

Document No. **3**

**FOR DISCUSSION**

**REPORT OF THE STUDY ON  
GENOCIDE WITH REGARD TO THE DARFUR CRISIS**

At its meeting in Geneva, Switzerland (30 August-6 September 2006), the WCC central committee “requested the staff to study if the use of the term ‘genocide’ with regard to the crisis in Darfur is appropriate in light of the internationally agreed conventions on this issue, and to offer counsel to the churches.”

Before proceeding with a close examination of the Darfur crisis and the response of the international community to it, there is need to examine the legal definition of the term ‘genocide’ and the particular challenges it poses.

**Analysis of the term ‘genocide’**

The word genocide was used for the first time by lawyer, Raphael Lemkin, who combined the Greek word *genos* (race or tribe) with the Latin word *cide* (cidere – to massacre, kill). Following the horrors of the holocaust he campaigned to have genocide recognized as a crime under international law. His efforts gave way to the adoption of the “Convention on the Prevention and Punishment of the Crime of Genocide”, adopted by the UN general assembly on 9 December 1948, coming into effect in January 1951. Article II of the convention offers a legal definition of the crime of genocide according to which 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. The convention also imposes a general duty on states that are signatories to “prevent and punish” genocide. The same definition was taken up later on by the statute of the two ad-hoc tribunals; e.g. the International Criminal Tribunal for Rwanda (Article 2) and the International Criminal Tribunal for ex-Yugoslavia (Article 4) and finally by the Rome statute of the International Criminal Court (Article 5).

Over the years the definition of genocide has been widely debated. Many have argued that it is too narrow and thus many of the mass killings perpetrated since the adoption of the convention would not fall under it. Some of the arguments invoked in support of this point are that the convention excludes targeted political and social groups. Furthermore, the definition is limited to direct acts against people and excludes acts against the environment which sustains them. Another issue is that proving intention beyond reasonable doubt is extremely difficult. An additional question along these lines is the difficulty of defining or measuring “in part” and establishing how many deaths equal genocide. One more dimension that should be taken into consideration is the reluctance of UN member states to single out other member states or intervene.

What differentiates genocide from other crimes against humanity is the intent to destroy in whole or in part a national, ethnic, racial or religious group. Acts which are directed against those groups with a discriminatory intent but not with intent to destroy them constitute crimes against humanity and not genocide. As becomes evident, there is a very fine line between those two categories which renders qualifying a certain crime as genocide a very difficult task.

In order to determine whether a particular crime constitutes genocide it needs to be ascertained whether a factual case has been made out of the legal pre-requisites. It requires the gathering of concrete evidence that can prove beyond reasonable doubt the commission of such a crime. The gathering of such evidence can prove to be a very difficult task especially during on-going crises, like in the case of Darfur.

### **Developments on international level with regard to the Darfur crisis**

In January 2005 an international commission of inquiry on Darfur, authorized by UN security council resolution 1564 of 2004, issued a report to the secretary general stating that, “the government of the Sudan has not pursued a policy of genocide”. Nevertheless, the commission cautioned that, “this should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide”. Following that, the United Nations security council adopted resolution 1593 (31 March 2005) referring the ongoing conflict in Darfur to the International Criminal Court (ICC). Following this, in April 2007, the ICC issued its first arrest warrants in a three-year investigation of war crimes in Darfur, Sudan, naming Janjaweed militia leader, Ali Kushayb, and Sudanese humanitarian affairs minister Ahmad Muhammed Harun, who is believed to have been one of the masterminds behind the well-reported mass killings and displacements in the region. Since the prosecutor did not find sufficient evidence to prosecute for genocide, they are being accused of 51 crimes against humanity and war crimes. Meanwhile, the mandate of the special rapporteur on the situation of human rights in the Sudan has been extended for one year by the Human Rights Council during its 6<sup>th</sup> session in December 2007.

On 14 July 2008, ICC prosecutor, Luis Moreno-Ocampo, submitted to the judges of the pre-trial chamber of the ICC an application for the issuance of an arrest warrant against Sudan’s President Omar Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes.

Three years after the security council requested him to investigate in Darfur, and based on the evidence collected, the prosecutor has concluded there are reasonable grounds to believe that Sudan’s President Al Bashir bears criminal responsibility in relation to ten counts of genocide, crimes against humanity and war crimes.

According to the prosecution evidence, President Al Bashir masterminded and implemented a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity. *‘Members of the three groups, historically influential in Darfur, were challenging the marginalization of the province; they engaged in a rebellion. Al Bashir failed to defeat the armed movements, so he went after the people. His motives were largely political. His alibi was a counterinsurgency. His intent was genocide’* the prosecutor said.

According to the evidence gathered, the prosecutor said that for over five years armed forces and the militia/Janjaweed, on President Al Bashir's orders, attacked and destroyed villages. They then pursued the survivors in the desert. Millions of civilians have been uprooted from lands they occupied for centuries, all their means of survival destroyed, their land spoiled and inhabited by new settlers. Those who reached the camps for the displaced people were subjected to conditions calculated to bring about their destruction (killings, rapes, hunger).

It should be noted that Sudan has not signed up to the ICC but the court has authority to act in this case because the UN security council gave it a mandate to do so, with resolution 1593 in March 2005. The pre-trial chamber will now review and assess the evidence presented to them over the next couple of months. If the judges determine that there are reasonable grounds to believe that President Omar Al Bashir committed the alleged crimes, they will decide on the best manner to ensure his appearance in court. If the judges issue the warrant, Sudan will be obliged to arrest its own president, in effect the president handing himself over, which most likely will never happen.

Under Article 89, President Al Bashir might also be liable to arrest if he visits one of the 106 states that are parties to the treaty. Article 89 of the court's statute says that the court "may transit a request for the arrest and surrender of a person...to any state on the territory of which that person may be found..."

This is the first time that the ICC prosecutor has made charges against a sitting head of state, breaking new ground in the reduction of national sovereignty rights that have characterized international law in recent years. The real impact of this development is yet to be seen. Meanwhile, on 31 July, the council renewed the UN African Union Mission (UNAMID) mandate for 12 months in resolution 1828. This was preceded by intense negotiations on a proposal, following a request to the ICC from its prosecutor for an arrest warrant against President Al Bashir, to include language suspending ICC proceedings under article 16 of the Rome Statute. According to this article "*No investigation or prosecution may be commenced or proceeded with under this statute for a period of 12 months after the security council, in a resolution adopted under chapter VII of the charter of the United Nations, has requested the court to that effect; that request may be renewed by the council under the same conditions.*" The majority resisted this proposal, but compromise was found in emphasizing the need to bring the perpetrators of serious crimes to justice (and the government's obligations in this respect) and also mentioning some council members' concerns related to the request for an arrest warrant against President Al Bashir. The resolution took note of those members' intention to consider these matters further.

Darfur will continue to be a focus for the UN security council in September. In particular council members are expected to discuss issues relating to the deployment of the UNAMID and current proceedings before the International Criminal Court (ICC). It is unclear whether any formal proposals for a suspension of proceedings against Sudan's President Omar Al Bashir before the ICC will emerge in September. A report from the sanctions panel of experts is due by 15 September.

It must be noted that divisions within the council on ICC issues are expected to continue. China, Russia, South Africa, Libya, Burkina Faso and Indonesia support the suspension of ICC proceedings. Other council members believe it is more important to safeguard legal mechanisms and to ensure accountability.

But recent developments on the ICC issue also seem to indicate that some of those members may be open to the possibility of an article 16 suspension of ICC proceedings for President Al Bashir. This would be provided there are serious steps from Khartoum in improving cooperation with the ICC, including credible action against other indictees, as well as real cooperation with UNAMID's deployment, facilitating humanitarian assistance and creating genuine conditions for a peace process. (There also seems to be a perception that pressure may be required on the rebels in that regard.)

On the other hand the Sudanese government unveiled a reconciliation initiative for Darfur including a national dialogue conference, but as yet no dates have been officially announced. The government also appointed a prosecutor to head domestic proceedings on serious crimes in Darfur. But skepticism remains due to the timing, the lack of Sudanese legislation dealing with such crimes, and weaknesses in the Sudanese judiciary. The government reportedly continues to refuse to execute pending ICC arrest warrants for Ahmed Haroun and Ali Kushayb. Thus many seem unconvinced of Khartoum's recent efforts on domestic mechanisms for justice and accountability, being mindful of past similar initiatives that they see as lacking credibility.

On Darfur, the key issue is whether there is anything the council can do to encourage the parties to move towards a genuine ceasefire and a peace process. Another is improving security and, in that context, determining how best to advance UNAMID's deployment.

Justice and accountability issues also seem likely to preoccupy members, in particular whether an appropriate balance can be found that preserves the integrity and independence of the ICC and avoids impunity, encourages Sudan's cooperation with UNAMID, improves the prospects of a ceasefire and peace process in Darfur and preserves overall stability in Sudan. In this regard, options could include:

- adopting a wait-and-see approach on the ICC's consideration of its prosecutor's request for an arrest warrant against President Al Bashir;
- reaching an understanding with Sudan that President Al Bashir's ICC proceedings could be suspended for one year provided that there is a watertight arrangement on Sudan's cooperation with the ICC over other indictees, improved cooperation with UNAMID, and concrete steps towards a ceasefire. (A necessary measure in this regard might be to consider a spectrum of sanctions against the rebels should they refuse to cease hostilities.); and
- some other watertight arrangement that would ensure legal accountability for ICC indictees, perhaps along the lines of the Lebanon tribunal (which applies domestic law but uses international judges and a neutral location—but a problem in this option is the absence of domestic legislation in Sudan incorporating the relevant international crimes).

If the option of domestic judicial mechanisms in substitution for the ICC is considered, important challenges would arise. In addition to issues relating to judicial capacity and independence, as already mentioned Sudan's legal system does not contain specific provisions for crimes against humanity, war crimes and genocide.

Still another issue is whether the council should increase its focus on the broader challenges facing Sudan, in particular whether there is anything the council should do on the north-south situation. This includes how best to ensure progress in implementing the CPA on elections in

2009 and a southern independence referendum in 2011; demarcating the north-south border and the status of Abyei; and oil-revenue sharing.

### **Closing remarks**

The pursuit of justice, peace and reconciliation has been at the core of the mission of Christian churches as a response to the teaching of Jesus in the sermon on the mount: 'Blessed are those who hunger and thirst for righteousness, for they will be filled...Blessed are the peacemakers, for they will be called the children of God.' (Mathew 5: 6-9)

The churches in different parts of the world, and especially in those countries which have suffered gross human rights violations, have been struggling against impunity at the national and international level. The rationale of this struggle has been not so much to seek punishment, but to overcome violence and impunity, to support victims and to pursue peace, justice and reconciliation.

In this work the paradigm of restorative justice has emerged as a way to stress the importance of restoring broken relationships within the communities. Through restorative justice, people begin to understand each other's vulnerability and acknowledge their humanity. Restorative justice means to restore victims, restore perpetrators and restore communities. A victim-centred approach emerges as one of the characteristics of restorative justice procedures from the community level to the national level.

The ICC, through the importance given to the participation of victims in its structure and proceedings, brings this dimension to the international level in a new way. Churches and ecumenical organizations have interpreted the cries of the victims as a demand to respect their rights. The ICC responds to victim's rights to truth, justice and reparation. Victims have the rights to know exactly what happened in the case of grave human rights violations. As it was stated in the **Report on the Armenian Genocide, adopted by the WCC central committee, Geneva, 15-22 February, 2005** '*From the Christian perspective, the path towards justice and reconciliation requires the recognition of the crime committed as a sine qua non condition for the healing of memories and the possibility of forgiveness. Forgiveness does not mean forgetting but to look back with the intention to restore justice, the respect for human rights and relationships between perpetrators and victims.*'

Churches have welcomed the establishment of the ICC and some have urged their governments to sign and ratify the Rome statute. In a **Statement on the International Criminal Court adopted by the WCC central committee, Geneva, 15-22 February, 2005**, WCC urged for the universal ratification of the Rome statute of the ICC and welcomed and endorsed the establishment of the ICC as a permanent instrument to provide accountability for specified crimes in the process of overcoming impunity and contributing to peace-building with justice.

The same statement recalled the commitment of the churches in the Decade to Overcome Violence-Churches seeking reconciliation and peace, following the biblical teaching 'seek peace and pursue it.' (Psalm 34:14)

From the analysis that preceded, it becomes quite evident that genocide is a rather complex issue with not just legal but also political parameters. Genocide has legal implications, entailing full-scale intervention by the international community and therefore it cannot be treated lightly without due consideration and in-depth analysis of all different elements

surrounding a given case. A careful balance is required between the need for justice and accountability on the one hand and peace on the other, in order to succeed in combating impunity and building a long lasting peace through a truly reconciliatory process.

Thus churches should follow closely and with great caution the developments concerning the Darfur crisis both on UN and ICC level. Churches should also continue to support ecumenical and inter-religious initiatives that address the work of the ICC, like the faith and ethics network for the ICC and the Centre for Justice and Reconciliation in the Hague and all other efforts, national and international, that aim at pursuing justice and reconciliation and pray for a just and peaceful world.