

# Genocide, or not genocide, that is the question

*A case study of the international community's  
interpretation and investigation of the  
Darfur-conflict*

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# Summary

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**Place:** Institute for Criminology and Sociology of Law: Faculty of Law, University of Oslo

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This thesis is an inquiry into the definitional struggle among international actors on whether the Darfur-conflict constitutes genocide. Based on reports published by international actors I examine how actors have conceptualized the concept of genocide and conducted fact-finding with the aim of answering the main research question: *Why does the international community disagree on whether the Darfur-conflict constitute genocide.*

In 2003 a conflict between the non Arab groups the Fur, Masaalit and Zaghawa and the Government of Sudan aligned with the Arabic militia group Janjaweed in Darfur intensified and arose to international attention. Actors within the international community have largely agreed upon that the Government of Sudan has committed massive abuse against civilians in Darfur, but actors, such as the United States government, the inter-governmental organizations the United Nations and the two non-governmental organization Amnesty International Physicians for Human Rights disagree on whether the abuse constitutes crimes against humanity or genocide. These actors have conducted fact-finding into the conflict and published reports with their main findings and analysis of this conflict in relation to the concept of genocide.

Based on three main theoretical frameworks I have analyzed these reports. These frameworks are: Scott Straus' (2001) identification of 15 different genocide definitions that can be conceptualized based on five core dimensions: (1) whether the definitions holds group annihilation as primary goal, (2) how intent is defined, (3) mode of annihilation, (4) agent of annihilation, and (5) target of annihilation; William Schabas'(2009) understanding of the

definition of genocide stipulated in the 1948 Genocide Convention as a three-folded concept: (1) the physical element which describes the actual physical act, (2) the mental element that describes the intention the physical act must be committed with and (3) the element of protected groups which identifies the specific groups that must targeted; and Michael Bothe's (2007) six stages – (1) initiation, (2) determination of mandate, (3) taking evidence, (4) evaluating evidence, (5) statement of facts and (6) reaction – for comparing fact-finding missions.

My inquiries into how the G-word is conceptualized and how they have conducted investigation show that the actors conceptualize the G-word differently and conduct fact-finding differently. Based on the findings I would argue that these differences may explain why the international community – here represented by the US, the UN, AI and PHR – disagree on whether the Darfur-conflict constitutes genocide. Most notably, the Commission adopted a more narrow understanding of the concept than the other actors leading to a conclusion that acts of genocide did not occur. This conclusion may have been further influenced by a mandate that required them to follow international criminal law more strictly than the other actors. The US, PHR and AI also adopted the framework of international criminal law to describe the Darfur-conflict, but they were not required to strictly follow the legal framework. The different interpretations by the PHR, the US and AI indicate that the different actors have selectively analyzed elements of the definition. This suggests that the definition in the Convention is used in order to strengthen their arguments. The definition is, in other words, used subjectively. The different elements of the law are applied primarily when it fits what the actors has found or want to present.







# Takk

Mange har hjulpet meg i arbeidet med denne oppgaven, og de fortjener alle en stor takk.

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# Table of contents

- 1 Introduction ..... 1**
  - 1.1 The puzzle..... 1
  - 1.2 Research questions and scope..... 2
  - 1.3 The Darfur-conflict..... 4
  - 1.4 Supranational Criminology..... 5
  - 1.5 Outline ..... 7
- 2 Methodology ..... 8**
  - 2.1 Darfur – a case study ..... 8
  - 2.2 Actors..... 10
  - 2.3 Selection and evaluation of reports ..... 14
    - 2.3.1 Reports by international actors..... 14
    - 2.3.2 Evaluation of the reports ..... 19
  - 2.4 Analytical approach..... 22
- 3 Darfur: From a Humanitarian Crisis to a Crime Scene..... 26**
  - 3.1 Introduction ..... 26
  - 3.2 Sudan and Darfur..... 26
  - 3.3 The outbreak of the Darfur- conflict..... 28
  - 3.4 International response..... 30
- 4 Conceptualizing genocide ..... 37**
  - 4.1 Introduction ..... 37
  - 4.2 Theoretical framework ..... 37
    - 4.2.1 The 1948 Genocide Convention..... 40
  - 4.3 State: the United States..... 48
    - 4.3.1 Physical element..... 49
    - 4.3.2 Mental element..... 50
    - 4.3.3 Element of protected groups ..... 53
  - 4.4 IGO: the United Nations..... 54
    - 4.4.1 Physical element..... 54
    - 4.4.2 Mental element..... 55
    - 4.4.3 The element of protected groups ..... 64
  - 4.5 NGOs: Amnesty International, Physicians for Human Rights ..... 66

4.5.1	Physical element.....	67
4.5.2	Mental element.....	69
4.5.3	The element of protected groups.....	71
4.6	Conclusion.....	72
<b>5</b>	<b>Documenting abuse.....</b>	<b>75</b>
5.1	Introduction.....	75
5.1.1	Fact- finding.....	76
5.1.2	Theoretical framework.....	77
5.2	IGO: the United Nations.....	80
5.2.1	Initiation and mandate.....	80
5.2.2	Taking of evidence.....	83
5.2.3	Evaluating evidence.....	89
5.3	State: the United States.....	92
5.3.1	Initiation and mandate.....	92
5.3.2	Taking of evidence.....	93
5.3.3	Evaluating evidence.....	96
5.4	NGOs: Amnesty International, Physicians for Human Rights.....	97
5.4.1	Initiation and mandate.....	97
5.4.2	Taking of evidence.....	99
5.4.3	Evaluating evidence.....	102
5.5	Conclusion.....	104
<b>6</b>	<b>Concluding remarks.....</b>	<b>107</b>
	<b>References.....</b>	<b>112</b>
	<b>Abbreviations.....</b>	<b>118</b>

<b>Table 1:</b>	Major reports used for the analysis of the application of the concept of genocide and fact-finding procedures in the Darfur-conflict.....	19
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# 1 Introduction

## 1.1 The puzzle

The conflict in Darfur in Sudan between the three local groups Masaalit, Zaghawa and Fur, and the Government of Sudan aligned with the militia group Janjaweed intensified during 2003. This resulted in one of the worst situations of mass atrocities the last decade. Despite being a precarious and chaotic situation demanding immediate response, the international community has engaged in what may be described as a "callous exercise in semantics", discussing whether the situation amount to genocide or "simply" crimes against humanity or war crimes, instead of actually stopping the atrocities (Miles 2006:251). The international community, here represented by the government of United States (US), the inter-governmental organization United Nations (UN), and the two non-governmental organizations Amnesty International (AI) and Physicians for Human Rights (PHR), have disagreed on whether the Darfur- conflict is genocide. Reports and statements by these actors give a clear image of the definitional struggle over the conflict. AI writes in July 2004 that "although some human rights abuses committed could be interpreted as [genocide], the evidence remain inconclusive".<sup>1</sup> In September 2004 The US Secretary of State Colin Powell held a speech to the Senate accusing the government of Sudan of committed genocide in Darfur. He stated that "when we reviewed the evidence compiled [...] we concluded, I concluded, that genocide has been committed genocide in Darfur and that the Government of Sudan and the Jingaweit bear responsibility".<sup>23</sup> In January 2005 the UN appointed investigative team concluded, that "no genocidal policy has been pursued and implemented in Darfur by the Government authorities".<sup>4</sup> A year later, in January 2006, the PHR argued that genocide have occurred in Darfur. They write that their report "is adding to the mounting evidence of [...] genocide perpetrated [...] in Darfur".<sup>5</sup> This thesis examines this

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<sup>1</sup> Amnesty International, *Rape as a Weapon of War: Sexual Violence and its Consequences*, July 18<sup>th</sup> 2004:30 (hereafter AI 2004)

<sup>2</sup> Colin Powell, *The Crisis in Darfur: Testimony before the Senate Foreign Relations*", US State Department, September 9<sup>th</sup> 2004) 2004:5 (hereafter Powell 2004)

<sup>3</sup> Jingaweit is used by the US. Janjaweed refers to the same organizations and is used by the other actors. Both terms are used in this these, but, to be sure, they refer to same.

<sup>4</sup> The International Commission on Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary- General*, September 18th 2005 (hereafter COI 2005)

<sup>5</sup> Physicians for Human Rights, *Darfur- Assault on Survival: A Call for Security, Justice, and Restitution*, January 2006 (hereafter PHR 2006)

disagreement of whether Darfur constitutes genocide or not. The statements above are retrieved from reports the actors have published following the investigation into the situation. I analyze in this thesis the reports with the purpose of exploring how the concept of genocide is understood and applied by the international community, in a case of mass atrocities. Furthermore, I scrutinize how the actors' investigative process leading to the reports, may have influenced their conclusions.

## 1.2 Research questions and scope

When conflicts and cases of mass violence are detected they may be understood and framed differently. According to Zacher et.al (2014) the Darfur-conflict has been framed in five different ways; (1) *the insurgency frame* holds the Darfurian rebels responsible for the violence; (2) *the civil war frame* holds both parties accountable and suggest a form for peace agreement as the solution; (3) *the humanitarian emergency frame* does not focus on the violence, but on the displaced and the need for humanitarian aid; (4) *the crime frame* depicts the violence as criminal; (5) *the violence-but-not-criminal frame* depicts the violence not as criminal, but still as disproportionate and aggressive.

How conflicts and atrocities are framed have huge impact on how the international community may and can react. For instance, in the case of Rwanda, the UN Secretariat's decision to label the conflict as civil war rather than genocide, made the UN force in Rwanda useless, as their guidelines did not allow them to intervene actively to stop the killing in cases of civil war (ibid). In the case of Darfur, the crime frame has dominated the international response (ibid, see also chapter 3), but no active and effective military intervention has yet been initiated to stop the violence (Lippmann 2007). However, as a response to the strong crime frame, the International Criminal Court (ICC) initiated in June 2005 a criminal investigation into the situation in Darfur. Thus far, the investigation has led to several arrest warrants, among others on the President of Sudan, Omar al-Bashir, for accounts of war crimes, crimes against humanity and genocide. However, few of the suspects has thus far been delivered to the ICC. Although the crime frame has dominated the characterization of Darfur, different terms – war crimes, crimes against humanity and genocide – has been used to describe the conflict. And, as showed by way of introduction, the actors disagree in particular in whether the conflict amount to genocide.

This definitional struggle over the Darfur-conflict led me to my main research question:

*Why does the international community disagree on whether the Darfur-conflict is genocide or not?*

While this question could be approached from a variety of different theoretical perspectives, I have decided to focus on two perspectives in particular. The main research question has therefore been further divided into two distinct questions, which are explored separately in two different chapters. First, I examine *how the G-word is conceptualized among actors reporting on the Darfur-conflict*. The aim of this is to scrutinize how actors apply and interpret the concept of genocide regarding cases of mass atrocities. Secondly, I examine *how the same actors documented the abuse in the Darfur-conflict*. This part intends to dissect the actors' fact-finding process and analyze how their approach may have influenced their conclusion as to whether the conflict should be defined as genocide. In order to answer these two questions, I have adopted three main theoretical frameworks. These frameworks will be elaborated further later, but let me briefly present these. In chapter 4 I utilize two theoretical frameworks: Scott Straus' (2001) conceptualization of the concept of genocide in his article "Contested meanings and conflicting imperatives: a conceptual analysis of genocide" and William Schabas' (2009) three elements that divide the definition of genocide set out in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in his book *Genocide in International Law*.<sup>6</sup> Straus identifies 15 different genocide definitions and argues that these definitions differ in relation to five core dimensions. Schabas divides the 1948 Genocide Convention into the physical element which describes the actual physical act, the mental element that describes the intention of the physical act and the element of protected groups which identifies the groups that must be targeted. The theoretical perspective, utilized in Chapter 5, is Michael Bothe's (2007) framework for comparative research on fact-finding missions. In his article "Fact-finding as a means of ensuring respect for international humanitarian law" Bothe distinguishes between the 6 stages: (1) initiation, (2) determination of mandate, (3) taking evidence, (4) evaluating evidence, (5) statement of facts and (6) reaction which may be helpful in comparing any fact-finding procedures.

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<sup>6</sup> Hereafter 1948 Genocide Convention or Convention.

My main research questions is, in other words, limited to how the concept of genocide is conceptualized among actors reporting on the conflict, and how they have conducted their investigation. However, the question is also limited in several other respects. First, it is limited in the sense that I will only analyze some of the main actors within the international community, namely the United Nations at the international level; the United States (US) at the national or state level; and Amnesty International and Physicians for Human Rights at the non- governmental level. Second, the question is limited to a few selected reports published by the actors. The actors as well as the main reports will be thoroughly presented in Chapter 3. Third, the thesis is limited to the extent that I will not say much about possible political motives of the different actors. While all actors probably have their own political agenda for launching investigation into the Darfur-conflict, this thesis is not concerned with the actors' agenda. Fourth, this thesis will not engage in the extensive debate regarding whether or not genocide has actually been committed in Darfur (see for instance Trahan 2007, Patrick 2005). Instead, the aim of this study is to analyze *how* the international community has *described* the conflict – how they understand the concept of genocide and whether their fact-finding process may have influenced their conclusion on the situation in Darfur.

### **1.3 The Darfur-conflict**

The Darfur-conflict will be more thoroughly introduced in the next chapter, but let me briefly present some important actors and important events in the conflict already at this point. The Darfur-conflict emerged in 2003 when the Government of Sudan, aligned with the militia group Janjaweed, responded to increasing rebel activity in the region by attacking civilians belonging to the Fur, Masaalit and Zaghawa – three of the largest groups in Darfur. Members of these groups had earlier established the rebel groups Sudan Liberation Movement/ Army (SLM/A) and the Justice and Equality Movement (JEM). These two organizations believed that Darfur was being politically and economically marginalized by the central authorities. They launched at the beginning of the century smaller attacks on local police stations in order to raise awareness of their situation. While these attacks initially were considered insignificant by the Government, the attack launched by the rebel groups in April 2003 on the Government's military base in the region's main city El Fashir was more organized and caused more damage than any attack before. The Government responded at first with counter-attacks against the rebels, but the attacks escalated into targeting civilians belonging to the



Fur, Masaalit and Zaghawa. These attacks include bombing, destruction of villages, killing, raping, looting, forced displacement and destruction of means of survival (Rothe and Mullins 2007). Several attempts of negotiating peace agreements were made (Lippmann 2007), but it was not until 2011 the parties signed a deal that so far seems to have resulted in some stability in the region.<sup>7</sup> By this time UN estimates that several millions are displaced and even more is dependent on humanitarian assistance.<sup>8</sup>

## 1.4 Supranational Criminology

Mass atrocities – like the one which took place in Darfur – has been thoroughly studied by many disciplines, but the discipline of criminology has been slow to recognize international crimes as a field of inquiry (Smeulers and Haveman 2008; see also Hagan and Raymond-Richmond; Yacoubain 2000; Rothe and Friedrich 2006). International crimes are mass atrocities that is recognized as "unimaginable crimes, that deeply shock the conscience of humanity" and which "threaten peace, security, and the well-being of the world" (UN General Assembly). The crimes that today are recognized as international crimes are war crimes, crimes against humanity and genocide. Yacoubain (2000) presents four explanations for the lack of focus on international crimes within criminology: funding restrictions, local research focus, limitations of research methods and lack of education. Although all reasons are important aspects to address and deal with, the criticism of a localistic approach focusing on local space to the benefit of the global or transnational may arguably be the root cause, because a broader view is necessary to capture these crimes. This explanation relates to what Ulrich Beck (2002) has characterized as "methodological nationalism". Working within such a methodological paradigm, scholars has adopted "a nation state outlook on society, law, justice and history" (Beck in Aas 2007:176). Applied to the dicipline of criminology, it means that criminologists have studied crimes committed *within* states, they have failed to recognize the crimes committed *by* states. Arguably, this methodological nationalism has created a "blind spot for crimes and human rights violations committed by states themselves" (Aas 2007:183). Contributing to reduce this "blind spot" has been a motivating force behind this thesis. There have been few attempts by master students, at least at the Departement of Criminology and Sociology of Law at the University of Oslo, to address questions relating to

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<sup>7</sup> <http://www.globalis.no/Konflikter/Sudan-Darfur>

<sup>8</sup> <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm>

international crimes or international criminal justice in their theses.<sup>9</sup> An ambitious yet important goal of the thesis is to raise awareness of international crimes as a field of inquiry. This may be easier said than done, as another explanation for the "blind spot" could be that the lack of focus is due to the deliberate "denial" rather than unintended insufficient awareness of such crimes (Cohen 2001 in Smeulers and Haveman 2008:11). According to Cohen, situations of mass atrocities are too disturbing; consequently, facts often are blocked out, reinterpreted or even rationalized away (ibid). However, this argument does not explain why only the discipline of criminology has been reluctant to study mass atrocities. Interestingly, Cohen argues that gravity of a wrongdoing may actually be the cause of why the crimes are overlooked. I argue, however, that the gravity of the crime makes the crime even more important (and possibly more interesting) to study. My argument is in accordance with Smeulers and Haveman (2007), who argue that there are no good excuses for this lack of attention of international crimes. In fact, they have called for a new subfield within criminology, namely *supranational criminology*, which would exclusively focus on war crimes, crimes against humanity and genocide. In short, this new research field would, according to Smeuler and Haveman, deal with (1) the conceptualization of international crimes, (2) mapping of these crimes, (3) searching for possible explanations, theories and models explaining these crimes, (4) examine ways to conduct post-conflict justice and (5) discuss preventive and repressive strategies. My thesis should be seen as a contribution to the first task. This task is particularly concerned with defining war crimes, crimes against humanity, genocide and similar concepts, and conceptualizing what international crimes are, and what concepts used in scholarly research means and signifies.<sup>10</sup> By examining how key actors within the international community applies the concept of genocide in a specific case of mass atrocities, the thesis will provide insight into how the concept is understood and in what ways it should be subject to criminal investigation. Not only will profound conceptual difference may limit the value of cross-regional and cross-historical studies (Strauss 2001), conceptual contestation among activists, journalists, and especially politicians may have "life-and-death implications for non-combat casualties" (Miles 2006:251).

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<sup>9</sup> See for instance Enger (2007), Lohne (2009), Haaland (2012), Håkonsholm (2012), and Bergvall (2013)

<sup>10</sup><http://www.supranationalcriminology.org/framespage.html>

## 1.5 Outline

This thesis is divided in six chapters. **Chapter 2** – Darfur: From Humanitarian Crisis to a Crime Scene – presents background information on Sudan and Darfur as well as a brief overview of the conflict and the international response to the conflict. Sudan has been in civil war almost since they gained their independence in 1956. In early 2000 peace negotiations between Government and the southern region began, but almost before they started rebels started revolting in the western region, Darfur. This conflict became quickly a matter on the agenda of international actors, and various actors warned about the escalation of violence. Now, over a decade since the conflict began, the region is beginning to see some stability. **Chapter 3** – Methodology – presents my methodological approach in this thesis and includes a presentation of the actors sought out to represent the international community and their reports. This thesis is a single-case study in which the empirical reading has been guided by specific theoretical. In **Chapter 4** – Conceptualizing genocide – I examine how the actors have applied and interpreted the concept of genocide in their reports. The actors use the same definition of genocide, namely the definition set out in the 1948 Genocide Convention, but apply and interpret the definition differently. **Chapter 5** – Documenting Abuse in Darfur – presents the actors' fact-finding process and discusses how their approach may have influenced their conclusion as to the conflict constitutes genocide. The main findings show that the actors differentiate in relation to why and how they conducted fact-finding, and in what they claimed to be evidence. These differences influenced their ultimate genocide conclusion. In **Chapter 6** – Concluding remarks – I summarize the main findings and make some concluding remarks on the implications of these findings.

## 2 Methodology

Methodology relates to how the researcher has solved his research question(s). According to Halvorsen (2008) methodology is the dogma of how to collect, organize, process, analyze and interpret social facts so that other can follow our steps and progress”. In this chapter I will describe how I have solved my research question: *why does the international community disagree on whether the Darfur- conflict is genocide?* In short, I have answered this question by conducting a document analysis of reports on the conflict published by the United States, the United Nations, Amnesty International and Physicians for Human Rights. I will in the following give an account of (1) why these actors were chosen and what kind of institutions they represent, (2) how the reports published by these actors were selected and collected and (3) how I have analyzed the documents.

### 2.1 Darfur – a case study

Early in the research process decisions regarding *what* and *who* will be subject of inquiry and further *how* this study will be undertaken needs to be addressed. These reflections refer to the project’s research design (Johannessen et al. 2010). Qualitative methods include a variety of different research design such as phenomenology, ethnography, grounded theory and case studies. My thesis is a case study. *Case study* is a research design that involves detailed and intensive analysis (Bryman 2012:709). While it is possible to conduct comparative study of two or more cases, this is a single-case study. A single-case study is a research design in which the researcher engages in a thorough and detailed analysis of one particular case (Bryman 2012:709). Such in-depth analyses are often carried out in order to capture the complexity of the specific case, and rich information about the entity is necessary to do that (Bryman 2012:66).

What exactly counts as a case is disputed. While it is common to understand a case as for instance a single family, school, organizations, etc., (Bryman 2012:66), a more sophisticated definition understands a case as a particular theoretical phenomenon such as revolutions, regimes, economic systems or different types of personalities (Bennett 2001 in Ringdal 2009:148). While the first understanding clearly would recognize the Cuban missile crisis as a single event, and subsequently as a case, the latter perspective conceptualizes the Cuban missile crisis as several different types of cases such as coercive diplomacy or crisis

management (ibid). Similarly the Darfur-conflict could be viewed as a single event, but it could be more accurate to adopt Bennett's understanding and view the Darfur-conflict as an event involving different types of cases such as mass violence, crisis management, state crime or as I see the conflict: as an example of a case where different actors in the international community disagree about the nature of the atrocities. More specifically, they differ in opinion as to what extent the violent actions should be interpreted as genocide or not.

Yin (2009 in Bryman 2012:70) distinguishes between whether the case is *unique* or *typical* of its kind. Arguably, the Darfur-conflict might be interpreted as being both unique and typical depending on the criteria used for comparison. The Darfur- conflict is a *typical* case because the response by the UN and several non- governmental organizations (NGOs) resembles their response in earlier cases of mass atrocities, most notably in Rwanda and Bosnia-Herzegovina.<sup>11</sup> In all three cases the UN and NGOs have conducted investigation and fact-finding. In addition, all three UN- initiated investigations resulted in international prosecution; in Rwanda and Bosnia- Herzegovina in the form of establishment of ad- hoc international tribunals, while in Darfur as a referral to the permanent International Criminal Court. While the NGOs did not hesitate to describe all three situations of mass atrocities as genocide, the UN has however, been reluctant to use the G- word.

The Darfur-conflict is a *unique* case because an alleged genocide never before has been so thoroughly and extensively documented. Contributing to this uniqueness is the American approach to this conflict. Not just did they for the first time officially use the G-word to describe an ongoing conflict they also led the first state led investigation into an alleged genocide in another state. In contrast to Rwanda, the American policy toward the Darfur-conflict is characterized by an active use of the G-word, by both the House of Representatives and the executive branches of the government. In addition to use of the G-word by the US, the Darfur conflict is also unique because the investigative team established by the UN was tasked to make a formal decision of whether genocide had occurred or not. The extensive use of the G-word by different actors presents in other words, the Darfur conflict as a suitable case to study the international community's understanding and application of the concept of genocide in relation to an ongoing case of mass atrocities.

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<sup>11</sup> Non- governmental organizations are non-profitable organizations established with a specific purpose independently of governments. See 1.2 for more information.

In his article “Case studies: Types, Designs, and Logics of Inference”, Jack Levy (2009) differentiates between different types of case studies based on the theoretical purpose and research objectives. He distinguishes mainly between *ideographic case studies* aiming at describing, explaining and/ or interpreting specific case(s) and *hypothesis generating or testing case studies* which aims to generalize beyond the data and develop more general theoretical frameworks. My case study does not aim to develop general theories, but rather to describe how and interpret why different actors in the international community reached different conclusions as to whether the Darfur-conflict could be interpreted as genocide. My thesis is therefore an ideographic case study. Levy distinguishes furthermore between *inductive* and *theory-guided cases studies* within ideographic case studies. While inductive cases lacks a framework to guide the empirical analysis and aims at describing all aspects because they are interconnected, theory guide cases studies are guided by conceptual framework(s) that directs the empirical reading towards relevant and specified aspects while actively neglecting others. Similarly, Yin (2007 in Johannessen et al. 2010) distinguishes between a theoretical and a descriptive approach to case studies. While the latter often concerns cases in which the researcher has little knowledge and few or no theoretical assumptions, the former is preferable and means that the researcher’s theoretical perspectives structure and guide the process of analysis. In this thesis, the following two main theoretical questions have guided the empirical analysis: firstly, how the notion of genocide may be conceptualized; and secondly, how fact-finding missions can be compared. I will return to these questions in section 2.4 where the analytical approach will be presented more thoroughly.

## **2.2 Actors**

The purpose of this thesis has been to examine how the concept of genocide is understood and applied by the international community in a case of mass atrocities. While the term "international community" addressed in the Vienna Convention refers all states in the world, more recent use of the term also includes inter- governmental organizations and non-governmental organizations (Fassbender 2009). The General Assembly of the UN stated in their Declaration on the Occasion of the Fiftieth Anniversary of the UN that their work would be more efficient if it was supported by "all concerned actors of the international community, including non-governmental organizations, multilateral institutions, regional organizations

and all actors of civil society" (ibid.:68). In this thesis my understanding of the international community is based on the one by the UN General Assembly. I maintain here that the international community is comprised of states, IGOs and NGOs.

States are the highest authority controlling a defined geographical space or a territory. In order to gain status as a state there must, according to international humanitarian law, exist (1) a specific and limited territory, (2) a permanent population, (3) a form of government that sustain the rule of law and (4) the ability to act in relation to other states (Ruud and Ulfstein 2006). States are commonly referred to as legal subjects this imply that states have rights they can claim and obligations they can incur (ibid).

Inter-governmental organizations (IGO) are organizations established by states in order to solve common problems. Examples of such organizations are the International Telecommunication Union and the Universal Postal Union, two of the oldest IGOs dating back to mid- 19<sup>th</sup> century in which the states have collaborated in order to find common solutions and a common ground. One of the most well-known IGOs is the United Nations. While this organization is characterized by being general and world-embracing, other can be established with specific goals or working methods and concentrated to a specific area or region. The institutional foundation of IGOs is usually manifested in a treaty signed by the member states. This treaty usually also sets out the purpose, scope and structure of the organization. Through establishing binding resolutions within their own organization and creating treaties with other states and organizations IGOs may also be characterized as legal subjects within international humanitarian law. The main differences are first and foremost that organizations do not have their own territory or population. And where states have sovereign power over their territory, IGOs will always be limited in accordance with the treaty establishing the organization. However, as the organization grows the more power is transferred to the secretariat and other permanent bodies, thus making the organization more independent of the member states (Ruud and Ulfstein 2006:106-107).

Non-governmental organizations (NGOs) are unions of individuals who have engaged in collaboration usually with a specific purpose and interests (Ruud and Ulfstein 2006:107-108). NGOs vary in terms of size, structure and working methods. There exist thousands of organizations like these, but the most well-known are often concerned with a specific area such as the environmental organization Greenpeace or the human rights organization Amnesty International. NGOs work in close connection with the UN, but do not have the

same status as states and IGOs. They have indeed, the right to speak and possess often a great deal of power, but their influence is not based on the right to vote. They usually attend conferences as observers (Ruud and Ulfstein 2006).

In order to answer my research question I needed to explore how actors representing these types of institutions defined and described the Darfur-conflict. Representing states in my thesis is the United States. The reason why only the US is selected is simply because they remain the only government who has conducted their own independent investigation into the conflict and also the only state who officially have accused the Government of Sudan of committing genocide. US has become very powerful economically, culturally, politically and military. Since the fall of Soviet Union and ending of the Cold War the US has been one of the most powerful states in the world, and a dominating actor in international politics (Østerud 2014:229). Representing inter-governmental organizations I sought out the United Nations because of their involvement in the conflict having established an independent commission of inquiry to investigate the situation.

The United Nations was founded by 51 states in the aftermath of Second World War in an attempt to reduce the risk of such major conflicts and wars. Today there are over 190 member states. According to the UN Treaty signed in 1951 the UN is supposed to work world-wide towards sustained peace through (1) establishing friendship among states and nations, (2) solving economic, social, cultural and humanitarian problems around the world and (3) promoting human rights. Important in this work is that the UN will be the rendezvous for states (Ruud and Ulfstein 2006:207ff). The UN is divided into 6 principal organs. While the General Assembly is the forum for every member state to claim their right to speak, the Security Council is an organ of only 15 members in which five of them France, Russia, the US, China and Britain are permanent providing them the power to veto any proposed resolutions. This organ is the chief body for securing peace and security. In contrast to the General Assembly which may adopt recommendation, the Security Council may adopt resolutions that are binding for the member state, in so far as none of the five permanent powers put down veto (Ruud and Ulfstein 2006:213). The UN is working for the universal respect of human rights. It is however, an organization by and for states. This means that, despite being established based on a moral code that every human being is equally worth, the organization puts the interest of the members- states first (Thakur 1994).



In this thesis I have chosen Amnesty International (AI) and Physicians for Human Right (PHR) as representing non-governmental organizations (NGOs). These organizations have actively worked for raising awareness of the human rights abuse in the conflict through publishing several reports. They are among the most well-known NGOs within the field of human rights. I will briefly present these organizations.

Amnesty International was founded in 1961 and has become a leading global movement on human rights issues enjoying over 3 million activists in over 150 countries. With the vision that every men, women and children should enjoy the human rights, AI works to uncover human rights abuse and advocate through extensive networking that every government should be observant and implement human rights standards.<sup>12</sup> In 1977 they received the Nobel Peace Prize for their excellent promotion of universal human rights.<sup>13</sup>

Physicians for Human Rights was founded in 1986 based on the idea that physicians, scientist and other health care professionals could be essential in uncovering human rights abuse because of their specific sets of skills and credibility.<sup>14</sup> Central in the establishment was the recognition that war and violent conflicts brings about a whole range of health consequences. Both physical and psychological, in which health professionals not just are familiar with, but possess in-depth knowledge of how to collect necessary information that would provide concrete evidence (Hannibal and Lawrence 1996). PHR is organized with the view of being able to (1) document directly from the field of mass atrocities through forensic science, medical examinations and epidemiological research, (2) advocate their findings and concern for human rights abuse, mainly through publishing reports and (3) to educate and train health care professionals to help victims of war and mass atrocities (ibid). PHR have conducted training programs around the world, and they work in close connection with the Public Health and Medical Schools at Harvard University. This connection played an important role in their work in Darfur as leading figures at the program also serve as members of PHR. Important cornerstones of their work so far includes the first documentation of use of chemical weapons in Iraq against the Kurds in 1988, the exhumation of mass graves in conflict in the former Yugoslavia and producing forensic evidence used in the trials at the International Criminal Tribunal for Rwanda in 1996. They shared the Nobel Peace Prize for their active work in the International Campaign to Ban Landmines in 1997. The documentation of the destruction of

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<sup>12</sup> <http://www.amnesty.org/en/who-we-are>

<sup>13</sup> [http://nobelpeaceprize.org/en\\_GB/laureates/laureates-1977/](http://nobelpeaceprize.org/en_GB/laureates/laureates-1977/)

<sup>14</sup> <http://physiciansforhumanrights.org/about/>

livelihood and means of survival in Darfur between 2003 and 2005, documenting of tortured detainees in Iraq, Afghanistan and at Guantánamo. The organization showed in 2010 how CIA medical personnel developed more efficient interrogation techniques that amounted to torture.<sup>15</sup>

## **2.3 Selection and evaluation of reports**

In answering my research question – i.e. why the concept of genocide remains contested as an accurate depiction of the (on-going) atrocities in Darfur – specific reports published by the actors described above were singled out because of their specific discussion of what kind of international crime the violence in Darfur constitute. Before I evaluate the reports as source of data let me briefly summarize these reports and their main findings.

### **2.3.1 Reports by international actors**

#### **Amnesty International**

One of the reports selected was published by Amnesty International. This report – “Rape as a Weapon of War: Sexual Violence and its Consequences” – was published in July 2004 and dealt only with abuse of sexual nature directed towards women.<sup>16</sup> The report is divided into nine subchapters, and includes background information on the conflict, presentation of findings of sexual abuse towards women, discussion of consequences of the violence, a discussion of causes to the violence, analysis of findings of sexual violence in relation to international legal standards, conclusions and, lastly, recommendations. The organization has documented that rape has occurred in different forms and at different places, for instance that rape has occurred as a form of humiliation and as part of sexual slavery and that rape has occurred during attacks, during flight and in Internally Displaced Persons settlements. Furthermore, the report argues that the consequences of the sexual violence are devastating and has long- term effects, individually as well as collectively, in the form of negative stigma, medical and mental health problems and changes in the traditional village and household life. In relation to international law, the report argues that as rape has been used as a weapon and constitutes war crimes and a crime against humanity due to its widespread and systematic

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<sup>15</sup> <http://physiciansforhumanrights.org/>

<sup>16</sup> AI 2004

nature. The organization argues, moreover, that other abuse than rape also amount to war crimes and crimes against humanity, but although the abuse could be interpreted as genocide their evidence remain inconclusive. The report suggests means to stop the atrocities to all parties, including the UN and the African Union. The report suggests that the UN should establish an impartial Commission of Inquiry to investigate the situation.

### **Physicians for Human Rights**

The second documented selected by a NGO was the report "Darfur: Assault on Survival - A Call for Security, Justice, and Restitution" published by Physicians for Human Rights (PHR) in January 2006.<sup>17</sup> This report provides overview of the conflict and investigative techniques utilized in the investigation, detailed description of findings from the investigation, an analysis of the findings in relation to international law, steps to compensation victims and repair the community, conclusions and recommendations to the international community as well as the Government of Sudan and the rebel forces. The report argues that "a way of life has been destroyed" as killings, rapes, destruction of villages, looting of cattle and livestock and destruction of other means of survival have been so destructive on families and communities that it is difficult to imagine how traditional life may be rebuilt. These assaults are characterized as "an anti- livelihoods strategy" which the reports argue represents serious violations of international and human rights law. The organization continues to argue that these violations amount to international crime under the 1948 Convention on the Prevention and Punishment on the Crime of Genocide. Furthermore, it is argued that the violations committed in Darfur require reparations through restitution, rehabilitation, compensation, satisfaction and guarantees of non- repetition. PHR recommends that UN authorizes a multinational intervention force to restore law and order, that the international community continues with humanitarian aid and that all available information is handed over to the International Criminal Court so that they can properly conduct criminal investigation.

### **The United States and the Atrocity Documentation Team**

In response to the situation in Darfur the US requested the non-governmental organization Coalition for International Justice to conduct investigation in Darfur. They formed the Atrocity Documentation Team (ADT) and published in September 2004 their report

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<sup>17</sup> PHR 2006

“Documenting Atrocities in Darfur” based on 1136 interviews of Darfurian refugees living in refugee camps in Chad. The respondents’ answers were coded and turned into atrocity statistics. The report includes sections describing the historical and political development of the conflict, the humanitarian crisis, the human rights crisis, ethnographic background of the parties involved in the conflict, the current international response, results from the survey and the survey methodology. The report argues that the result from the survey indicates that attacks followed a similar pattern in which villages first were bombed before soldiers arrived in trucks or on horses and surrounded the village. The soldiers then attacked the villages, killed people and looted personal properties before the village was set on fire. The report explain, furthermore, that the survey indicates a pattern of abuse against members of the non Arab communities in Darfur and includes murder, rape, beatings, ethnic humiliation and destruction of property and means of survival.<sup>18</sup>

The second document selected by the US is the testimony "The Crisis in Darfur" by the US State Secretary Colin Powell to the Senate Foreign Relations in September 2004.<sup>19</sup> This testimony is a speech held by Colin Powell on the situation in Darfur in which he explained and presented the US’ engagement in the conflict, the international response by the UN and African Union and further recommendations to stop the atrocities, and, finally, whether the US’ believed this conflict to be genocide. The State Secretary explained that the situation in Darfur was one of the most difficult situations the international community is facing and that it was imperative that the community came to an agreement on how to deal with the situation. Colin Powell explained, furthermore, that the State Department had launched an investigation into the situation which revealed that the atrocities committed by the Government of Sudan and Janjaweed against non Arab villagers were consistent and widespread and include killings, rapes, burning of villages bombings. He then argued that the Government of Sudan and Janjaweed had committed acts of genocide under the 1948 Genocide Convention and urged the UN to take appropriate actions following the Convention.

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<sup>18</sup> US Department of State, *Documenting Atrocities in Darfur* (Washington, DC: Bureau of Democracy, Human Rights and Labor and Bureau off Intelligence and Research, September 9 2004 (hereafter US State Department 2004)

<sup>19</sup> Powell 2004

## **The United Nations**

The United Nations established in September 2004 the International Commission of Inquiry (the Commission) on Darfur to conduct a three-month long investigation into the Darfur-conflict.<sup>20</sup> The Commission was requested to investigate reports of violations of international humanitarian law (IHL) and international human rights law (IHRL) by all parties, to determine whether acts of genocide had occurred, to identify perpetrators of such violations and the suggest means to ensure accountability of the ones responsible for the violations. In January 2005 the Commission published their report entitled Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General; a comprehensive document of over hundred pages. The report is divided into seven sections: the first, provides information about the Commission's role and on the historical and social background of the conflict; the second, presents findings of atrocities committed by all parties and a legal analysis of the atrocities in relation to IHL and IHRL, and in furtherance whether the violations amount to international crime, i.e. war crime or crime against humanity; the third, provide in-depth analysis of whether the atrocities amount to the international crime genocide; the fourth, identifies the perpetrators of the violations of international crimes; the fifth, presents mechanisms to ensure accountability for the crime committed in Darfur; and in the sixth, the Commission provides a conclusion and recommendations. The Commission found in relation to the first task of investigating report of violations of IHL and IHRL that both parties, i.e. the Government of Sudan/Janjaweed and the rebel groups (although substantially less than the Government and Janjaweed) have committed a number of violations of IHL and IHRL and that some of these amount to war crimes. The Commission argues also that the violations of Government of Sudan and Janjaweed amount to crimes against humanity due to the widespread and systematic nature of the violations. In relation to the second task of determining whether acts of genocide had occurred the Commission concluded that acts of genocide did not occur because one constitutive element of the definition applied was absent, namely the requisite element that the perpetrators must have acted with "intent to destroy, in whole or in part, [the targeted group] as such". Nevertheless, the Commission argues that one should not rule out the possibility that individuals, including government officials acted such intent. With regard to the third task of identifying perpetrators of international crimes, i.e. war crimes, crimes against humanity and genocide, the Commission found that officials of the Government of Sudan, members of the militia Janjaweed, members of the rebel groups, and

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<sup>20</sup> COI 2005

certain foreign army officers have acted on personal capacity. Some individuals within these groups/institutions have also been identified to be responsible for joint criminal enterprise to commit international crimes and for planning/ordering or of aiding and abetting in committing such crimes. The names of individuals identified by the Commission as perpetrators of international crimes are withheld from the report, but have delivered a list of the names to the UN Secretary-General with a recommendation that the list should be handed over to a competent prosecutor. In relation to the third task of suggesting measures to ensure that the ones responsible are held accountable the Commission strongly suggested that the UN Security Council should refer the situation to the International Criminal Court (ICC) arguing that many of the alleged crime have been widespread and systematic, and thereby meeting the threshold of the Court, and that the Sudanese judicial system has been unable and unwilling to stop the impunity of the atrocities. All the major reports described here and used in this thesis are listed in table 1.

Before I go on to evaluate these reports however, let me make a quick remark regarding a few reports that could have been included yet were excluded from my material. In searching for reports in the Darfur-conflict, I retrieved several documents from the NGOs Human Rights Watch (HRW) and International Crisis Group (ICG). The reports from HRW depicted the situation as criminal using terms such as war crimes and crimes against humanity.<sup>21</sup> In another report, they also accused the Government of Sudan of implementing a policy of ethnic cleansing.<sup>22</sup> But despite neatly fitting the crime frame as described by Zacher et.al (2014) the reports by Human Rights Watch has not been thoroughly studied because they do not use the concept of genocide. The report "Darfur: Failure to Protect" published by ICG used the G-word, but not in an active way. In fact the organization argued against using the terms war crimes, crimes against humanity or genocide to describe the conflict. The report states that:

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<sup>21</sup> Human Rights Watch, *Darfur in Flames: Atrocities in Western Sudan*, April 2<sup>nd</sup> 2004

<sup>22</sup> Human Rights Watch, *Darfur destroyed: Ethnic cleansing by government and militia forces in Western Sudan*, May 2004

*"International Crisis Group uses the term "atrocities crimes" advisedly. The extensive debate over whether genocide has occurred or "only" crimes against humanity or war crimes is misplaced. Whether or not any party to the conflict acted with the intent "to destroy, in whole or in part, a national ethnic or religious group, as such" can only be properly determined through a credible investigative and judicial process".<sup>23</sup>*

Instead of presenting arguments in favor or against the conflict being genocide, the organization takes on a more neutral standing arguing that it is inappropriate and misplaced to engage in a debate over whether the situation qualify as crimes against humanity or genocide. While reports by ICG have been excluded because the organizations actively refrain from using the concepts of international crime such as war crimes, crimes against humanity and genocide, the selected reports have been analysed precisely because of actively use the concepts.

Table 1: Major reports used for the analysis of the application of the concept of genocide genocide and fact-finding procedures in the Darfur-conflict

<b>Organization/ Institution</b>	<b>Title</b>	<b>Date</b>	<b>Pages</b>
Amnesty International	Rape as a Weapon of War: Sexual Violence and its Consequences	19.07.04	35
United Nations	The Report by the International Commission of Inquiry on Darfur to the United Nations Secretary- General	25.01.05	176
The United States	Documenting Atrocities in Darfur	09.09.04	8
The United States	The Crisis in Darfur	09.09.04	6
Physicians for Human Rights	Darfur: Assault on Survival- A Call for Security, Justice, and Restitution	01.01.06	67

### 2.3.2 Evaluation of the reports

Analysis of documents stands out from data the researcher has collected in the field because the documents are written by others and with another purpose than the researcher's intention. This means that it is important to evaluate the documents (Thagaard 2009). In order to compensate for this distance from the data, it is possible to assess and evaluate documents based on the four criteria *authenticity*, *credibility*, *representativeness* and *meaning* (Scott 1990 in Bryman 2012:544). While authenticity relates to whether the document is genuine,

<sup>23</sup> International Crisis Group, *Darfur: The Failure to Protect*, March 8<sup>th</sup> 2005CG – Failure to Protect 2005

the question of credibility relates to whether the document is free from error and distortion. Representativeness concerns whether the text is typical of its kind. And at last, the question of meaning relates to whether the document is clear and comprehensible.

These reports have been retrieved through the internet and the actor's homepage. Although the web can be hacked, this easy availability on the internet and the widely use of these reports in scientific research is a clear indication that these documents are genuine, and indeed *authentic*. Since I am not examining whether the actor's description represents real life in Darfur I am not concerned whether the information in the reports are right or wrong. Rather, the aspect of credibility relates to whether the report is a credible depiction of the actor's point of view. Similarly, the question of *representativeness* relates to whether the conclusion in the reports is representative of the actor's position on the question of genocide in Darfur.

The first document deriving from the US was in fact written by the NGO Coalition for International Justice (CIJ) and cannot therefore be viewed as an official document by the state. CIJ was founded in 1995 in order to support and promote the ad-hoc international tribunals for Rwanda and the former Yugoslavia. Later the organizations have also supported criminal and transitional justice initiatives for Cambodia, East Timor, Sierra Leone and most recently Darfur. Their main work includes advocacy and public education campaigns in order to influence decisions-makers around the world, but mainly in Washington. In March 2006 the organization closed its operations stating it was not intended to be a permanent institution.<sup>24</sup> CIJ's report was however, based on investigation requested by the US State Department and accomplished in collaboration with the Department, and furthermore used as evidence in the second document deriving from the US. This second document is a speech by an American politician. Although the document is a speech by only one American politician it arguably presents a credible and representative depiction of the official American viewpoint. Not only was the American politician the US State Secretary which gives the speech authoritative power, but the House of Representatives had already passed a resolution calling the Darfur conflict genocide providing consensus among American politicians on the use of G-word. The report by the PHR is both credible and representative because it remains one of

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<sup>24</sup> <http://sudan.uconn.edu/cij.htm>



few reports written by an organization on the conflict and is presented as the key work on the conflict on the organization's homepage.<sup>25</sup>

The report published by AI reveals nothing about who is responsible for the research or who has written the document. It is, however, nothing that indicates that the report cannot be taken as a trustworthy depiction of the organization's stand. The report remains one of the largest and most comprehensive documents published by the organization on the conflict. This does however, not mean that the report is automatically representative of the actor's official policy. The actor has published reports after the selected document here was issued. Initial search on the organizations does not indicate that they have changed their official viewpoint away from the selected report. The report may thus, be taken as key document published by the organization.

In the case of UN the report by the Commission is only one report out a huge body of documents published by the UN-system. The report is however, a key document because it derives from a commission that the Secretary-General established in order to investigate the situation. That the Security Council has not criticized or undermined the report, but acted on the Commission's recommendation and referred the situation to the ICC suggests that the report should be taken as both representative and credible. The report may therefore be interpreted as the official position of the UN.

Although all of the actors have been actively involved in documenting abuse in Darfur, the political agenda and purpose behind the reports varies. While the US was interested in facts that could help them to decide whether they could describe the situation as genocide (Totten and Markusen 2007), the UN requested a report that focused on the legal characteristics of the situation in Darfur applying international humanitarian law and international human rights law to assess the violence mainly with the view to ensure individual criminal accountability (Yewen in Bergsmo 2013:154). While the long-lasting goal of the NGOs may also concern impunity for mass atrocities, their reports may, based on the presentation of the actors, arguably mainly serve the purpose of raising awareness of human rights abuse. The different agenda behind the reports may suggest that the meaning of the reports may vary and the reports therefore may be interpreted as unclear. However, I am not concerned with the political agenda influencing the reports. I am chiefly concerned with the fact that the reports

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<sup>25</sup> <http://physiciansforhumanrights.org/issues/mass-atrocities/darfur-genocide/>

are clear on the question of genocide. The actors present clear conclusions as to whether the conflict constitutes genocide or not.

## **2.4 Analytical approach**

Analysis of data has two main purposes: first, reducing and systematizing the data without losing relevant information, and secondly, analyzing and interpreting the data trying to find themes and patterns (Johannessen et al. 2010). Describing this process is important within any research, because it increases the transparency of the research, which again is vital for the integrity and evaluation of the findings and conclusions of the research (Bryman 2012).

There are several ways to analyze qualitative data. Johannessen et al. (2010) describes phenomenological analysis which aims to find the meaning of the data, grounded theory which aims to develop concepts and theories, ethnographic analysis which focuses on the researchers' own interpretation and different kinds of analysis of stories and language oriented analysis. He also presents analysis within case studies. In 1.1 I argued that my thesis is a case study, and more specifically a theory-guided case study which means that specific theoretical frameworks have guided my empirical analysis. In a theory-guided case study the different frameworks allow the researcher to focus attention on specific aspects or themes while ignoring others (Levy 2008). As such, a theory-guided case study resembles what Weiss (1994 cited in Thagaard 2010:171) has termed "issue-focused analysis" in which selected themes and topics considered relevant to the research question(s) are extracted from the data and then categorized. Issue-focused analysis may be criticized for presenting an incomplete perspective because the excerpts that are extracted are taken out of its original context (Thagaard 2010). My thesis is vulnerable of this risk because I am not concerned with the entirety of the published reports, but rather specific topics and themes within the reports. In order to compensate for a possible incomplete perspective, Thagaard argues it is important that the excerpt is related to the paragraph it was extracted from. I have in this thesis quoted in length from the reports and discussed the context of the citations to make sure that the meaning of the citation is maintained and to ensure that my interpretations can be evaluated.

As already mentioned briefly, three chief theoretical frameworks have guided my empirical analysis. The two first frameworks relates to how the concept of genocide is conceptualized. The first framework concerns the variety of different conceptualization of genocide. Based on

an extensive literature review, Scott Straus' (2001) lists no less than 15 different definitions of genocide used by scholars and institutions. This list provided me with a framework to identify more detailed how the different actors in the international community had conceptualized genocide in their reports on the Darfur conflict. Furthermore, Straus argues that these genocide definitions differ around five core dimensions, namely (1) whether the definitions holds group annihilation as primary goal, (2) how intent is defined, (3) mode of annihilation, (4) agent of annihilation, and (5) target of annihilation. The first dimension relates to whether it is necessary to destroy the entire group or just parts of the group. The second framework relates to how scholars understand the definition of genocide stipulated in the 1948 Genocide Convention as a three-folded concept: (1) the physical element which describes the actual physical act, (2) the mental element that describes the intention the physical act must be committed with and (3) the element of protected groups which identifies the specific groups that must be targeted. These frameworks provided me with key words to search for in the empirical material. First and foremost I utilized the main dimensions proposed by the scholars. In addition I identified words that appeared frequently in relation to the main dimensions, such as "destruction, intent, purpose, deliberate, killing, targeted groups, membership.

The third and final framework in this thesis pertains what might be labeled the 'fact-finding process'. Michael Bothe (2007) argues that any fact-finding mission could be analytically divided into six distinct stages: (1) initiation, (2) determination of mandate, (3) taking evidence, (4) evaluating evidence, (5) statement of facts and (6) reaction. While all these six stages are useful when comparing different investigations (including those related to e.g. war crimes, crimes against humanity and genocide), not all these stages were used in my thesis. I was primarily concerned with determination of mandate, taking of evidence and evaluation of evidence. These terms are abstractions of a rather complex process and it was therefore necessary to identify key words that could guide my reading further. I therefore expanded the search in the reports for each of the stages. For instance, the word mandate was expanded to include purpose and aim, while taking evidence was expanded to include working methods, investigation and techniques. In order to find how the actors have evaluated their evidence words such as strong, weak, evidence, proof, circumstantial, indicative, suggest, believe, confirm, conclude have been key words. All of these key words were found in some of the reports, and therefore utilized to examine and compare the other reports.

The reports have been read several times to ensure that all relevant information has been collected. Following the initial phase of phenomenological analysis in which the point is to gain overview and a broad understanding of the data (Johannessen et al. (2010), I read the entire reports even though there were specific topics within the reports I was particularly interested in. In the next rounds of reading, I was, however, not concerned with the general impression, but with locating and identifying the relevant and specific themes based on the theoretical frameworks. In this process it was necessary to read the documents again and again because I understood more after each time I read the report. While discovering interesting and relevant facts in one report, it was necessary to reexamine the other reports in order to confirm or invalidate whether the other reports also contained this fact or aspect. My findings have been structured in two different ways. It was natural to structure my findings from the reports based on the different actors. This gave me an overview of the different actors. However, as the comparative perspective is important in this thesis, I also structured my findings based on the different themes. While this structure did not provide overview, it offered insight in the different themes and highlighted differences and similarities. Based on these findings it was necessary to read the reports again in order to reexamine some of the findings in light of what the different actors had written in their reports. In this process I utilized tables to organize the data. Tables may be used to structure and organize data in order to visualize connections (Johannessen et al. 2010:171). I created two tables; the first, visualizing how the different actors had applied the genocide definition; the second, describing in detail the fact-finding process of the actors. These two tables demonstrated clearly what the reports and actors had in common and what distinguished them from one another.

Johannessen et al. (2010) distinguishes between three ways to read a text: reflexively, interpretively and literally. (1) A reflexive way of reading data means that the researcher reads the data specifically through his own role and perspectives. The researcher takes into account that he in some way has influenced the collected material and that the material therefore must be interpreted in relation to him. (2) Reading data interpretively means that the researcher tries to understand the meaning behind what the informant says or writes. The main point is that the data is interpreted within a larger context. While an interpretive approach does not focus on the verbatim meaning of the text, but rather what lies behind, this is exactly what a literal way of reading texts focuses on. (3) By reading a text literally the researcher views the text as an analytical object in itself.

I have read the text both literally and interpretively. One of the aims of this study has been to show – through the actor’s arguments – how they reached diverging conclusions as to whether the Darfur-conflict constitutes genocide or not. This requires a literal reading of the text in the sense that it is necessary to extract the exact wording of the reports to accurately illustrate the actor’s point of view. Specific words, arguments and even smaller paragraphs have been extracted to show and compare how each actor has applied the definition of genocide conceptualized in the 1948 Genocide Convention. It is through the literal reading of the reports I have been able to uncover similarities as well as differences between the actors. It has also been important to read the reports interpretively. This mainly a question of interpreting how the actors’ understanding of the genocide definition resembles or diverges from earlier cases in the literature. However, it is also concerns the extent to which the actors methodological approach, mandate, working methods and threshold of findings have affected their conclusion.

# 3 Darfur: From a Humanitarian Crisis to a Crime Scene

## 3.1 Introduction

In this chapter I will give a short introduction of Sudan and Darfur in order to contextualize the Darfur-conflict. I will also present a rather compact summary of the Darfur-conflict before I briefly outline the international response to this conflict in terms of how the conflict was described.

## 3.2 Sudan and Darfur

Sudan is one of the largest countries in Africa. It is located northeast on the African continent and border to Ethiopia, Eritrea and the Red Sea in the east, Egypt and Libya to the north and Chad and The African Republic to the west. Sudan was one of the last African countries to be colonized, but after avoiding the first wave of colonialism in the 19<sup>th</sup> century, they lost its independence to the Anglo- Egyptians in 1916. Although the colonizers wanted to make small adjustments relating governing and administration, their changes resulted in marginalization of rural regions (Prunier in Mullins and Rothe 2007). However, this marginalization of rural regions continued after Sudan gained its independence in 1958, and has been a significant factor to the various rebels against the central authorities (Mullins and Rothe 2007). In 2011 Sudan was split when South-Sudan broke out after a civil war which has almost continuously raged since Sudan became independent. This was the result of a process which may be traced back to 2002 when the Government of Sudan and the leading rebel group in South, Sudan People's Liberation Movement/Army, started peace talks. This was after increasing international pressure to end the world's longest civil war. Then in 2005 the Comprehensive Peace Agreement was signed and the South was given the opportunity to hold a referendum in 2011 to vote for independence. Despite this split, Sudan is still one of largest countries in Africa. Since Sudan became independent, successive military regimes, all of which have gained power through *coup d'état*, have caused instability and undermined democratic values. These regimes have variously imposed an Islamic state ideology, and simultaneously fought cultural pluralism. Sudan has, in fact, only experienced ten year of democracy (1956-1958,

1965-1969 and 1985-1987) (Apsel 2009). General Omar Al Bashir has ruled Sudan since he carried out a *coup d'état* in 1989.



Sudan:

**Capital, Khartoum**

**Area, 1,886,068 km<sup>2</sup>**

**Population, 30,894,000**

Darfur:

**Capital, El Fashir**

**Area, 493,180 km<sup>2</sup>**

**Population, 7,500,000**

Darfur is a region located northwest in Sudan. It borders Chad, Libya and The Central African Republic. The region is roughly the size of France and is populated of around 6 million people. The name Darfur derives from two words: Dar which means homeland and Fur which is the name of one of the largest tribes in the region. Literally the name means ‘the homeland of the Fur’ (Tar 2006). The Fur-sultanate dominated the region from the 17<sup>th</sup> century until late 19<sup>th</sup> century. Darfur was originally a sultanate, but became a part of Sudan in 1917 under the Anglo-Egyptian rule. Despite being the largest region in Sudan in terms of landmass and population, the region has due to its remote location away from the center, been heavily marginalized by the central authorities in northern Khartoum for decades (Rolandsen in Bøås and Dunn 2007). Darfur shares the same cultural diversity as Sudan itself. Between 30 and 60 different ethnic groups or tribes, depending on one’s definition, have been identified in Darfur. Although there are many different groups and dialects, the majority of the Darfurian population is Muslim, speaks Arabic and appears physically similar. The population of Darfur may be divided into two main groups: Arabs and non-Arabs or Africans. The non-Arabs

represent around 75% of the population and the main tribes are the Fur, Masaalit, Zaghawa, Berti, Dagu, Tungur, Midob, Birgid, Albigu, Tama, Bargu, Bediat, Myame, Sngar and Mararit. The rest of the Darfurian population is mainly Arab groups such as Rizigat, Habanya, Beni- Halba, Taisha, Mahamied, Mahrya, Beni Hussein (Yousif ). Although the difference is not clear cut, most of the Arab groups are pastoralists moving around in close connection with the season, while the non-Arab groups are permanent farmers cultivating different crops. These different groups have traditionally coexisted in a symbiotic relationship in which Arab pastoralists grazed their cattle and camels on the non-Arab land short periods of the year, and subsequently fertilized the land for future crops. However, serious drought in the region following scarce rainfall in the 1970s and the 1980s increased the pressure of the shared land. This in addition to the increasing flow of weapons into the region intensified the clashes between these groups (Markusen 2006). The result was a war between Arab groups and the Fur in the late 80s and between Arab groups and the Masaalit from 1995 to 1999 (Reyna 2010). In response to these clashes both Arab and non-Arab groups formed their own defense groups in order to protect themselves and their livelihood. First the Arabs established the militia popularly called *Janjaweed* in the 1980s, while members of the non-Arab groups, mainly the Fur, Masaalit and Zaghawa also started to organized themselves. This led to the establishment of Sudan Liberation Movement/ Army (SLM/A) and the Justice and Equality Movement (JEM) at the beginning of the 21<sup>st</sup> century (ibid).

### **3.3 The outbreak of the Darfur- conflict**

The defense groups established in Darfur became central actors in the Darfur-conflict which intensified in 2003. This crisis is a conflict between the three non-Arab tribes Fur, Masaalit and Zaghawa and the government of Sudan. The government also recruited the Janjaweed in their battle against these three groups. During 2002 and early 2003 Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) launched smaller attacks against local police stations and government installations demanding greater power and wealth share (Markusen 2006). In April 2003 SLA and JEM attacked the military base in the regional capital El Fashir, killing 75 soldiers, pilots and technicians, destroying several military vehicles and helicopters and abducting 32 people. This attack, which caught the government by surprise and humiliated the military, has been widely recognized as the trigger point of this conflict (Lemarchand 2006). According to O'Fahey (2006) the timing of the



attack was not a coincidence because the peace negotiation revealed that Darfur was excluded from the new power and wealth deals generated by the negotiation. Even though Darfur was not part of the civil war between the Government and the South, they were still marginalized in the same way as the South. This made the people of Darfur feeling "neglected and left at the margins of the political spectrum" (Mullins and Rothe 2007:144). The attack surprised the government, but the historical large destruction forced the central authorities to retaliate. The government was, however, in a bad position to strike back as most of their force still was deployed in the south. But this did not prevent the Sudanese government from responding to the attack. While they deployed the troops, the government also recruited allies from the nomadic Arab defense group Janjaweed which previously have fought against members of the rebel groups. Although the government claims no ties with this militia group, there are evidences that the government have paid salaries and provided the Janjaweed with weapons and army uniforms (Rothe and Mullins 2007). Together the Sudanese Army and the Janjaweed started to launch coordinated attacks by both air and land directed against members of SLM/A and JEM, but also against civilians belonging to the Fur, Zaghawa and Masaalit, namely the groups comprising SLM/A and JEM. These attacks have included bombing and destruction of villages, killing, raping, looting, forced displacement and destruction of means of survival. By the end of 2004 more than 1.6 million people were internally displaced, more than 200.000 had sought refuge in neighboring Chad, and several hundred villages were destroyed by fire or bombs.<sup>26</sup> The numbers of deaths are highly disputed. By spring 2005 the number ranged from 63.000 deaths to 400.000 deaths (Hagan in Smeulers and Havemen 2008).

There have been several attempts to negotiate between the rebels groups and the Government but no lasting ceasefire or peace occurred until a couple of years ago (Lippmann 2007). Already in April 2004 the insurgents from Darfur met with the Sudanese government in the N'djamena Humanitarian Ceasefire Agreement negotiation, but did not come to an agreement. Yet another attempt was made in November 2005. This time the parties signed a Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur, but failed to comply with the suggestions put forward. In April 2006 the AU negotiated the Darfur Peace Agreement between the insurgents and the government. Although the agreement provided for the people of Darfur to held a referendum in 2010, to decide whether the three regional states

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<sup>26</sup> COI 2005:61

comprising Darfur should be consolidated into a unitary region with joint of the government, the rebel groups refused to sign the deal claiming that the Sudanese government did not guarantee the rebel groups power within the central government and in the local Darfur government. In the meantime the UN and AU had managed to come to an agreement with the Sudanese government on sending troops to Darfur (Lippmann 2007). According to UN estimates, there are now 2.7 million Darfurians, who are internally displaced and are stuck in Internally Displaced Persons (IDP) camps and nearly 5 million people rely on humanitarian aid.<sup>27</sup> In mid-2008 the International Criminal Court opened investigation into the situation after receiving a referral from the UN Security Council.<sup>28</sup> In 2009 the Court issued an arrest warrant for the president General Omar El- Bashir for charges on war crimes and crimes against humanity. The Government responded by expelling and suspending operations of 13 international humanitarian aid organizations and 3 domestic aid organizations. The conflict has resulted in total collapse of law and order. The IDP camps are today too crowded and volatile and many uncontrolled small arms loot livestock, hijack humanitarian vehicles and relief support and extort money for protection.<sup>29</sup> Nevertheless, in December 2010 negotiations between the parties began in Doha, Qatar. In June 2011 the parties signed the Doha Document for Peace in Darfur (DDPD). This agreement would compensate the people of Darfur for the suffering over the last decade. In contrast to the peace agreement between the Sudanese government and the South, which provided the South with a referendum determining whether they would become independent or not, DDPD does not offer Darfur the same opportunity. Nevertheless, provide them with more power through a council with both legislative and executive power. This Council – Darfur Regional Authority – began its work February 2012.<sup>30</sup>

### **3.4 International response**

The campaign the government of Sudan, in close coordination with Janjaweed, launched against both rebels belonging to SLM/A and JEM and the civilian population of the Fur, Masaalit and Zaghawa have received massive international response and coverage in the

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<sup>27</sup> <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm>

<sup>28</sup> <http://www.icc->

[cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx)

<sup>29</sup> <http://www.eyesondarfur.org/conflict.html>

<sup>30</sup> <http://www.globalis.no/Konflikter/Sudan-Darfur>

international press. While the trigger of the conflict is widely held to be the large attack against El Fashir in April 2003, Amnesty International (AI) warned already in February about the deteriorating situation in Darfur. In a public statement they called for immediate ceasefire and international investigation.<sup>31</sup> AI continued to monitor the situation, and released statements in April<sup>32</sup>, July<sup>33</sup> and November<sup>34</sup> warning about the intensification of the conflict. Despite several warnings about the escalation of the violence in Darfur, it was not until December 2003 that the situation received attention by the UN, most notably by Secretary-General Kofi Annan and the UN Emergency Relief Coordinator Jan Egeland. With Egeland's statement "Darfur has quickly become one of the worst humanitarian crisis in the world" (Totten and Markusen, 2006:xx) and Annan's concern of "the human rights violations and lack of humanitarian access".<sup>35</sup> Darfur was now acknowledged as a serious crisis by the UN system, even though it took longer time before the organizations responded to the situation. It took over six months before the UN held a major discussion of the situation in Darfur. The situation did not appear on the UN Security Council's agenda until March 2004 (Slim 2004).

Then, on January 7 2004, the US Holocaust Memorial Museum Committee on Conscience released a "genocide warning"<sup>36</sup> on Darfur (Totten and Markusen 2007:xx). In February AI raised again awareness of the unfolding crisis, when they released their first major report concluding that "the grave human rights abuses [...] cannot be ignored any longer, nor justified or excused by a context of armed conflict"<sup>37</sup>. This publication may mark a shift in the amount of international response. From this point and forward, reports and statements were released continuously. In March Tom Vraalsen, UN's special advisor on Sudan from 1998 to 2004, followed Egeland's characterization and warned about the humanitarian crisis (Totten and Markusen 2007). Jan Egeland continued to advocate for the situation. His statement on

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<sup>31</sup> Amnesty International, *Urgent need for Commission of Inquiry in Darfur as situations deteriorates*, 21.02.2003 <http://www.amnesty.org/en/library/info/AFR54/004/2003>

<sup>32</sup> Amnesty International, *Crisis in Darfur – urgent need for international commission of inquiry and monitoring*, 28.04.2003

<sup>33</sup> Amnesty International, *Empty Promise? Human Rights Violations in government-controlled areas*, 16.7.2003

<sup>34</sup> <http://www.amnesty.nl/nieuwsporaal/pers/humanitarian-crisis-in-darfur-caused-sudan-government-s-failures>

<sup>35</sup> <http://www.un.org/sg/statements/?nid=689>

<sup>36</sup> The Committee draws on the three-stage warning system the international movement Genocide Watch has established. While the first stage, genocide watch, relates to early indicators of mass killings and genocide, the second stage, genocide warning, may be used "when [...] genocide is imminent, often indicating with genocidal massacres. The last stage, genocide emergency, is reserved for situation where genocide is unfolding (<http://www.genocidewatch.org/alerts/newsalerts.html>).

<sup>37</sup> Amnesty International, *Darfur: «Too many people killed for no reason»*, 3.2.2004

April 2, that a “coordinated scorched- earth campaign of ethnic cleansing”<sup>38</sup> occurred in Darfur, marked, however, an important shift in rhetoric: From describing Darfur as a humanitarian crisis, though important as it pointed to the human suffering from natural causes, his new statement, defining the situation as ethnic cleansing, referred to human suffering as a result of criminal action. On the very same day, Human Rights Watch (HRW) released their very first in depth report on Darfur. Following Egeland’s statements that people in Darfur were suffering from criminal conduct, they argued that “militias backed by the government of Sudan are committing crimes against humanity in Darfur”.<sup>39</sup>

The atrocities in Darfur coincided with the tenth anniversary of the Rwandan genocide. This may, according to several scholars, have had a major impact on how the conflict in Darfur was framed and perceived. Also in the beginning of April 2004, Kofi Annan spoke about preventing genocide as he held a speech commemorating the 10<sup>th</sup> anniversary of the Rwandan genocide in 1994. In this speech he expressed grave concern for the situation unfolding in Darfur, and argued that “whatever terms [we] use to describe the situation, the international community cannot stand idle”<sup>40</sup>. With the commemoration of the Rwandan genocide in April, Darfur was now being framed through a new lens. The 1994 Rwandan genocide is not just remembered by the Hutu elites slaughtering of hundreds of thousands of Tutsi and moderate Hutu, but also for the international community’s lack of respond and willingness to describe the situation for what it was: genocide (Brunk 2008). Mukesh Kapila, the then UN President and Humanitarian Coordinator for the Sudan between March 2003 and March 2004, publically compared the unfolding atrocities in Darfur with what happened 10 years earlier in Rwanda. He stated:

*“I was present in Rwanda at the time of the genocide, I’ve seen many other situation around the world and I am shocked at what is going on in Darfur ... The only difference between Rwanda and Darfur now is the numbers involved”*(cited in Brunk 2008:30)

According to Brunk (2008:30) Kapila’s “appeal to Rwanda [...] was a significant derivation from the preceding humanitarian representational trend”. Without actually describing Darfur with the term genocide, the conflict was now being framed in terms of genocide, shifting the focus from the humanitarian consequences of the situation to the “underlying violent roots”

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<sup>38</sup> <http://www.un.org/apps/news/story.asp?NewsID=10307&Cr=sudan&Cr1#.UpXHWnbKz5o>

<sup>39</sup> Human Rights Watch, *Darfur in flames: Atrocities in Western Sudan*, 3.04.2004:

<http://www.hrw.org/reports/2004/04/01/darfur-flames-0>

<sup>40</sup> <http://www.preventgenocide.org/prevent/UNdocs/KofiAnnansActionPlanToPreventGenocide7Apr2004.htm>

(ibid). March and April 2004 was a major turning point in the international response and covering of conflict: Illustratively, in the UK's national newspapers, Darfur was only cited twice in March compared to 27 times in April. In the previous 15 months, Darfur was mentioned 19 times; during the next 15 months, 334 articles were written about Darfur (Brunk 2004). And reports from the field continued to be published. On May 6, HRW published their second report on Darfur, arguing that the "government of Sudan is responsible for ethnic cleansing and crimes against humanity in Darfur".<sup>41</sup> Along with a report presented by Kapila<sup>42</sup>, the UN was now speeding up their documentation and information-gathering on the situation. May 7 the UN Acting High Commissioner for Human Rights Bertrand Ramcharan, delivered a report<sup>43</sup>, in relation to the World Conference on Human Rights, raising concern about the security and human dignity in Darfur as they have "identified disturbing patterns of massive human rights violations in Darfur, perpetrated by the Government of the Sudan and its proxy militia, many of which may constitute war crimes and/or crimes against humanity".<sup>44</sup> There was, however, no reference to the concept of genocide. On June 15 John Prendergast<sup>45</sup>, the Special Advisor to the President from the International Crisis Group, described Darfur as a genocide as he testified<sup>46</sup> to the Senate. He stated that:

*"the situation in Darfur more than satisfies the Genocide Convention's conditions for multilateral preventive action... [I]t cannot be contested that in Darfur a large section of Sudan's population is alarmingly at risk, that the Government of Sudan has so far failed comprehensively in its responsibility to protect them, and that it is time for the international community, through the Security Council, to assume that responsibility... Over the past year, Darfur has been Rwanda in painfully slow motion»<sup>47</sup>.*

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<sup>41</sup> Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by government and militia forces in western Sudan*, 6.5.2004:1

<sup>42</sup> Kapila, *Situation of human rights in the Sudan: Violations of human rights in the greater Darfur region*, 18.4.2004, Mukesh Kapila, Humayon Alizadeh and Isabelle Balot (available at: <http://www.mukeshkapila.org/download/Item%2045.pdf>)

<sup>43</sup> The report is based on a five-member team who first spent a week doing interviews with refugees in Chad, and upon further requests also visited Khartoum, and also Darfur where they undertook "on-the-spot inquiries in different parts (E/CN.4/2005/3).

[http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/863d14602aa82caec1256ea80038e268/\\$FILE/G0414221.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/863d14602aa82caec1256ea80038e268/$FILE/G0414221.pdf)

<sup>44</sup> UN Commission on Human Rights, *Situation of human rights in the Darfur region of the Sudan*, May 7th 2004, E/CN.4/2005/3

<sup>45</sup> Prendergast is human rights activist, who have worked for the Clinton White House, the State Department, the National Intelligence Council, UNICEF, Human Rights Watch, the International Crisis Groups and the US Institute for Peace (<http://enoughproject.org/blogs/john-prendergast>)

<sup>46</sup> Sudan: Peace, but at what Prize?, John Prendergast, 15.06.2004

<sup>47</sup> Ibid.

Then on June 24, Annan stated on a press conference that “terrible crimes have been committed” and that “it was bordering on ethnic cleansing”. He highlighted that “we should act now, and stop arguing about which label to put on it”.<sup>48</sup> However on the same day the US Ambassador-at-Large for War Crimes, Pierre Prosper stated that “I can tell you that we see indicators of genocide and there is evidence that points in that direction” (in Totten and Markusen 2007:xxiv). The Secretary of State, Colin Powell, argued, on the other hand, that “we’re not there yet”<sup>49</sup>, stating that:

*“Whether you call it genocide or whether someone prefers to call it ethnic cleansing or some people think, as a technical matter, it doesn’t reach the level of either ethnic cleansing or genocide.... What we are seeing is a disaster, a catastrophe, and we can find the right label later. We’ve got to deal with it now. That’s my focus”*<sup>50</sup>

Despite Powell’s energetic arguing that it did not matter whether the situation was described genocide, Congressmen Frank Wolf and Senator Sam Brownback, released, the same day a report from their three-days-trip to Darfur, arguing that the situation “may very well meet” the test of the Genocide Convention.<sup>51</sup> Also the non-governmental organization Physicians for Human Rights (PHR) released a statement, advocating for intervention to save lives as their investigation had compiled indicators of genocide.<sup>52</sup>

In July AI published a new report, arguing that the crimes committed may be genocide, but that their evidence is inconclusive.<sup>53</sup> In late July the US House Of Representatives responded to the report by Brownback and Wolff and passed a resolution declaring that “the atrocities unfolding in Darfur [...] were genocide”<sup>54</sup>, urging the US President George W. Bush to call the situation genocide and consider intervening (Lippmann 2007). A few days later Holocaust Memorial Museum’s Committee on Conscience upgraded their “genocide warning” to “genocide emergency”, arguing that the threat we warned about earlier now is real.<sup>55</sup> Then on September 9, the US officially accused the government of Sudan of committing genocide, when the US Secretary of State Colin Powell spoke to Senate arguing they have evidence of

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<sup>48</sup> [http://www.un.org/apps/news/story.asp?NewsID=11153&Cr=sudan&Cr1#.UxbiqlX1\\_ps](http://www.un.org/apps/news/story.asp?NewsID=11153&Cr=sudan&Cr1#.UxbiqlX1_ps)

<sup>49</sup> <http://2001-2009.state.gov/secretary/former/powell/remarks/34033.htm>

<sup>50</sup> Ibid.

<sup>51</sup> Brownback, Sam and Frank Wolf, *Trip report*, 29.06.2004

<sup>52</sup> Physicians for Human Rights, *PHR Calls for Intervention to Save Lives in Sudan: Field Team Compiles Indicators of Genocide*, 23.06.2004

<sup>53</sup> Amnesty International, *Rape as a Weapon of war: Sexual Violence and its Consequences*, 19.07.2004

<sup>54</sup> <https://www.govtrack.us/congress/bills/108/hconres467/text/eh>

<sup>55</sup> <http://www.ushmm.org/information/press/press-releases/united-states-holocaust-memorial-museum-declares-genocide-emergency-in-suda>

genocide being committed (in Totten and Markusen 2007:265). 9 days later, on September 16, the Security Council and Kofi Annan passed the Resolution 1564, establishing an international commission of inquiry to investigate human rights abuses in Darfur, and to determine whether acts of genocide have occurred.<sup>56</sup> Three months later, the commission issued their report concluding that Janjaweed and Government forces have perpetrated war crimes and crimes against humanity, but not acts of genocide<sup>57</sup>. Now, two of the most powerful actors had two rather contradicting conceptualizations of the conflict: the US and Colin Powell arguing for genocide and the UN, with the Commission's findings, arguing against genocide. Then, a few days later, a preliminary report by the non-governmental organization PHR argued that genocide might be unfolding in Darfur, as they have documented systematic destruction of livelihoods<sup>58</sup>. This was just a preview of their final report, published in January 2006, which abundantly concludes that genocide have occurred in Darfur.<sup>59</sup>

The international response towards the Darfur- conflict has been massive. Never before have a possible genocide been so thoroughly studied and documented (Markusen 2006). The summer of 2005 marked an important shift in the international response. After receiving a historical referral from the UN Security Council, the International Criminal Court initiated in June 2005 a full blown criminal investigation into the situation in Darfur. With jurisdiction over the international crimes war crimes, crimes against humanity and genocide, the situation was now in legal system. Thus far, the investigation has led to several arrests warrant. Most notably on the President of Sudan, Omar al-Bashir for war crimes, crimes against humanity and genocide. This is the first time Court issued an arrest warrant for the crime of genocide. In addition the ICC has opened cases against the former Minister of State for the Interior of the Government of Sudan, the alleged leader of the Janjaweed and the Chief in Commander of the rebel group JEM. Three of the suspects the Court has issued arrest warrants remains at large and has not been delivered to the Court.<sup>60</sup> In retrospect there are a few reports that stand out in the international response. They stand out, not just in length, but by including large sections on what type of international crimes the violence in Darfur constitute. Several of the

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<sup>56</sup> UN Security Council S/RES/1567, 18.09.2004

<sup>57</sup> COI 2005

<sup>58</sup> PHR 2006

<sup>59</sup> Ibid.:42

<sup>60</sup> [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx)

above conclusions and descriptions of the Darfur- conflict are extracted from larger reports written by the actors. While the above section presents an overview of the international response and the conceptualization of the Darfur- conflict, this thesis focuses exclusively on a few selected reports and the inferences made in the reports. These reports are presented more thoroughly in the next chapter.



# 4 Conceptualizing genocide

## 4.1 Introduction

In this chapter I examine how the actors have conceptualized the G-word in their reports on the Darfur- conflict. My aim is to present their arguments of whether the conflict constitutes genocide or not in order to discuss how they apply the concept. This chapter is divided into different sections. In 4.2, I present the theoretical framework I utilize in my analysis. In the three next sections 4.3-4.5, I systematically present and discuss my findings in relation to each actor in the following order: State (i.e. the United States), Inter-governmental organization (i.e. the United Nations) and non-governmental organizations (i.e. Amnesty International and Physicians for Human Rights). These sections are structured similarly, due to a common understanding of genocide as a three-folded concept (Schabas 2009): the *physical element* relates to the physical acts of violence that genocide may be committed (i.e. killing, causing harm, deliberately inflicting destructive conditions on life, preventing births and forcible transferring children from the group); the *mental element* relates to intention these acts of violence must be committed with (intent to destroy, in whole or in part); the *element of protected group* relates to a set of specific groups that must be targeted before the criminal act qualify as genocide (national, ethnical, religious or racial groups). These three elements will be further elaborated upon and explained in 4.2. Finally, in 4.6, I present a conclusion of my main findings.

## 4.2 Theoretical framework

The term genocide – often referred to as the G-word – was introduced by the lawyer Raphael Lemkin in his seminal work entitled *Axis Rule in Occupied Europe* from 1948 in an attempt to capture the deliberate and destructive targeting of Jews as a group. Lemkin defined genocide as “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups completely” (Strauss 2001:360). Since Lemkin presented the concept at the end of Second World War, many different definitions have been introduced making the concept widely discussed and disputed in the academic literature. Scott Strauss (2001) identifies 15 different genocide definitions in his article "Contested meanings and conflicting imperatives: A conceptual analysis of

genocide". Shortly after Lemkin invented and defined the notion of genocide his conceptualization of the destructive targeting of groups was recognized by the (2) United Nations. In 1948 the organization established the Convention on the Prevention and Punishment on the Crime of Genocide. This convention acknowledged genocide as an international crime under international law, and defined the crime as "any of the following acts committed with intent to destroy, in whole or in part, a religious, ethnical, national or racial 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 calculating to bring about its physical destruction in whole or in part, d) imposing measures intended to prevent births within the group and e) forcibly transferring of children of the group to another group".

This definition has received massive criticism. Some criticize it for being too broad stipulating that only a "part" of the group may be targeted, whereas others accuse the definition for being too narrow since only four groups may be victims of genocide. These critical remarks have influenced more recent definitions. (3) In 1959, Peter Drost proposed a more inclusive definition when he argued that genocide should be conceptualized as "the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such". (3) Leo Kuper defined in 1981 genocide as a "crime against a collectivity, taking the form of massive slaughter, and carried out with explicit intent". (5) The political scientists Barbara Harff and Ted Gurr defined in 1988 genocide as "the promotion and execution of policies by a state or its agents which results in the deaths of a substantial portion of a group". (6) The same year Henry Huttenbach suggested that genocide should be defined as the "destruction of a specific group within a given national or even international population". (7) The following year Ervin Staub argued that genocide is "an attempt to exterminate a racial, ethnic, religious, cultural or political group, either directly through murder or indirectly creating the conditions that lead to the group's destruction". (8) In 1990, the historian Frank Chalk and sociologist Kurt Jonassohn argued that genocide is "a form of one-sided mass killing in which the state or other authority intends to destroy a group, as that group and membership is defined by the perpetrators". (9) Another sociologist, Helen Fein defined in the same year genocide as "sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim". (10) Also in the same year the

historian, Yehuda Bauer offered this genocide definition: “A purposeful attempt to eliminate an ethnicity or a nation, accompanied by the murder of large numbers of the targeted group”. (11) In 1992 Robert Melson argued that genocide is “a public policy mainly carried out by the state whose intent is the destruction in whole or in part of a social collectivity or category, usually a communal group, class, or a political fraction”. (12) In 1994, Israel Charny defined genocide as “mass killing of substantial numbers of human beings, when not in course of military action against the military forces of an avowed enemy, under conditions of the essential defenseless and helplessness of the victims”. (13) Steven Katz, a Jewish philosopher, defined, also in 1994, genocide as the “actualization of intent, however, successfully carried out, to murder in its totality any national, ethnic, racial, religious, political, social, gender, or economic groups, as these groups are defined by the perpetrators, by whatever means”. (14) Irving Louis Horowitz, an American sociologist, contributed to the field of genocide when he in 1997 proposed that genocide entails “structural and systematic destruction of innocent people by a state of bureaucratic apparatus”. The Professor in sociology, Levon Chorbajian focused on murder when he, in 1999, defined genocide as acts “initiated by authoritarian states, premeditated, involving great cruelty, and bringing about large numbers of deaths in absolute terms and deaths as a percentage of target populations”.

Scott Straus (2001) argues that the 15 different genocide definitions are best compared along five core dimensions: (1) whether intentional group annihilation is core idea, (2) how intent is formulated, (3) how the mode of annihilation is defined, (4) who the agent of annihilation is and (5) who the target of annihilation is. The first aspect relates to whether genocide targets the entire or just parts of the group. Most of the genocide definition argues that genocide is a crime that is committed on purpose, with intent. The second aspect, then, relates to how this intent is formulated. The third core dimension, concerns the question of how genocide may be committed, or rather what kind of acts may constitute genocide. The fourth dimension relates who may commit genocide, the fifth, and last dimension focus on who or/and what kind of groups are the targets of genocide. Straus argues that this definition does not posit intentional group annihilation as core idea because the genocide is conceptualized as not just the destruction of the entire group, but as partial destruction as well. Furthermore the definition formulates intent as "intent"; identifies the mode of annihilation as "killing members of the group", "causing serious bodily or mental harm to members of the group", "deliberately inflicting on the group conditions of life. Calculated to bring about its physical destruction in whole or in part", "imposing measures intended to prevent births within the group" and

"forcibly transferring children of the group to another group"; does not specify who might or must be the agent of annihilation; and posit that the target of annihilation must be groups of "national, ethnical, racial or religious" character. In contrast to Straus, William Schabas (2009) divides this definition in three different elements; the physical element, the mental element and the element of protected groups. Since all the actors studied here apply the genocide definition stipulated in the 1948 Genocide Convention and follow a similar understanding as Schabas, I therefore present this definition more thoroughly in relation to these three elements.

#### **4.2.1 The 1948 Genocide Convention**

All actors apply the same definition of genocide, namely the definition of genocide set out in the 1948 Genocide Convention, but they interpreted the definition differently.<sup>61</sup> As stated above, this definition defines genocide as any of the following acts: killing, or causing serious bodily and mental harm, or deliberately inflicting conditions of life calculated to bring about physical destruction on a group, or imposing measures to prevent births, or forcibly transferring of children to another group, committed "with intent to destroy, a national, ethnical, racial or religious group, as such".

In the genocide literature, this definition is usually discussed by splitting its content into three elements: a physical element, a mental element and the element of protected group. The physical element relates to the prohibited acts that are enumerated from a- c in Article II of the Convention. The mental element relates to the specification in the chapeau of the article that these prohibited acts must be committed "with intent to destroy, in whole or in part the group] as such". The element of protected group relates to the fact that the definition specifies that genocide only take place in cases where the targeted groups are of national, ethnical, racial or religious character. Before I begin analyzing the actors' application of this definition, I will give a presentation of these elements. This section is mainly based on the work of William Schabas and his book *Genocide in International Law* (2009).

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<sup>61</sup> Powell 2004; COI 2005, AI 2004; and PHR 2006

## **The physical element**

The physical element or *actus reus* of any crime relates to the actual physical act that describes the crime. In this definition of genocide set out in the Convention, there are several acts that constitute genocide. These acts are literally enumerated in the following five paragraphs: (a) killing, (b) causing serious bodily or mental harm, (c) deliberately inflicting conditions calculated to destroy, (d) impose measures to prevent births and (e) to forcible transfer children from one group to another. Conduct of either one of these acts may constitute genocide if the other elements of the definition are met as well. While killing may be the most undisputed and clearest way to commit genocide, some of the other acts enumerated have been open for interpretation. In stark contrast to the immediate death by killing, paragraph (c) refers to "slow death" by inflicting calculated conditions in order to bring about the group's physical destruction (Akhavan 2012:50). Such conditions may include subsistence diet, systematically forced expulsion and reduction of essential medical care (ibid). Paragraph (b) – causing serious bodily or mentally harm – is also less clear than the first paragraph. Acts that have been interpreted as serious bodily or mentally harm are acts of torture, rape and sexual violence and wide range of other unhuman and degrading treatment (Schabas 2009). Measures to prevent births – paragraph (d) – have been interpreted as acts of sexual mutilation, sterilization, separation of the sexes and prohibition of marriages. The last enumerated act of genocide (e) – forcibly transferring children from one group to another group – was included in the convention at the last minute (Schabas 2009). The Drafters had already categorized forcibly transfer within a category of crimes that dealt with specific cultural aspects of the group. Besides forcibly transfer this category included forced and systematic exile of individuals representing the culture of the group, prohibition of using the national language, private and non-private conversations, the systematic destruction of books and prohibition of new publications on the national language, organized destruction of religious and historical monuments and objects of specific value. However, these acts were not considered genocide because they only related to the group's culture. Forcibly transfer of children was, nevertheless, recognized as genocide because such transfer could have "serious consequences for the viability of the group as such" (Schabas 2009:202).

## **The mental element**

All crime includes as previously noted, a mental element which relates to the criminal intent of the act. This means that the crime of genocide requires proof of intent to commit the

underlying acts enumerated from a-e (see above). The definition requires, however, proof of another intent as well since the term "with intent" appears in the chapeau of the definition. This term specifies the intent of the crime, namely the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". With this sentence, the definition does not only underscore that the genocide is a "crime requiring intent", but also that it is necessary to prove that the intention of the perpetrator was in fact, "to destroy [the targeted group] as such" (Schabas 2009:256). In other words, "the prosecution must go beyond establishing that the offender meant to engage in the conduct, or meant to cause the consequences" (ibid). It must also be convincingly proven that the actions of the offender were carried out with a 'specific intent' or *dolus specialis*". This *dolus specialis* is what differentiate the crime of genocide from other serious international crimes such as war crimes and crimes against humanity (Schabas 2009:256). The ICTY and ICTR have underscored that it is the element of *dolus specialis* that singles out the crime of genocide as the worst and at the top of hierarchy of international crimes (Akhavan 2012). This specific element of intent may be further explained by distinguishing between, on the one hand, knowledge of the consequences and, on the other, the active wish to cause the damage following the act itself. As argued by Akhavan (2012: 44):

*"It is not sufficient that the accused knows that his acts will, inevitably or... probably, result in the destruction of the group in question; rather, the accused must seek the destruction in whole or in part of a group".*

This means that the crime of genocide, as stipulated in the 1948 Genocide Convention is a goal-oriented crime. This does not, however, mean that it is result-oriented. As long as the offender intended the destruction of group, it does not matter whether the destruction is realized (Akhavan 2012).

### ***Components of the mental element***

According to Schabas (2009:270), the *dolus specialis* is composed of two components: "to destroy" and "in whole or in part". Lemkin originally defined genocide as not just the physical destruction of the group, but also the destruction of political institution, economic life, and the destruction of language and culture as well. The 1948 Genocide Convention does not conceptualize genocide to encompass all these different ways of destroying a group, however. Instead, its scope is limited to physical and biological destruction, and hence excluding political and cultural destruction.

The second component "in whole or in part" was, and still is, subject to extensive debate before it was finally used in the Convention. Most importantly, the different delegations have been discussing whether genocide had to be aimed at destroying the entire group or whether it was sufficient enough with partial destruction. While the final definition clearly does not require the total annihilation, the question of what "in part" actually means remains questionable. Schabas (2009) presents four different approaches to the scope of the term "in part". The first approach insists that while the result may be partial destruction of a group, the intention of the perpetrators must be to destroy the *entire* group. The second approach tries to specify "in part" by replacing the term with "substantial". Both ICTR and ICTY have argued in this direction. While the ICTR said that "in part" means "a considerable number of individuals", ICTY argued that genocide require the destruction of a "substantial" part (Schabas 2009:279).

The third approach tries also to specify the term "in part" by replacing it. But instead of using the word "substantial", placing a quantitative perspective the number of how many "in part" may constitute, the word "significant" is used. This approach was first introduced by the Whitaker report, which was a report by Benjamin Whitaker published in 1985 on the concept of genocide for the United Nations, which referred to "in part" as "a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership". The Commission of Experts setup by the United Nations to investigate grave human rights abuse on the former Yugoslavia endorsed this view arguing that:

*"a given group can be defined on the basis of its regional existence, as opposed to a broader and all- inclusive concept encompassing all the members of the group who may be in different regions or areas. For example, all Muslims in Bosnia- Herzegovina could be considered a protected group. One could also define the group as all Muslims in a given area of Bosnia- Herzegovina, such as Prijedor, if the intent of the perpetrator is the elimination of that narrower group" (in Schabas 2009:282).*

The Commission of Experts pointed to political and administrative leaders, religious leaders, academics, intellectuals and business leaders as examples of "significant" portions of a group. This view was further recognized and utilized by the ICTY. The Commission of Experts explained further that this approach should take into account how the rest of the population of the group is treated (Schabas 2009). This approach leads, however, to a debate of which strata of the group that is most important. The Trial Chamber of ICTY held that genocide had

occurred despite only Muslim men of military age in Srebrenica had been killed, while the rest had not been killed but rather transferred to another place. The Chamber argued that

*"the combination of those killings with the forced transfer of the women, children and elderly would inevitably result in the physical destruction of the Bosnian Muslim population of Srebrenica [and thus, constitute acts of genocide]" (van den Herik in Henham and Behrens 2007:85).*

The fourth approach does neither focus on the quantitative number nor the qualitative characteristics of the victims, but rather on the geographical space in which the victims has been attacked. According to this approach, destroying all members of a group within a country, a region, or a town would meet the requirement of "in part" (Schabas 2009). This approach seems to apply to all of the three major genocide cases: the genocide in Rwanda against the Tutsi population, in Turkey against the Armenians and by the Nazi Germany against the Jews. In all three cases members of the targeted groups residing outside the target zone were not attacked: the Turkish government targeted only Armenians within its borders; the Hutus in Rwanda did not focus on targeting the Tutsi population in for instance Burundi; and the Nazis appeared to be focused on the Jews within Europe, not Jews in the entire world.

### *Evidence of the mental element*

The preceding presentation of the mental element provides a little glimpse of what must be considered when dealing with the crime of genocide. However, the question of how to prove the "intent to destroy [the targeted group] as such" remains. What kind of elements is important in providing evidence of the *dolus specialis*?

The proof of intent in the crime of genocide is more demanding than that required for murder, simply because the definition of genocide has included a second intent, a specific intent, namely the "intent to destroy [the targeted group] as such" (Schabas 2009:265). Obviously, a confession by the perpetrator explaining his wishes and purpose behind the acts may assist establishing the mental state of the attacker. Similarly, Schabas refers to a genocidal declaration or speech issued before or simultaneously as the atrocities are being committed as aspects that would help revealing the specific intent. These types of evidence may be referred to as direct proof. In most cases, however, such direct proof is non-existent. Hence, despite several examples of genocidal declarations, intent must often be found elsewhere because the accused usually does not help the prosecutor in explaining his or her deeds. The Appeal Chamber in ICTR held that:



*"By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must usually be inferred" (Schabas 2009:265).*

This method of inferring the specific intent was established by the ICTR and relates to finding relevant facts and circumstances such as:

*"the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of the atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or repetition of destructive and discriminatory acts" (Schabas 2009:266).*

These facts are often referred to as "circumstantial evidence" (ibid). A ICTR Trial Chamber expressed, however, caution using this method because it would use other information than his own acts to establish his intention. The Chamber wrote:

*"[E]vidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention of a person is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action" (Schabas 2009:266).*

Despite solving the problem of rarely finding direct proof, the method of inferring the specific intent is not without considerations. According to Schabas, the difficulty of establishing proof of the requisite "intent" can and should be solved by placing more emphasis on the identification of a plan or policy. "It is the identification of a plan or policy, either through specific documentary evidence or by deduction based on various factual manifestations, that permits the inference that perpetrators acted with genocidal intent" (Schabas 2009:267). Documenting that there was a plan, a decision to carry out a genocidal policy, is for Schabas, in other words, decisive in determining whether the offenders possess the requisite "intent". An Appeal Chamber of ICTY denied that a plan or policy was a requisite component of the crime as defined in the 1948 Genocide Convention. However, the Chamber argued that:

*"in the context of proving specific intent, the existence of a plan or policy may become an important factor. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime" (Schabas 2009:245).*

The Chamber points, in other words, out that a state plan or policy may provide evidence that perpetrators acted with intent, and thereby proving that genocide had occurred (as long as the other components also had been satisfied). Schabas acknowledges that a state plan is not formally required as a component of the definition of genocide set out in the Convention, but argues, nevertheless, that it not just *can* be important in proving the crime had occurred, but that such a plan *should* be decisive in showing that the perpetrators acted with intent. As such, it seems that a state plan or policy is a pivotal aspect of genocide for Schabas. The debate about the role of a plan or policy cases of genocide have continued since the Tribunal ruled that it was not a formal element of the crime. This aspect received fuel after the UN-established International Commission of Inquiry on Darfur concluded that "the Government of Sudan had not implemented a policy of genocide". According to Schabas this conclusion affirms the significance of a plan or policy.

### **The element of protected groups**

Article II of the 1948 Genocide Convention defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This means that the convention only protects groups of national, ethnical, racial or religious character, and in order for criminal acts to be qualified as genocide it is decisive to determine the targeted group's identity as either one of the four groups enlisted. This aspect of the definition has been highly disputed ever since the definition was established. The main argument against this aspect is that there are several groups who are left outside of the protection of the definition, most notably cultural, economic and political groups.

Identifying the victim group's identity has been difficult from the very first time the Genocide Convention was applied in court. In 1998, fifty years after the Genocide Convention was established, the first judicial interpretation of the convention came in the case of *Prosecutor v. Akayesu* in the International Tribunal for Rwanda (ICTR). The Trial Chamber found it difficult to separate the Tutsi and Hutus on the basis of objective criteria and to categorize the Tutsi group within the four groups enlisted in the Convention. As a consequence, the Chamber referred to the Convention's drafters who spoke of the protection of "all stable and permanent groups", not just the four specific groups enlisted in the Convention. Despite not being able to conclude that the Tutsi group was a national, ethnic, racial or religious group,

the Chamber was therefore able to argue that the group should be considered a protected group. The Chamber argued that:

*"In the opinion of the Chamber, it is particular important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group" (ibid).*

This meant that the Tutsi group was defined as a protected group without being termed as a national, ethnical, racial or religious group. Not surprisingly, this approach has been widely discussed. In particular, it has been criticized for going beyond the actual text of the Convention (Schabas 1999). Moreover, Schabas pinpoints that it may have been erroneous to interpret that the intent of Convention's drafters was to ensure that "all stable and permanent groups" became protected. According to Schabas this term "stable and permanent groups" appears seldom in the drafts and the fact that political groups, which arguably are more flexible than the groups enlisted, were included in the Convention until the very last minute suggest that the Trial Chambers' arguments are highly questionable (Schabas 1999). Another Trial Chamber in ICTR ruled months later that the Tutsi group could be identified as an ethnic group. However, this decision was not based on any objective criteria, but rather on the fact that Rwandan laws had defined the group as an ethnic group (ibid). In this approach, the Trial Chamber, in the cases of *Kayeshema* and *Ruzindana*, argued that an ethnic group could be "a group identified as such by others, including perpetrators of the crimes" (in Schabas 1999:383).

During the first trials when the 1948 Genocide Convention was applied, the court found it difficult to separate the victim group and the perpetrators on objective grounds, such as language, skin colour and religion. In order to deal with this problem, the two Trial Chambers adopted two rather different approaches. The first looked to the Convention's drafters and argued that despite the fact that there were four groups enlisted, the initial intention of drafters was to protect all stable and permanent groups. The other Chamber more or less dismissed this approach, but found that even groups identified on the basis of subjective criteria could be considered distinct ethnic groups.

It is still a debate within international criminal law regarding to which extent the victim group's identity should be defined, based on objective criteria or subjective criteria. While there are obviously few – if any – objections to an objective approach, there are several objections against a decision based on a pure subjective test. According to Schabas, for

example, a decision of the group identity that is solely based on subjective criteria expands the notion of genocide too much. He argues that "the flaw of this approach is allowing, at least in theory, genocide to be committed against a group that does not have any real objective existence (Schabas 1999:384). He also explains that "although helpful to an extent, the subjective approach flounders because law cannot permit the crime to be defined by the offender alone. It is necessary therefore to determine some objective existence of the four groups" (ibid.:384). Moreover, it has been pointed out that identification of the victim group must be based on positive characteristics. According to Komar (2008) identifying the victims on the basis of what they are not is not acceptable. Similarly, Schabas (2009:130) writes that "a negative approach to definition by referring to what [the group] it is not, rather than what it is, has been fairly convincingly rejected by the courts".

While I above have presented the definition of genocide set out in the 1948 Genocide Convention and the major differences of how the physical element, the mental element and the element of protected groups may be understood, I now turn to how the actors sought out to represent how the international community has understood and interpreted each of these three elements in their report on the Darfur-conflict. The three elements has structured my analysis of the United States (representing states), the United Nations (representing inter-governmental organizations) and Amnesty International and Physicians for Human Rights (representing non-governmental organizations), respectively, following in that order.

### **4.3 State: the United States**

The State Secretary Colin Powell refers in his speech to the whole text of Article II of the 1948 Genocide Convention. He states that:

*"Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide [...] genocide occurs when the following three criteria are met: First, specific acts are committed, and those acts include: Killing ;causing serious bodily and mental harm ;deliberately inflicting conditions of life calculated to bring about physical destruction a group in whole or in part; imposing measures to prevent births; or forcibly transferring of children to another group ... The second criteria: These acts are committed against members of national, ethnic, racial or religious groups; and the third criterion is, they are committed with intent to destroy, in whole or in part, the group, as such".<sup>62</sup>*

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<sup>62</sup> Powell 2004:5

In other words, Powell makes it abundantly clear that the definition of genocide as it is spelled out in the 1948 Genocide Convention requires three criteria to be met before acts of genocide have occurred. But how has he applied these three elements, and what arguments does he present in relation to these elements?

### 4.3.1 Physical element

In his speech Colin Powell makes it explicit that there are five ways genocide may be committed. In relation to the physical violence in Darfur, Colin Powell states that:

*"The totality of the evidence from the interviews we conducted in July and August, and from other sources available to us shows that the Jingoist and Sudanese Military forces have committed large-scale acts of violence, including murders, rape and physical assaults on non-Arab individuals. Second, the Jingoist and Sudanese military forces have destroyed villages, foodstuffs, and other means of survival. Third, the Sudan Government and its military forces obstructed food, water, medicine, and other humanitarian aid from reaching affected populations, thereby leading to further deaths and suffering. And finally, despite having been put on notice multiple times, Khartoum has failed to stop the violence".<sup>63</sup>*

Despite listing the five enumerated acts in the Convention, Powell does not use the precise language of the Convention when he describes the violence in Darfur. However, the acts Powell mentions – murder, rape, destruction of means of survival and obstruction of food, water and medicine – may arguably fit the three first enumerated acts: Murder obviously fits the first paragraph, killing; acts of rape have been interpreted as "serious bodily and mental harm, the second subparagraph"; and destruction of means of survival and obstruction of humanitarian assistance have been interpreted as creating conditions that may lead to the physical destruction of the group, the third paragraph. This understanding that the US believes genocide by the three first clauses of Article II of the Convention has been committed without using the direct language of the Convention is in accordance with Jerry Fowler (2006:32) who argues that:

*"In announcing his determination, Secretary Powell pointed to murder, rape, and other physical violence committed against members of non-Arab ethnic groups. This violence corresponded with the acts specified in Article II (a) and (b) of the UNCG— killing members of a group and causing serious bodily or mental harm to them. He also pointed to the destruction of foodstuffs and other means of survival of the targeted groups, coupled with obstruction by the Sudanese government of the humanitarian assistance that the victims*

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<sup>63</sup> Powell 2005:4

*needed in order to survive. This conduct, which itself inflicted a large number of deaths on the targeted population in addition to those caused by direct violence, corresponded with article II(c)—deliberately inflicting conditions of life calculated to bring about a group's physical destruction, in whole or in part”.*

Similarly, Pierre Prosper's (Kostas in Totten and Markusen 2007:121) analysis suggests that Colin Powell was hinting towards the three first "genocidal acts" despite refraining from using the acts' direct language. Referring to an interview with Prosper, Stephen Kostas (in Totten and Markusen 2007:121) writes in his article that:

*"Prosper recalls the group examining the concepts of unlawful killing, causing of serious bodily and mental harm, and "the real one that got us... was the deliberate infliction of conditions of life calculated to destroy the group in whole or in part".*

These findings suggest that the US believes that the three first enumerated acts in the Article II of the 1948 Genocide Convention have occurred in Darfur. The US' understanding of the Article II (a), (b) and (c) does not seem to contradict previous interpretations by including any new elements into the acts. While almost all the definitions compared by Strauss recognize killing as mode of annihilation, the US' understanding of genocide as entailing these three forms of annihilating – killing, causing severe bodily as well as mental harm and inflicting destructive conditions – suggest a wider understanding of what constitute genocide than many of the definitions enlisted by Scott Straus. Most notably the definitions by Drost, Kuper, Charney and Bauer fall short of the US' conceptualization because only killing or mass killing has been posit as mode of annihilation. In addition to the 1948 Genocide Convention the definition of Chorbajian which describes mode of annihilation as "great cruelty" and the definition Fein and Huttenbach conceptualizing mode of annihilation as "physical destruction" fit the US' understanding.

### **4.3.2 Mental element**

Colin Powell recognizes in his speech that for acts to qualify as genocide, they must be committed with "intent to destroy". The State Secretary argues that the acts committed in Darfur have been carried out with such purpose. He states that:

*"We believe the evidence corroborates the specific intent of the perpetrators to destroy "a group in whole or in part", the words of the Conventions".<sup>64</sup>*

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<sup>64</sup> Powell 2004:5

Furthermore, he explains why they believe that the committed acts have been intended to destroy the group. He argues that "this intent may be inferred from their deliberate conduct".<sup>65</sup> This argument is, however, somewhat confusing because the words *intent* and *deliberate* may be interpreted as synonyms, which makes the statement tautological. This confusion could have been solved by clarifying what is meant by "deliberate conduct", but the State Secretary does not explain any further what they consider to prove this "deliberate conduct.

Specific questions such as "Did those who harmed you say anything to you" and "Were there any particular groups or types of people who were singled out for harm" were included in the ADT survey to identify the nature and intent of the perpetrator (Howard in Totten and Markusen 2007:62). The ADT documented that over 30 % of the respondents witnessed or experienced derogatory language and racial epithets.<sup>66</sup> While this aspect have interpreted as helpful to determine whether the perpetrators possessed the requisite genocidal intent (Van der Herik in Henhan and Behrens 2007:78), Pierre Prosper has denied the importance of this aspect in the US' determination that the perpetrators acted with genocidal intent (Kostas in Totten and Markusen 2007:121

Pierre Prosper was the first Ambassador-at-Large for War Crimes for the US and worked also as prosecutor in Rwanda tribunal, but was now operating as a legal consultant for the State Secretary. According to him they had to rely on information outside of the report regarding the question of intent (Kostas in Totten and Markusen 2007). Stephen Kostas reveals several illuminating facts about how Colin Powell was convinced by Pierre Prosper that the perpetrators in the Darfur-conflict possessed the requisite genocidal intent. In a telephone conversation Prosper points to the close connection between the Janjaweed and the Government of Sudan as well as the central authorities' ability to hold the Janjaweed accountable. Kostas (in Totten and Markusen 2007:121) writes:

*"With the data and the [Genocide Convention] in hand, Powell telephoned Prosper at home on a Saturday night to walk him through the facts and the law. The two analysed the facts summarized in the Report and those they already had collected...:" How they created these militias; they had the ability to rein them in and then did not; they acted in concert with the Janjaweed... in attacking these villages... the aerial bombardment and then Janjaweed would come in; and then the fact that that Government of Sudan would block humanitarian assistance to people in need". It was enough, Prosper says, "to [prove] the intent"*.

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<sup>65</sup> Powell 2004:5

<sup>66</sup> US State Department 2004:2

This passage reveals much more than the speech Powell held about how the US believed to prove the "deliberate conduct". The failure of the Sudanese government to stop the Janjaweed and the active blockage of humanitarian assistance seems to have played a crucial role for Colin Powell in interpreting the perpetrators conduct as "deliberate". Prosper also explains one significant finding in their analysis, namely that only African villages, and not Arab villages had been destroyed even though the villages were neighbours (Kostas in Totten and Markusen 2007:121). In relation to the IDP camps and the government's obstruction of humanitarian assistance, Prosper and Powell argued that there was no "logical explanation [...] other than to destroy the group". Powell and Prosper summarize their view:

*"Let's pretend that it was not coordinated. They knew what was going on and not only did they do nothing to stop the situation, they intentionally obstructed assistance that would have bettered the situation. So, when you have the knowledge, you take no steps to stop it, and then, when people are trying to help, you block the assistance, what else could you want than for these people to die or be destroyed"(ibid).*

These facts suggest, in other words, that the US used the method of inferring genocidal intent from a number of contextual facts. According to Kostas (in Totten and Markusen 2007) this way of finding genocidal intent had, in fact, been underscored by Pierre Prosper, who with his background as prosecutor from the first genocide case in the ICTR had convinced his colleagues that evidence of genocidal intent could be found in both the context and in express statements.. The argument that the perpetrators acted in deliberate manner is based on the US understanding that government and Janjaweed acted in "coordination and collaboration" and the government's active effort to reject members of the Fur, Masaalit and Zaghawa any assistance in form of food and medicines. According to Kostas (in Totten and Markusen 2007) Powell and Prosper came to an understanding that the situation had to be genocide because the Government of Sudan actively work against and sabotaged humanitarian assistance despite knowing that people in the entire Darfur desperately needed lifesaving assistance.

The US' analysis does not indicate that how many that has been attacked has been an issue in their assessment. There is also nothing that indicates that the state must be involved before the criminal act may qualify as genocide. Colin Powell explicitly asserts that both the Government of Sudan and the militia Janjaweed have committed crimes. He states that "genocide has been committed in Darfur and [...] Government of Sudan and the Janjaweed



bear responsibility".<sup>67</sup> Colin Powell place great emphasis on the mental element as this element is the only element commented upon in relation to the Darfur-conflict. As such the US' understanding that the question of intent is important is in accordance with several of the definitions compared by Strauss. While there are several definition that does claim that the acts must be intentional such as Charney who argue that genocide does not require any intent or Huttenbach who claims that "intent is secondary to fate of the group" (Straus 2001:354), the definitions by Kuper, Chalk and Jonassohn, Katz Melson and Staub all argue that the acts must be committed with some sort of intent.

### **4.3.3 Element of protected groups**

In the report by the Atrocity Documentation Team, the Darfur conflict is depicted as a conflict between the non-Arab population and the Government of Sudan and their allied Arab militia. Colin Powell describes in his speech the targeted group as "the African civilian population" and as "non-Arab villagers".<sup>68</sup> The State Secretary explicitly recognizes that the 1948 Genocide Convention requires the identification of the targeted groups as a national, ethnic, racial or religious group. However, they do not engage in a discussion of the identity of the victims besides using the terms "African civilian population" and "non-Arab individuals". Whether the US believes these terms refer to a national, racial or ethnic group remains somewhat cloudy. Using the term "non-Arab" would fail to identify the group by what they are, at least according to Komar and Schabas. However, there are indications that the US still considers that the targeted group may qualify as a protected group. When Colin Powell in his speech concludes that the mental element has been met (see discussion below), he also claims that "other elements of the convention have been met as well". Again, whether this means that the element of protected groups has been met remains uncertain. However, if the US considers the term "non-Arab" sufficient to determine that the victim group is a protected group, they are indeed applying an approach that has been rejected by courts. Their approach, then, suggests that the US believes that groups may be identified by what they are not.

The US' lack of a proper discussion of the targeted groups, may suggest that despite initially stipulating, they applied the genocide definition spelled out in the 1948 Genocide Convention. However, they have moved away from this definition in practice. Their practice indicate a

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<sup>67</sup> Powell 2004:5

<sup>68</sup> Powell 2004

understanding of the target of annihilation that is closer to the definitions by Drost, Kuper and Fein, who argues that genocide are committed against a collectivity, more than the Convention states. Also Chorbajian arguments that "targeted populations" are the victims of genocide may resemble the US' understanding.

## 4.4 IGO: the United Nations

The Commission argues that the 1948 Genocide Convention requires "a number of objective and subjective elements for individual criminal responsibility for genocide to arise".<sup>69</sup> Both the subjective and objective element is twofold. The objective element relates to (1) the prohibited acts which "must take form of a (a) killing, or (b) causing serious bodily or mental harm, or (c) inflicting on a group conditions of life calculated to bring about its physical destruction, or (d) imposing measures intended to prevent births within the group, or (e) forcibly transferring of children of the group to another group and (2) to the targeted groups "which must be a national, ethnical, racial or religious group".<sup>70</sup>

The subject element is twofold because the definition requires criminal intent to commit the underlying offences enumerated and a specific criminal intent which is specified in the chapeau of Article II. This second criminal intent requires that the acts must be committed with "intent to destroy, in whole or in part [the targeted group] as such". The commission describes this criminal intent as:

*"an aggravated criminal intention or dolus specialis [which] implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such".<sup>71</sup>*

The Commission describes in other words, four different criteria that must be met before acts of genocide have occurred. How and to what extent do their analysis and conclusion of the alleged genocide in Darfur relate to these elements?

### 4.4.1 Physical element

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<sup>69</sup> COI 2005:124

<sup>70</sup> COI 2005:124

<sup>71</sup> COI 2005:124

The Commission acknowledges that genocide may be committed in five different ways and that they have documented several of these acts being committed in Darfur. They claim that there "is no doubt that some of the objective elements of genocide materialized in Darfur".<sup>72</sup> The Commission clarifies by stating that they have:

*"collected substantial and reliable material which tends to show the occurrence 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".*<sup>73</sup>

In other words, the Commission claims that the enumerated acts of Article II (a), (b) and (c) have occurred in Darfur. While there are no explanations or specifications around Article II (a) and Article II (b), the Commission explained in relation to Article II (c) that the deliberate infliction of destructive conditions could be seen in the systematic destruction of villages and crops, forced expulsion and looting of cattle.<sup>74</sup> There is little evidence to suggest that the Commission has gone beyond how the three first enumerated acts generally have been understood in the literature and international case law. The Commission's focus on these forms of annihilation suggests that they strictly followed the definition set out in the Convention. Although almost all definitions argue that killing is the mode of annihilation the Commission's understanding exceeds the understanding that killing is the only form of annihilation. Many definitions are therefore not compatible with the Commission's application. However, in addition to the 1948 Genocide Convention the definition of Chorbajian which describes mode of annihilation as "great cruelty" and the definition Fein and Huttenbach conceptualizing mode of annihilation as "physical destruction" fit the understanding of the Commission.

#### **4.4.2 Mental element**

The Commission explicitly recognizes that the question of whether the physical acts were committed with "intent to destroy, in whole or in part [the targeted group] as such, or "genocidal intent" as the Commission calls it, is a "constitutive element of genocide". The Commission argues that they found evidence both for and against "genocidal intent", but that

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<sup>72</sup> COI 2005:129

<sup>73</sup> COI 2005:129

<sup>74</sup> COI 2005:129

the evidence against was more convincing; thus leading them to conclude that the requisite mental element of Article II of the 1948 Genocide Convention was not present. The Commission writes:

*"Some elements emerging from the facts including the scale of the atrocities and the systematic nature of the attacks, killing, displacement and rape as well as the racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show the lack of the genocidal intent".<sup>75</sup>*

These "other more indicative elements" relate to a number of situations and incidents the Commission has collected through their investigation. Based on these elements the Commission concluded that the actions of the Sudanese government did not "evinced a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds".<sup>76</sup> First of all, the Commission referred to several cases in which the Janjaweed and the government forces refrained from killing everyone when they attacked villages. Instead of killing all, they selectively killed groups of young men. The Commission explicitly describes one case, in which the perpetrators attacked Wadi Saleh – a group of 25 villages – and did not kill everybody. In the words of the Commission:

*"According to credible account of eye witnesses questioned by the Commission, after occupying the villages the Government Commissioner and the leader of the Arab militias that had participated in the attack and burning, gathered all those who had survived or had managed to escape into a large area. Using a microphone they selected 15 persons (whose name they read from a written list) [...] and executed them on the spot. They then sent all the elderly men, all boys, many men and all women to a nearby village [...] whereas, they executed 205 young villagers, who they asserted to be rebels. According to male witnesses interviewed by the Commission and who were among the survivors, about 800 persons were not killed".<sup>77</sup>*

The Commission argues that this situation shows that the perpetrators did not wish or wanted to destroy the groups. Instead, the Commission argues that the intention was "to murder those men they considered as rebels, as well as to forcibly expel the whole population so as to

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<sup>75</sup> COI 2005:130

<sup>76</sup> COI 2005:132

<sup>77</sup> COI 2005:131

vacate the villages and prevent rebels from hiding among, or getting support from, the local population".<sup>78</sup>

Secondly, the Commission referred to situations in which forcibly dislodged people were not killed but forced to abandon their homes and live together in government-selected areas. The Commission argues that the conditions in these camps "do not seem to be calculated to bring about the extinction of the ethnic group".<sup>79</sup> Thirdly, several villages of mixed population of both African and Arab tribes, have not been targeted. Fourthly, the Commission presents a case in which only one of two brothers were killed when they were met by Janjaweed. According to the Commission, the killed brother resisted when Janjaweed wanted his only camel, while the other brother did not resist. The Commission argues:

*"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 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".<sup>80</sup>*

Despite the initial statement that there were some elements that could be interpreted as evidence of genocidal intent, The Commission found evidence of other situations suggesting otherwise. In short, the behavior of the perpetrators in these situations supports the argument that they were not intentionally trying to destroy the targeted groups. Based on the conclusion that the perpetrators did not possess the requisite genocidal intent the Commission then concluded that no acts of genocide had occurred. The Commission writes that "on the basis of the above observations, the Commission concludes that the Government of Sudan has not pursued a policy of genocide".<sup>81</sup> Furthermore, the Commission explains that despite the existence of the objective elements:

*"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 evidence 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*

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<sup>78</sup> COI 2005:131

<sup>79</sup> COI 2005:131

<sup>80</sup> COI 2005:131

<sup>81</sup> COI 2005:131

*pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare".<sup>82</sup>*

The Commission argues that the targeted villages and groups in Darfur are targeted because these tribes and villages contained rebels and insurgents rather than because the Government and Janjaweed intended to destroy the groups as such. However, the Commission underscores in their conclusion that even though the central authorities did not possess genocidal intent, specific individual may have acted with such intent aiming to destroy, at least partially, the group as such. The Commission writes:

*"One should not rule out the possibility that in some instance single individuals including Government officials, may entrain a genocidal intent or, in other words, attack the victims with specific intent of annihilating, in part, a group perceived as a hostile group. If any single individual, including any Government officials, has such intent, it would be up to a competent court to make such a determination on a case-by-case basis".<sup>83</sup>*

In this regard the Commission have made it clear that it would not make final judgements as to criminal guilt, but instead have handed over a sealed list suspects of individuals having committed international crimes.

## **Discussion of the mental element**

As one of their four tasks, the Commission was asked to determine whether acts of genocide had occurred or not. After arguing, as shown in the preceding sections, that both objective elements of the definition of genocide in the 1948 Genocide Convention are present in Darfur, the Commission states that the mental element is missing and therefore that acts of genocide has not occurred. The finding that the perpetrators did not possess the requisite "intent" was decisive in the Commission's conclusion that genocide has not taken place in Darfur.

There has been a debate of how many people must be attacked before the criminal act qualifies as genocide. How many constitute "in part"? The Commission presents several facts that may shed some light on this aspect of the 1948 Genocide Convention. All the examples the Commission presents as evidence proving that the perpetrators did not possess the requisite genocidal intent includes situations in which the attackers *did not kill everybody they came across even though they belonged to the Fur, Masaalit and Zaghawa*. The

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<sup>82</sup> COI 2005:132

<sup>83</sup> COI 2005:132

Commission's main argument is that since the civilian members of these groups were not "killed outright", the perpetrators could not have intended to "eradicate the group".

After being presented with evidence of various criminal acts, including many situations involving killing, raping, beating, destruction of means of survival, bombing and burning of villages and forced displacement from page 63 to 107, which are all intended to prove that the perpetrators violated a number of international convention, the majority of the violations amounting to war crimes and crimes against humanity, the Commission presents four examples showing that the Government did not pursue a genocidal campaign. However, what is interesting about these four pieces of evidence and the arguments by the Commission is the implicit interpretation of Article II, in which genocide is defined as acts committed "with intent to destroy" groups either "in whole" or merely "in part". It is, in other words, obvious that the entire group neither needs to be targeted nor vanish from the face of the earth.

As previously mentioned, one of the evidences the Commission present proving the absence of genocidal intent was a situation in which two brothers were confronted by the Janjaweed and only one was killed because he gave away his cattle while his brother did not. When the Commission then presents an example of one situation that includes two brothers out of the millions of people that have been affected by the conflict, and where the Commission's point is that only one of the brothers was killed, arguably because he did not want to give away his cattle, the question is whether they overlooked the "in part" of the Convention.

Several academics have raised question of the Commission's interpretation of the "in whole or in part" part of the convention. The Commission presents several cases which they claim prove that the perpetrators did not possess the specific intent. According to Luban (2006), these situations may just as much prove the genocidal intent. Luban argues that it would be fruitful to compare the Commission's arguments with the ones that appear in the conviction of General Krstic in case of Srebrenica-massacre in July 1995 in Bosnia-Herzegovina. In this conviction the Tribunal argued that it was neither Muslims nor Bosnian Muslims as a whole that was targeted and slaughtered but rather the specific group of Bosnian Muslim men of military age. Women and children were displaced to other areas. The Tribunal concluded nevertheless that the killing of the displacement of women and children made it impossible for the Muslim community in Srebrenica to survive. In other words, while the ICTY viewed killing of the men and the displacement as evidence of genocide, the Commission did not. Moreover, as emphasized by Luban, while ICTY claimed that the displacement of women and

children should be merely seen as a tactical manoeuvre avoiding increased publicity, the Commission place great emphasis on the perpetrators failure to kill women and children as evidence of no genocidal intent, rather than as sensitivity to public opinion. Luban (2006:12) thus concludes that "the similarities of Srebrenica [and Darfur] are striking, but the ICTY and the Commission reached opposite conclusions on remarkably similar evidence". Luban argues that this indicate that the Commission followed Lemkin's original idea more closely than the ICTY.

*[a] comparison of the Darfur Report with Kristic suggests that the UN Commission was more faithful than the ICTY to Lemkin's uncompromised conception of genocide: the Commission was unwilling to concede that a selective attack amounts to an assault on a group as such. But the ICTY had simply carried to a logical conclusion the compromised conception of genocide against a group in part, a group-within-a-territory-and so it was more faithful to the law as it actually exists" (Luban 2006:14)..*

This indicates that the Commission and the ICTY adopted rather different understanding of what "in part" signifies. While the ICTY adopted the third approach of interpreting "in part", namely that the "in part" relates to whether the targeted victims could be identified as a "significant" part of the group that was attacked, the Commission seems to have adopted a more narrow understanding. The Commission did not, as Luban argues, consider the significance of the targeted victims. Nor did they, as the second approach of interpreting "in part" suggests, discuss whether the targeted victims were a substantial part of the group. The fourth approach, which takes into consideration, the geographical space, in which the victims were targeted, was also not discussed by the Commission. The first approach to the scope of the term "in part" argues that the perpetrators intention must be to destroy the entire group, even if the result may only be partial destruction. This view is, in other words, more narrow than the other approaches which do not requisite total destruction as core argument. They argue that it is necessary to destroy a substantial or a significant part of the group, or even just a group confined within a limited geographical zone. Based on the evidence the Commission's presents the Commission may arguably have utilized the first approach claiming that total destruction must have been the aim of the perpetrators. In a similar vein, Mionki (2010:7) argues that the Commission adopted a narrow understanding of the term "in part". He claims that "the Commission on Darfur seems to have adopted [a] very restrictive definition. This can be seen from the [use] of the words "annihilate", "eradicate" and "extinction""



In relation to how to prove genocidal intent, I distinguished in 5.2.1 between direct and circumstantial evidence. Circumstantial evidence is evidence that is based on inferring genocidal intent from the context and not from the words and deeds of the accused. The Commission recognized this method of inferring genocidal intent stating that "as to proof of specific intent, it may in absence of direct explicit evidence, be inferred from a number of facts and circumstances". The Commission cites from several genocide cases from both ICTY and ICTR to show what kind of aspects genocidal intent may be inferred from.

The Commission utilized this method in their analysis arguing that "some elements emerging from the facts" could indicate that the perpetrators possessed the requisite "intent". Hence, the Commission cannot be confronted for ignoring this method. The Commission found nevertheless other evidence that contradicted the circumstantial evidence leading them to conclude that the specific intent was not present. This has resulted in criticism of the Commission's evaluation of the circumstantial evidence. According to Totten (2009) the Commission does not properly analyse and evaluate all their findings in relation to the number of facts and circumstances case law presents as relevant for inferring genocidal intent. In his article, Totten presents an in-depth analysis of the information that was publically available and which the Commission also possessed. He concludes that the Commission erred in their evaluation of the evidence they possessed. His analysis is basically a critique of how the Commission discusses the question of genocidal intent. According to Totten (2009), the Commission possess more than enough evidence from the context which indicated that the perpetrators acted with intent. He concludes that:

*"Ultimately, in light of so much evidence that suggest that the GoS and the Janjaweed were intent on destroying in whole or in part the black Africans, the major question remains is: Exactly what sort of policy, evidence and actions would evince – for the COI Commissioners – a specific intent to destroy in whole or in part, groups distinguished on racial, ethnic, national, or religious grounds? More deaths? More racial and ethnic slurs? More wells poisoned? More humanitarian goods stolen or prevented from reaching those who are destitute, dying, and internally displaced? A smoking gun? The COI does not say."*

The Commission concluded that no acts of genocide have occurred because the Sudanese Government did not pursue a "policy of genocide". This has again flared up the debate about the importance of the aspect of a policy or a plan to prove genocidal intent. On the one side, Samuel Totten (2009) has raised strong critique of the Commission's conclusion arguing that the Commission was not tasked to determine whether the Government had implemented a

policy of genocide. On the other, the well-known international criminal law expert William Schabas (2005) claims that the Commission's inference underscores the importance of such a plan or policy in deciding whether the perpetrators acted with the specific intent to destroy the targeted group as such.

According to Totten (2009), the Commission failed in their analysis because their conclusion was not based on the tasks they received. Referring to the Commission's report, Totten pinpoints that the Commission was tasked to investigate "reports by violations of international humanitarian law and international human rights law in Darfur by all parties" and "to determine whether or not acts of genocide had occurred". Totten argues that the Commission's conclusions that the Sudanese Government did not pursue a "policy of genocide" is not only wrong, but fails to carry out what they were tasked to do. He states that "the problem is that [the Commission] was not given the sole task to determine whether or not the GoS committed genocide". Totten raises concern whether the Commission adequately discussed the Janjaweed, its role and its relationship to the central authorities. Similarly, Loewenstein and Kostas (in Totten and Markusen 2007:850) claim that:

*"It is appropriate to ask whether the Darfur Commission properly framed its inquiry by focusing on whether there was a state plan or policy of genocide, when it was asked to 'determine' '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'".*

However, William Schabas is of a different opinion than Totten, Loewenstein and Kostas. According to Schabas (2005:877), the Commission was tasked to determine whether the Government really pursued a genocidal policy. He explains that:

*"in effect, in asking the Darfur Commission whether genocidal acts were being committed in Sudan, the Security Council wanted to know whether genocide being committed in pursuance of a plan or policy of the state. Of course, the Security Council did not make this explicit, but the whole point was obvious enough".*

Schabas disregards Totten's accusation that the Commission was tasked to determine whether or not there existed any state plan, because it could be logically deducted from the situation. But if the Security Council really wanted proof of whether there existed any plan, why was that not expressed in the tasks they assigned for the Commission? And if finding a state plan, which was the Commission's interpretation of the four tasks they receive, why did they not convey their interpretation? Furthermore, it is worth noticing that the Commission writes that

several official state documents were withheld and/or claimed to not exist despite that they had been promised access to them. While it is highly problematic that the Government did not fully cooperate, the missing documents may undermine the Commission conclusion. If there would be a policy of genocide, where would one find evidence of such a plan? Most likely one would find evidence of a plan or policy of genocide in official state documents. Or rather, if documents are withheld, one cannot conclude with certainty that there was no plan or policy. That is, however, what the Commission did. Schabas claims anyway that the Commission's conclusion affirms the central role of a plan or policy in assessing the perpetrator's mental state.

*"Does anybody really care whether a single individual, acting alone and independently of involvement or complicity of the Sudanese Government, had the intent to destroy an ethnic group? Surely this question never interested the Security Council, or Colin Powell, for that matter, nor could an individual génocidaire acting alone without a state plan or policy provide a pretext for Security Council action, or for the intervention of UN bodies pursuant to Article VIII of the Genocide Convention, or give a basis for jurisdiction of the International Court of Justice in accordance with Article XI of the Convention. The Darfur Commission implicitly understood this, and answered accordingly. Although there is no shortage of authority claiming that a state plan or policy is not an element of the crime of genocide, the behaviour of Security Council and the Darfur Commission shows that a state plan or policy is not only an essential ingredient of the crime, it is the question that lies at the very heart of the debate" (Schabas 2005:877).*

While the focus on the question of intent indicate that the Commission adhered to the Convention, and also fits the conceptualizing of intent in the definitions by Kuper, Chalk and Jonassohn, Katz, Melson and Staub, they formulate the question of intent with some sort of intent. Their interpretation may, nevertheless, have departed from the Convention. It has been pointed out that the Commission have put too much weight on a couple of situations in which only rebels, not civilians were killed, and thus not recognized that the Convention acknowledges partial group destruction as genocide as well. The Commission's understanding suggests therefore that their application of the concept of genocide is closer to for instance Chalk and Jonassohn, who claims that the destruction must be intentional and target the entire group, or Lemkin, Katz and Staub who maintain that genocide concerns the intentional group annihilation, not just partial destruction. Chalk and Jonassohn specifies, in contrast to the definition set out in the Convention, that the perpetrators must be the state or other authority. As the Commission concludes that the Government has not implemented a policy of genocide, and does not comment further upon whether Janjaweed may have committed

genocide, it seems that the Commission also posits that the agent of annihilation must be the stated.

#### 4.4.3 The element of protected groups

The Commission acknowledges that identifying the targeted group according to international law "is a constitutive element of genocide".<sup>84</sup> The Commission presents two different ways to identify the victim group. The first way relates to whether there are any objective differences such as language, religion or skin- color, between the perpetrators and the victims, and is referred to as the 'objective test' of identifying victim group. According to the Commission, there are no objective differences between the attackers and the victims in Darfur. They write that:

*"The various tribes that been object of attack and killings (chiefly the Fur, Masaalit and Zaghawa) do not appear to make up ethnic groups distinct from the ethnic groups to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim)".<sup>85</sup>*

Concluding that the conflicting parties *objectively* do not make up different ethnic group, the Commission proceeded with another way of identifying the victim group. This second way of determining the differences between the victim and perpetrator is referred to as the 'subjective test' and relates to whether the groups in question, despite no objective differences, nevertheless might perceive each other and themselves as different groups. Based on this way of identification, the Commission concluded that the targeted tribes might be identified as a protected group. This conclusion is grounded on a historical reason as the Commission argues that "those tribes in Darfur who support rebels have increasingly come to be identified as "African" and those supporting the government as the "Arabs"". <sup>86</sup> Moreover, the Commission argues that how the different groups refer to and label each other also indicate that the conflicting groups are different. They write:

*"There are other elements that tend to show a self- perception of two distinct groups. In many cases militias attacking "African" villages tend to use derogatory epithets, such as "slaves", "blacks", "Nuba" or "Zurga" that might imply a perception of the victims as members of a distinct group ... As for the victims, they often refer to their attackers as*

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<sup>84</sup> COI 2005:129

<sup>85</sup> COI 2005:129

<sup>86</sup> COI 2005:130

*Janjaweed, a derogatory term that normally designates "a man (a devil) with a gun on a horse". However, in this case the term Janjaweed clearly refers to "militias of Arab tribes on horseback or on camelback." In other words, the victims perceive the attackers as persons belonging to another and hostile group".<sup>87</sup>*

In other words, the Commission concludes that since the conflicting groups perceive each other as distinct different, the targeted group may be identified as a protected group. This is underscored by the various labels being used to characterise the opposing groups. These arguments lead the Commission to conclude that the targeted group falls under the protection of the convention.

The Commission considered in their analysis of genocide both the subjective and the objective approach of identifying the targeted group (see 5.2.1). While the Commission first applied the objective approach reaching a conclusion that the victims did not belong to a protected group, the Commission then utilized the subjective approach arguing that the targeted group nevertheless could be identified because the victims and the perpetrators viewed themselves as belonging to distinctly different group. Basing a determination of the targeted group in the question of whether genocide has occurred on the subjective approach has been criticized for allowing the group to be identified solely on the basis of how the groups are perceived by each other. Even though this approach has been criticized, the Commission's analysis might strengthen the approach. By dismissing the importance of objective criteria, the Commission has opened up for a new interpretation of how targeted groups can be identified. In short, it defends the subjective approach arguing that it is sufficient enough that the opposing parties recognize themselves and each other as different groups when determining whether the target group falls under the category of a protected group.

While the Convention has been heavily criticized for leaving out, for instance, political groups, making the Convention quite limited to protect only national, ethnical, racial and religious group, the subjective test may arguably partly erase this limitation. Both the ICTR and the Commission applied the subjective test and despite difficulties of identifying the targeted groups as a national, ethnic, racial, or a religious group they were nevertheless recognized as a protected group. So despite not fitting the enlisted groups in the Convention, the targeted groups have been protected. As Beth van Schaack (2004:1123) has put it: "In this

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<sup>87</sup> COI 2005:130

way, the Commission continued the trend in International Criminal Law towards relaxing the boundaries around the Convention's protected groups".

The question of which groups should be protected by the 1948 Genocide Convention has been widely discussed. The Commission applied the subjective test and argued that since the opposing groups defined each other as different, then the targeted group may be defined as a protected group. The definition in the Convention does not offer a definition of the groups enlisted, nor how one should identify the targeted group. How the perpetrators have defined the targeted group was, however, important for the Commission. This understanding complies with the understanding of Chalk Jonassohn and Charney, who include as the target of annihilation "groups, as that group and membership are defined by the perpetrator". Although the Commission does not specify whether the targeted groups in Darfur constitute national, ethnical, religious or racial groups, the definition proposed by Katz, that victims of genocide are "national, ethnical, racial, religious, political, social, gender, or economic group, as these groups are defined by the perpetrators" also resembles the Commission's process of identifying the group based on the perpetrator's view and characterization. The Commission's understanding may also fit other definition such as Drost, Kuper and Fein who argues that the target of annihilation is any "collectivity" or the definition by Charney and Horowitz who expand the target group even more, and identifies victims of genocide as defenseless and innocent people.

## 4.5 NGOs: Amnesty International, Physicians for Human Rights

Amnesty International (AI) refers in their report to the Rome Statute when they define what genocide is. The organization states that:

*"Acts of genocide include killings members of a group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions calculated to bring about its physical destruction in whole or in part; imposing measures to intended to prevent births within a group; and forcibly transferring children of a group to another group, where such acts are committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".<sup>88</sup>*

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<sup>88</sup> AI 2004:27

Physicians for Human Rights (PHR) states in relation to the definition of genocide in the 1948 Genocide Convention that:

*"Under Article II of the Genocide Convention, two elements – one subjective and the other objective – must be present for a criminal act to qualify as genocide. The subjective element requires "an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The objective element requires that a perpetrator has committed any of the following acts: (a) killing members of a group, (b) causing serious bodily or mental harm to members of a group, (c) inflicting on a 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 of children of the group to another group".<sup>89</sup>*

PHR makes it clear that there are two different elements – the subjective and the objective – element that must be met before acts of genocide have occurred. Are these elements a part of the organizations analysis and conclusion of whether the Darfur-conflict constitutes a genocide?

#### **4.5.1 Physical element**

AI does not engage in a discussion of whether the violence they have documented fits the physical element of Article II in the Convention. However, the violence the organization does describe resembles some of the enumerated acts in the convention. The organization refers to "widespread destruction of houses and villages", "looting and forced displacement" and "rape and other forms of sexual violence".<sup>90</sup> It is undisputed that rape may constitute "serious bodily or mental harm", the words of the second paragraph of Article II. "Forced displacement" may also fit the Convention, as these types of acts have been interpreted precisely as "deliberately inflicting on the group conditions of life. Calculated to bring about its physical destruction in whole or in part" (see the third paragraph of Article II). Anyhow, the organization does not discuss whether the enumerated acts in the Article II have occurred in Darfur. The definition set out in the Convention is the only definition of the 15 compared by Straus that includes mental or bodily harm as a mode of annihilation. The acts that Amnesty International describes may possible fit the definition suggested by Chorbajian as he describes "great cruelty" as a mode of annihilation or Katz' definition as he argues that genocide may be committed by "whatever means".

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<sup>89</sup> PHR 2006:40

<sup>90</sup> PHR 2006:42

PHR recognizes, as shown above, that genocide may be committed in five different ways. They argue in their report that genocide by "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" – Article II (c) of the Convention – have occurred against groups in Darfur. They write that:

*"As outlined in this report, PHR has found compelling evidence of an attempt by the GOS and the Janjaweed to, among other acts, drive people from their villages without provisions or medical care, kill or steal their livestock, destroy their homes, burn their crops, pollute their well, loot their possessions and chase them into the desert – in short, to "deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part"". <sup>91</sup>*

PHR argues, in other words, that their findings of forced displacement and destruction of means necessary to survive have created destructive conditions aiming at least partially to eradicate the group. Besides subparagraph (c), the organization does not discuss their findings in relation to other acts enumerated in Article II. This is, however, not because they did not find evidence pointing to the occurrence of the other acts, but due to limited focus on Article II(c).<sup>92</sup> The organization notes in this regard that "the focus of this report on Article II(c) of the Genocide Convention should not be construed as suggesting that the actions of the Government of Sudan and the Janjaweed do not qualify as genocide under other clauses of the Convention".<sup>93</sup> But to be perfectly clear, Article II(c) is the only clause that PHR discuss in their report and the organization concludes that the acts mentioned by this paragraph have occurred in Darfur.

PHR focus in their report exclusively on how the perpetrators have inflicted destructive conditions on purpose in order to destroy the group physically. Besides the Genocide Convention's definition, several other definition also point to physical destruction as a mode of annihilation. For instance the definition by Fein and Huttenbach defined genocide as "physical destruction". What "physical destruction" means is, however, not specified. PHR's understanding may therefore lie closest with Ervin Staub who follows the Convention claiming that genocide could be committed by causing destructive conditions.

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<sup>91</sup> PHR 2006:42

<sup>92</sup> This aspect will be elaborated in the next chapter as I will compare the purpose of the various actors.

<sup>93</sup> PHR 2006:40



## 4.5.2 Mental element

According to PHR, "an assessment of genocide also requires the element of "intent"". <sup>94</sup> The organization further argues that they have found evidence that the Government of Sudan and Janjaweed intended to destroy the Fur, Zaghawa and Masaalit, in whole or in part. These evidences, the organization claims, are both direct and circumstantial. The direct evidence relates to statements by the perpetrators directed towards the victims explaining why they are attacked. PHR writes that they have:

*"found direct evidence of genocidal intent. For instance, survivors interviewed by PHR reported that their attackers shouted such things as "Exterminate the Nuba!" These types of statements are classic admissions as to a perpetrator's mental state, in this case, evidencing the intent to "exterminate" the "Nuba", i.e. the non- Arab group being attacked".* <sup>95</sup>

PHR argues that such language as "Exterminate the Nuba" are explicit evidence of a specific intention to "destroy [the targeted] group, in whole or in part, as such". Moreover, the organization also claims to have found circumstantial evidence that proves the "intent". These circumstantial evidences are based upon the method of inferring genocidal intent from the context of which the crime was committed. These evidences are characterized as "strong" and "overwhelming". PHR explains:

*"PHR's investigation reveals overwhelming evidence from which genocide intent may be inferred: only non-Arab populations were targeted in the utter eradication of villagers and village life; the atrocities have been committed on a massive scale; the GOS/ Janjaweed exhibit the same pattern of atrocities across time and against different non-Arab ethnic group, including, critically, systematically destroying anything that can sustain life; victims are targeted because of their membership in particular groups; the GOS refused repeatedly to allow aid organizations access to the area; the GOS/Janjaweed have targeted non-Arabs regardless if their age (particularly males), and even attack men, women and children who are fleeing. These and other findings, individually and collectively, suggest the mental state of the perpetrators, namely an intent to destroy certain ethnic groups "in whole or in part".*

PHR found both direct and circumstantial evidence that together indicated that the perpetrators intended to destroy the targeted groups. PHR is clear that circumstantial evidence may be used when direct evidence is not found. "International law is clear that genocidal intent may be inferred" and by placing emphasis on the method of contextual interpretation,

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<sup>94</sup> PHR 2006:42

<sup>95</sup> PHR 2006:42

the organization contribute to strengthen this way of finding genocidal intent.<sup>96</sup> This method has been criticized for allowing genocidal intent to be proved from the context rather than from the direct observation of words and deeds of individuals. The organization have also included direct expressions from perpetrators as corroborating evidence, which at least partly compensate for the exclusive contextual focus. Furthermore, PHR's argument that the Government refused aid-organizations to do humanitarian work in the conflict zone could be taken as evidence of a plan by the Government to carry out their goal. However, there is no evidence indicating that the PHR believed a state plan or policy to be a necessary element of finding genocidal intent.

AI discusses whether or not the violence in Darfur has been committed "with intent to destroy [the targeted] group, in whole or in part, as such". Yet, the organization concludes that they do not possess the necessary evidence to argue that the perpetrators intended the destruction of the targeted groups. The organization points to several different criminal acts that have been committed in a way that may indicate genocidal intent. For example, the AI notes the "... widespread destruction of houses and villages in combination with the looting and forced displacement appears to have as an objective to destroy livelihoods".<sup>97</sup> Moreover, AI writes that "rape has been widespread and, at least sometimes systematic with possibly an intention to destroy the social structure and community of specific ethnic groups".<sup>98</sup> AI argues that these acts definitely show that the perpetrators meant to "collectively punish" civilians perceived to be anti-state rebels or involved with such rebels.

While these acts to "collectively punish" also may be interpreted as acts aimed at destroying the targeted groups, the organization concludes that the "evidence remains inconclusive".<sup>99</sup> Moreover, the organization "has not been in a position to date to conclude that there was genocide or that there was "intent to destroy, in whole or in part, a national, ethnic, racial or religious group"". <sup>100</sup>

In their report, the AI does not discuss whether the violence in Darfur has manifested itself in any of the five acts enumerated in Article II or whether the violence has been directed against one of the four groups enlisted. However, the organization does discuss whether the violence

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<sup>96</sup> PHR 2006:42

<sup>97</sup> AI 2004:30

<sup>98</sup> AI 2004:30

<sup>99</sup> AI 2004:30

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was intended to destroy the targeted groups, though without distinguishing between different types of evidence. In short, they argue that the widespread and systematic nature of the attacks may constitute evidence of genocidal intent. AI also mentioned the fact that different types of criminal acts created a more difficult way to continue daily life. The analysis of whether the Darfur-conflict constitute genocide is based on the findings showed above, substantially shorter and less extensive than the other actors' analysis and does not really give much to discuss how they understand the concept of genocide or the specific components of Article II of the 1948 Genocide Convention. Nevertheless, the fact that the organization focuses on both the militia Janjaweed and the Government of Sudan as perpetrators may suggest that the AI does not see the existence of a state plan or official policy as necessary. Moreover, it is nothing that indicates that the organization believes that total annihilation must be the goal of acts of genocide.

Both PHR and AI focus on the question of intent in their analysis and differentiate in other words their understanding of genocide from the definitions proposed by Lemkin, Drost, Charney, Fein, Bauer, Chorbajian, Harf and Gurr, Horowitz and Huttenbach who does not conceptualize genocide with "intent". Instead PHR and AI follow the definitions by the Convention, Kuper, Chalk and Jonassohn, Katz, Melson and Staub.

### **4.5.3 The element of protected groups**

Both AI and PHR refer to and cite the entire definition of genocide set out in 1948 Genocide Convention, and acknowledge by this that the definition requires that the acts described in the definition must be directed at national, ethnical, racial or religious groups. However, the organizations do not, in the same way as the US and the Commission, specify in an independent element that the Convention only protects groups of national, ethnical, racial or religious identity. Neither PHR nor AI present a discussion of whether the targeted groups may be identified as a national, ethnic, racial or religious group, and thereby fall under the protection of the Convention.

There are indications that both organizations believe that the targeted groups – the Fur, Zaghawa and Masaalit – are ethnic groups. AI writes that "In February 2003, a new armed insurgent group, calling itself the Sudan Liberation Movement/Army (SLM/A) and composed mainly of members of the Fur, Zaghawa and Masaalit ethnic groups of Darfur emerged and

attacked government targets".<sup>101</sup> PHR states that "In the current conflict in Darfur, Sudanese military forces and Janjaweed militias have systematically assaulted, raped, tortured tens of thousands of civilians belonging to the Fur, Masaalit, Zaghawa and other non-Arab ethnic groups who have lived in the western region of Sudan for generations".<sup>102</sup>

PHR identification of the targeted group may be problematic, at least if they claim that the group in fact fits the enlisted ethnic group, because the groups are identified by what they are not. The targeted groups of the Fur, Zaghawa and Masaalit are identified as non-Arab, which only explains what they are not, rather than what they are. A negative approach of identifying group identity has been widely refused by scholars as well as previous court tribunal decision. Anyway, because there is no discussion of the victim group's identity or an ascertainment that the target group does falls under the protection of the 1948 Genocide Convention, both organization fail to systematically apply the definition of genocide set out in Convention. This has perhaps made it easier to conclude that genocide has occurred in Darfur, at least in the case of PHR.

Neither PHR nor AI follow the definition of genocide set out in the Convention, which requires the identification of the targeted group as national, ethnical, religious or racial group, by actually discussing the targeted group's identity or, just, ascertain that the targeted group is a protected group. In this way, both actors may have adopted an understanding of genocide proposed by the definition of Drost, Kuper, Charney, Fein, and Chorbajian, Horowitz does not require any specific identity of the targeted groups. For instance Drost, Kuper and Fein define the target of annihilation as "collectivity", while Charney and Horowitz define "defenseless" and "innocent" people as victims of genocide (Straus 2001:350-353)..

## 4.6 Conclusion

In this chapter I have examined how the concept of genocide or the G-word has been conceptualized by the US, the UN, Physicians for Human Rights (PHR) and Amnesty International (AI) in their reports on the Darfur- conflict. Despite applying the same definition – the 1948 Genocide Convention, the results of my analysis suggests that the actors understand and interpret this definition differently.

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<sup>101</sup> AI 2004:6

<sup>102</sup> PHR 2006:18

The physical element is discussed by the Commission, PHR and the US, but not by AI. Both the Commission and the US concluded that the three first enumerated acts of the definition (subparagraph a, b and c) had materialized in Darfur. PHR argued, however, that genocide under only subparagraph (c) had been committed. AI does not discuss the mode of annihilation directly, but their focus on sexual violence may arguably fit subparagraph (b). The US, PHR and the Commission adhered, in other words, to the Convention. Though all definitions holds killing as mode of annihilation, the actors understanding that genocide may be committed through other means than killing stands in stark contrast to almost every definition.

The mental element is explicitly discussed by all actors, though to various extent and with various conclusions. The US argued that the perpetrators possessed the requisite "intent" and Colin Powell claimed in his speech that this "intent" could be inferred from the perpetrators "deliberate conduct". The Commission argued that some facts could indicate that the perpetrators possessed the genocidal intent, but concluded that this intent was absent because they found that the perpetrators in several cases only killed rebels and not the civilians. The focus on a few cases showing that not all members of the group were killed suggest that the Commission adopted a narrow reading of the Convention, not taking into account that partial group destruction also amount to genocide. AI argued in a similar vein that some facts suggested the existence of genocide intent. In contrast to all actors they concluded, however, that their evidence remained inconclusive to prove that genocide had or had not occurred. PHR argued that they had found evidence of the perpetrator's intending the total or partial destruction of the targeted groups, because the perpetrators expressed so in statements to the victims, and because the context showed widespread and systematic targeting of members belonging to certain groups.

Regarding the element of protected groups, only the Commission discussed explicitly this element. They concluded that the targeted group could be identified as protected group because the targeted group and the perpetrators perceive each other and themselves as distinct different groups. This conclusion strengthens the view that a targeted group may be characterized as a protected group without any objective differences and based on how the perpetrator perceives the opposing group. This method is recognized by other genocide definitions as well. The lack of discussion by AI, the US and PHR suggest that they in practice moved away the definition spelled out in the Convention and adopted an

understanding proposed by other definitions that the specific identity of the targeted group is secondary to the fact that groups are being deliberately targeted.

While all actors initially started with applying the definition as it is set out in the 1948 Genocide Convention, the analysis suggests that the actors, though variously, have interpreted the different elements of the definition that resembles other definitions of genocide.

# 5 Documenting abuse

## 5.1 Introduction

In the previous chapter I examined how the actors conceptualized the concept of genocide. The results indicated that all actors applied the same definition, i.e. the one stipulated in the 1948 Genocide Convention. This suggests that the legal definition is universally accepted, and that the inability to reach a common understanding of whether the Government of Sudan and its allied militia engaged in genocide against local groups in Darfur, is not related to contestation of the definition of genocide. However, despite this definitional agreement, the actors did not necessarily apply the definition similarly. While all actors discussed the mental element of the definition, only The US, the UN and PHR, discussed the physical element, not the AI. And only the UN discussed whether the targeted group could be identified as a protected group. It was a disagreement regarding the mental element – and how to empirically demonstrate "the intent to destroy" in particular – that seems to have been decisive to the actors' divergent conclusions.

In this chapter I ask the question: How did the actors in the international community document the abuse in the Darfur-conflict? I want to examine the extent to which the actors' disagreement might (also) be explained by aspects related to how the actors ascertained their facts – commonly labelled the fact-finding process (Bothe 2007). While the actors' conclusions have received much attention in the academic literature, their methodological approach has scarcely been subjected to critical inquiry. Human rights reports by NGOs have played a significant role in raising awareness of the Darfur-conflict (Slim 2004; Miles 2006), but their investigative techniques have arguably received far less attention. This lack of methodological focus stands in stark contrast to the attention the report by the Commission has received. Scholars have not just discussed the Commission's analysis of international criminal law, but also their working methods and burden of proof. While Alston (2005:601), for example, argues that Commission's work should be a "model for future response to comparable crisis situations", Samuel Totten (2009:357) has described the Commission's investigation as "understaffed, hurried and rather unsystematic". The Atrocity Documentation Team has been praised for setting precedent on how future nations may (legally) determine the true nature of unfolding atrocities within other nations (Totten and Markusen 2006).

In the following chapter I will first give a short introduction of the basic components of a fact-finding process. Thereafter, I present the main theoretical framework utilized in this chapter, before I analyze the actors' fact-finding process. This analysis is based on the theoretical framework described below in 1.1.2. Each type of actor is discussed separately: first, the UN; second, the US; and third, Amnesty International and Physicians for Human Rights. Lastly, in 1.5, I offer some concluding remarks.

### **5.1.1 Fact- finding**

There are several definitions of fact-finding. However, the only one stipulated (so far) in an international document defines fact- finding as "any activity designed to obtain information of the relevant facts of any dispute of situation". This definition was established in 1991 when the United Nations put forward fact-finding guidelines in their Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security (Frulli 2012:1324). Historically, fact-finding as dispute settlement may be traced back to the late 19<sup>th</sup> century and the 1899 Hague Convention (Van der Herik 2014). After the American battleship Maine sank in 1898 and two different national inquiries (the US and Spain) reached diverging conclusions to the causes of the sinking, the Russians suggested to establish an international commission of inquiry to investigate the situations. The Hague Conference a year later endorsed this idea, and states agreed to the Regulation of the 1899 Hague Convention on the Peaceful Settlement of Disputes. Yet, specific working methods and mandates were not specified until the 1907 Hague Convention, which specified that such fact-finding commission was supposed to elucidate facts through impartial and conscientious investigation with the aim of conflict solution (ibid).

A more commonly fact-finding is described as the process of elucidating facts in order to establish more agreement in relation to the often varied perceptions of the facts (Frulli 2012). Though fact-finding is an important element in any dispute, it has come to play a crucial role in international relations (Bothe 2007). Especially since the 1990s, in the wake of the uprising of international criminal justice, there has been a substantial increase in international fact-finding missions outside criminal justice (Bergsmo 2013). The different reports and statements scrutinized in this thesis could be seen as illustrating examples of this development. Fact-finding in relation to international criminal, humanitarian and human rights is not only a question of how to ensure a convincing account of the facts, but also



related to the assessment and evaluation of the specific findings in accordance with the applicable legal framework. According to Utmelidze (in Bergsmo 2013), fact-finding could therefore be seen as a "quasi- judicial or quasi- judicial like" process.

### **5.1.2 Theoretical framework**

Michael Bothe (2007) provides a relevant framework in order to compare the different investigations. According to him fact-finding procedures follow these stages: (1) initiation, (2) determination of mandate, (3) taking evidence, (4) evaluating evidence, (5) statement of facts and (6) reaction. Before presenting these stages more thoroughly let me first inform that the fifth and sixth stage is not a part of the analysis in this chapter. The penultimate and fifth stage relates to the conclusion of the fact-finding mission and is usually presented in a report. The sixth stage relates to the reaction based on the mission's conclusion(s) in the report. The reason why the fifth stage is excluded is that it is not the entire report published by the actors that is subject of inquiry in this thesis. Rather it is the relevant information in relation to my research question that is extracted from the reports. The reports are important, but not as the fifth stage in the fact-finding process. While, Bothe argues that the sixth and final stage is the most important one, this stage is excluded because my research question does not address the actors (political) reaction in aftermath of the publication of the report. I now turn to the four first stages of the fact-finding process.

#### ***Stage one and two: Initiation and mandate***

The first stage relates to how a fact-finding mission begins. Bothe talks about suspicion or unilateral claim as possible examples of motives to start a fact-finding mission. While such an example may include cases in which the fact-finding mission was specifically established based on the actor's mistrust or uncertainty into a dispute or situation, fact-finding missions may also be a part of a routine in which ascertaining facts is a part of their daily work. Regardless of the point of departure, Bothe argues that fact-finding missions entail a mandate. Bothe does not define mandate in his article, but Yuwen (in Bergsmo 2012:154) explains that the mandate sets out the scope of the missions and determines their political authority. In other words, mandate relates to what the fact-finding missions are supposed to do. The two first stages – initiation and mandate specification – tell us, however, a lot about the "ultimate purpose and function of the procedure" (Bothe 2007:250). Furthermore, according to Yuwen (in Bergsmo 2012:157), mandate of international fact-finding missions should include the

commission's purpose, working method, the geographic scope and time of span of factual finding, the applicable law and the scope of the commission's conclusion

### *Stage three: Taking of evidence*

The third stage – taking evidence – relates to how the mission proceeds in the field, and how they ascertained their facts. Moreover, this stage is concerned with the access to the field of inquiry and the reliability of the process. There are no uniform standards of how fact-finding should be conducted. One of the most common ways, however, to conduct fact-finding is to interview victims and witnesses (Kaleck and Terwindt in Bergsmo 2013)

### *Stage four: Evaluating evidence*

The fourth stage of the fact-finding process relates to that the commission's evaluation of their evidence. This process may be described as "the degree to which evidence warrants a conclusion to what the commission considers to be evidence or rather how strong they believe the evidence they possess are. Evidence comes in different shapes and may be categorized into direct and indirect or circumstantial evidence depending on the proximity to the facts" (Smet in Bergsmo 2013:112). Another way to categorize the different kinds of evidence is to distinguish between documentary evidence, physical or real evidence and testimonial evidence. Testimonial evidence is information about a fact collected through another source than the one who experienced the fact. The most common source of testimonial evidence and corner stone of any fact-finding process is witness testimony (ibid).

An important aspect that must be determined in the evaluation of the evidence is what standard of proof that should be applied in the analysis. Standard of proof relates to burden of proof or burden of persuasion that a party must obtain to establish or refute a disputed factual issue.<sup>103</sup> This means that the standard of proof concerns the quality of the information that is put forward, and to what degree it is certain that the accused actually committed the act at issue. In the criminal justice system there are different evidentiary threshold for how a case can proceed. For instance, if a case is brought before the International Criminal Court, it is required to be investigated unless the prosecutor finds there is "no reasonable basis to proceed". Then if the prosecutor wants to file an arrest warrant there must be "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court". In order for the charges to be confirmed by the Court there must be offered "sufficient evidence to establish substantial grounds to believe that the person committed the crime

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<sup>103</sup> <http://legal-dictionary.thefreedictionary.com/Standard+of+proof>

charged". Subsequently, at trial, evidence proving the guilt of the accused must be "beyond reasonable doubt". This means that in cases of war crimes, crimes against humanity and genocide, which are the crimes the ICC can prosecute, there are different burden of proof for a case to proceed in their system (Fowler 2006:35). The actors and different fact-finding commissions studied here, as I will show in this chapter, are not judicial bodies and therefore not subject to the requirements such as the ICC. However, there have been attempts to adopt such principles described above, to fact-finding missions by NGOs, but any standardization of evidentiary thresholds remains unestablished (Kaleck and Terwindt in Bergsmo 2013:406). A standardized system might make it easier to compare fact-finding missions and their evidence in the same way as evidence in judicial bodies can be tested against each other. However, the great differences between NGOs and how and where they work would make difficult to establish a standardized system that every organizations would follow (ibid).

Assessing the trustworthiness of testimonies in the context of international fact-finding is an extremely difficult task, which often includes time and resources the NGOs do not have (Smet in Bergsmo 2013:117). Smet argues that the receiver of the report should be given a "clear and candid picture of the justification for each of the findings, as well as the potential grounds of defeasibility" instead of "relying on artificial decision tools like standards of proof or other forms of classification of factual findings" (ibid.:136). He claims that describing the evidence and the context of how it was collected, is a much better way of justify the findings and conclusions of the report. This also gives the receiver of the report the ability to critically evaluate the evidence. In order to sustain the thick description advocated by Smet and, at the same time, trying to make evidence presented by fact-finding mission amenable to litigation, Orentlicher suggested in 1990 that evidence presented by NGOs should be evaluated on four different levels: "reasonable suspicion", "balance of probabilities", "clear and convincing evidence" and "overwhelming evidence" (Kaleck and Terwindt in Bergsmo 2013:417-418). Reasonable suspicion means that there are "grounds for suspicion that the incident [...] occurred, but other conclusions are possible. The next level of threshold would argue that there exists more evidence that supports the findings than contradicts it. "Clear and convincing evidence" means that the evidences are solid and that there are significantly more evidences that supports the finding, and limited evidence to suggest otherwise. The fourth and last level suggests that finding is based on "conclusive and highly convincing evidence". Despite the attempts and efforts to adopt standardized systems of burden of proof, and not explicitly expressing their evidentiary threshold, fact-finding missions apply thresholds when

they make findings and draw conclusions (Jacobs and Harwood in Bergsmo 2013:341). Furthermore, one should bear in mind that the thresholds in fact-finding is an "exercise of balancing the interest of efficiency and credibility" (ibid.:342). Another recommendation to increase the ability to evaluate the evidence is to distinguish clearly between direct evidence from factual inferences, from indirect evidences as well as to emphasize the differences between findings and conclusions (Kaleck and Terwindt in Bergsmo 2013:416). Smet (in Bergsmo 2013:98) talks about how the fact-finding is built of three main ingredients, which determines the quality of the fact-finding: (1) how strong the connection is between the evidence and the conclusion; (2) how solid is each of the evidence is, independent of the conclusion and (3) how much of the relevant evidence the evidence includes. Although these three aspects are utilized in data programs in order to provide fine grained analysis of the quality of the evidence. However, the questions may also be relevant outside such data programs because they concern general aspects of the evidence – the link between the evidence and the conclusion, and the amount of evidence that is put forward.

## **5.2 IGO: the United Nations**

### **5.2.1 Initiation and mandate**

The UN is the largest institution working towards peace and security. The 1948 Universal Declaration of Human Rights, in which all human beings are given the same basic rights, is the corner stone of the organization. In conflicts and war these basic human rights are often violated, and the UN and its predecessor League of Nations have used fact-finding as part of their activities in maintaining peace and security of the civilians (Bothe 2006). Despite having sent several teams to report back on the humanitarian and human rights situation in Darfur (Lippmann 2007), the Security Council decided in Resolution 1564 of September 18<sup>th</sup> 2004 to establish an independent commission of inquiry that would investigate the situation in Darfur. The Secretary-General appointed Antonia Cassese, Mohammed Fayke, Hina Jilani, Dumisa Ntsebez and Therese Striggner-Scott to the Commission, and designated Mr. Cassese as its Chairman. The Resolution 1564, in which the Darfur-conflict is determined to constitute "a

threat to international peace and security and stability of the region"<sup>104</sup>, sets out the mandate of the fact-finding mission. The resolution explains that the Security Council:

*"requests that the Secretary-General rapidly establish an international commission of inquiry in order immediately 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 view to ensuring that those responsible are held accountable"*.<sup>105106</sup>

It was further requested that the investigation was supposed to start rather quickly and report back to the Secretary-General with their final report within 3 months, i.e. January 25<sup>th</sup> 2005. Following Yuwen's list of aspects that a mandate should entail, the Commission's mandate was rather unspecified. The mandate specified the applicable law (IHL and IHRL) and the geographic scope (Darfur). However, it did not specify working methods, the purpose and the scope of their conclusion. The mandate did not specify the purpose of the investigation. It was claiming that the task of identifying the perpetrators was "with the view of ensuring that those responsible are held accountable". The time of span of what kind of period "reports of violations of IHL and IHRL" should be investigated is not specified in the mandate. In relation to these unspecified aspects, the Commission has interpreted the tasks they received. It is, however, no doubt that the Commission was given four tasks.

The Commission has interpreted the first task to involve investigating "reports of violations" rather than "alleged violations" and argues that this means that they were "mandated to establish facts relating to possible violations of international human rights law and humanitarian law committed in Darfur". The Commission interpreted their two next tasks to requiring them to characterize the established violations in relation to international criminal law. This means that they needed to establish whether the violations amount to international crimes, and what category of international crime they would fall under (war crimes, crimes against humanity or genocide). Furthermore, the Commission interpreted in relation to the third task that "perpetrators" should cover "the executioners or material authors of international crimes, as well as those who may have participated [ordered, aided, or abetted in or in any other ways taken part in] the commission of such". In addition to this third task of

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<sup>104</sup> UN Security Council Resolution 1564 18th September 2004.

<sup>105</sup> Ibid.

<sup>106</sup> International Humanitarian Law is mainly codified in the Hague/Geneva Conventions and regulates how war should be fought to minimize the damages for non-combatants. International human rights law is closely related to IHL but relates to violations of declarations and conventions that protect the rights of every human being (Savelsberg 2010)

identifying perpetrators with the view of stopping the impunity of committing atrocities, the Commission explained that they needed to suggest mechanism for accountability. They were not provided with "powers proper to a prosecutor"<sup>107</sup> and were therefore dependent on both parties – the rebel groups defending Darfur, and the Government of Sudan – to fulfil their obligations.

Moreover, in relation to time of span of which violations the Commission should investigate the Commission explains that:

*"With regard to the time- frame, the Commission´s mandate is inferred by the resolution. While the Commission considered all events to the current conflict in Darfur, it focused in particular on incidents that occurred between February 2003, when the magnitude, intensity and consistency noticeably increased, until mid-January just before the Commission was required to submit its report".<sup>108</sup>*

This independent commission is just another example of international fact-finding missions established by the UN. However, it would be incorrect to view the Commission as a successor of the early efforts by the UN Commission of Human Rights during the 1960s and 1970s in relation to South Africa and Palestine because of its significance (Alston 2005). Instead the Commission resembles more the efforts by the Security Council since the 1990s, such as the international commissions that was established to investigate the situations in Rwanda and the former Yugoslavia in 1994 and in Burundi in 1996 (Alston 2005). In the two first cases, the findings of international commissions resulted in the establishment of ad-hoc international criminal tribunals that would prosecute the atrocities that had been committed (Frulli 2012). The Commission´s recommendation in the case of Darfur resulted in UN referring the situation to the now established permanent international criminal court. The mandate of the Commission of Inquiry on Darfur is, however, very different from the earlier international commissions established in the 1990s. According to Alston (2005), the Commission "stands in stark contrast to the open-endedness" of the earlier fact-finding commissions, because the Commission was specifically tasked to make formal determination on whether the violations of international humanitarian law constituted genocide, and to identify the perpetrators of the atrocities. Why did the Secretary Council decide to give the Commission this task? Was there anything special about this conflict suggesting that such a task was more relevant? Is there anything that indicates that it was more appropriate to task this international commission, but

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<sup>107</sup> COI 2005:10

<sup>108</sup> COI 2005:11

not the commission investigating in 1994 in Rwanda, which was recognized by many as one of the clearest cases of genocide since Holocaust? A possible reason for the inclusion of this task in the Commission's mandate may be the fact that the US had already officially accused the Sudanese Government for having committed genocide against tribes in Darfur, and the UN felt compelled to meet this level of accusation. Anyhow, what this task tells us is that the Commission was officially tasked to make a formal decision on whether violations in Darfur amounted to genocide or not, and it could not avoid this question even if it wanted to, or found it difficult. This also suggests that the Commission needed to assess or at least should have assessed how they would make such a decision.

The Security Council Resolution did not specify the definition of genocide they wanted the Commission to operate with. However, it would be fair to assume that the Security Council meant that the Commission was supposed to apply the definition of genocide set out in the UN-established Genocide Convention. The application of this definition is further underscored by the fact that the Commission interpreted their mandate to characterize the violations of IHL and IHRL in relation to international criminal law. The definition of genocide as stipulated in the Convention is the only legally acknowledged definition and characterized as a law under international law.

### **5.2.2 Taking of evidence**

The Commission received four tasks to accomplish, and decided that their "working methods should be devised to suit each of its different tasks".<sup>109</sup> In relation to the two first tasks – to investigate reports of violations of IHRL and IHL and to determine whether acts of genocide had occurred – the Commission studied former reports and collected their own information by acting as a "fact-finding body".<sup>110</sup> In this process, in which the Commission argued it was mandated to classify the violation according to international criminal law, they were collecting all data required for a legal analysis. The Commission states:

*"Although clearly not a judicial body, in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body. It therefore collected all material necessary to for such a legal analysis".<sup>111</sup>*

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<sup>109</sup> COI 2005:11

<sup>110</sup> COI 2005:6

<sup>111</sup> COI 2005:11

In relation to identifying the perpetrators, the Commission interviewed witnesses, officials, prisoners and socio-political elites. They examined documents and visited places where reported crimes had been committed such as villages; camps collecting internally displaced people; and sites of mass graves. The Commission was designated in two different teams that would help them in their investigation. The first team was led by a chief investigator and conducted in collaboration with four judicial investigators; two female investigators specialized in gender violence; four forensic experts; and two military analysts in the actual investigation in the field of Darfur and Khartoum. This team was further split in three to cover different geographical areas: West Darfur Teams, North Darfur Team and South Darfur Team. The second team assisted the Commission in analyzing the collected material and comprised of five legal researchers and one political affair officer.

The Commission collected a dozens of existing reports of human rights violations, conducted a couple of hundreds interviews with members of the Darfurian rebels, witnesses and government officials and they carried out a dozen of crime scene analysis. In the end of the report, the Commission has included lists of all government officials and representatives from the rebels groups SLM/A and JEM that they have interviewed; cities, towns and sites they have visited; and public reports from state and non-state actors they have reviewed.

According to the report, the West Darfur Team visited 13 towns and villages outside the regional capital AL- Geneina of West Darfur. Here they collected information of attacks on 51 villages, 11 cases of rape through interviewing 116 witnesses, and 12 circumstantial witnesses. The team also interviewed government officials and representative of the SLM/A and JEM. North Darfur Team was originally based in El Fashir, but assisted the South Darfur Team as well, because of security reasons due to increased fighting around El Fashir. During their investigation the team interviewed 141 witnesses, collecting information of 98 separate incidents and visited seven crime scenes. South Darfur Team was based in Nyala. They visited seven villages and concentrated their investigation on six case studies. The team was accompanied by forensic experts who conducted 16 crime scene examinations. A total of 39 rape and sexual assault cases were documented.

The Commission was able to interview not only witnesses and victims such as the investigations by the US, AI and PHR had done, but also representatives of the rebel groups



SLM/A and JEM and of the central authorities of Sudan, including ministers of the government. The crime of genocide as it is spelled out in the 1948 Genocide Convention place great emphasis on the intention of the perpetrators requiring them to intend the total or impartial destruction of the targeted group. Interviewing the people within the institution that by the international community exclusively has been accused of being the ones responsible for the atrocities committed in Darfur, may therefore be characterized as highly important and even absolutely necessary in order to assess whether acts of genocide have occurred or not. The Commission possessed in the end of their investigation a list of individuals, including government officials, they suspected of having committed international crimes, including war crimes and crimes against humanity. The Commission writes further, in relation to the question of genocide, that they do not rule out that "single individuals, including Government officials" may have intended the total or impartial destruction of the targeted group, but that it should be up to a court to decide. As stated in the previous chapter, people being accused of genocide are unlikely to confess. Schabas (2009) has therefore argued that a policy or plan should be used to determine whether the perpetrator actually, intended the destruction of the group. More specifically, he has suggested that that specific documentary evidence or deduction based on various factual manifestations could be useful to determine if there was a plan or policy. Government documents could be viewed as "documentary evidence" and thus being highly relevant in determining the official governmental policy or plan.

Regardless of whether this was recognized by the Commission or not, they may have failed to acquire the necessary information by the Government of Sudan to determine properly whether acts of genocide had occurred or not. The Commission writes in their report that the Government of Sudan "generally" have been "cooperative", but several cases of non-cooperation and/or attempts to interfere and taint the Commission's work are illustrated. In two instances the Commission received positive response on their request to see government documents, but only to learn that, in the first case, the documents apparently did not exist after all, and in the second case, that only parts of the requested documents were turned over them. In the first case, the First Vice-President assured the Commission that they would grant access to documents relating to the use of armed forces against rebels in Darfur and other measures concerning the civilians. However, when the Commission tried to retrieve these documents, the governors of the three regional states of Darfur denied their existence. In the second situation, the Minister of Defence agreed to hand over documents describing deployment of military aircraft and helicopter gunships in Darfur since February 2003, but

failed to deliver the entire document. Despite requesting the entire document a second and a third time, the Government failed to provide the Commission the requested material. In other words, important documents that could provide insight in the government's use of armed forces, and possibly whether there existed a specific plan, was not analyzed by the Commission because the authorities (most likely) deliberately failed to provide access.

The Commission traveled throughout the entire Darfur, an aspect the UN-established investigative team was alone in being able to do, and acquired testimonies and information from witnesses and victims from a wide geographical zone. This provided the Commission with an exceptional opportunity to gain knowledge of how systematic and widespread the occurrence of atrocities, and to speak with victims and people affected by the situation in the "war zone". The Commission has, however, been strongly criticized in their approach to the documentation of human rights abuse, among others from personnel from its own investigative team. In the following section I will discuss the Commission's lack of training in taking testimony and absence of a questionnaire to guide the interviews.

***"It is unfathomable as to why a single questionnaire was not developed"***

The need to establish an international commission of inquiry to investigate the situation in Darfur was established in an UN resolution on September 18<sup>th</sup> and in October the Secretary-General appointed a five-member body and requested them to deliver their report within three months. The Commission started their work on October 25<sup>th</sup> in Geneva with a briefing with staff that had been assigned to help them carry out their mission. According to one of the investigators, Debb Brodtkin, who also accompanied on the US' Atrocity Documentation Team, this briefing did not include any information or preparation as to how they were actually going to carry out the investigation. She notes this in email to Samuel Totten (2007:359):

*"During our briefing [about the COI] in Geneva, we were given no format or indication as to how the investigation and interviews were to be conducted as a result, every investigator conducted his/her own investigation and interviews in whatever fashion he/she preferred. I cannot believe that with the vast difference in expertise of each investigator there would be any semblance of consistency in regard to the gathering of the evidence... The UN investigation did not provide any parameters whatsoever and an untrained interviewer could easily have asked questions in a manner that would have elicited whatever response he or she hoped to obtain".*

Brodkin is very sceptical of how the Commission proceeded in their briefings, at least in retrospect. She strongly criticizes Mr. Cassese and his commission's lack of training in how to actually carry out the interviews and whether there was any specific information they needed to collect regarding the four tasks the Commission received.

While it is criticisable that the investigators did not get a proper briefing in how to conduct interviews, it is rather unlikely that people without any skill in conducting interviews would have been hired to accompany the Commission on their mission. One would think that the four investigators and two female investigators specializing in gender violence, knew how to ask questions that not only captured valuable information, but was asked in a way that did not endangered or otherwise made the informants reluctant to share his/her experience. That the investigators carried out the interviews in different fashion may not have been dramatically problematic. However, the fact that people are clearly not familiar to conducting interviews, are in fact blameworthy. According to Debb Brodtkin, the military analysts did not analyse information but conducted interviews instead. Similarly, she claims that the forensic experts from Argentine Anthropology Forensic Team also conducted interviews despite clearly not being trained or remotely suitable to carry out such work due to language problems. She argues that:-

*“the thirteen experts were not [...] used in the fields of their own expertise. The analysts never did any analysing of the information, they interviewed. The closest the forensic experts got to using their expertise was taking some photographs, otherwise they were trying to do interviews in their very broke English” (Totten 2007:373).*

Furthermore, she asserts that:-

*“I know that the forensic experts were extremely upset that they were not there to use their expertise, i.e., exhume bodies, etc. and were expected to conduct interviews. Their first language was Spanish and their English was broken. So they had an extremely difficult time conducting interviews because they did not know the meaning of some of English words the translators would use when translating from Arabic” (ibid.:374).*

Debb Brodtkin points to some serious problems concerning how the investigation was conducted and how the resources were distributed and handled. In contrast to the other investigations the Commission was unique in being comprised with forensic experts in the investigative team. It is highly unfortunate if they, as Brodtkin claims, were not given the opportunity to use their specific sets of skills. Komar (2008) has underscored the increased significance and use of forensic experts in investigations of mass atrocities. Especially in

cases of genocide, forensic anthropologists possess well-needed expertise in how to document mass graves, analyse evidence and identify the victim group's identity through personal identification. Considering forensic experts' expertise, it is strange they were asked to do interviews, at least if we take into account what Brodtkin reveals. According to the Commission's report, forensic experts were used numerous times.<sup>112</sup> In the back of the report, in which the Commission give a summary of the work of the different investigative teams, they reveal the forensic experts accompanied all three investigative teams. However, it is only in collaboration with the South Darfur Team that the experts, according to the report, conducted actual crime scene examinations. What the experts in detail found out, is not elaborated. The combination of Brodtkin's claims and the report's rather little focus on the forensic experts suggests that the Argentine Forensic Anthropology Team could have played a larger role in the Commission's work.

What perhaps made it even more difficult for the forensic experts to carry out interviews, was because the investigators were not given a questionnaire that could guide their interviews. In contrast to the ADT and PHR which designed a questionnaire before going into field, so that the investigators knew what to ask about in order to obtain the relevant information, this was not the case for the Commission. Debb Brodtkin asserts that-:

*"there was never any sort of discussion about using a questionnaire. There was never any discussion at all about how the interviews were conducted. We were just told to conduct interviews" (Totten 2007:374).*

Furthermore, Brodtkin explains that the importance of collecting racial epithets or any statements shouted from the perpetrators. She had learned that from the time with ADT and the questionnaire designed by Coalition for International Justice (CIJ), this was important in order to capture the mental state of the perpetrators. Without such kind of data, it would be difficult to assess whether they possessed genocidal intent or not. She writes:

*"I do not recall anything about the need to collect information regarding racial epithets. But I believe that it definitely should have been. I noted [such information] in a number of my interviews because I realized the importance due to the CIJ questionnaire. However, I presume many of the investigators did not know to ask questions about such matters" (Totten 2007:360).*

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<sup>112</sup> See for instance COI 2005:66; COI 2005:77

While the designers and leading figures behind both ADT and PHR's study underscored the importance of racial statements from the perpetrators directed towards the victims, it seems odd that the investigators of the Commission did not look for this. As Totten (2009:359) argues: "It is unfathomable as to why a single questionnaire was not developed". This may have resulted in unsystematic documentation of racial epithets and statements shouted from the perpetrators. It is still possible that informants gave information about such incidents, yet without knowledge of this, it is impossible to know whether such information was documented or ignored. Knowing that this aspect was important and systematically documented by both ADT and the PHR investigation, this lack of systematic documentation of epithets may have had a negative impact on the Commission's ability to properly determine whether acts of genocide have occurred or not.

### 5.2.3 Evaluating evidence

The evidence the Commission collected includes former reports, witness testimonies, interviews with representatives of the rebel groups and the government, government documents and evidence from crime scenes.

In contrast to the other actors, the Commission discusses what kind of standard of proof they can and cannot apply. Regarding the third task of identifying perpetrators, the Commission writes as follows:

*"In the view of the limitations inherent in its powers, the Commission decided that it could not comply with the standards normally adopted by criminal courts (proof of facts beyond a reasonable doubt), or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a prima facie case). It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime. The Commission would obviously not make final judgments as the criminal guilt; rather, it would make an assessment of possible suspects that would pave the way for future investigations, and possible indictments, by a prosecutor"*<sup>113</sup>

This means that the Commission recognized that they could not apply the standard of proof legally required to make a conviction, the highest burden of proof, or the standard required to confirm indictments. Instead they argued that due to their limitations, they would adopt a

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<sup>113</sup> COI 2005:12

standard in which perpetrators could be “reasonably suspected of being involved in the [...] crime” if a “reliable body of material consistent with other verified circumstances” indicated that the individual was involved in the crime.

According to the levels of evidentiary thresholds in the ICC described in 1.1.2, this suggests that the Commission adopted the second lowest burden of proof. Following Orentlicher’s threshold system, the Commission adopted the lowest level of standard which identifies the perpetrators based on “grounds for suspicion that the incident [...] occurred, but that other conclusions are possible”. Although the Commission specified their burden of proof when identifying perpetrators, they do not describe such standards regarding the evidence collected to determine whether acts of genocide had occurred or not. In fact, the Commission only commented that they collected all material needed to make a legal analysis, despite pinpointing that they are not a judicial body. But what kind of evidentiary threshold did they apply within this legal analysis? Do they apply the same standard as the one they applied used to identify perpetrators? According to David Luban (2007:13), identifying perpetrators and identifying crimes should involve the same standard of proof because they come hand in hand: evidence of a perpetrator having committed a crime ultimately includes evidence about the crime itself. In his article "Calling Genocide by its Rightful Name", David Luban therefore argues that the Commission used a low burden of proof. He claims that it is "unfathomable that [the Commission] would not find genocide in Darfur" based on the "remarkably weak standard – reliable material consistent with verified circumstances that tends to show reasonable suspicion" (ibid.:14).

Jerry Fowler (2006) (ref.) is of a quite different opinion, however. In contrast to Luban’s criticism of the Commission not finding genocide based on their *low* burden of proof, Fowler argues that the Commission’s conclusion is "less mysterious" because of their *high* burden of proof. According to Fowler, the Commission was tasked to make "a threshold finding" in order to make the appropriate action, but instead it ended up applying the standard of proof utilized in courts when they decide the guilt of the accused. Fowler (2006:34) asserts that:-

*"The Commission hints that it applied an extremely high standard assessing the evidence. "Courts and other bodies charged with establishing whether genocide has occurred", the report notes, "must however be very careful in the determination of the subjective element". It then approvingly quotes the International Criminal Tribunal for the Former Yugoslavia for the proposition that "[c]onvictions for genocide can be entered only where intent has been unequivocally established". In essence, the commission adopted for*

*itself the standard intent must be shown "beyond reasonable doubt" – the weight of evidence necessary to convict an individual in a criminal trial".*

How can Fowler and Luban have so drastically different views of the burden of proof applied by the Commission? While Luban refers to what the Commission writes about how to identify the perpetrators of any criminal activity (including war crimes, crimes against humanity and genocide), Fowler cites the report where they explicitly argues that convictions of genocide demand that intent was unequivocally established. In other words, while Luban emphasizes the fact that the Commission, indeed, applied a threshold lower than the ones used in judicial bodies, Fowler disregards this passage of the report and cites from report's historical review of how genocidal intent has been interpreted in earlier case law. The two scholars cite, in other words, different passages from the report. Whereas Luban actually cites what the report claim to have done, Fowler claims that the Commission has adopted a high standard because they cite from a case, not because the Commission writes so or because he can show it through analyzing the evidence. Whether the Commission did, as Fowler suggests, applied the high standard of proof as is required in trials in order to convict may be difficult to determine since the Commission does not explain their standard for determining whether acts of genocide has occurred or not. However, it seems that the Commission applied a rather high evidentiary standard because, put simply, one page that includes four specific cases were interpreted as "more indicative" than the dozens of pages describing members of the Fur, Masaalit and Zaghawa being killed, raped, beaten and displaced, and their villages being destroyed by bombs and fire and their stocks and cattle being stolen.

Smet argues that it is more important and valuable to describe the weaknesses and strengths in the evidence than to utilize tools like standard of proof. The Commission does not utilize a standard of proof when classifying the evidence concerning genocidal intent. Yet their description of the evidence may be characterized as unclear. Following Smet it may be fruitful to look at the connection between the evidence and the conclusion, the amount of evidence and the strength of each elements of the evidence. The Commission argued that "some elements emerging from the facts [...] could be *indicative* of the genocidal intent".<sup>114</sup> These facts are "the scale of atrocities", "the systematic nature of the attacks, killing, displacement, and rape" and "racially motivated statements". These facts are facts that were described and documented in detail over many previous pages. The Commission then argued

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<sup>114</sup> Italics added.

that there were "other *more indicative* elements that show the lack of genocidal intent".<sup>115</sup> These elements are subsequently presented over the next page. The point is to show how much evidence is presented both for and against the existence of genocidal intent. The "more indicative elements that show the lack of genocidal intent" includes three specific cases the Commission describes. How can three specific cases outweigh the dozens of cases described earlier? In this way, it seems that the amount of evidence is rather small.

## 5.3 State: the United States

### 5.3.1 Initiation and mandate

The US' engagement in Darfur may be traced back to early 2001, when Andrew Natsios Administrator of US Agency for International Development (USAID) travelled to Sudan after he and State Secretary Colin Powell had increased their humanitarian aid in response to drought affecting the region (Natsios in Totten and Markusen 2007:25-42). Then in 2004 government officials and USAID staff went back. This time they flew by helicopter over the region discovering destroyed villages. On ground they received numerous accounts of horrific crimes. In April the USAID prepared a requested mortality assessment estimating that as many as 300 000 might perish within 8 months. In addition the USAID worked closely with the State Department and Humanitarian Information Unit to try to retrieve useful data from satellites. In June they were able to turn the data into maps, photos and charts that visualized and confirmed extensive destruction of hundreds of villages throughout Darfur. These images were, however, not "hard evidence"; the US State Department decided therefore to try to obtain more evidence through first hand testimonies (ibid.:37). Subsequently, Lorne Craner, at the time Assistant Secretary for the Bureau of Democracy, Human Rights and Labor, invited non-governmental organizations (NGOs) to attend a meeting with suggestions of how to create a survey that in a "authoritative, rigorous and fast way" would help the State Department to "understand the nature of the crimes in order in part to determine if [the situation] could be described as genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" (Bang-Jensen and Freese in Totten and Markusen 2007:45). The invited parties discussed ways to accomplish such an investigation, but Craner's demand that they needed a team to be sent to Darfur within few days was unrealistic

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<sup>115</sup> Italics added.



as none of the parties had the resources to comply with the request. However, a few days later the NGO Coalition for International Justice (CIJ) went to Craner feeling confident that they were able to carry out the investigation. At this point, the CIJ had received many positive reactions from their wide network of prosecutors, investigators and academics on the question if they were interested in assisting in documenting abuse in Darfur. The team the CIJ assembled has become known as the Atrocity Documentation Team (Totten and Markusen 2007). The final mandate of the ADT was, according to Jonathan Howard (in Totten and Markusen 2007:59), to "conduct a large-scale, random sample survey in refugee camps in Chad". The purpose of investigation was, basically, to gain knowledge of the extensive destruction and to classify the atrocities, including whether they could be described as genocide, through interviewing many Darfurian in refugee camps. In contrast to the United Nations who has investigated mass atrocities on several occasions, it was the first time the US decided to investigate such atrocities. The work of ADT was in this way historical. In addition it was the first time any government opened investigation into an ongoing alleged genocide (Totten and Markusen 2007).<sup>116</sup>

### **5.3.2 Taking of evidence**

The US investigated abuse in Darfur by requesting a NGO to send a team – The Atrocity Documentation Team (ADT) – to conduct semi-structured interviews of over a thousand Darfurians who had managed to escape to refugee camps in Chad. The respondent's answers were coded by the interviewees and registered in a dataset, which was subsequently turning into atrocity statistics showing the percentage of different types of crimes experienced and witnessed among the Darfurian refugees (Totten and Markusen 2007).<sup>117</sup>

The idea to conduct a survey was based on arguments by the Department of State, Intelligence and Research (INR) and the Department of Democracy, Rights and Labor, which reasoned that a survey of refugees would offer the most accurate description of both past and ongoing events in Darfur. Through such a survey the State Department could expand their knowledge beyond what the existing documentation from NGOs, media and their own satellite imagery had already revealed. Although the existing documentation had been important thus far, it did

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<sup>116</sup> See Bergsmo (2013) for a comprehensive list of international fact-finding missions established by the UN-system between 1992-2013

<sup>117</sup> See Jonathan Howard in Totten and Markusen 2007:59-74 for a thorough description of the survey methodology.

not provide enough information to determine the scale of the atrocities. Jonathan Howard, who served as a survey methodologists on the ADT, explains the need to conduct a large survey in this way:

*"[The] two primary sources for information – field reporting and imagery – fell short, however, in two regards. The ad-hoc nature of field reporting, while consistently pointing to an ethnic dimension of the conflict, could not provide a reliable accounting of the scale of the conflict; thus, it was impossible to determine to what degree the wrenching stories trickling out were representative of the Darfuri population at large. Analysis of the satellite imagery provided evidence that destruction was extensive, but could not establish the ethnicity of the destroyed villages or the identity of the perpetrators. While it was possible to photograph destroyed villages, it was impossible for imagery alone to determine whether the villages were destroyed because of their ethnic composition (in Totten and Markusen 2007:61)*

The aim of the ADT's survey was to draw "respondents whose overall demographic characteristics reflect that of the broader population" (Howard in Totten and Markusen 2007:64). This meant that in order to be able to generalize the answers to reflect beyond the ones interviewed, it was important for the ADT to interview both men and women, old and young, and members of different tribes. However, ADT faced a major problem since there was not any available data on the demographic of the refugees and the camps, as such information is necessary to draw a "stratified random sample" (ibid.:65). Jonathan Howard (in Totten and Markusen 2007:59) writes that-:

*"The Darfur Atrocities Documentation Team's mandate to conduct a large- scale random sample survey in the refugee camps of Chad was perhaps one of the most methodologically and logistically challenging projects of its kind in recent history".*

Albeit methodologically suboptimal, the ADT solved their problem of lack of demographic data by using information obtained from the administration of the refugee camps. The ADT randomized the selection of respondents by first distributing the numbers of interviews in the grids in the camps, which was divided ethnically and proportionally to the size of the different ethnic groups. After the grids were selected, ADT randomized further by using a telling system that helped the interviewer to randomly pick refugees in each specific grid. The Office of Research which analysed the data ADT collected, concluded in the end that "the applied methodology and oversight on the ground had yielded a sample that geographically captured the entire scope of the Darfur refugees in Chad" (ibid.:66).

Prior to sending the ADT to the field, INR, DRL and CIJ designed a questionnaire. This questionnaire was designed to provide statistics that would capture the type and extent of events in Darfur, narratives from refugees describing the conflict as detailed as possible and spatial data. The questions that were created by INR, DRL and CIJ were open-ended allowing the respondents to tell their story. Generating quantitative data from such qualitative response is usually difficult and time-consuming, because it involves comprehensive interpretation of the information in order to fit the answers into different categories or codes. However, the ADT was rather pressed on time. In order to be able to quantify the interviews, categories to codify the interview was therefore developed before the interviews took place allowing the interviewee to code the answers immediately. All interviews were cross-checked. The answers were mainly used in two different databases. The first database represented each refugee and provided the atrocity percentage that reflects the percent of refugees who reported witnessing or directly experiencing each type of event, such as killing, bombing, raping, looting, etc. The second database represented each event registered from all the respondents. Over 10 000 events were registered. This dataset was used to generate percentage of specific perpetrator being implicated in events.

The investigators that conducted the investigation were trained in the questionnaire they were supposed to follow. In addition, the investigators received an extensive briefing on the situation. Samuel Totten and Eric Markusen (2007:86) writes-:

*"In [Abeche], the investigators, along with the interpreters, received several hours of briefing and training organized by CIJ. U.S. State Department Michael Orona provided an overview of the history of the conflict in Darfur, as well as the current situation in Darfur along the Chad side of the Chad-Sudanese border. A Sudanese doctor/refugee discussed the culture and customs of the refugees. Stefanie Frease, the project leader, described the overall project, explained the operational plan, provided location assignments, and discussed communications and safety procedures. Jonathan Howard from the State Department's Office of Research explained the methodology for conducting the interviews and went over the eight-page questionnaire devised for the investigation to be filled out. He explained that the questionnaire had been developed in Washington D.C. via a collaborative effort involving various nongovernmental organizations and staff from the U.S. State Department. Throughout, he emphasized the importance of the systematic, random selection of respondents [and] how to actually conduct randomized interviews, and how to code the questionnaire".*

This suggests that the investigators knew what to task about, how they should proceed in the interviews and how they should select informants. The questionnaire was carefully designed

to be able to gather information that would reveal the mental state of the perpetrators so that the aim of the attacks could be assessed. Questions that specifically would help determine whether the perpetrators possessed the requisite genocidal intent were included. Jonathan Howard writes that-:

*"Since the issue of intent is key in ascertaining whether a situation constitute genocide or not, several questions were included whose aim was to identify the true nature and intent of the perpetrator's actions. These questions included, "Did those who harmed or attacked you say anything to you"? and "Were there any particular groups or types of people who were singled out for harm?"".*

This means that, unlike the Commission, the ADT was able to systematically collect statements and epithets shouted at the victims. In addition, it suggests that such statements were considered more important to the ADT in making a genocide determination, than in the case of Commission. Although this could have been a decisive aspect concerning the ultimate genocide conclusion, given that statements shouted at the victims may reveal the mental state of the perpetrators and the ADT (in fact, the survey documented that 33% of the respondents heard experienced racial epithets), the importance of this aspect has been denied. As stated in the previous chapter, Pierre Prosper has maintained that the genocide conclusion rested on information outside the ADT survey. Nevertheless, it might have been important to establish that the situation, indeed, was racialized. In addition, the inclusion of the questions arguing that statements by the perpetrators may reveal the perpetrator's mental state, suggest that the US' investigation forethought how genocidal intent may be proved.

### **5.3.3 Evaluating evidence**

The Atrocity Documentation Team utilized a system in their survey that excluded facts or information that the respondents had heard of. This means that the ADT distinguished between direct and indirect evidence. They collected only facts about incidents the respondents himself/herself had experienced.

*"Reported atrocities were included in the data set only if the respondent directly witnessed the event. For the purpose of this study, a respondent is considered to have "directly witnessed" an atrocity if she or he was an eyewitness to the event, visually confirmed*

*the death of the victims, or in cases of rape, was directly told about the atrocity by the victim. Hearsay accounts were excluded from the data set*<sup>118</sup>

This means that this survey, requested by State Department, was based on direct evidence from the field. The State Secretary Colin Powell does not articulate what kind of burden of proof the US applied in determining that the Darfur-conflict constitutes genocide. In fact, rather little is said about the evidence in his speech. His claim that "the deliberate conduct" proves the genocidal intent is not in any form explained or described, and is therefore difficult to assess. However, according to Jerry Fowler (2006:35), the State Secretary applied a rather low evidentiary threshold. He argues that despite not explicitly referring to a specific threshold "the tenor of analysis, which emphasized the necessarily limited nature of the ADT investigation and other information available, suggest that he was, in essence, asserting a *reasonable basis* for concluding that the Sudanese government and its Janjaweed allies had committed genocide".

Regardless of whether Fowler is right in his assessment, it is possible to argue that the US probably utilized a lower evidentiary threshold than the Commission. Colin Powell states in his speech that the genocidal intent may be inferred from their "deliberate conduct". Although I previously argued that the US' evidence therefore could be characterized as circumstantial, this is not a term they apply themselves.

## **5.4 NGOs: Amnesty International, Physicians for Human Rights**

### **5.4.1 Initiation and mandate**

#### *Amnesty International*

AI was among the first actors to warn about the unfolding crisis in Darfur in the early 2002. Their first report published February 2003 collected testimonies of various types of abuse against Darfurians who had managed to flee to Chad. The second report published in May 2004 focused exclusively on sexual violence directed towards women. The report does not state a clear mandate for the investigative team in the same way as the Commission received four tasks to investigate. The report mentions, however, that the organization they conducted their investigation in February 2004 in Chad, primarily by collecting testimonies from women

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<sup>118</sup> ADT 2004:1

who had experienced sexual abuse. Despite including a discussion of whether the situation constitute genocide, there is nothing in the report that indicates that the organization was specifically concerned with determining whether acts of genocide had been committed. However, the report presents how sexual abuse have been interpreted within the framework of international crime, and shows in detail how rape and other sexual violence have been interpreted as a war crime, crime against humanity and even genocide. Whether this knowledge made the organizations exclusively focus on sexual abuse or whether these facts became knowledge after they documented rape and other sexual crimes against Darfurian women, is unclear.

### *Physicians for Human Rights*

PHR on the other hand, was specifically concerned with the concept of genocide in their investigation. The report that was published in January 2006 was based on three separate investigations in Sudan and Chad. The first one was carried out in 2004 with a general goal of documenting abuse. PHR concluded that they had "identified indicators of genocide". These findings prompted the organization to send new investigative teams to "investigate the situation in greater detail and to explore the impact of this devastation on prospects for life and livelihoods throughout the region".<sup>119</sup>

Since the organization found evidence of grave human right violations that pointed towards groups being targeted because of their identity, they decided to focus their investigation on finding facts that could prove whether genocide under the 1948 Genocide Convention was occurring in Darfur. However, genocide may be committed in several different ways. Article II of the Convention enumerates, as discussed in the previous chapter, five genocidal acts: killing, causing of serious bodily or mental harm, deliberately inflicting destructive conditions calculating to destroy the group, preventing births within the group and to forcibly transfer children onto another groups. Since killing, raping and other violent acts had been widely documented by other actors, PHR wanted to focus on the violence that did not kill the members of the Fur, Masaalit and Zaghawa outright, but nevertheless, was life-threatening . They wanted to focus on "the intense destruction of land holdings, communities and families as well as the disruption of all means of sustaining livelihoods and procuring basic necessities".<sup>120</sup> By doing this, they could concentrate their attention on subparagraph c of

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<sup>119</sup> PHR 2006:7

<sup>120</sup> PHR 2006:1

Article II in the Convention. This paragraph holds that genocide may be committed by "deliberately inflicting on the group condition on life, calculating to bring about its physical destruction in whole or in part". This focus on the conditions of life surrounding the members of the targeted groups they argued would "complement and expand" the already existing body of material describing the conflict in Darfur.<sup>121</sup> The report explains:

*"PHR's objective in the documentation of evidence of destruction of livelihoods and means of survival is to make the case that these particular actions should be considered in the overall analysis of and response to the crimes committed in Darfur"*<sup>122</sup>.

The three fact-finding missions PHR has deployed to Chad and Darfur has been in close coordination with Harvard Humanitarian Initiative (HHI) at Harvard Public School of Public Health. Leading figures of HHI also hold positions as board members of PHR.<sup>123</sup>

## 5.4.2 Taking of evidence

### *Amnesty International*

AI writes little about the way they have collected data on abuse in Darfur. According to the report, AI collected around 100 testimonies of Darfur women in refugee camp in Chad in which statements were selected to underscore their overall findings of specific acts of sexual violence, directed towards women specifically. The refugee camps they visited were set up by the UN High Commissioner for Refugees and included the camps Goz, Amer, Kounoungo and Mile.<sup>124</sup> However, information concerning where the victims were found; how the victims and the informants have been selected; or how they have been interviewed, is not accounted for in the report. In contrast to PHR and the US which describes this process in detail, AI's methodological approach is substantially less elaborated upon. The organization has, however, taken precautions to secure the informants by not naming them.

The lack of information of methodological approach means that it is impossible to determine whether the testimonies represent the targeted groups and/or represent the entire Darfur-population, geographically speaking. In addition, since no questionnaire has been presented or

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<sup>121</sup> PHR 2006:1

<sup>122</sup> PHR 2006:47

<sup>123</sup> Harvard Humanitarian Initiative is an interdisciplinary faculty at the Harvard University that works to improve the way of doing humanitarian work. Important in this work is to instil the value of the universal human rights and to educate the future humanitarian leader. See <http://hhi.harvard.edu/about-us> for more information.

<sup>124</sup> AI 2004

information concerning how the interviews were conducted is available, it is difficult to assess how their interviews might have influenced their final conclusion as whether acts of genocide have occurred or not. If a questionnaire was not utilized, the organizations may have lost important information due to lack of consistency in the conduction of interviews. However, what we do know is that only women have been interviewed. While this only represent one of the sexes, the specific focus on sexual violence and the extensive documentation of rape may have contributed to the organization's closing in on the question of genocide (despite claiming that their evidence are inconclusive) because rape has been acknowledged as a way of committing genocide. The Trial Chamber in the Akayesu case argued that

*"[T]he Chamber wishes to underscore the fact that in its opinion [rape and other forms of sexual violence] constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict [sic] harm on the victim as he or she suffers both bodily and mental harm" (Schabas 209:185-186).*

By exclusively focusing on sexual violence, the organization has concentrated their findings on specific and limited ways genocide may be committed. Their findings of widespread and sometimes systematic use of rape and sexual violence may have encouraged an analysis the findings in light of the concept of genocide.

### ***Physicians for Human Rights***

PHR includes in their report a chapter explaining how their investigation has proceeded and what kind of methods they applied collecting information. PHR collected information mainly through interviews and visual documents. PHR traveled to several refugee camps in Chad between May 2004 and July 2005. In these camps the organization sought out and randomly selected members from the three largest non-Arab tribes namely the Fur, Zaghawa and Masaalit. Interviewing members of each of these groups was important because the organization wanted to examine whether the pattern of attacks against non-Arab groups happened at random or if the attacks were carried out systematically. The members were solicited from three villages, each locating in one of the three main regions on Darfur. This was to secure that the sample of respondents represented the entire Darfur, geographically speaking. PHR did not obtain visa for their final trip to Chad, and was therefore forced to abandon their aim of geographical representativeness. This means that they were only able to



randomly selected informants from three villages in North and West Darfur, and not South Darfur as the organization initially wanted to.

In these camps the organization randomly selected heads of households belonging to each of the three groups. In Oure Cassoni refugee camp, they acquired 12 heads of households from Zaghawa families originally from Furawiya; in Treging and Bredjing, 18 respondents belonging to Masaalit initially from Terbeba; and in Djabal refugee camp, 16 members from the Fur once living in Bendisi. A total of 47 heads of households were interviewed based on a pre-made questionnaire, which the organizations had made publically available by including it in the back of the report. The findings from these in-depth semi-structured interviews have been quantified and presented in tables to visualize the devastation that these families have experienced. In Oure Cassoni PHR carried out additional interviews. Two meetings with village leaders and focus groups with three or four villagers were conducted. In the focus groups, which also were based on semi-structured interviews, the organization utilized a proportional piling system and diagrams to describe and collect information about circumstances of flight, losses of assets and distribution of wealth. A proportionate piling system involves the use of a pile of beans, marbles, stones or similar objects to determine relative importance of different items compared to each other.

The interviews and other methodological techniques were meant to create a picture of how village life was prior to the attacks. Another important aim was to reconstruct how the attacks were carried out and how the villages tried to flee from the attacks. In addition to the interviews, PHR also took 700 aerial and land images of refugees and destroyed land and villages. The organization was able to capture a broad picture of the situation in Darfur by being concerned with interviewing all the three targeted groups from almost the entire Darfur region. The organization pinpoints that their interviews are not representative of the entire Darfur population, and that their result therefore exclusively represent the actual households of which heads of household were interviewed. However, their study and findings thoroughly show how unimaginable great impact the attacks have had on villages and the ones living there. This stands in stark contrast to the other investigations (e.g. AI and the Commission) which have not been able to take into account the geographical representation and representation of the targeted groups. The Commission has arguably achieved geographical representation by having conducted investigation in all three states, but they do not mention anything about statistical representation of the targeted groups. Although the ADT may been

closest to having achieved a representative sample of the Darfurian population, they have not been able to achieve the same level of description of village life before and after the attacks, as PHR through their in-depth interviews.

PHR's report is only based on interviews with the victims of attacks carried out against them and their villages. Neither the representatives from the rebel groups SLM/A and JEM nor from the Government or the Janjaweed have been interviewed and scrutinized for their actions. As the organization was not in contact with the central authorities during their investigation the suggestion by Schabas that a plan or policy found in government documents could be useful to prove the genocide intent is irrelevant. Similarly as ADT, but in contrast to the Commission, PHR based their interviews on a questionnaire that was designed prior to their fieldwork. The questionnaire included questions concerning demography, specific types of violence and patterns or destruction of means of survival. Questions such as "Did the attackers tell you why they were harming you?", "Where there people in your village or region who were not attacked?" and "Did the attackers use certain words describing you and others who were attacked?" were also included in order to obtain a picture of the motives of the perpetrators. As the organization ultimately presented findings of statements shouted to the victims belonging to the Fur, Masaalit and Zaghawa as direct and explicit evidence of genocidal intent, their systematic documentation has been of great significant in their genocide assessment.

### **5.4.3 Evaluating evidence**

#### ***Amnesty International***

AI does not specifically state what kind of evidentiary threshold they apply in their fact-finding and conclusion. According to Jacobs and Howard (in Bergsmo 2013), fact-finding missions adopt standards in their findings, even though their thresholds are not explicitly stated or discussed. The report does not, however, offer much information to discuss the aspect of standard of proof. In contrast to the other actors, AI does not offer a definite conclusion as whether acts of genocide have or have not occurred. The organization argues that some of the human rights abuse "*could be interpreted* as aimed at destroying ethnic groups" and "*appear to have* as an objective to destroy livelihoods", and furthermore that the human rights abuse have been committed "*with possibly an intention* to destroy social structures and community of specific ethnical groups". Ultimately they conclude,

nevertheless, that the evidences "remain inconclusive". They write that "the organization is not in a position to confirm or prove that the punishment had as an objective to destroy specific ethnical groups".

The phrases the organizations used – "could be interpreted", "appear to have" and "possibly" – suggest that the organizations are not certain about the extent to which the observations should be seen as indicators of genocide. To conclude that they cannot prove that genocide has occurred seems therefore to be in accordance with how they describe their evidence.

### *Physicians for Human Rights*

Similar to the AI, but contrary to the Commission, PHR does not discuss the evidentiary threshold they applied. However, a careful reading of their report reveals some aspects relating to their standard of proof.

PHR states in their report that they have found both direct and circumstantial evidence of genocidal intent. While the organization only presented one piece of direct evidence that explicitly proved the genocidal intent, several circumstantial evidences, which could be used to infer genocidal intent, were also described. These circumstantial evidences are described as "strong" and "overwhelming".

The organization's explicit division between direct and circumstantial evidence complies with the suggestion to properly categorize the collected evidence. This stands in stark contrast to the other actors. Moreover, they provided additional description of the weight of the circumstantial evidence by characterizing the evidence as "strong" and "overwhelming". Using these words, the report's evidentiary threshold resembles Orentlicher's fourth and final level on the system of standard of evidence.

PHR's evidences are best compared to the Commission's findings because they resemble each other. The Commission also documented epithets and argued that some of the factual circumstances could indicate the existence of genocidal intent. Both actors referred to the scale of the atrocities, the systematic nature of the attacks and the use of derogatory language as possible evidence of genocidal intent. But while PHR characterized these evidence as "strong" and "overwhelming" indicating that the organization believed there was no doubt that genocide has occurred, the Commission characterized the evidence as only "indicative" and argued that there existed other evidence that was "more indicative". This suggests that PHR applied a lower threshold than the Commission. Even though PHR did not present the

same evidence as the Commission did against genocidal intent, the different characterization of the circumstantial evidence indicates quite different evidentiary threshold.

## 5.5 Conclusion

In this chapter I have examined whether the actors' genocide conclusion may be influenced by aspects relating to their investigative or fact-finding process. Based on Bothe's (2007) theoretical framework for comparing different fact-finding missions, I have examined the different investigation's mandate, methods for obtaining evidence and evaluation of evidence. Subsequently, I discussed how these aspects might have influenced the actor's ultimate conclusion on whether the Darfur-conflict constitutes genocide.

The mandate and purpose of the different fact-finding missions varied. While AI conducted their investigation on the purpose of documenting solely sexual abuse against women, all the other actors focused on the concept of genocide in their investigation. In the case of the Commission and the US the focus on the concept of genocide was one of several aspects in focus, while PHR exclusively focused on the concept of genocide. This may explain why PHR, the UN and the US provide a more extensive discussion on the concept, than AI, and ultimately why AI neither confirmed nor denied whether acts of genocide had occurred.

How the actors collected evidence also differentiate. All actors interviewed victims from atrocities in Darfur, but only the Commission interviewed officials for the Government, the alleged perpetrators. This provided, initially, the Commission with a better opportunity to assess the mental state of the perpetrators. Not specifically in regard to individuals because they are unlikely to confess to their own crime, but in relation to accessing whether the government has implemented a policy of genocide. Documents of perceived value were, however, deliberately withheld. While the US and PHR conducted interviews, respectively 1136 and 48, that was transformed into atrocity statistics, the reports by the Commission and AI suggests no such statistical transformations of interviews. The Commission interviewed victims from the entire Darfur. AI did not provide much information about their informants, how they were collected, which group they belonged to or where they came from. Nevertheless, their explicit focus on women and sexual violence may have opened up for discussing the question of genocide. The organization documented extensive use of sexual violence and shows that sexual violence has been interpreted as a war crime, crime against

humanity and even genocide. In other words, their focus on sexual violence may have led the organization into a discussion of whether the situation in Darfur constituted genocide.

The US, the Commission and PHR's wider sample of informants than AI may have made them more equipped to assess the extent of the atrocities, and whether specific groups actually were sought out for destruction. But even though the actors interviewed different people and amount of people, what seems to have been most decisive difference between the actors, is the use and non-use of a pre-made questionnaire. Both the US and PHR conducted semi-structured interviews, which included specific questions in order to obtain information about the mental state of the perpetrators that could be used to assess whether the perpetrators acted with intent to destroy the groups. No such questionnaire has been published by the Commission or AI. In the case of the Commission, a member of its investigative team has confirmed that no questionnaire was used and that the Commission did not offer any training and preparing the investigators for the investigation. The Commission, the US and PHR explained all that express statements by the perpetrators could be used to prove the genocidal intent, but the Commission did not, in contrast to the US and PHR, systematically document such statements. This may have negatively influenced the Commission and AI's ability to assess the mental state of the perpetrators through express statements.

In relation to evaluation of evidence only the Commission discuss explicitly what kind of evidentiary threshold they applied in their findings. Neither the US, AI or PHR discuss this aspect. The Commission discuss, however, this aspect in relation to their task of identifying perpetrator, not in determining whether acts of genocide have occurred. There is disagreement in whether the Commission applied a threshold utilized in courts which require proof that is "beyond reasonable doubt" or a threshold in which require "reliable material consistent with verified circumstances that tends to show reasonable suspicion". It may be difficult to assess specifically what kind of threshold they utilized. The focus on only three specific cases that showed that the majority of the ones killed were rebels and not civilians was proof enough that the perpetrators possess the requisite genocidal intent may suggest that the Commission adopted a high threshold. Nevertheless, the main point is that the analysis suggest that the Commission adopted a *higher* threshold than the other actors, at least the US and PHR. These two actors argued they found proof of genocide being committed based one circumstantial evidence. These circumstantial evidences resemble the evidence the Commission first argued

"could indicate" genocidal intent, but then dismissed as enough evidence to infer genocidal intent. So, in other words, the Commission utilized a higher threshold than the US and PHR.

In the case of AI it is difficult to assess their evidentiary threshold because they provide a rather short discussion on the question of genocide. They argue, however, that some evidence may indicate genocidal intent, but that the evidences are inconclusive. This could mean that AI did not apply a low threshold, because then they would (most likely) have concluded that genocide might or have occurred.

## 6 Concluding remarks

In 2003 a conflict between the non Arab groups the Fur, Masaalit and Zaghawa and the Government of Sudan aligned with the Arabic militia group Janjaweed in Darfur intensified and arose to international attention. Actors within the international community have largely agreed upon that the Government of Sudan has committed massive abuse against civilians in Darfur, but actors, such as the United States government, the inter-governmental organizations the United Nations and the two non-governmental organization Amnesty International Physicians for Human Rights disagree on whether the abuse constitutes crimes against humanity or genocide.

In this thesis, I have explored this definitional struggle by examining reports published by these actors. My main research question was: *Why does the international community disagree on whether the Darfur-conflict constitutes genocide?* In order to answer this question, I have examined two aspect of this definitional struggle, one related to conceptualization and one related to the methodological approach. First, I discussed *how the g-word is conceptualized among actors reporting on the Darfur-conflict* and then I scrutinized *how abuse in Darfur is documenting*. In exploring these two questions, I have utilized three main theoretical frameworks: Scott Straus identification of five core dimensions along which definitions of genocide can be classified (i.e. groups annihilation as core idea, formulation of intent, mode-, agent-, and target of annihilation); William Schabas' understanding of the definition of 1948 Genocide Convention as three-folded (i.e. physical element describing the physical acts, mental element stipulating the criminal intent and element of protected group specifying the target); and Michael Bothe's four stages for comparing fact-finding procedures (i.e. initiation, mandate, taking of evidence and, evaluation of evidence). These frameworks have guided my empirical reading of the selected reports. Before I answer my main research question, let me briefly present my findings of my inquiries into how the G-word is conceptualized and how the actors have conducted their fact-finding.

The concept of genocide is widely disputed. This is clearly shown in Scott Straus' (2001) identification of 15 different genocide definitions. In the international community today, however, all actors – at least the ones scrutinized in this thesis – apply the same definition, namely the definition spelled out in the 1948 Genocide Convention. Yet this does not mean that the conceptual struggle is over. In fact, the results from my analysis demonstrate that

despite explicitly applying the same legal definition of genocide, the actors understand and interpret this definition differently. Let me briefly summarize some of the main differences.

All actors, but AI, discuss the physical element. While the Commission and the US argued that the three first enumerated acts - (a) killing, (b) causing serious bodily or mental harm, (c) deliberately inflicting conditions calculated to destroy – have materialized in Darfur, PHR argued that only the third enumerated act had occurred. The US, PHR and the Commission adhered, in other words, to the Convention. Although their understanding fit other definitions as well (since all definitions posit killing as mode of annihilation), their interpretation that genocide may be committed through other means than killing exceeds the understanding of the majority of the other genocide definitions.

The mental element is explicitly discussed by all actors, though to a varying extent and with diverging conclusions. While both the US and PHR claimed this element was present due to contextual evidence, the Commission claimed the opposite. In short, the Commission argued that despite indicators suggesting otherwise, the element was absent due to the existence of several cases where the perpetrators refrained from killing all members of the group. By not taking into account that the Convention also posits partial group destruction as genocide, the conclusion presented by Commission suggests that it had adopted a narrow interpretation. Arguably, this interpretation may have made it more difficult to conclude that genocide had occurred. In contrast to the US, PHR and the UN, AI was unable to reach a conclusion regarding this element due to inconclusive evidence.

Among the actors in the international community analyzed in this thesis, only the Commission explicitly discussed the third element, i.e. the element of protected groups. They concluded that the targeted groups were protected by the Convention because the opposing groups perceived each other and themselves as different. This conclusion strengthens the view that a targeted group may be characterized as a protected group without any objective differences. This method is recognized by other genocide definitions as well. By not discussing the identity of the targeted group, AI, the US and PHR seems to have moved away from the Convention and adopted an understanding proposed by other definitions. The lack of discussing the element of protected groups suggests that the actors believe that the specific identity of the targeted group is secondary to the fact that groups are being deliberately targeted. While all actors initially applied the definition as it was set out in the 1948 Genocide Convention, the analysis suggests that the actors, to a greater or lesser extent, have adopted an



understanding of the different elements of the definition that resembles other definitions of genocide.

In order to answer my main research question, I have also examined whether the actors' disagreement could be related to their methodological approach. Based on Bothe's (2007) theoretical framework for comparing different fact-finding missions, I have examined the different investigative team's mandate, methods for obtaining evidence and evaluation of evidence. The mandate relates to the purpose of the fact-finding and/or tasks the investigative team accomplished. The methods of obtaining evidence concern how the actors conducted their investigation, and the evaluation of evidence relates to the standard of proof the actors applied in making their findings.

The mandate and purpose of the different fact-finding missions varied. While AI conducted their investigation on the purpose of documenting solely sexual abuse against women, all the other actors focused on the concept of genocide in their investigation. In the cases of the Commission and the US, the concept of genocide was only one but several aspects of the investigation, while PHR exclusively focused on the concept of genocide. This may explain why PHR, the Commission and the US, as compared to the AI, provided a more extensive discussion on the concept. Furthermore, it may explain why all actors but AI was able reach a definite conclusion as whether acts of genocide had occurred or not.

How the actors collected evidence is also different: the US conducted 1136 semi-structured interviews that turned into atrocity statistics; PHR conducted 48 semi-structured interviews of Darfurian that was transformed to atrocity statistics, carried out interviews in focus group and took over 700 photos of destroyed villages; AI conducted interviews with female victims and witnesses; and the Commission applied several methods, ranging from interviews of a couple of hundred victims/witnesses and government officials to analyses of existing reports of abuse and investigation of crime scenes. These investigations vary in terms of the number of interviews, which part of the conflict they belonged to and the extent to which the respondents represented the targeted groups in Darfur. However, it is arguably the use or non-use of a premade questionnaire that may have had most influence on the genocide determination. While both the US and PHR conducted semi-structured interviews, which included specific questions in order to obtain relevant information about whether the perpetrators intended to destroy the targeted group, no such questionnaire was utilized by neither the Commission nor

AI. This may have negatively influenced the Commission and AI's ability to systematically assess the mental state of the perpetrators through documenting racially motivated statements.

In relation to evaluation of evidence, only the Commission explicitly discussed what kind of evidentiary threshold they applied in their findings. Neither the US, AI or PHR discuss this aspect. It may, however, be difficult to assess specifically what kind of threshold the Commission utilized. The focus on only three specific cases that convinced the Commission – or at least made them doubt – that the perpetrators did not act with intent, suggests that the Commission adopted a high threshold. Nevertheless, the main point is that the analysis suggest that the Commission adopted a *higher* threshold than the other actors, at least compared to the US and PHR. While all three actors found circumstantial evidence of genocidal intent, only the US and PHR argued that these evidences was enough to conclude that genocide had occurred. The fact that AI argue that their evidence is inconclusive may suggest that the organization did not apply a low threshold. But whether they adopted a high threshold is difficult to evaluate based on their sort genocide assessment.

*Why does the international community disagree on whether the Darfur-conflict constitutes genocide?* has been my main research question. The inquiries into how the G-word is conceptualized and how they have conducted investigation show that the actors conceptualize the G-word differently and conduct fact-finding differently. Based on the findings described above I would argue that these differences may explain why the international community – here represented by the US, the UN, AI and PHR – disagree on whether the Darfur-conflict constitutes genocide. Most notably, the Commission adopted a more narrow understanding of the concept than the other actors leading to a conclusion that acts of genocide did not occur. This conclusion may have been further influenced by a mandate that required them to follow international criminal law more strictly than the other actors. The US, PHR and AI also adopted the framework of international criminal law to describe the Darfur-conflict, but they were not required to strictly follow the legal framework. The different interpretations by the PHR, the US ad AI indicate that the different actors have selectively analyzed elements of the definition. This suggests that the definition in the Convention is used in order to strengthen their arguments. The definition is, in other words, used subjectively. The different elements of the law are applied primarily when it fits what the actors has found or want to present.

Word count: 43 323



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# Abbreviations

**ADT** – Atrocity Documentation Team

**AI** – Amnesty International

**COI/ the Commission** – The International Commission on Inquiry on Darfur

**HRW** – Human Rights Watch

**ICC** – International Criminal Court

**ICTR** – International Criminal Tribunal for Rwanda

**ICTY** – International Criminal Court for the former Yugoslavia

**IGO** – Intergovernmental organization

**ICL** – International criminal law

**IHL** – International Humanitarian Law

**IHRL** – International Human Rights Law

**JEM** – Justice and Equality Movement

**NGO** – Nongovernmental organization

**UN** – United Nations

**PHR** – Physician for Human Rights

**SLM/A** – Sudan Liberation Movement/Army

**SPLA** – Sudan’s People Liberation Army

**US** – United States