in which all people held captive were not killed cannot demonstrate ipso facto a lack of genocidal intent for any number of reasons, e.g., prudential considerations in light of the presence of international aid observers (including calculations about the difficulties of body disposal).

Consequential errors of fact on the part of the Commission authors are revealed in a subsequent paragraph, also purporting to show a lack of "genocidal intent":

"Another element that tends to show the Sudanese Government's lack of genocidal intent can be seen in the fact that 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." (Para. 515)

This is an incomplete, finally deeply inaccurate characterization of the realities of internal displacement in Darfur (and into Chad). First, a great many village populations have been killed outright in their entirety (or overwhelmingly), or die in flight from violence. Indeed, mortality is exceedingly high following violent displacement (which constitutes the vast majority of human displacement in Darfur). Of note here is a singularly important study of traumatic and early post-traumatic mortality resulting from violent displacement, published in *The Lancet* by authors from Doctors Without Borders/Medecins Sans Frontieres and others (*The Lancet*, October 1, 2004, "Violence and mortality in West Darfur, Sudan (2003-04): epidemiological evidence from four surveys"). Inexplicably, this report is not cited by the Commission authors in their substantial bibliography of NGO reports.

Secondly, a very large percentage of the displaced population has not been "forced to abandon their homes and live together in areas selected by the Government [of Sudan]": they have been forced to flee into inaccessible rural areas presently beyond the reach of any humanitarian relief efforts. They are dying in great numbers, with mortality rates that can best be estimated on the basis of the famine conditions predicted by the US Agency for International Development ("Projected Mortality Rates in Darfur, 2004-2005" ([http://www.usaid.gov/locations/sub-saharan\\_africa/sudan/cmr\\_darfur.pdf](http://www.usaid.gov/locations/sub-saharan_africa/sudan/cmr_darfur.pdf)), and more recently by the International Committee of the Red Cross ("Food-Needs Assessment: Darfur," ICRC [Khartoum], October 2004).

Moreover, those who have fled to Chad---well over 200,000---are clearly not "living together in areas selected by the Government [of Sudan]": they are living in a foreign land, in harsh and forbidding conditions, where competition with indigenous Chadians for water and pasturable land has on several occasions turned violent. The vast influx of new refugees now predicted for 2005 by the UN High Commission for Refugees will dramatically exacerbate present tensions.

The factual misrepresentations here are simply shameful.

Equally shameful is the Commission's factual misrepresentation of the conditions in the camps and the history of humanitarian access over the past 15 months:

"The living conditions in those camps, although open to strong criticism on many grounds, 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." (Para. 515)

In fact, a number of camps have indeed been extermination sites at some point in their history. Most notorious is the Kailek camp, which is discussed earlier (Para. 273-276) by the Commission authors, though not in a fashion that makes fully apparent the nature of deliberate human destruction (see March 2004 analyses by this author of large-scale human destruction occurring in Kailek Camp in March 2004 at [www.sudanreeves.org](http://www.sudanreeves.org), confirmed by a UN inter-agency investigation of April 2004: see <http://www.sudanreeves.org/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=191>). But Kailek is far from unique, as the Commission report itself makes clear.

Moreover, to claim that "Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance" is a shocking distortion of the truth, if we look back as far as November/December 2003 (certainly a period of time within the purview of the Commission's investigation). At the time, Tom Vraalsen, UN special envoy for humanitarian affairs in Sudan, declared in a memo to the UN humanitarian coordinator for Sudan (Mukesh Kapila), that Khartoum was "systematically" denying access to areas in which non-Arab/African tribal populations were concentrated:

"Delivery of humanitarian assistance to populations in need is hampered mostly by systematically denied access. While [Khartoum's] authorities claim unimpeded access, they greatly restrict access to the areas under their control, while imposing blanket denial to all rebel-held areas." (Tom Vraalsen, Note to the Emergency Relief Coordinator; "Sudan: Humanitarian Crisis in Darfur," December 8, 2003)

The phrase "systematically denied access" was highlighted in Vraalsen's memo. It was not for over half a year, and perhaps 100,000 deaths later, that the international community was finally able to overcome what had been months of Khartoum's deliberate impeding of humanitarian deployment and access.

Currently, the Khartoum regime continues to impede deployment and access by means of violence that has created intolerable security conditions for humanitarian organizations. This is the very violence so fully chronicled by the Commission authors elsewhere in their report, and which they demonstrate is both relentless in its focus on civilians and overwhelmingly the responsibility of the regime's regular and Janjaweed militia forces.

The tendentious conclusion about Khartoum's "allowing humanitarian organizations to help the population in camps" is also belied by a policy of forced removals of internally displaced persons from camps, a policy clearly in evidence by mid-summer 2004 (see July 13, 2004 analysis by this writer at <http://www.sudanreeves.org/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=200&page=1>), and which has continued to the present:

"The UN food agency has relocated a total of 88 aid workers from three camps in [West Darfur]: Golu, Zaleinge and Nertetie. WFP is concerned that government forces may start relocating people in the camps back to their villages, where there is less protection from government-backed militias known as Janjaweed." (AP, November 2, 2004)

"Security forces moved in before dawn and removed some people from camps near Nyala [capital of South Darfur], the World Food Programme [said]. 'Early this morning, police surrounded two camps and

later on relocated a number of internally displaced people' [said] the WFP's spokeswoman in Nyala." (Reuters, November 2, 2004)

Khartoum's attitudes toward camp populations are also revealed in several well-reported large-scale assaults on camp populations. Following violent blockades of several camps in early November 2004, Khartoum agreed to:

"Take all steps required to prevent attacks, threats, intimidations and any other form of violence against civilians." ("Protocol on the Improvement of the Humanitarian Situation in Darfur," Abuja, November 9, 2004)

The day following its commitment to this agreement, Khartoum's actions at the El Jeer camp for displaced persons were reported by the BBC:

"Sudanese government forces stormed a refugee camp in Darfur, attacking men, women and children, within hours of Khartoum signing a security agreement with rebels that was supposed to bring peace to the region. BBC television footage showed Sudanese security forces entering the El Geer refugee camp near Nyala, bulldozing it, firing tear gas at women and children, beating some of the male inhabitants and moving others to a nearby camp. The violence came hours before Jan Pronk, the UN's Sudan envoy, arrived to visit the camp, the BBC said. At one point during his visit a plastic bullet was fired at a cameraman standing next to a UN vehicle." (BBC, November 10, 2004)

Returning to the broader question of "genocidal intent" as addressed by the Commission of Inquiry, we may find other examples of shoddy, if all too revealing, logic. For example, the Commission authors instance events involving two brothers from Jabir Village (North Darfur):

"One inhabitant of the Jabir Village was among the victims of an attack carried out by Janjaweed on 16 March 2004 on the village. He stated that he did not resist when the attackers took 200 camels from him, although they beat him up with the butt of their guns. Instead, prior to his beating, his young brother, who possessed only one camel, had resisted when the attackers had tried to take his camel, and had been shot dead. Clearly, in this instance the special intent to kill a member of a group to destroy the group as such was lacking, the murder being only motivated by the desire to appropriate cattle belonging to the inhabitants of the village. Irrespective of the motive, had the attackers' intent been to annihilate the group, they would not have spared one of the brothers." (Para. 517)

But what can one such example demonstrate? How can we make any general inferences about Janjaweed behavior in this instance? How even to be sure that this was the Janjaweed and not an element of the pervasive banditry that the Commission authors elsewhere cite? Does momentary and singular "mercy" have anything to do with the vast patterns of human destruction that define the crime of genocide? There were of course example of momentary or individual mercies in the Nazi deaths camps; this does not make them any less sites of genocidal destruction.

This example---its singularity, its logical irrelevance for broader conclusions, the ambiguity of even its factual implications---betray a desperation on the part of the Commission authors. Sadly, there could be little better evidence that they have begun with a sense of severe political constraint in making a genocide determination, and allowed this politically governed conclusion to dictate their reasoning.

Perhaps aware of how tendentious and poorly reasoned their arguments are, the Commission authors add a significant qualification to their determination that "genocidal intent" has not been demonstrated:

"One should not rule out the possibility that in some instances \*\*\*single individuals\*\*\*, [emphasis in original] including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group. If any

single individual, including Governmental officials, has such intent, it would be for a competent court to make such a determination on a case-by-case basis. Should the competent court determine that in some instances certain individuals pursued the genocidal intent, the question would arise of establishing any possible criminal responsibility of senior officials either for complicity in genocide or for failure to investigate, or repress and punish such possible acts of genocide."

In other words, the Commission authors admit, there may indeed have been "genocidal intent" on the part of individuals in the Khartoum regime, and there may indeed have been "complicity in genocide" on the part of other officials. But this has significance only if we accept that the Commission authors have demonstrated that there is presently insufficient evidence of "genocidal intent" on a broad scale within the Khartoum regime and the Janjaweed. In this, the Commission authors have failed not only badly but revealingly.

#### THE COMMISSION'S FINDINGS OF "CRIMES AGAINST HUMANITY"

The strongest, and by far the most substantial part of the Report of the International Commission of Inquiry on Darfur, lies in Section I ("The Commission's Findings of Violations of International Human Rights Law and Humanitarian Law by the Parties [to the Darfur Conflict]," Para. 73-488). This section establishes clear definitions and thresholds for "crimes against humanity," as opposed to the lower threshold required for "war crimes." There is a highly informed discussion of relevant treaties, the Geneva Conventions, and international law generally (Para. 154-181).

The report also establishes with welcome authority a clear chain of command within the Khartoum regime, both its military and security services and various of its political organs. This permits very clear inferences about the identities of those within the National Islamic Front regime whose names have been put under seal, pending referral to an international prosecutor (whether at the International Criminal Court or an ad hoc tribunal). For example, Sallah Gosh, the senior official in Khartoum's multi-layered National Security and Intelligence Service, is almost certainly named (see Para. 85-97), as is Abdel Rahim Hussein, Minister of the Interior and charged with the "Darfur portfolio" by the regime.

Further, the Commission authors are able to point out with relentless force and clarity the various ways in which the judicial system under Khartoum's tyrannical rule is incapable of responding to the massive criminality the Commission documents. Indeed, the complicity of the courts and judicial officers in either concealing or collaborating in crimes, as well as in the creation of a climate of total impunity, is established by the Commission beyond reasonable doubt.

The Commission is also able to sort out in reasonably clear fashion the relation of Khartoum's regular forces, the Popular Defence Forces (see Para. 81-84), and the various categories within the ultimately heterogeneous force known as the Janjaweed (Para. 106-110). Most importantly, the Commission solidifies our understanding of the "clear links [that] exist between the State and militias from all three categories [of Janjaweed forces]," as well as between Khartoum and the PDF (Para. 111 and ff.).

Especially notable in this context, the Commission addresses a key question about responsibility for Janjaweed actions:

"When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in Tadic (Appeal), at §§ 98-145. Thus they are acting as de facto State officials of the Government of Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning, those crimes, or for failing to prevent or repress them, under the notion of superior responsibility." (Para. 123)

And crucially, from this it follows that:

"Whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that (i) the Government incurs international responsibility for any violation of international human rights law committed by the militias, and in addition (ii) the relevant officials in the Government may be held criminally accountable, depending on the specific circumstances of each case, for instigating or for aiding and abetting the violations of humanitarian law committed by militias." (Para. 125)

So persuasive is this logic, that it forces a return to the question of responsibility for genocide and the issue of "genocidal intent" on the part of the Khartoum regime. For it is not enough to speak simply of such "intent" on the part of Khartoum officials: we must ask about the much more conspicuous evidence of "genocidal intent" on the part of the Janjaweed. And we must ask in turn why---if such genocidal intent on the part of the Janjaweed can be demonstrated---Khartoum and its military officials do not incur responsibility for complicity in genocide. Here the countless examples of ethnically/racially charged language, and language clearly referring to ethnic/racial destruction or extermination, become of critical importance. Amnesty International, Human Rights Watch, the International Crisis Group, as well as many journalists have recorded hundreds of examples of such language, though it is given only facile treatment by the Commission authors:

"A refugee farmer from the village of Kishkish reported ... the words used by the militia: 'You are Black and you are opponents. You are our slaves, the Darfur region is in our hands and you are our herders.'" (Amnesty International Report, "Too Many People Killed for No Reason," page 28, February 3, 2005)

"A civilian from Jafal confirmed [he was] told by the Janjawid: 'You are opponents to the regime, we must crush you. As you are Black, you are like slaves. Then all the Darfur region will be in our hands. The government is on our side. The government plane is on our side to give us ammunition and food.'" (Amnesty International Report, "Too Many People Killed for No Reason," page 28, February 3, 2005)

Tamur Bura Idriss, 31, said he lost his uncle and grandfather. He heard the gunmen say, 'You blacks, we're going to exterminate you.' He fled deeper into Chad that night." (New York Times [dateline: Tine, Darfur] January 17, 2004)

There was a terrible, though perhaps inevitable prescience in comments made by an African tribal leader to a UN news service in the context of such violence and language:

"'I believe this is an elimination of the black race,' one tribal leader told IRIN" (UN Integrated Regional Information Networks, al-Geneina [Darfur], December 11, 2003)

The Commission of Inquiry has not addressed nearly directly enough this language and the violence that has mirrored these genocidal threats. It has as a consequence left unanswered key questions about Khartoum's complicity in genocide and other issues of accountability for genocide.

#### COMMISSION FINDINGS CONCERNING MILITARY MOTIVES

Though there are a great many findings of fact in this lengthy report, none is more important than a conclusion, reiterated at several junctures, about the lack of justification for Khartoum's military actions:

"There are consistent accounts of a recurrent pattern of attacks on villages and settlements, sometimes involving aerial attacks by helicopter gunships or fixed-wing aircraft, including bombing and strafing with automatic weapons. However, a majority of the attacks reported are ground assaults by the military, the Janjaweed, or a combination of the two. Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction,

looting of property and livestock, as well as deliberate destruction and torching of villages. These incidents have resulted in the massive displacement of large parts of the civilian population within Darfur as well as to neighbouring Chad. The reports indicate that the intensity of the attacks and the atrocities committed in any one village spread such a level of fear that populations from surrounding villages that escaped such attacks also fled to areas of relative security." (Para. 186)

"Except in a few cases, these incidents are reported to have occurred without any military justification in relation to any specific activity of the rebel forces. This has strengthened the general perception amongst observers that the civilian population has been knowingly and deliberately targeted to achieve common or specific objectives and interests of the Government and the Janjaweed." (Para. 187)

"Except in a few cases, these incidents are reported to have occurred without any military justification in relation to any specific activity of the rebel forces." This is the essential truth about war in Darfur, and stands independently of a conclusion about genocide.

If there is a complementary truth, one established with comparable authority by the Commission, it is that the destruction of non-Arab/African villages has been distinguished by a comprehensiveness that makes clear the goal of rendering these formerly thriving living sites humanly uninhabitable:

"There is an abundance of sites with evidence of villages burnt, completely or partially, with only shells of outer walls of the traditional circular houses left standing. Water pumps and wells have been destroyed, implements for food processing wrecked, trees and crops were burnt and cut down, both in villages and in the wadis, which are a major source of water for the rural population." (Para. 235)

"The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels. In fact, attacks were most often intentionally directed against civilians and civilian objects. Moreover, the manner in which many attacks were conducted (at dawn, preceded by the sudden hovering of helicopter gun ships and often bombing) demonstrates that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Massalit and Zaghawa tribes. From the viewpoint of international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes." (Para. 267)

#### CONCLUSION (PART I):

There can be no shrinking from these authoritative declarations and findings, and this is again true whatever conclusions are reached about "genocidal intent" on the part of the Khartoum regime. The international community is presently allowing the National Islamic Front regime and its Janjaweed militia allies to continue with an extensive and systematic campaign of war crimes, crimes against humanity, and (despite the weak arguments of the Commission authors) genocide. There is no credible deterrent in place, or in prospect, to end these terrible crimes, however designated. Moreover, despite the importance of a referral to the International Criminal Court, as recommended by the Commission, this cannot be accepted as a substitute for the international humanitarian intervention that is so clearly required.

Such an intervention must provide not only security for the civilian populations so acutely vulnerable to these ongoing criminal actions, it must also provide the logistics and transport that will enable humanitarian capacity to match growing and presently vastly under-served humanitarian needs. This is the real conclusion to be drawn from the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General.

There is no sign that Kofi Annan has drawn such a conclusion in the week that he has had the report.

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