

Alina Ioana Apreotesei\*:

### Genocide and Other Minority Related Issues in Cases before the International Criminal Court

The establishment of the International Criminal Court (ICC) represented a major step of the international community toward creating the rule of law. It is the first treaty-based<sup>1</sup> permanent court to have jurisdiction over “the most serious crimes of concern to the international community as a whole”<sup>2</sup>, namely genocide, war crimes, crimes against humanity, and once defined, aggression.<sup>3</sup> Unlike the ad-hoc tribunals which are based on the principle of concurrency<sup>4</sup>, ICC is based on a new principle of law, that of complementarity, which means that it can exercise its jurisdiction only if a state is ‘unable’ or ‘unwilling’ to carry out investigations or prosecutions.<sup>5</sup> The establishment of the Court was also seen as a guaranty for the protection of the minorities, as the Rome Statute incriminates both genocide<sup>6</sup> and persecution as a crime against humanity.<sup>7</sup>

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\* Alina Ioana Apreotesei is PhD-student at the Péter Pázmány Catholic University (Budapest)

<sup>1</sup> The Rome Statute which is the ‘birth certificate’ of the ICC was ratified by 106 states as the situation in April 2008.

<sup>2</sup> Preamble of the Rome Statute.

<sup>3</sup> On the crime of aggression, see Alina Ioana Apreotesei, *Aggression as an Individual Crime*, in *Collega*, XI, 2 (2007) at 198-201 or *The Crime of Aggression under the Jurisdiction of the International Criminal Court*, in *Romanian Military Thinking*, 3 (2007) at 44-49.

<sup>4</sup> See John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, Transnational Publishers, New York, 1998 at 73.

<sup>5</sup> See Sharon A. Williams, *Article 17. Issues of Admissibility*, in “Commentary on the Rome Statute of the International Criminal Court”, Otto Triffterer (Ed), Nomos Verlagsgesellschaft Baden-Baden, 1999, at 383-94 or John T. Holmes, *Complementarity: national Courts versus the ICC*, in “The Rome Statute of the International Criminal Court: a Commentary”, Antonio Cassese, Paola Gaeta, John R.W.D. Jones (Eds.), Oxford University Press, New York, 2002, Chapter 18.1. at 667-87.

<sup>6</sup> Article 6 of the Rome Statute provides: “For the purpose of the present 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: (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.”

<sup>7</sup> Article 7 (1) (h) provides: “For the purpose of the present Statute ‘crimes against humanity’ means any of the following acts when committed as committed part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:... (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”

The present article proposes to analyze the early jurisprudence of the ICC from the point of view of the minority protection. Considering the fact that most of the investigations are in countries where on-going conflicts are based on ethnic grounds, it is a challenge to see what direction follows ICC, when it comes for minorities. Does it really offer a guaranty for the minority protection? Is it the best mechanism to deal with justice for minorities? These questions are taken into account next.

The first situation where the ICC Prosecutor started to investigate was the one in the Democratic Republic of the Congo (DRC)<sup>8</sup>. For fifteen years now the former Zaire has been the host of a conflict between the ethnic groups of Hema and Lendu. The main reason the conflict burst was the land. While Hema is a pastoralist group, Lendu is dedicated to agriculture.<sup>9</sup> Representatives of both groups were transferred to The Hague to be held accountable for their crimes. The first person in custody was Thomas Lubanga Dyilo of Hema ethnicity, the founder of political and military movements as the Union of Congolese Patriots and the Forces patriotiques pour la libération du Congo<sup>10</sup>. The other two persons in custody, Germain Katanga,<sup>11</sup> commander of the Force de résistance patriotique en Ituri, and Mathieu Ngudjolo Chui,<sup>12</sup> commander of the Nationalist and Integrationist Front and high-ranking member of the National Army of the Government, are of Lendu ethnicity.

Two of the accused persons were already in custody in DRC when transferred to The Hague, while the third was arrested at the request of the ICC.<sup>13</sup> There were some rumors that Lubanga was arrested in DRC for genocide and crimes against humanity<sup>14</sup>, but there are no such charges against Lubanga at ICC. The Prosecutor charged him with three war crimes, namely enlisting,

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<sup>8</sup> ICC Press Release ICC-OTP-20040623-59-En, 23 June 2004.

<sup>9</sup> See Stanislas Bucyalimwe Mararo, *Kivu and Ituri in the Congo War: The Roots and Nature of a Linkage*, at 204, in Stefaan Marysse, and Filip Reyntjens (Eds.), "The Political Economy of the Great Lakes Region in Africa", Palgrave, Hampshire, 2005.

<sup>10</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

<sup>11</sup> See *The Prosecutor v. Germain Katanga*, Warrant of arrest, available at [http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1\\_tEnglish.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1_tEnglish.pdf) last visited April 2008

<sup>12</sup> See *The Prosecutor v. Mathieu Ngudjolo Chui*, Warrant of arrest, 6 July 2007, available at <http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-1-tENG.pdf> last visited April 2008.

<sup>13</sup> See Demande d'arrestation et de remise de Matthieu Ngudjolo Chui adressée a la Republique Democratique de Congo, 14 Novembre 2007, available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-265-FRA.pdf> last visited April 2008.

<sup>14</sup> See E.N. Trikoz, *First Criminal Investigations in Practice of the International Criminal Court*, in International Law 1 (29) / 2007 at 230 or William A. Schabas, *First Prosecutions at the International Criminal Court*, Human Rights Law Journal, Vol. 27. No.1-4, 2006, at 36.

conscripting and using children under 15 into hostilities. These crimes were confirmed in January 2007<sup>15</sup> and his trial is to start on June 2008.<sup>16</sup>

It is hard to understand why the Prosecution focused only on these allegations as more other unlawful acts had been committed. For example in 2002-2003 more than 800 civilians from Lendu tribe have been killed by FPLC and more villages have been the target of the operation called 'Chikana Namukono' based on murder, torture and sexual violence.<sup>17</sup> Since December 2004 thousands of people have been displaced from the city of Mongbvalu or the ones who remained have been living in terror.<sup>18</sup> The fact that Lubanga was charged only with the three war crimes mentioned above is even more worrying as ICC Prosecutor is aware of the fact that since 1 July 2002 around 8000 people have been killed and 600000 have been displaced in Congo's eastern Ituri province.<sup>19</sup>

The situation is no better in the case against the other two persons in custody, either. Even if they are charged with nine counts of crimes (six war crimes and three crimes against humanity), all of them committed primarily against population of Hema ethnicity, there is no persecution among the charges against them at ICC. The situation is more delicate as Katanga was arrested in Congo not only for war crimes and crimes against humanity, but also for genocide.<sup>20</sup>

The Office of the Prosecutor started another investigation<sup>21</sup> at the request of Uganda which was the first to refer its situation to the ICC.<sup>22</sup> Initially, the Pre-Trial Chamber issued five warrants of arrest but currently only four of them are active.<sup>23</sup> Because there is not too much information

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<sup>15</sup> Decision on confirmation of charges, available at [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803\\_French.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803_French.pdf) and [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf) last visited April 2008.

<sup>16</sup> See Press release: *The Trial in the case of Thomas Lubanga Dyilo will commence on 23 June 2008*, ICC-CPI-20080313-PR297-ENG, 13 March 2008, available at <http://www.icc-cpi.int/press/pressreleases/348.html> last visited April 2008.

<sup>17</sup> See Joint NGO Letter sent to ICC Prosecutor, 31 July 2006 available at [http://www.iccnw.org/documents/DRC\\_joint\\_letter\\_eng.PDF](http://www.iccnw.org/documents/DRC_joint_letter_eng.PDF) last visited April 2008.

<sup>18</sup> See Trikoz Id. 14 at 229.

<sup>19</sup> See Associated Press, *International prosecutor says Congolese warlord may face additional war crimes charges*, 7 August 2006, available at:

[http://www.firstglobalselect.com/scripts/cgiip.wsc/globalone/htm/news\\_article.r?vcnews-id=350883](http://www.firstglobalselect.com/scripts/cgiip.wsc/globalone/htm/news_article.r?vcnews-id=350883) last visited April 2008.

<sup>20</sup> Human Rights Watch, *Second War Crimes Suspect to Face Justice in The Hague*, 18 October 2007. Available at <http://hrw.org/english/docs/2007/10/18/global17125.htm> last visited April 2008.

<sup>21</sup> See ICC Press Release *Prosecutor of the International Criminal Court opens an investigation into Northern Uganda*, ICC-OTP-20040729-65-En, 29 July 2004 available at [http://www.icc-cpi.int/pressrelease\\_details&id=33&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html) last visited April 2008.

<sup>22</sup> See ICC Press Release *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC*, 29 January 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html) last visited April 2008.

<sup>23</sup> See ICC-02/04-01/05 Case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*.

disclosed to the public for the moment, we can only draw the conclusion that all the crimes (Kony-33 counts, Otti-33 counts, Odhiambo-19 counts and Ongwen-33 counts) were committed against civilian population in general and no particular ethnic group was targeted. The accused persons are members of the Lord's Resistance Army (LRA), a rebel movement which is waging war against the Ugandan government and terrorizing the civilian population in the north.<sup>24</sup>

Another situation where ICC Prosecutor opened an investigation is that of Darfur, in the Sudan. Like more other African countries, Sudan was the field of battle of civil wars for a lot of years. After gaining independence from British – Egyptian rule in 1956, Sudan has been ruled predominantly by military regimes. People from south first revolted in 1963<sup>25</sup> and again in 1983. The conflict took a lot of lives and led to a flux of refugees and internally displaced persons.<sup>26</sup> It was only in 2002 that the Government and the rebels initiated a peace process which ended in 2005. This was the historical background when another conflict burst, this time in Darfur. Two rebel African groups (Sudan Liberation Movement/Army SLM/A, and Justice and Equality Movement JEM) revolted against the Government, composed mainly from Arabs.

The Sudan Liberation Movement/Army is predominantly composed by people coming from Fur tribe, while the Justice and Equality Movement is representing mainly the Zaghawa tribe. The Fur, Masaalit and Zaghawa tribes are the most numerous black African in Darfur and they are predominantly agriculturalists (Fur) or sedentary cattle herders (Zaghawa).<sup>27</sup> They share the same religious as the other tribes, the Islam, and besides Arab, they speak their own indigenous languages. The two rebel groups share the same goals as they are both fighting against the central government's policies of marginalization, racial discrimination, exclusion and exploitation, real political criticism and socioeconomic inequalities.<sup>28</sup> It was also about the permanent fight against nomadic Arabs and sedentary African tribes which the government did not seem to address,<sup>29</sup> while the conflict between Arabs (39%) and Africans (61%) seemed to develop.

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<sup>24</sup> See [www.resolveuganda.org](http://www.resolveuganda.org).

<sup>25</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva 25 January 2005, at 18.

<sup>26</sup> See Helen Young, Abdalmonium Osman and Rebecca Dale, *Darfurian Livelihoods and Libya: Trade, Migration, and Remittance Flows in Times of Conflict and Crisis*, in *International Migration Review*, Vol. 41, No. 4, (Winter 2007), 826-49.

<sup>27</sup> See Mika Vehnamaki, *Darfur Scorched: looming genocide in Western Sudan*, in *Journal of Genocide Research* 2006, 8 (1), March, at 51.

<sup>28</sup> *Ibid* at 67. JEM is more religiously implicated though. Its leader Khalil Ibrahim pretends to be the author of *The Black Book*, the JEM's manifesto. See also Alex Cobham, *Causes of Conflict in Sudan: Testing The Black Book*, in *The European Journal of Development Research*, Vol. 17, No.3, Sept. 2007, at 462-80.

<sup>29</sup> *Id* 25 paragraph 59.

The Government adopted a very interesting strategy, as it lacked military personnel. It called upon local tribes to fight against the rebels, developing the existing tensions between the Arab nomadic and African sedentary tribes. They were to become the *Janjaweed*, a term used for a bandit on a horse or camel.<sup>30</sup> Their people are supported militarily and financially by the Government of Sudan.<sup>31</sup> The Janjaweed started to fight the rebels and terrifying the civilian population, as the majority of people is formed by persons belonging to Fur, Masaalit and Zaghawa tribes. Therefore, they did not attack only the fighting rebels but they directed their attacks against the civilian population, too.

The Janjaweed systematically destroyed hundreds of villages in Darfur, killing boys and men, raping women and girls<sup>32</sup>, destroying water wells and irrigation systems, food and seed stocks, looting cattle, in other words, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”.<sup>33</sup> In 2005 the number of deaths was 80000, while at the end of 2007 it reached 450000. Around 2, 5 millions of refugees and internally displaced persons (IDP) were also reported.<sup>34</sup>

The peace process started by signing an agreement in September 2003 and it was followed by another one in April 2004. Both provided for ceasefire. Peace talks followed during the summer of 2004 and in November there were signed two Protocols, one on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur.<sup>35</sup> Unfortunately, they did not lead to peace. The SLM/A and JEM asked for the disarming of the Janjaweed but the Government continued to deploy its ground and air forces.<sup>36</sup> The signing of the Darfur Peace Agreement later in May 2006, did not improve the situation. Violence seemed to be more chaotic and unpredictable, threatening the humanitarian intervention.<sup>37</sup>

The first who reacted to the atrocities committed in Darfur, was the United States who, in the summer of 2004 called the situation “genocide”. In July and August they sent a team of

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<sup>30</sup> Ibid, par. 69.

<sup>31</sup> Id 27 at 65 or id. 25 par. 68.

<sup>32</sup> Id 27 at 68.

<sup>33</sup> See also Eric Reeves, *Darfur: Ongoing Genocide*, in *Dissent*, Fall 2004, at 19.

<sup>34</sup> See CRED, *Darfur: Counting the Deaths*, 26 May 2005, available at <http://www.cred.be/docs/cedat/DarfurCountingTheDeaths-withClarifications.pdf> last visited April 2008. See also id. 27 at 68 or Alex Cobham, *Causes of Conflict in Sudan: Testing The Black Book*, in *The European Journal of Development Research*, Vol. 17, No.3, Sept. 2007, at 462-3.

<sup>35</sup> Id 25 par. 70.

<sup>36</sup> Eric Reeves, *Genocide by Attrition*, in *Dissent*, Winter 2005, at 24.

<sup>37</sup> Eric Reeves, *Genocide Without End? The Destruction of Darfur*, in *Dissent*, Summer 2007, at 9.

investigators to the field to ascertain whether genocide had been perpetrated. The experts found that “the government of Sudan and the Janjaweed are guilty of committing genocide against the Fur, Masaalit, Zaghawa and other Black African tribes of Darfur”.<sup>38</sup>

The findings of the investigation made at that time US Secretary of State Colin Powell to accuse the government of Sudan of genocide. International community also reacted but it was criticized for not sufficiently intervene to stop genocide.<sup>39</sup> The United Nations Security Council’s responses got the same critics as it did not authorize the use of military force for humanitarian purposes against the wishes of a functioning state.<sup>40</sup> The first reaction of the Security Council was to pass a resolution establishing a Commission of Inquiry “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>41</sup>

The only effective international military response came from the African Union which received some help from the European Union and NATO.<sup>42</sup> In June 2004 the AU proposed an observer mission (AMIS) in Darfur which later was assisted by a UN team. As the mission did not succeed in neutralizing the Janjaweed, AMIS was extended.<sup>43</sup> The UN also remained actively in the region, providing assistance through the Office for Coordination of Humanitarian Affairs.<sup>44</sup> In the summer of 2005 US Government decided that AMIS should be handed over to a UN peacekeeping force but both AU and UN were reluctant, while Khartoum opposed.<sup>45</sup> Sudan also rejected the SC Res. 1706/2006<sup>46</sup> where the Council asked for Sudan’s consent to a UN force.<sup>47</sup> The language of the Resolution drew a lot of criticism, being characterized as a “mockery”

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<sup>38</sup> Samuel Totten and Eric Marcusen, *The US Government Darfur genocide investigation*, Journal of Genocide Research, 2005, 7(2), at 285.

<sup>39</sup> Rhoda E. Howard-Hassmann, *Genocide and State-Induced Famine: Global Ethics and Western Responsibility for Mass Atrocities in Africa*, in Perspectives on Global Development and Technology, Vol. 4, Issue 3-4, 2005 at 504.

<sup>40</sup> Paul D. Williams, *Military Responses to Mass Killing: the African Union Mission in Sudan*, in International Peacekeeping, Vol. 13, No.2, June 2006, at 170.

<sup>41</sup> SC RES. 1564/2004, available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/N04/515/47/PDF/N0451547.pdf?OpenElement> last visited April 2008.

<sup>42</sup> See also Natalia Touzovskaia, *EU-NATO Relations: How Close to ‘Strategic Partnership’?* in European Security, Vol. 15, No.3, Sept. 2006, at 251-53.

<sup>43</sup> Id 40 at 176.

<sup>44</sup> Id 42.

<sup>45</sup> See Alex de Waal, *Darfur and the failure of the responsibility to protect*, in International Affairs, 83:6, 2007, at 1042.

<sup>46</sup> SC Res. 1706/2006 available at [http://www.sudanjem.com/pdf/1706\\_download.pdf](http://www.sudanjem.com/pdf/1706_download.pdf) last visited April 2008.

<sup>47</sup> See Nsongurua J. Udombana, *Still Playing Dice with Lives: Darfur and Security Council Resolution 1706*, in Third World Quarterly, Vol. 28, No.1, 2007, at 99-116.

because it allowed Sudan a veto over the introduction of foreign troops.<sup>48</sup> A few months later, Sudan agreed on the UN–African Union Mission in Darfur (UNAMID), a hybrid AU–UN force.<sup>49</sup>

The Commission of Inquiry established following the SC Res. 1564/2004 began its work in October 2004 led by the prestigious international lawyer Antonio Cassese. The Commission reported back within three months concluding that even if the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law, there is no genocide in Darfur. The 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. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity.” The Commission also mentioned that the crimes were committed primarily against “the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called ‘African’ tribes.”<sup>50</sup> The rebels, at their turn, seem to be “responsible for serious violations of international human rights and humanitarian law which may amount to war crimes.”<sup>51</sup>

When trying to find if there is genocide in Darfur, the Commission focused particularly on three directions: *actus reus*, *mens rea* and the concept of ‘protected group’. Concerning the first element, the Commission found that there is no doubt that *actus reus* of genocide has been committed as there was evidence of “systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle).”<sup>52</sup>

When it came for *mens rea* of genocide, the Commission found that it was missing as “the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific

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<sup>48</sup> See Global Progress Report, 2007 at 411.

<sup>49</sup> See SC Res. 1769/2007 available at <http://www.un.org/News/Press/docs/2007/sc9089.doc.htm>, last visited April 2008. See also *Sudan, UN reach agreement on peacekeeping plan*, CBC News, available at <http://www.cbc.ca/world/story/2007/06/12/sudan-agreement.html>.

<sup>50</sup> Id 25. at 3.

<sup>51</sup> Ibid. at 4.

<sup>52</sup> Ibid. para. 507.

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.<sup>53</sup> The Commission found therefore, that the Government of Sudan has not pursued a policy of genocide<sup>54</sup> but it might be responsible for persecution as a crime against humanity. It also admitted that some individuals, including Government officials, might have been acting with genocidal intent. One may wonder what exactly does this mean. Should we understand that the Government of Sudan did not commit genocide but some individuals or Government officials did commit genocide? But if some Government officials committed genocide while they were in office, does not this mean that the State also is responsible for genocide?<sup>55</sup> The Commission avoided saying that particular persons committed genocide as it considered that only a competent court should make such a determination. If the Commission would have said that genocide has been committed, further consequences would have followed, primarily concerning the obligation of Sudan to prevent genocide. In the case of *Bosnia and Herzegovina v. Serbia and Montenegro*,<sup>56</sup> ICJ stated that a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is true that Sudan did not ratify the Convention on the Prevention and Punishment of the Crime of Genocide, but as ICJ showed in the above mentioned case, the Genocide Convention is not the only international instrument providing for an obligation on the States to take certain steps to prevent genocide. Sudan itself is bound by a number of international treaties on human rights.<sup>57</sup>

The Commission also analyzed if the three tribes in Darfur against whom the crimes were primarily committed, may be qualified as a 'protected group', namely a national, ethnical, racial or religious group, as the Convention of Genocide provides for. The Commission noted that apparently, one of the main differences between the militia and the attacked tribes is the character of their occupation: nomadic respectively sedentary. They seem to speak the same language (also the African tribes speak their indigenous languages as well), and embrace the same

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<sup>53</sup> Ibid para. 518.

<sup>54</sup> Still the testimonies of the victims and witnesses suggest something else: "we will kill all men and rape the women. We want to change the color." (see John Hagan, Wenona Rymond-Richmond, and Patricia Parker, *The Criminology of Genocide: The Death and Rape of Darfur*, in *Criminology*, Vol.43, No.3, 2005 at 526), or "You blacks, we're going to exterminate you", "You are slaves, we will kill you. You are like dust, we will crush you." (see Eric Reeves, *Darfur: Ongoing Genocide*, in *Dissent*, Fall 2004, at 21).

<sup>55</sup> See Alain Pellet, *Responsabilité de l'État et responsabilité pénale individuelle en droit international*, *Romanian Journal of International Law*, No.4 (January-June 2007) at 11-20.

<sup>56</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, 26 February 2007. The judgement is available at <http://www.icj-cij.org/docket/files/91/13685.pdf> last visited April 2008.

<sup>57</sup> See id. 25 paras. 147-171.



religion. Apparently there is no ethnical distinction between the Janjaweed and the rebels, but rather a distinction based on sympathy towards the combatants: “those tribes in Darfur who support rebels have increasingly come to be identified as ‘African’ and those supporting the government as the ‘Arabs’.”<sup>58</sup> The Commission concluded though, that the victims represent “a permanent and stable group”<sup>59</sup> as found by ICTR in *Akayesu* case<sup>60</sup> and therefore, fall under the protection of the Genocide Convention. The Commission should have relied not on the ICTR finding, to which no other reference has been made by any other ICTR trial or appeal chambers,<sup>61</sup> but rather on the fact that the Janjaweed saw the three tribes as a distinct group.

The Report of the Commission could not escape from criticism. The Commission was accused of substituting “legal reasoning for scientific data”, or of using “its authoritative power and control to deny the meaning of the genocidal charge”.<sup>62</sup> According to other critics, due to some deficiencies of the Rome Statute, the Report reflects the confusion of collective responsibility and criminal liability of individuals.<sup>63</sup> Apart from these critics, the Commission is quite wise in refusing “to make the quantum leap from the extermination of rival combatants to the intentional destruction of an ethnic group”<sup>64</sup> as this would have a lot of consequences on the international level. As Prof. Schabas suggested, for the US, finding genocide in Darfur it would be for sure “an appealing proposition to tarnish Sudan, which must be on its short list for the vacant Iraqi seat as a member of the ‘axis of evil’, with the odium of ‘genocide’.”<sup>65</sup> On the other hand, not recognizing genocide in Darfur, because of the consequences this might have for international law, would mean a victory of politics over justice and most of all, would be a cruel disrespect for the victims.

The Report ends with some recommendations concerning the mechanisms to ensure accountability for the crimes committed in Darfur. The International Criminal Court seemed to be the best organism to deal with the perpetrators, as the Sudanese courts were qualified by the Commission both as “unable and unwilling to prosecute and try the alleged offenders”<sup>66</sup>. Other

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<sup>58</sup> Ibid para. 510.

<sup>59</sup> Ibid para 498.

<sup>60</sup> Prosecutor v. Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998.

<sup>61</sup> See William A. Schabas, *Darfur and the ‘Odious Scourge’: The Commission of Inquiry’s Findings on Genocide*, in Leiden Journal of International Law, 18 (2005), at 878.

<sup>62</sup> John Hagan, Wenona Rymond-Richmond, and Patricia Parker, *The Criminology of Genocide: The Death and Rape of Darfur*, in Criminology, Vol.43, No.3, 2005 at 534-5.

<sup>63</sup> George P. Fletcher and Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, in Journal of International Criminal Justice, 3 (2005), 539-61.

<sup>64</sup> Id 61 at 881.

<sup>65</sup> Ibid at 882.

<sup>66</sup> Id. 25 para. 568.

possibilities like establishing an Ad Hoc International Criminal Tribunal or extending the mandate of ICTR or ICTY, as well as creating a mixed court, were also taken into account but these measures seemed to be inappropriate. Therefore, the Commission recommended to the Security Council to act under Chapter VII of the UN Charter and, as article 13 (b) of the Rome Statute provides, to refer the situation in Darfur to the ICC.

Following the Commission recommendations, the Security Council referred the situation to the ICC, by passing the Resolution 1593/2005.<sup>67</sup> The Resolution is particularly important as it marks the first SC referral to the ICC. Article 13(b) of the Rome Statute gives the Security Council the power to trigger the jurisdiction of the Court by acting under Chapter VII of the UN Charter. This trigger mechanism,<sup>68</sup> as well as the power of the Prosecutor to initiate an investigation *proprio motu*<sup>69</sup> was among the most discussed issues at the Rome Conference, as they were seen as a breach to the states sovereignty. The Resolution passed with eleven votes to none and four abstentions (Algeria, Brazil, China and US). In June 2005, the ICC Prosecutor opened the investigation in Darfur<sup>70</sup> and in April 2007 two warrant of arrest were issued, one for a Government official, Ahmad Harun, and the other for a Janjaweed militia leader, Ali Kushayb.<sup>71</sup>

The Government of Sudan does not cooperate with ICC and it is rather hostile to the Court. Ahmed Harun, former Minister of Interior was appointed Minister of Humanitarian Affairs and continues to enjoy impunity and a “high profile in the Sudanese media and in public life”.<sup>72</sup> He is also co-chair of a committee authorized to deal with human rights complaints, including on Darfur.<sup>73</sup> The other person indicted by ICC, Ali Kushayb, the “Butcher of Darfur”,<sup>74</sup> was released from Sudanese custody as there was no evidence against him. On the contrary, ICC Prosecutor

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<sup>67</sup> S/RES/1593(2005), 30 March 2005. See also Press Release SG/SM/9797, AFR/1132.

<sup>68</sup> See Hector Olásolo, *The triggering procedure of the International Criminal Court, procedural treatment of the principle of complementarity, and the role of Office of the Prosecutor*, 26 March 2004, The Hague, Guest Lecture Series of the Office of the Prosecutor.

<sup>69</sup> See Avril McDonald and Roelof Haveman, *Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, 15 April 2003, The Hague, Expert consultation process on general issues relevant to the ICC Office of the Prosecutor.

<sup>70</sup> See Press release ICC-OTP-0606-104-En, The Hague, 6 June 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&cid=107&dl=en.html](http://www.icc-cpi.int/pressrelease_details&cid=107&dl=en.html) last visited April 2008.

<sup>71</sup> See Warrant of arrest for Ahmad Harun, available at [http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf) and Warrant of arrest for Ali Kushayb available at [http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf) last visited April 2008.

<sup>72</sup> Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 5 December 2007, para 24.

<sup>73</sup> See Human Rights Watch Report 2008 at 167, available at [http://hrw.org/wr2k8/pdfs/wr2k8\\_web.pdf](http://hrw.org/wr2k8/pdfs/wr2k8_web.pdf) last visited April 2008.

<sup>74</sup> See Wasil Ali, *Sudan confirms release of Darfur war crimes suspect indicted by ICC*, Sudan Tribune, 2 April 2008, available at <http://www.sudantribune.com/spip.php?article26594>.

proved that “they joined together to persecute and attack civilians who were not participants in the conflict, based on the rationale that those civilians were rebel supporters.”<sup>75</sup>

Harun and Kushayb are both charged with 51 counts for war crimes and crimes against humanity, all of them committed against primarily population of Fur ethnicity. One may wonder how come the committing of 51 crimes against a particular ethnic group does not prove a genocidal intent. How come there is no genocide among the charges? The International Criminal Court was hoped to be a guaranty for the protection of minorities. There is persecution among the charges against Ali Kushayb and Ahmad Harun but it seems it still not enough to prove genocide. ICC Prosecutor proves to be more careful even than the Commission of Inquiry. The Commission argued there was no policy of genocide from the government side but it admitted that some individuals, including government officials might have been acted with a genocidal intent. The Commission also handed ICC with a list containing 51 names of suspects. The Prosecutor chose to charge only two high ranking persons and there is no genocide among the charges against them.

#### *Conclusions:*

Considering the fact that the Rome Statute provides for the same minimum and maximum of penalties, regardless if you commit genocide or crimes against humanity,<sup>76</sup> the Prosecutor might have been opted for the easiest path, choosing to charge with persecution instead of genocide which is very difficult to prove. In this way, he would avoid the consequences the indictment would have over Sudan and he would manage to get a sentence over the two accused.

If Harun would be charged with genocide and would be found guilty, due to its official position, Sudan also should be found responsible of genocide by ICJ. The situation is quite the same with the case of Milosevic. As suggested in the literature, if he would have been found guilty of genocide, Serbia and Montenegro should have been found also responsible for genocide. The vice versa is not also true, though. Harun might not be indeed guilty of genocide, but his war

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<sup>75</sup> Id 72 para. 2.

<sup>76</sup> Article 77 of the Rome Statute reads as follows: “Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”

crimes and crimes against humanity might be some elements for the genocide committed at the state level<sup>77</sup>, issue which would be for the ICJ to determine.

If this would be the strategy the OTP would vote for, this would create a dangerous precedent. It would demonstrate that ICC might be politically manipulated, that it fears international consequences and most of all it would fail to protect the minorities.

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<sup>77</sup> See A. Pellet id 55 at 19.