

*The Commission of Inquiry on Darfur: A United Nations Success Story*

By John L. Washburn and Wasana Punyasena

**Introduction**

The Security Council has only begun to act on the atrocities in Darfur. Meanwhile, the killings and destruction continue. Mindful of his own and the Security Council's failure to respond to the beginning of the genocide in Rwanda, Secretary-General Kofi Annan has found a way to force the Council to stay focused on Darfur through the establishment of the United Nations Commission of Inquiry on Darfur. This dramatic example of high performance by the UN Secretariat can help put in proper perspective the current storm of criticisms about the efficiency of the UN as an institution. There are good reasons for these reservations, but their noise and heat obscure the continuing quiet achievements of the Secretariat under the firm leadership of SG Annan in pushing the staff and main bodies of the UN to face their most acute and tragic challenges. The Secretary-General's efforts in this case have helped render denial and indifference impossible. Member states' will to act effectively in Darfur will now be tested publicly and inescapably.

**Background**

For more than two years now, the government of Sudan with the government-supported Arab Janjaweed militia has undertaken a policy of ethnic cleansing toward the local black population in the Western region of Darfur. The attacks were started to quell a violent rebellion in the region but have escalated beyond any justifiable counterinsurgency campaign. In March 2005, Jan Egeland, the UN Under-Secretary-General for Humanitarian Affairs, reported that approximately 180,000 persons had been killed, and about two million people had been displaced, with 10,000 people dying each month.

The UN Security Council has passed multiple resolutions regarding Sudan—including Resolutions 1547, 1556 and 1574 in 2004—each deploring violations of humanitarian law in Darfur. But none improved the situation significantly for the civilians on the ground. In March 2005, negotiations in the Council centered on three main issues: (1) deployment of troops to support the peace agreement that ended the separate North-South civil war; (2) adoption of targeted sanctions against members of the Sudanese government judged to be responsible for atrocities in Darfur; and (3) referral of the Darfur situation to the International Criminal Court (ICC).

The United States, as a fierce opponent of the ICC, would likely have vetoed a comprehensive resolution that included peacekeepers, sanctions and a referral to the Court. For weeks, deliberations went on until the first resolution (1590) was adopted to send 10,000 troops to southern Sudan to monitor the North-South peace agreement and also support the African Union troops in the Darfur region. A second resolution (1591) includes targeted sanctions on the government of Sudan. These two resolutions were adopted without including the ICC referral to ensure consensus would be reached on them in the Security Council, given the need for fast action on the ground in Darfur.

Previous US government statements about the situation in Darfur as well as domestic political factors made it difficult for the US to maintain its policy of uncompromising opposition to the ICC in this case. In fall 2004, US Secretary of State Colin Powell had declared already that the atrocities in Darfur amounted to genocide. In House Concurrent Resolution 467 and Senate Concurrent Resolution 133, the US Congress also declared that genocide was occurring in Darfur. Moreover, the issue of Darfur raised a great deal of attention among conservatives and evangelical Christians. This concern had begun with alarm over the plight of Christians in southern Sudan. As conservative Christian groups visited Sudan, they were appalled by the atrocities against members of other religions, including those in Darfur. Thus, the administration felt confident that it would not face conservative attacks for abstaining on the Darfur referral resolution.

In the end, the US did not veto the resolution that referred the situation in Darfur to the Prosecutor of the ICC. The European countries that led a strong coalition in favor of the ICC in the Security Council arrived at a compromise with the US late at night on March 31, 2005. The final resolution (1593) includes a provision purporting to exempt from ICC jurisdiction nationals of countries that are not party to the Court (other than Sudan) such as the US. The intent of the provision is to make such nationals subject exclusively to their own states' jurisdictions.

The tragic developments in Darfur continue despite these actions by the UN Security Council. Urgent, decisive action to protect civilians in Darfur is needed now as much as ever. Yet, the referral of the Darfur situation to the ICC strikes a significant blow against the culture of impunity in Darfur and elsewhere and adds greater legitimacy to the Court. This would not have happened without the work of the International Commission of Inquiry on Darfur. Moreover, without the Commission's report and the Secretary-General's astute handling of it, the Security Council would probably not have taken its other actions on Darfur. As they created and supported the Commission, the Secretariat and Secretary-General demonstrated that they were determined to act on the lessons of Rwanda and to use the Commission to force the members of the Council to face up to them as well.

### **The Commission of Inquiry on Darfur**

The Commission of Inquiry on Darfur was established through Security Council Resolution 1564 in September 2004 upon the recommendation of SG Annan. The resolution requested that the Secretary-General rapidly establish such a Commission "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.” The Secretary-General appointed a team of five international legal and humanitarian rights experts from around the world as the members of the Commission.<sup>1</sup> A Secretariat and a legal research team consisting of investigators, forensic experts, military analysts and gender violence investigators accompanied them. The Office of High Commissioner for Human Rights, led by Louise Arbour, appointed and supported this team of more than 30 people.

The Commission’s work included two missions to Sudan and visits to relevant places in neighboring Chad, Eritrea and Ethiopia where most refugees from Darfur reside. The investigative teams stayed on the ground for a total of eight weeks. The Commission was able to collect a broad range of information also from governments, and nongovernmental and international organizations.

### **The Commission’s Report and Findings**

The report of the Commission, which is both competent and thorough, demonstrates the expertise of the members of the Commission.<sup>2</sup> Its comprehensive structure gives a detailed description of the atrocities committed in Darfur, clearly describing how Sudanese troops and Janjaweed militias committed gross and heinous international crimes, namely war crimes and crimes against humanity. The Commission, however, did not find sufficient evidence of “intent to destroy” on the part of the Sudanese government to conclude the government had pursued a policy of genocide, according to the internationally recognized definition. This single, somewhat technical finding dominated news coverage of the Commission’s report and, as a result, the finding that individuals in Sudan may well have intended genocide and that this should be investigated further was often overlooked.

Meanwhile, the Commission was clear that the crimes for which there was sufficient evidence “may be no less serious and heinous than genocide” and that the absence of a policy of genocide “should not be taken in any way as detracting from the gravity of the crimes perpetrated in [Darfur].” In the law of the ICC, these crimes are treated just as seriously as genocide, merely lacking the requisite intent. Accordingly, crimes against humanity can result in equally strong sentencing in a court as a charge of genocide.

---

<sup>1</sup> The Commission members included: Antonio Cassese, Commission Chairman, law professor and former President of the International Criminal Tribunal for the former Yugoslavia (Italy); Mohammed Fayek, Secretary-General of the Arab Organization for Human Rights (Egypt); Hina Jilani, UN Special Representative on Human Rights Defenders (Pakistan); Dumisa Ntsebeza, Commissioner on Truth and Reconciliation Commission in South Africa (South Africa); and Therese Striggner-Scott, Chairwoman of the Ghana Law Reform Commission (Ghana).

<sup>2</sup> The report of the Commission of Inquiry on Darfur, UN Document S/2005/60, can be found at [http://www.icc-cpi.int/library/cases/Report\\_to\\_UN\\_on\\_Darfur.pdf](http://www.icc-cpi.int/library/cases/Report_to_UN_on_Darfur.pdf). Other relevant documents can be found via the UN Mission in the Sudan at <http://www.un.org/Depts/dpko/missions/unmis/>.

The Commission entrusted to the Secretary-General in a separate sealed report 51 names of those it accused of perpetrating these crimes. It emphasized that a prosecutor and court are free to decide whether these individuals should be charged and tried. It also placed in the care of UN High Commissioner Arbour nine large boxes of substantial evidence against those and other persons.

The Commission's report reviews Sudanese investigations and characterizes them as inefficient in dealing with the prosecution of the grave atrocities committed in Darfur. It concludes that the Sudanese judiciary is unable and unwilling to prosecute such violations. The Commission recommended that for the quickest and most competent action, the Security Council should refer the Darfur situation to the ICC in The Hague.

### **UN Actions**

The Commission's report was presented to the Secretary-General on January 25, 2005, and the Security Council received it in open session on February 16, 2005. In presenting the report, the Secretary-General and High Commissioner Arbour were clearly determined not to allow Council members to flinch away from confronting their responsibilities in Darfur.

Dissatisfied with the Security Council's lack of progress after nearly three weeks of receiving the report, SG Annan called the Council into emergency session on March 8, 2005 and pressed them to act. The Council responded with further resolutions on Sudan and Darfur, culminating in the Council's dramatic referral of the Darfur atrocities to the ICC. In ceremonies in New York and The Hague, the Prosecutor of the Court has since received the list of 51 names and the boxes of evidence from the Secretary-General and High Commissioner Arbour.

The Secretary-General and the Security Council took immediate action to implement the March resolutions. Following the Security Council request that UN forces work closely with African Union forces, SG Annan presented a report in which he explained how the UN could assist the African Union's peacekeeping mission to fight insecurity on the ground. Furthermore, following the resolution on sanctions, a Security Council Committee on sanctions concerning Sudan began its work in the beginning of May 2005.

The ICC also took immediate action following the referral. After conducting a preliminary inquiry, the Prosecutor opened a formal investigation into Darfur on June 1, 2005. The evidence collected by the International Commission of Inquiry and other sources confirmed that serious crimes within the jurisdiction of the Court have been committed in Darfur. On June 29, 2005, the Prosecutor addressed the Security Council to inform it on the progress of his investigation. His presentation showed that he is determined to require the Security Council to take measures against Sudan if Sudanese authorities refuse to cooperate with the Court. Therefore, Security Council action continues to be crucial to bring accountability to Darfur.

### **Conclusion**

The Security Council's actions on Sudan and Darfur are far from ideal. The resolutions on peacekeeping and sanctions are inadequate in resources and scope. It will have to do much more to meet the Secretary-General's call to stop the violence and the suffering. In the two months of inaction in the Security Council from the date the Commission's report was published to the resolutions in late March, more than 10,000 people died in Darfur. The referral of the situation to the ICC alone does not have direct impact on the violence, as recent attacks on villages in Darfur have shown. The referral, however, is an important step in ending the aura of impunity for those directing and most accountable for the Darfur atrocities.

The Secretariat and the Commission have successfully fulfilled their mandate on Darfur to warn, inform and confront. The Secretary-General and the Secretariat have shown a resolve very different from their hesitancy before the genocide in Rwanda. The Security Council must now act equally well on its responsibilities. Although its first actions are the start it never made in Rwanda, they are inadequate. The Council must do more and faster to stop the violence and suffering in Darfur.

***John L. Washburn is Convener and Wasana Punyasena is Deputy Convener of UNA-USA's program, the American NGO Coalition for the International Criminal Court (AMICC).***

*The United Nations Association of the United States of America (UNA-USA) is the nation's largest grassroots foreign policy organization and the leading center of policy research on the UN and global issues. UNA-USA Policy Briefs are intended to provide background and stimulate discussion on issues related to US foreign policy and the work of the UN. For more information, please visit [www.unausa.org](http://www.unausa.org).*