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Pursuant to Security Council Resolution 1564 of 18 September 2004 Geneva, 25 January 2005

### INTRODUCTION

[...]

### II. THE HISTORICAL AND SOCIAL BACKGROUND

[...]

### 3. The Current Conflict in Darfur

1. The roots of the present conflict in Darfur are complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, [...] deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support amongst certain tribes, are playing a major role in shaping the current crisis.
2. It appears evident that the two rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) began organizing themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. While only loosely connected, the two rebel groups cited similar reasons for the rebellion, including socio-economic and political marginalization of Darfur and its people. In addition, the members of the rebel movements were mainly drawn from local village defence groups from particular tribes, which had been formed as a response to increases in attacks by other tribes. Both rebel groups had a clearly stated political agenda involving the entirety of the Sudan, demanding more equal participation in government by all groups and regions of the Sudan. Initially the SLM/A, at that stage named the Darfur Liberation Front, came into existence with an agenda focused on the situation of the people of Darfur, and only later expanded its agenda to cover all of the Sudan. The Justice and Equality Movement based its agenda on a type of manifesto – the “Black Book”, published in 2001 – which essentially seeks to prove the disparities in the distribution of power and wealth, by noting that Darfur and its populations, as well as some populations of other regions, have been consistently marginalized and not included in influential positions in the central Government in Khartoum. It is noteworthy that the

two movements did not argue their case from a tribal point of view, but rather spoke on behalf of all Darfurians, and mainly directed their attacks at Government installations. It also appears that with regard to policy formulation, the *New Sudan* policy of the SPLM/A [Sudan People's Liberation Movement/Army] in the South had an impact on the SLM/A, while the JEM seemed more influenced by trends of political Islam. Furthermore, it is possible that the fact that the peace negotiations between the Government and the SPLM/A were advancing rapidly, did in some way represent an example to be followed by other groups, since armed struggle would apparently lead to fruitful negotiations with the Government. It should also be recalled that despite this broad policy base, the vast majority of the members of the two rebel movements came from essentially three tribes: The Fur, the Massalit and the Zaghawa.

3. It is generally accepted that the rebel movements began their first military activities in late 2002 and in the beginning of 2003 through attacks mainly directed at local police offices, where the rebels would loot Government property and weaponry. [...]
4. Most reports indicate that the Government was taken by surprise by the intensity of the attacks, as it was ill-prepared to confront such a rapid military onslaught. Furthermore, the looting by rebels of Government weaponry strengthened their position. An additional problem was the fact that the Government apparently was not in possession of sufficient military resources, as many of its forces were still located in the South, and those present in Darfur were mainly located in the major urban centres. Following initial attacks by the rebels against rural police posts, the Government decided to withdraw most police forces to urban centres. This meant that the Government did not have *de facto* control over the rural areas, which was where the rebels were based. The Government was faced with an additional challenge since the rank and file of the Sudanese armed forces was largely composed of Darfurians, who were probably reluctant to fight "their own" people.
5. From available evidence and a variety of sources including the Government itself, it is apparent that faced with a military threat from two rebel movements and combined with a serious deficit in terms of military capabilities on the ground in Darfur, the Government called upon local tribes to assist in the fighting against the rebels. In this way, it exploited the existing tensions between different tribes.
6. In response to the Government's call, mostly Arab nomadic tribes without a traditional homeland and wishing to settle, given the encroaching desertification, responded to the call. They perhaps found in this an opportunity to be allotted land. One senior government official involved in the recruitment informed the Commission that tribal leaders were paid in terms of grants and gifts on the basis of their recruitment efforts and how many persons they provided. In addition, the Government paid some of the Popular Defence Forces (PDF) staff their salaries through the tribal leaders, with State budgets used for these purposes. The Government did not accept recruits from all tribes. One Masaalit leader told the Commission that his tribe was willing to provide approximately one thousand persons to the PDF but, according to this source, the Government did not accept, perhaps on the assumption that the recruits could use this as an opportunity to acquire weapons and then turn against the Government. Some reports also indicate that foreigners, from Chad, Libya and other states, responded to this call and that the Government was more than willing to recruit them.
7. These new "recruits" were to become what the civilian population and others would refer to as the "Janjaweed", a traditional Darfurian term denoting an armed bandit or outlaw on a horse or camel. [...]
8. [...] On 8 April 2004, the Government and the SLM/A and JEM signed a humanitarian ceasefire agreement, and in N'Djamena on 28 May they signed an agreement on ceasefire modalities.

Subsequent peace talks took place [...] under the mediation of the African Union. On 9 November in Abuja, the Government, the SLM/A and the JEM signed two Protocols, one on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur. In the context of further negotiations, the parties have not been able to overcome their differences and identify a comprehensive solution to the conflict.

[...]

## **SECTION I: THE COMMISSION'S FINDINGS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW BY THE PARTIES**

[...]

### **II. THE NATURE OF THE CONFLICT IN DARFUR**

1. The first [...] issue relates to the nature of the armed conflict raging in Darfur. This determination is particularly important with regard to the applicability of the relevant rules of international humanitarian law. The distinction is between international armed conflicts, non-international or internal armed conflict, and domestic situations of tensions or disturbances. The Geneva Conventions set out an elaborate framework of rules that are applicable to international armed conflict or 'all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties'. Common Article 3 of the Geneva Conventions and Additional Protocol II set out the prerequisite of a non-international armed conflict. It follows from the above definition of an international conflict that a non-international conflict is a conflict without the involvement of two States. Modern international humanitarian law does not legally set out the notion of armed conflict. Additional Protocol II only gives a negative definition which, in addition, seems to narrow the scope of Article 3 common to the Geneva Conventions. The jurisprudence of the international criminal tribunals has explicitly elaborated on the notion: 'an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. Internal disturbances and tensions, 'such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are generally excluded from the notion of armed conflict.
2. The conflict in Darfur opposes the Government of the Sudan to at least two organized armed groups of rebels, namely the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). [...] The rebels exercise *de facto* control over some areas of Darfur. The conflict therefore does not merely amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (i) existence of organized armed groups fighting against the central authorities, (ii) control by rebels over part of the territory and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict under common Article 3 of the Geneva Conventions are met.
3. All the parties to the conflict (the Government of the Sudan, the SLA [SLM/A armed branch] and the JEM) have recognised that this is an internal armed conflict. Among other things, in 2004 the two rebel groups and the Government of the Sudan entered into a number of international agreements, inter se, in which they invoke or rely upon the Geneva Conventions.

### III. CATEGORIES OF PERSONS OR GROUPS PARTICIPATING IN THE ARMED CONFLICT

[...]

#### 1. Government Armed Forces

[...]

##### *(iv) Popular Defence Forces*

1. For operational purposes, the Sudanese armed forces can be supplemented by the mobilization of civilians or reservists into the Popular Defence Forces (PDF). [...]
2. According to information gathered by the Commission, local government officials are asked by army Headquarters to mobilize and recruit PDF forces through tribal leaders and sheikhs. [...] As one tribal leader explained to the Commission, 'in July 2003 the State called on tribal leaders for help. We called on our people to join the PDF. They responded by joining, and started taking orders from the Government as part of the state military apparatus.'
3. The PDF provides arms, uniforms and training to those mobilized, who are then integrated into the regular army for operations. At that point, the recruits come under regular army command and normally wear the same uniform as the unit they are fighting with. [...]

#### 2. Government supported and/or controlled militias – the 'Janjaweed'

[...]

##### *(ii.) Uses of the term in the context of current events in Darfur*

1. [...] [I]n practice, the term "Janjaweed" is being used interchangeably with other terms used to describe militia forces working with the Government. Where victims describe their attackers as Janjaweed, these persons might be from a tribal Arab militia, from the PDF or from other entity, as described below.

[...]

##### *(vi.) The question of legal responsibility for acts committed by the Janjaweed*

[...]

1. When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in Tadic (Appeal), at para. 98-145 [See ICTY, The Prosecutor v. Tadic [Part C.]]. Thus they are acting as *de facto* State officials of the Government of Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning, those

crimes, or for failing to prevent or repress them, under the notion of superior responsibility.

2. When militias are incorporated in the PDF and wear uniforms, they acquire, from the viewpoint of international law the status of organs of the Sudan. Their actions and their crimes could be legally attributed to the Government. [...]
3. On the basis of its investigations, the Commission is confident that the large majority of attacks on villages conducted by the militia have been undertaken with the acquiescence of State officials. The Commission considers that in some limited instances militias have sometimes taken action outside of the direct control of the Government of Sudan and without receiving orders from State officials to conduct such acts. In these circumstances, only individual perpetrators of crimes bear responsibility for such crimes. However, whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that (i) the Government incurs international responsibility (vis-à-vis all other member States of the international community) for any violation of international human rights law committed by the militias, and in addition (ii) the relevant officials in the Government may be held criminally accountable, depending on the specific circumstances of each case, for instigating or for aiding and abetting the violations of humanitarian law committed by militias.

[...]

## Paras 143 to 174

### IV. THE INTERNATIONAL LEGAL OBLIGATIONS INCUMBENT UPON THE SUDANESE GOVERNMENT AND THE REBELS

[...]

#### 1. Relevant Rules of International Law Binding the Government of the Sudan

1. Two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict.

[...]

##### *(i.) International human rights law [...]*

1. In the case of a state of emergency, international human rights law contains specific provisions which prescribe the actions of States. In particular, article 4 of the International Covenant on Civil and Political Rights sets out the circumstances under which a State Party may derogate temporarily from part of its

obligations under the Covenant. Two conditions must be met in order for this article to be invoked: first, there must be a situation that amounts to a public emergency that threatens the life of the nation, and secondly, the state of emergency must be proclaimed officially and in accordance with the constitutional and legal provisions that govern such proclamation and the exercise of emergency powers. The State also must immediately inform the other States parties, through the Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Even during armed conflict, measures derogating from the Covenant 'are allowed only if and to the extent that the situation constitutes a threat to the life of the nation'. In any event, they must comply with requirements set out in the Covenant itself, including that those measures be limited to the extent strictly required by the exigencies of the situation. Moreover, they must be consistent with other obligations under international law, particularly the rules of international humanitarian law and peremptory norms of international law.

2. Article 4 of the ICCPR clearly specifies the provisions which are non-derogable and which therefore must be respected at all times. These include the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. Moreover, measures derogating from the Covenant must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.
3. Other non-derogable 'elements' of the Covenant, as defined by the Human Rights Committee, include the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibition against taking hostages, abductions or unacknowledged detention; certain elements of the rights of minorities to protection; the prohibition of deportation or forcible transfer of population; and the prohibition of propaganda for war and of advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence. The obligation to provide effective remedies for any violation of the provisions of article 2, paragraph 3, of the Covenant must be always complied with.
4. In addition, the protection of those rights recognized as non-derogable require certain procedural safeguards, including judicial guarantees. For example, the right to take proceedings before a court to enable the court to decide on the lawfulness of detention, and remedies such as *habeas corpus* or *amparo*, must not be restricted by derogations under article 4. In other words, 'the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.'
5. The Sudan has been under a continuous state of emergency since 1999 and, in December 2004, the Government announced the renewal of the state of emergency for one more year. According to the information available to the Commission, the Government has not taken steps legally to derogate from its obligations under the ICCPR. In any event, whether or not the Sudan has met the necessary conditions to invoke article 4, it is bound at a minimum to respect the non-derogable provisions and 'elements' of the Covenant at all times.

## **(ii.) International humanitarian law**

1. With regard to international humanitarian law, the Sudan is bound by the four Geneva Conventions of 1949, as well as the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, of 18 September 1997, whereas it is not bound by the two Additional Protocols of 1977, at least qua treaties. As noted above, the Sudan has signed, but not yet ratified, the Statute of the International Criminal Court and the Optional Protocol to



the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and is therefore bound to refrain from “acts which would defeat the object and purpose” of that Statute and the Optional Protocol.

[...]

1. In addition to international treaties, the Sudan is bound by customary rules of international humanitarian law. These include rules relating to internal armed conflicts, many of which have evolved as a result of State practice and jurisprudence from international, regional and national courts, as well as pronouncements by States, international organizations and armed groups.
2. The core of these customary rules is contained in Article 3 common to the Geneva Conventions. [...]
3. Other customary rules crystallized in the course of diplomatic negotiations for the adoption of the two Additional Protocols of 1977, for the negotiating parties became convinced of the need to respect some fundamental rules, regardless of whether or not they would subsequently ratify the Second Protocol. Yet other rules were adopted at the 1974-77 Diplomatic Conference as provisions that spelled out general principles universally accepted by States. States considered that such provisions partly codified, and partly elaborated upon, general principles, and that they were therefore binding upon all States or insurgents regardless of whether or not the former ratified the Protocols. Subsequent practice by, or attitude of, the vast majority of States showed that over time yet other provisions of the Second Additional Protocol came to be regarded as endowed with a general purport and applicability. Hence they too may be held to be binding on non-party States and rebels.
4. That a body of customary rules regulating internal armed conflicts has thus evolved in the international community is borne out by various elements. For example, some States in their military manuals for their armed forces clearly have stated that the bulk of international humanitarian law also applies to internal conflicts. Other States have taken a similar attitude with regard to many rules of international humanitarian law.

[...]

1. Furthermore, in 1995, in its judgment in *Tadic (Interlocutory appeal)* the ICTY Appeals Chamber held that the main body of international humanitarian law also applied to internal conflicts as a matter of customary law, and that in addition serious violations of such rules constitute war crimes.

[...]

1. The adoption of the ICC Statute, followed by the Statute of the Special Court for Sierra Leone, can be regarded as the culmination of a law-making process that in a matter of few years led both to the crystallization of a set of customary rules governing internal armed conflict and to the criminalization of serious breaches of such rules (in the sense that individual criminal liability may ensue from serious violations of those rules).
2. This law-making process with regard to internal armed conflict is quite understandable. As a result both of the increasing expansion of human rights doctrines and the mushrooming of civil wars, States came to accept the idea that it did not make sense to afford protection only in international wars to civilians and other persons not taking part in armed hostilities: civilians suffer from armed violence in the course

of internal conflicts no less than in international wars. It would therefore be inconsistent to leave civilians unprotected in civil wars while protecting them in international armed conflicts. Similarly, it was felt that a modicum of legal regulation of the conduct of hostilities, in particular of the use of means and methods of warfare, was also needed when armed clashes occur not between two States but between a State and insurgents.

3. Customary international rules on internal armed conflict thus tend both to protect civilians, the wounded and the sick from the scourge of armed violence, and to regulate the conduct of hostilities between the parties to the conflict. [...]
4. For the purposes of this report, it is sufficient to mention here only those customary rules on internal armed conflicts which are relevant and applicable to the current armed conflict in Darfur. These include:
  - i. the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder [footnote 77: The rule is laid down in Common Article 3 of the 1949 Geneva Conventions, has been restated in many cases, and is set out in the 2004 *British Manual on the Law of Armed Conflict* (at para. 15.6). It should be noted that in the Report made pursuant to para. 5 of the UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN Forces in Somalia, the UN Secretary-General noted that "The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. [...] [T]hey are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of armed conflict than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants." (UN doc. S/26351, 24 August 1993, Annex, para. 12). According to a report of the Inter-American Commission on Human Rights on the human rights situation in Colombia issued in 1999, international humanitarian law prohibits "the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and parties actively taking part in the hostilities and to direct attacks only against the latter and, inferentially, other legitimate military objectives." (Third Report on the Human Rights Situation in Colombia, Doc OAS/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, para. 40). See also Tadic (ICTY Appeals Chamber), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, (1995), paras 98, 117, 132 [See ICTY, *The Prosecutor v. Tadic* [Part A.]]; *Kordic and Cerkez*, Case No. IT-95-14/2 (Trial Chamber III), *Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the limited Jurisdictional Reach of Articles 2 and 3*, 2 March 1999, paras 25-34 (recognizing that Articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II constitute customary international law).] (this rule was reaffirmed in some agreements concluded by the Government of the Sudan with the rebels);
  - ii. the prohibition on deliberate attacks on civilians;
  - iii. the prohibition on indiscriminate attacks on civilians, [footnote 80: This rule was held to be of customary nature in *Tadic (Interlocutory Appeal)*, at paras 100-102, is restated and codified in Article 13 of Additional Protocol II, which is to be regarded as a provision codifying customary international law, and is also mentioned in the 2004 *British Manual of the Law of Armed Conflict* [...].] even if there may be a few armed elements among civilians; [footnote 81: In a press release concerning the conflict in Lebanon, in 1983 the ICRC stated that "the presence of armed elements



among the civilian population does not justify the indiscriminate shelling of women, children and old people.” (ICRC, Press release no. 1474, Geneva, 4 November 1983). In 1997 in *Tadic* and ICTY Trial Chamber held that “it is clear that the targeted population [of a crime against humanity] must be of predominantly civilian nature. The presence of certain non-civilian elements in the midst does not change the character of the population” (judgment of 7 May 1997, at para. 638 and see also para. 643).]

- iv. the prohibition on attacks aimed at terrorizing civilians; [footnote 82: See the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.8.]
- v. the prohibition on intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- vi. the prohibition of attacks against civilian objects; [footnote 84: Pursuant to para. 5 of General Assembly Resolution 2675 (XXV, of 9 December 1970), which was adopted unanimously and, according to the 2004 *British Manual of the Law of Armed Conflict*, “can be regarded as evidence of State practice” (paras 15-16.2), “dwellings and other installations that are used only by the civilian population should not be the object of military operations”. See also the 2004 *British Manual of the Law of Armed Conflict*, at paras 15.9 and 15.9.1, 15.16 and 15.16.1-3).]
- vii. the obligation to take precautions in order to minimize incidental loss and damage as a result of attacks, [footnote 85: See the 2004 *British Manual of the Law of Armed Conflict*, at paras 15.22-15.22.1.] such that each party must do everything feasible to ensure that targets are military objectives [footnote 86: See *Zoran Kupreskic and others*, ICTY Trial Chamber, judgment of 14 January 2000, at para. 260 [See ICTY, *The Prosecutor v. Kupreskic et al.*] and to choose means or methods of combat that will minimise loss of civilians; [footnote 87: See for instance the Military Manual of Benin (*Military Manual*, 1995, Fascicule III, pp. 11 and 14 [...]), of Germany (*Military Manual*, 1992, at para. 457), of Kenya (Law of Armed Conflict Manual, 1997, *Precis* no. 4, pp. 1 and 8), of Togo (Military Manual, 1996, Fascicule III, pp. 11 and 14), as well as the *Joint Circular on Adherence to International humanitarian Law and Human Rights of the Philippines* (1992, at para. 2(c)). See also *Zoran Kupreskic and others*, [See ICTY, *The Prosecutor v. Kupreskic et al.*] ICTY Trial Chamber, judgment of 14 January 2000, at para. 260]
- viii. the obligation to ensure that when attacking military objectives, incidental loss to civilians is not disproportionate to the military gain anticipated; [footnote 88: In *Zoran Kupreskic and others*, an ICTY Trial Chamber held in 2000 that “Even if it can be proved that the Muslim population of Ahmici [a village in Bosnia and Herzegovina] was not entirely civilians but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. [...]” (judgment of 14 January 2000, at para. 513). See also some pronouncements of States. For instance, in 2002, in the House of Lords the British Government pointed out that, with regard to the civil war in Chechnya, it had stated to the Russian Government that military “operations must be proportionate and in strict adherence to the rule of law.” (in 73 *BYIL* 2002, at 955). The point was reiterated by the British Minister for trade in reply to a written question in the House of Lords (*ibidem*, at 957). See also the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.22.1. In 1992, in a joint memorandum submitted to the UN, Jordan and the US stated that “the customary rule that prohibits attacks which reasonably may be expected at the time to cause

incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited” (UN doc. A/C.6/47/3, 28 September 1992, at para. 1(h)). In a judgment of 9 December 1985, an Argentinean Court of Appeals held in the *Military Junta* case that the principle of proportionality constitutes a customary international norm [...]. Spain insisted on the principle of proportionality in relation to the internal armed conflicts in Chechnya and in Bosnia and Herzegovina (see the statements in the Spanish Parliament of the Spanish Foreign Minister, in *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid 1995, at 353, 473. In addition, see the 1999 Third Report on Colombia of the Inter-American Commission on Human Rights (Doc. OAS/Se.L/V/II.102 Doc.9, rev.1, 26 February 1999, at paras 77 and 79). See also the 1999 UN Secretary-General’s Bulletin, para. 5.5 (with reference to UN forces).]

- ix. the prohibition on destruction and devastation not justified by military necessity; [footnote 89: Rome Statute, at Article 8(2)(e)(xii). See also the 2004 *British Manual of the Law of Armed Conflict*, at paras 15.17-15.17.2). Under Article 23(g) of the Hague Regulations, it is prohibited “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”. The grave breaches provisions in the Geneva Conventions also provide for the prohibition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (see First Geneva Convention, Article 50 *in fine*; Second Geneva Convention, Article 51 *in fine*; Fourth Geneva Convention, Article 147 *in fine*; Additional Protocol I, Article 51(1) *in fine*.)]
- x. the prohibition on the destruction of objects indispensable to the survival of the civilian population; [footnote 90: Article 14 of the Second Additional Protocol; as rightly stated in the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.19.1, “the right to life is a non-derogable human right. Violence to the life and person of civilians is prohibited, whatever method is adopted to achieve it. It follows that the destruction of crops, foodstuffs, and water sources, to such an extent that starvation is likely to follow, is also prohibited.”]
- xi. the prohibition on attacks on works and installations containing dangerous forces;
- xii. the protection of cultural objects and places of worship;
- xiii. the prohibition on the forcible transfer of civilians;
- xiv. the prohibition on torture and any inhuman or cruel treatment or punishment; [footnote 94: See common Article 3(1)(a)]
- xv. the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence; [footnote 95: See common Article 3(1)(c)]
- xvi. the prohibition on declaring that no quarter will be given; [footnote 96: See Article 8(2)(e)(x) of the ICC Statute.]
- xvii. the prohibition on ill-treatment of enemy combatants hors de combat and the obligation to treat captured enemy combatants humanely; [footnote 97: See common Article 3(1) as well as the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.6.4]
- xviii. the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by the world community; [footnote 98: See common Article 3(1)(d); see also General Comment 29 of the Human Rights Committee, at para. 16]
- xix. the prohibition on collective punishments; [footnote 99: See Article 4(b) of the Statute of the ICTR and Article 3(b) of the Statute of the Special Court for Sierra Leone; See also General Comment 29

of the Human Rights Committee, at para. 11, according to which any such punishment is contrary to a peremptory rule of international law.]

- xx. the prohibition on the taking of hostages;
  - xxi. the prohibition on acts of terrorism;
  - xxii. the prohibition on pillage;
  - xxiii. the obligation to protect the wounded and the sick; [footnote 103: Common Article 3(2) of the Geneva Conventions.]
  - xxiv. the prohibition on the use in armed hostilities of children under the age of 15; [footnote 104: There are two treaty rules that ban conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities (see Article 8(2)(e)(vii) of the ICC Statute and Article 4(c) of the Statute of the Special Court for Sierra Leone). The Convention on the Rights of the Child, at Article 38, and the Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflicts [**See** Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000] raise the minimum age of persons directly participating in armed conflicts to 18 years, although not in mandatory terms [...] It may perhaps be held that a general consensus has evolved in the international community on a minimum common denominator: children under 15 may not take an active part in armed hostilities.]
5. It should be emphasized that the international case law and practice indicated above show that serious violations of any of those rules have been criminalized, in that such violations entail individual criminal liability under international law.
6. Having surveyed the relevant rules applicable in the conflict in Darfur, it bears stressing that to a large extent the Government of the Sudan is prepared to consider as binding some general principles and rules laid down in the two Additional Protocols of 1977 and to abide by them, although formally speaking it is not party to such Protocols. This is apparent, for instance, from the Protocol on the Establishment of Humanitarian Assistance in Darfur, signed on 8 April 2004 by the Government of the Sudan with the SLA and JEM, stating in Article 10(2) that the three parties undertook to respect a corpus of principles, set out as follows:

“The concept and execution of the humanitarian assistance in Darfur will be conform [*sic*] to the international principles with a view to guarantee that it will be credible, transparent and inclusive, notably: the 1949 Geneva Conventions *and its two 1977 Additional Protocols*; the 1948 Universal Declaration on Human Rights, the 1966 International Convention [*sic*] on Civil and Public [*sic*] Rights, the 1952 Geneva Convention on Refugees [*sic*], the Guiding Principles on Internal Displacement (Deng Principles) and the provisions of General Assembly resolution 46/182” (emphasis added).

[...]

1. Significantly, in Article 8(a) of the Status of Mission Agreement (SOMA) on the Establishment and Management of the Cease Fire Commission in the Darfur Area of the Sudan (CFC), of 4 June 2004, between the Sudan and the African Union, it is provided that ‘The African Union shall ensure that the CFC conducts its operation in the Sudan with full respect for the principles and rules of international Conventions *applicable to the conduct of military and diplomatic personnel*. These international

Conventions include the four Geneva Conventions of 12 August 1949 and their *Additional Protocols of 8 June 1977* and the UNESCO Convention of 14 May 1954 on the Protection of Cultural property in the event of armed conflict [...]” (emphasis added). Article 9 then goes on to provide that “The CFC and the Sudan shall therefore ensure that members of their respective military and civilian personnel *are fully acquainted with the principles and rules of the above-mentioned international instruments.*” (emphasis added)

[...]

## **2. Rules binding rebels**

1. The SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above. The same is probably true also for the NMRD.
2. Furthermore, as with the implied acceptance of general international principles and rules on humanitarian law by the Government of the Sudan, such acceptance by rebel groups similarly can be inferred from the provisions of some of the Agreements mentioned above.
3. In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law. The NMRD concluded two Agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In these Agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees.

[...]

## **Paras 182 to 292**

### **VI. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW – THE COMMISSION’S FACTUAL AND LEGAL FINDINGS.**

#### **1. Overview of violations of international human rights and humanitarian law reported by other bodies**

[...]

1. [...] [T]he Commission carefully studied reports from different sources including Governments, inter-governmental organizations, various United Nations mechanisms or bodies, as well as non-governmental organizations. [...] The Commission [...] received a great number of documents and other material from a wide variety of sources, including the Government of the Sudan. [...] The following is a brief account of these reports, which serves to clarify the context of the fact finding and the investigations conducted by the Commission. In the sections following this overview, individual incidents are presented according to the type of violation or international crime identified.

[...]

1. Most reports note a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur states beginning in early 2003. [...]
2. A common conclusion is that, in its response to the insurgency, the Government has committed acts against the civilian population, directly or through surrogate armed groups, which amount to gross violations of human rights and humanitarian law. While there has been comparatively less information on violations committed by the rebel groups, some sources have reported incidents of such violations. There is also information that indicates activities of armed elements who have taken advantage of the total collapse of law and order to settle scores in the context of traditional tribal feuds, or to simply loot and raid livestock.
3. There are consistent accounts of a recurrent pattern of attacks on villages and settlements, sometimes involving aerial attacks by helicopter gunships or fixed-wing aircraft (Antonov and MIG), including bombing and strafing with automatic weapons. However, a majority of the attacks reported are ground assaults by the military, the Janjaweed, or a combination of the two. Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages. These incidents have resulted in the massive displacement of large parts of the civilian population within Darfur as well as to neighbouring Chad. The reports indicate that the intensity of the attacks and the atrocities committed in any one village spread such a level of fear that populations from surrounding villages that escaped such attacks also fled to areas of relative security.
4. Except in a few cases, these incidents are reported to have occurred without any military justification in relation to any specific activity of the rebel forces. [...]
5. While a majority of the reports are consistent in the description of events and the violations committed, the crimes attributed to the Government forces and Janjaweed have varied according to the differences in the interpretation of the events and the context in which they have occurred. Analyses of facts by most of the observers, nevertheless, suggest that the most serious violations of human rights and humanitarian law have been committed by militias, popularly termed “Janjaweed”, at the behest of and with the complicity of the Government, which recruited these elements as a part of its counter-insurgency campaign.
6. Various reports and the media claim to have convincing evidence that areas have been specifically targeted because of the proximity to or the locus of rebel activity, but more importantly because of the ethnic composition of the population that inhabits these areas. [...]

[...]

## **5. Two Irrefutable Facts: Massive displacement and large-scale destruction of villages**

1. Results of the fact finding and investigations are presented in the next sections of the report and are analysed in the light of the applicable legal framework as set out in the preceding Section. However, before proceeding, two uncontested facts must be highlighted.
2. [...] Firstly, there were more than one million internally displaced persons (IDPs) inside Darfur (1,65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighbouring

Chad to the East of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three states of Darfur. [...]

[...]

## **6. Violations committed by the parties**

[...]

### ***(i.) Indiscriminate attacks on civilians***

#### ***(a.) Factual findings***

[...]

1. From all accounts the Commission finds that the vast majority of attacks on civilians in villages have been carried out by Government of the Sudan armed forces and Janjaweed, either acting independently or jointly. Although attacks by rebel forces have also taken place, the Commission has found no evidence that these are widespread or that they have been systematically targeted against the civilian population. Incidents of rebel attacks are mostly against military targets, police or security forces. Nevertheless, there are a few incidents in which rebel attacks have been carried out against civilians and civilian structures, as well as humanitarian convoys.

#### ***(1). Attacks by Government armed forces and the Janjaweed***

1. [...] [T]he Commission found that attacks on villages in Darfur conducted by Government of the Sudan armed forces and the Janjaweed took place throughout the conflict with peaks in intensity during certain periods. Most often the attacks began in the early morning, just before sunrise between 04:30 AM and 08:00 AM when villagers were either asleep or at prayer. In many cases the attacks lasted for several hours. [...]
2. In many cases a ground attack began with soldiers appearing in Land Cruisers and other vehicles, followed by a large group of Janjaweed on horses and camels, all with weapons such as AK47s, G3s and rocket-propelled grenades. Many of the attacks involved the killing of civilians, including women and children, the burning of houses, schools and other civilian structures, as well as the destruction of wells, hospitals and shops. Looting and theft of civilian property, in particular livestock, invariably followed the attacks and in many instances every single item of moveable property was either stolen or destroyed by the attackers. Often the civilians were forcibly displaced as a result of the attack.

[...]

1. In this context, the Commission also noted the comments made by Government officials in meetings with the Commission. The Minister of Defence clearly indicated that he considered the presence of even one rebel sufficient for making the whole village a legitimate military target. The Minister stated that



once the Government received information that there were rebels within a certain village, 'it is no longer a civilian locality, it becomes a military target.' In his view, 'a village is a small area, not easy to divide into sections, so the whole village becomes a military target.' [...]

### **Case Study 1: Anka village, North Darfur**

1. [...] At about 9 am on or about the 17 or 18 February 2004 the village of Barey, situated about 5 kilometres from the village of Anka, was attacked by a combined force of Government soldiers and Janjaweed. [...] At about 5 PM on the same day, witnesses from Anka observed between 300 and 400 Janjaweed on foot, and another 100 Janjaweed on camels and horseback, advancing towards Anka from the direction of Barey. The attackers were described as wearing the same khaki uniforms as the Government soldiers, and were armed with Kalashnikovs G3s and rocket-propelled grenades (RPGs). Witnesses observed about 18 vehicles approaching from behind the Janjaweed forces, including four heavy trucks and eighteen Toyota pickup vehicles. Some of the vehicles were green and others were coloured navy blue. The pickups had Dushka (12.7mm tripod mounted machine guns) fitted onto the back, and one had a Hound rocket launcher system which was used to fire rockets into, and across, the village. The trucks carried Government armed forces and were later used to transport looted property from the village. According to witnesses, villagers fled the village in a northerly direction, towards a wooded area about 5 kilometers from the village. Before the Janjaweed entered the village, the Government armed forces bombed the area around the village with Antonov aircraft. One aircraft circled the village while the other one bombed. [...] The bombing lasted for about two hours, during which time 20 to 35 bombs were dropped around the outskirts of the village. A hospital building was hit during the bombardment. After the bombing the Janjaweed and Government soldiers moved in and looted the village including bedding, clothes and livestock. Remaining buildings were then destroyed by burning. Janjaweed also fired RPGs into the village from the top of the hill overlooking Anka. The bombing of the areas around the village appear to have been conducted in order to facilitate the looting and destruction of the village by Janjaweed and Government armed forces on the ground. According to witnesses, approximately 30 SLM/A members were present in the village at the time of the attack, apparently to defend the village following the announcement of the imminent attack. 15 civilians were killed in Anka as a result of shrapnel injuries during and after the attack. 8 others were wounded. While some have recovered, others reportedly are disabled as a result of their injuries. The village is now totally deserted.

### **[...] (b.)Legal appraisal [...]**

1. To ensure that attacks on places or areas where both civilians and combatants may be found, do not unlawfully jeopardize civilians, international law imposes two fundamental obligations, applicable both in international and internal armed conflicts. First the obligation to take precautions for the purpose of sparing civilians and civilian objects as much as possible. Such precautions, laid down in customary international law, are as follows: a belligerent must (i) do everything feasible to verify that the objectives to be attacked are not civilian in character; (ii) take all feasible precautions in the choice of means and methods of combat with a view to avoiding or at least minimizing incidental injury to civilians or civilian objects; (iii) refrain from launching attacks which may be expected to cause incidental loss of civilian life or injury to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated; (iv) give effective advance warning of attacks which may affect the

civilian population, except “in cases of assault” (as provided for in Article 26 of the Hague Regulations of 1907) or (as provided for in Article 57(2)(c)) “unless circumstances do not permit” (namely when a surprise attack is deemed indispensable by a belligerent). Such warnings may take the form of dropping leaflets from aircraft or announcing on the radio that an attack will be carried out. According to the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, Y. Sandoz and others eds, 1987, at para. 2224) a warning can also be given by sending aircraft that fly at very low altitude over the area to be attacked, so as to give civilians the time to evacuate the area.

2. The second fundamental obligation incumbent [...] on any party to an international or internal armed conflict [...] is to respect the principle of proportionality when conducting attacks on military objectives that may entail civilian losses. Under this principle a belligerent, when attacking a military objective, shall not cause incidental injury to civilians disproportionate to the concrete and direct military advantage anticipated. In the area of combat operations the principle of proportionality remains a largely subjective standard, based on a balancing between the expectation and anticipation of military gain and the actual loss of civilian life or destruction of civilian objects. It nevertheless plays an important role, first of all because it must be applied in good faith, and secondly because its application may involve the prohibition of at least the most glaringly disproportionate injuries to civilians. [...]
3. As noted above, one justification given for the attacks by Government of the Sudan armed forces and Janjaweed on villages is that rebels were present at the time and had used the villages as a base from which to launch attacks – or, at the very least, that villagers were providing support to the rebels in their insurgency activities. Government officials therefore suggested that the villagers had lost their legal status as protected persons.
4. [...] [I]t is clear that the mere presence of a member or members of rebel forces in a village would not deprive the rest of the village population of its civilian character.
5. [...] [C]ontrary to assertions made to the Commission by various Government officials, it is apparent from consistent accounts of reliable eyewitnesses that no precautions have ever been taken by the military authorities to spare civilians when launching armed attacks on villages. [...]
6. The issue of proportionality did obviously not arise when no armed groups were present in the village, as the attack exclusively targeted civilians. However, whenever there might have been any armed elements present, the attack on a village would not be proportionate, as in most cases the whole village was destroyed or burned down and civilians, if not killed or wounded, would all be compelled to flee the village to avoid further harm. The civilian losses resulting from the military action would therefore be patently excessive in relation to the expected military advantage of killing rebels or putting them hors de combat.
7. *Concluding observations.* It is apparent from the Commission’s factual findings that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present or at least some rebels were hiding there, or that there were persons supporting rebels – an assertion that finds little support from the material and information collected by the Commission – the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack. The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels. In fact, attacks were most often intentionally directed against civilians and civilian objects. Moreover, the manner in which many attacks were conducted (at dawn, preceded by the sudden

hovering of helicopter gun ships and often bombing) demonstrates that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. From the viewpoint of international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes.

8. From the Commission's findings it is clear that the rebels are responsible for attacks on civilians, which constitute war crimes. In general, the Commission has found no evidence that attacks by rebels on civilians have been widespread, or that rebel attacks have systematically targeted the civilian population.

## **(ii.) Killing of civilians**

### **(a.) Factual findings**

#### *1. Killing by Government forces and/or militias*

1. [...] [T]he great majority of the killings were committed by people who witnesses described as Janjaweed, in most cases uniformed and on horses or camels. [...] Witness testimonies reflected in these reports describe attackers with Kalashnikovs and other automatic weapons shooting either indiscriminately or targeting specific people, usually men of military age. [...] Incidents of confinement of the civilian population, accompanied by arbitrary executions have also been reported, as well as civilian deaths as a result of indiscriminate air attacks by Government forces. The reports note that killings have continued during displacement in camps at the hand of the militias surrounding the camps, and that some IDPs have also been the victims of indiscriminate police shooting inside camps, in response to alleged rebel presence.

[...]

1. [...] [M]ost of the civilians killed at the hands of the Government or the militias are, in a strikingly consistent manner, from the same tribes, namely Fur, Massalit, Zaghawa and, less frequently, other African tribes, in particular the Jebel and the Aranga in West Darfur.

#### *a. Killing in joint attacks by Government forces and Janjaweed*

1. As an example of a case of mass killing of civilians documented by the Commission, the attack on Surra, a village with a population of over 1700, east of Zalingi, South Darfur, in January 2004, is revealing. Witnesses interviewed in separate groups gave a very credible, detailed and consistent account of the attack, in which more than 250 persons were killed, including women and a large number of children. An additional 30 people are missing. The Janjaweed and Government forces attacked jointly in the early hours of the morning. The military fired mortars at unarmed civilians. The Janjaweed were wearing camouflage military uniform and were shooting with rifles and machine guns. They entered the homes and killed the men. They gathered the women in the mosque. There were around ten men hidden with the women. They found those men and killed them inside the mosque. They forced women

to take off their maxi (large piece of clothing covering the entire body) and if they found that they were holding their young sons under them, they would kill the boys. The survivors fled the village and did not bury their dead.

[...]

1. A second attack occurred in March 2004. Government forces and Janjaweed attacked at around 15h00, supported by aircraft and military vehicles. Again, villagers fled west to the mountains. Janjaweed on horses and camels commenced hunting the villagers down, while the military forces remained at the foot of the mountain. They shelled parts of the mountains with mortars, and machine-gunned people as well. People were shot when, suffering from thirst, they were forced to leave their hiding places to go to water points. There are consistent reports that some people who were captured and some of those who surrendered to the Janjaweed were summarily shot and killed. [...] Men who were in confinement in Kailek were called out and shot in front of everyone or alternatively taken away and shot. Local community leaders in particular suffered this fate. There are reports of people being thrown on to fires to burn to death. There are reports that people were partially skinned or otherwise injured and left to die.

[...]

1. The Commission considers that almost all of the hundreds of attacks that were conducted in Darfur by Janjaweed and Government forces involved the killing of civilians.

*b. Killing in attacks by Janjaweed*

[...]

*c. Killing as a result of air bombardment*

1. Several incidents of this nature were verified by the Commission. In short, the Commission has collected very substantial material and testimony which tend to confirm, in the context of attacks on villages, the killing of thousands of civilians.

[...]

*2. Killing by Rebel Groups*

*a. Killing of civilians*

1. The Commission also has found that rebels have killed civilians, although the incidents and number of deaths have been few.

[...]

**(b.) Legal appraisal**

1. As stated above murder contravenes the provisions of the International Covenant on Civil and Political Rights and of the African Charter on Human and People's Rights, which protect the right to life and to not be "arbitrarily deprived of his life". As for international humanitarian law, murder of civilians who do not take active part in hostilities in an internal armed conflict, is prohibited both by common Article 3 of the 1949 Geneva Conventions and by the corresponding rule of customary international law, as codified in Article 4(2)(a) of Additional Protocol II. [...] It is crucial to stress again at this point that when considering if the murder of civilians amounts to a war crime or crime against humanity, the presence of non-civilians does not deprive a population of its civilian character. Therefore, even if it were proved that rebels were present in a village under attack, or that they generally used the civilian population as a 'shield', nothing would justify the murder of civilians who do not take part in the hostilities.
2. A particular feature of the conflict in Darfur should be stressed. Although in certain instances victims of attacks have willingly admitted having been armed, it is important to recall that most tribes in Darfur possess weapons, which are often duly licensed, to defend their land and cattle. Even if it were the case that the civilians attacked possessed weapons, this would not necessarily be an indication that they were rebels, hence lawful targets of attack, or otherwise taking active part in the hostilities. In addition, it should be noted that the Government of the Sudan did not claim to have found weapons in the villages that were attacked. Furthermore, many attacks occurred at times when civilians were asleep, or praying, and were then not in a position to "take direct part in the hostilities". The mere presence of arms in a village is not sufficient to deprive civilians of their protected status as such.

[...]

## Paras 298 to 422

### *(iii.) Killing of detained enemy servicemen*

[...]

### *(b.) Legal appraisal*

1. International humanitarian law prohibits ill-treatment of detained enemy combatants, in particular violence to life and person, including murder of all kinds (see common Article 3(1)(a) of the Geneva Conventions). It also specifically prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (see Article 3(1)(d) of the Geneva Conventions). Wilful killing of a detained combatant amounts to a war crime.

[...]

### *(v.) Wanton destruction of villages or devastation not justified by military necessity [...]*

1. In conclusion, the Commission finds that there is large-scale destruction of villages in all the three states

of Darfur. This destruction has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government forces may not have participated directly in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene are sufficient to make them jointly responsible. The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Massalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces. The targets of destruction during the attacks under discussion were exclusively civilian objects; and objects indispensable to the survival of civilian population were deliberately and wantonly destroyed.

[...]

#### ***(vi.) Forcible transfer of civilian populations***

[...]

1. With regard to specific patterns in the displacement, the Commission notes that it appears that one of the objectives of the displacement was linked to the counter-insurgency policy of the Government, namely to remove the actual or potential support base of the rebels. The displaced population belongs predominantly to the three tribes known to make up the majority in the rebel movements, namely the Masaalit, the Zaghawa and the Fur, who appear to have been systematically targeted and forced off their lands. The areas of origin of the displaced coincide with the traditional homelands of the three tribes, while it is also apparent that other tribes have practically not been affected at all.

[...]

#### ***(vii.) Rape and other forms of sexual violence***

##### ***(a.) Factual findings***

1. Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called “slaves” or “Tora Bora.”

[...]

1. In general, the findings of the Commission confirmed the above reported patterns. However, the Commission considers that it is likely that many cases went unreported due to the sensitivity of the issue and the stigma associated with rape. On their part, the authorities failed to address the allegations of rape adequately or effectively.

[...]



### ***Case Study: Attack on a school in Tawila, North Darfur***

1. One of the victims of rape during the attack on a boarding school in February 2004, a young girl, told the Commission that: At about 6:00 in the morning, a large number of Janjaweed attacked the school. She knew that they were Janjaweed because of their “red skin”, a term she used for Arabs. They were wearing camouflage Government uniforms. They arrived in a pickup truck of the same colour as the uniforms they were wearing. On the day before, she noticed that the Government soldiers had moved in position to surround the school. When they attacked the boarding house, they pointed their guns at the girls and forced them to strip naked, took their money, valuables and all of their bedding. There were around 110 girls at the boarding school. [...] The victim was taken from the group, blindfolded, pushed down to the ground on her back and raped. She was held by her arms and legs. Her legs were forced and held apart. She was raped twice. She confirmed that penetration occurred. The rape lasted for about one hour. Nothing was said by the perpetrators during the rape. She heard other girls screaming and thought that they were also being raped. After the rape, the Janjaweed started burning and looting. [...] The victim became pregnant as a result of this rape and later gave birth to a child. [...]

### ***Case Study: Attack on Terga, West Darfur [...]***

1. [T]he Commission found that women who went to market or were in search of water in Tarne, North Darfur, were abducted, held for two to three days and raped by members of the military around March 2003. [...] The Commission further found that twenty-one women were abducted during the joint Government armed forces and Janjaweed attack on Kanjew, West Darfur, in January 2004. The women were held for three months by Janjaweed and some of them became pregnant as a result of rape during their confinement [...].

### ***Case Study: Flight from Kalokitting, South Darfur***

1. [...] The village was attacked around four in the morning. [...] One of the victims stated as follows: “It was around 04h00 when I heard the shooting. Three of us ran together. We were neighbours. Then we realised that we did not bring our gold. When we returned, we saw soldiers. They said stop, stop. They were several. The first gave his weapon to his friend and said to me to lie down. He pulled me and threw me on the floor. He took off his trousers. He ripped my dress and there was one person holding my hands. Then he “entered” [a word for intercourse]. Then the second “entered”, and the third “entered.” I could not stand afterwards. There was another girl. When he said lie down, she said no. Kill me. She was young. She was a virgin. She was engaged. He killed her.” The third woman who was also there stated that she was raped in the same way.

[...]

### ***(b.) Legal appraisal***

[...]

1. Common article 3 to the Geneva Conventions binds all parties to the conflict and, *inter alia*, prohibits “violence to life and person, in particular cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.” While Sudan is not a party to the Additional Protocol II to the Geneva Conventions, some of its provisions constitute customary international law binding on all parties to the conflict. This includes prohibition of “rape, enforced prostitution and any form of indecent assault,” and “slavery”.
2. Rape may be either a war crime, when committed in time of international or internal armed conflict, or a crime against humanity (whether perpetrated in time of war or peace), if it is part of a widespread or systematic attack on civilians; it may also constitute genocide. Rape has been defined in international case law [...]. In short, rape is any physical invasion of a sexual nature perpetrated without the consent of the victim, that is by force or coercion, such as that caused by fear of violence, duress, detention or by taking advantage of a coercive environment.

**(viii.) *Torture, outrages upon personal dignity and cruel, inhuman or degrading treatment***

[...]

**(ix.) *Plunder***

**(b.) *Legal appraisal***

1. As noted above under customary international law the crime of plunder or pillage is a war crime. It consists of depriving the owner, without his or her consent, of his or her property in the course of an internal or international armed conflict, and appropriating such goods or assets for private or personal use, with the criminal intent of depriving the owner of his or her property.

[...]

1. The Commission also finds it plausible that the rebel movements are responsible for the commission of the war crime of plunder, albeit on a limited scale.

**(x.) *Unlawful confinement, incommunicado detentions and enforced disappearances***

[...]

**(b.) *Legal appraisal***

1. The right to liberty and security of person is protected by Article 9 of the ICCPR. The provisions of this Article are to be necessarily read in conjunction with the other rights recognized in the Covenant, particularly the prohibition of torture in Article 7, and Article 10 that enunciates the basic standard of humane treatment and respect for the dignity of all persons deprived of their liberty. Any deprivation of liberty must be done in conformity with the provisions of Article 9: it must not be arbitrary; it must be based on grounds and procedures established by law; information on the reasons for detention must be

given; and court control of the detention must be available, as well as compensation in the case of a breach. These provisions apply even when detention is used for reasons of public security.

2. An important guarantee laid down in paragraph 4 of Article 9 is the right to control by a court of the legality of detention. In its General Comments the Human Rights Committee has stated that safeguards which may prevent violations of international law are provisions against *incomunicado* detention, granting detainees suitable access to persons such as doctors, lawyers and family members. In this regard the Committee has also stressed the importance of provisions requiring that detainees should be held in places that are publicly recognized and that there must be proper registration of the names of detainees and places of detention. [...] [F]or the safeguards to be effective, these records must be available to persons concerned, such as relatives, or independent monitors and observers.
3. Even in situations where a State has lawfully derogated from certain provisions of the Covenant, the prohibition against unacknowledged detention, taking of hostages or abductions is absolute. [...] [T]hese norms of international law are not subject to derogation.
4. The ultimate responsibility for complying with obligations under international law rests with the States. The duty of States extends to ensuring the protection of these rights even when they are violated or are threatened by persons without any official status or authority. States remain responsible for all violations of international human rights law that occur because of failure of the State to create conditions that prevent, or take measures to deter, as well as by any acts of commission including by encouraging, ordering, tolerating or perpetrating prohibited acts.
5. The importance of determining individual criminal responsibility for international crimes whether committed under the authority of the State or outside such authority stands in addition to State responsibility and is a critical aspect of the enforceability of rights and of protection against their violation. International human rights law and humanitarian law provide the necessary linkages for this process of determination.
6. [...] [C]ommon Article 3 of the Geneva Conventions prohibits acts of violence to life and person, including cruel treatment and torture, taking of hostages and outrages upon personal dignity, in particular, humiliating and degrading treatment.
7. According to the Statute of the International Criminal Court, enforced disappearance means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, these acts may amount to a crime against humanity.
8. The abduction of women by Janjaweed may amount to enforced disappearance [...]. The incidents investigated establish that these abductions were systematic, were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the IDP population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law.
9. The Commission also finds that the arrest and detention of persons by the State security apparatus and

the Military intelligence, including during attacks and intelligence operations against villages [...] may also amount to the crime of enforced disappearance as a crime against humanity. These acts were both systematic and widespread.

10. Abduction of persons during attacks by the Janjaweed and their detention in camps operated by the Janjaweed, with the support and complicity of the Government armed forces amount to gross violations of human rights, and to enforced disappearances. However, the Commission did not find any evidence that these were widespread or systematic so as to constitute a crime against humanity. Nevertheless, detainees were subjected to gross acts of violence to life and person. They were tortured or subjected to cruel and humiliating and degrading treatment. The acts were committed as a part of and were directly linked to the armed conflict. As serious violations of Common Article 3 of the Geneva Conventions [...] the Commission finds that the acts constitute war crimes.
11. Abduction of persons by the rebels also constitute serious and gross violations of human rights, and amount to enforced disappearance, but the Commission did not find any evidence that they were either widespread or systematic in order to constitute a crime against humanity. The Commission, nevertheless, has sufficient information to establish that acts of violence to life and person of the detainees were committed in the incidents investigated by the Commission. They were also subjected to torture and cruel, inhuman and degrading treatment. The acts were committed as a part of and directly linked to the armed conflict and, therefore, constitute war crimes as serious violations of the Common Article 3 of the Geneva Conventions.

***(xi.) Recruitment and use of children under the age of 15 in armed hostilities***

[...]

***(b.) Legal appraisal***

[...]

1. [...] [I]f it is convincingly proved that the Government or the rebels have recruited and used children under 15 in active military hostilities, they may be held accountable for such a crime.

**VII. ACTION OF SUDANESE BODIES TO STOP AND REMEDY VIOLATIONS**

[...]

**1. Action by the police**

[...]

1. Normally, in an international armed conflict the civil police force does not formally take part in the hostilities and can, at least theoretically, be considered as a non-combatant benefiting from the safeguards and protections against attack. However, in the particular case of the internal conflict in Darfur, the distinction between the police and the armed forces is often blurred. There are strong elements indicating occurrences of the police fighting alongside Government forces during attacks or

abstaining from preventing or investigating attacks on the civilian population committed by the Janjaweed. There are also widespread and confirmed allegations that some members of the Janjaweed have been incorporated into the police. President El-Bashir confirmed in an interview with international media that in order to rein in the Janjaweed, they were incorporated in “other areas”, such as the armed forces and the police. Therefore, the Commission is of the opinion that the ‘civilian’ status of the police in the context of the conflict in Darfur is questionable.

[...]

## **Paras 525 to 616**

### **SECTION III: IDENTIFICATION OF THE POSSIBLE PERPETRATORS OF INTERNATIONAL CRIMES**

#### **I. GENERAL**

[...]

1. The Commission has [...] decided to withhold the names of these persons from the public domain. [...]
2. The Commission notes at the outset that it has identified ten (10) high-ranking central Government officials, seventeen (17) Government officials operating at the local level in Darfur, fourteen (14) members of the Janjaweed, as well as seven (7) members of the different rebel groups and three (3) officers of a foreign army (who participated in their individual capacity in the conflict), who may be suspected of bearing individual criminal responsibility for the crimes committed in Darfur.
3. The Commission’s mention of the number of individuals it has identified should not however be taken as an indication that the list is exhaustive. [...]

#### **II. MODES OF CRIMINAL LIABILITY FOR INTERNATIONAL CRIMES**

##### **1. Perpetration or co-perpetration of international crimes**

[...]

##### **2. Joint criminal enterprise to commit international crimes**

1. [...] International law also criminalizes conduct of all those who participated, although in varying degrees, in the commission of crimes, without performing the same acts [...].
2. There may be two principal modalities of participation in a joint criminal enterprise to commit international crimes. First, there may be a multitude of persons participating in the commission of a crime, who share from the outset a common criminal design (to kill civilians indiscriminately, to bomb hospitals, etc.). In this case, all of them are equally responsible under criminal law, although their role and function in the commission of the crime may differ (one person planned the attack, another issued the order to the subordinates to take all the preparatory steps necessary for undertaking the attack, others physically carried out the attack, and so on). The crucial factor is that the participants voluntarily took part in the common design and intended the result. Of course, depending on the importance of the role played by each participant, their position may vary at the level of sentencing [...].

3. There may be another major form of joint criminal liability. It may happen that while a multitude of persons share from the outset the same criminal design, one or more perpetrators commit a crime that had not been agreed upon or envisaged at the beginning, neither expressly nor implicitly, and therefore did not constitute part and parcel of the joint criminal enterprise. For example, a military unit [...] sets out to detain, contrary to international law, a number of enemy civilians; however, one of the servicemen, in the heat of military action, kills or tortures one of those civilians. If this is the case, the problem arises of whether the participants in the group other than the one who committed the crime not previously planned or envisaged, also bear criminal responsibility for such crime. As held in the relevant case law, 'the responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group, and (ii) the accused willingly took that risk.' In the example given above [...], a court would have to determine whether it was foreseeable that detention at gunpoint of enemy servicemen might result in death or torture.

[...]

### **3. Aiding and abetting international crimes**

1. The notion of aiding and abetting in international criminal law. As pointed by international case law, aiding and abetting a crime involves that a person (the accessory) gives practical assistance (including the provision of arms), encouragement or moral support to the author of the main crime (the principal), and such assistance has a substantial effect on the perpetration of the crime. The subjective element or *mens rea* resides in the accessory having knowledge that his actions assist the perpetrator in the commission of the crime.

[...]

### **4. Planning international crimes**

1. Planning consists of devising, agreeing upon with others, preparing and arranging for the commission of a crime. As held by international case law, planning implies that "one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases."

[...]

### **5. Ordering international crimes**

[...]

### **6. Failing to prevent or repress the perpetration of international crimes (superior responsibility)**

[...]



1. With regard to the position of rebels, it would be groundless to argue (as some rebel leaders did when questioned by the Commission) that the two groups of insurgents (SLA and JEM) were not tightly organized militarily, with the consequence that often military engagements conducted in the field had not been planned, directed or approved by the military leadership. Even assuming that this was true, commanders must nevertheless be held accountable for actions of their subordinates. The notion is widely accepted in international humanitarian law that each army, militia or military unit engaging in fighting either in an international or internal armed conflict must have a commander charged with holding discipline and ensuring compliance with the law. This notion is crucial to the very existence as well as enforcement of the whole body of international humanitarian law, because without a chain of command and a person in control of military units, anarchy and chaos would ensue and no one could ensure respect for law and order.
2. There is another and more specific reason why the political and military leadership of SLA and JEM may not refuse to accept being held accountable for any crime committed by their troops in the field, if such leadership refrained from preventing or repressing these crimes. This reason resides in the signing by that leadership of the various agreements with the Government of the Sudan. By entering into those agreements on behalf of their respective “movements” the leaders of each “movement” assumed full responsibility for conduct or misconduct of their combatants. [...]

## **SECTION IV: POSSIBLE MECHANISMS TO ENSURE ACCOUNTABILITY FOR THE CRIMES COMMITTED IN DARFUR**

### **I. GENERAL: THE INADEQUACIES OF THE SUDANESE JUDICIAL CRIMINAL SYSTEM AND THE CONSEQUENT NEED TO PROPOSE OTHER CRIMINAL MECHANISMS**

[...]

### **II. MEASURES TO BE TAKEN BY THE SECURITY COUNCIL**

#### **1. Referral to the International Criminal Court**

##### ***(i.) Justification for suggesting the involvement of the ICC***

[...] [see hereafter, para. 648]

#### **2. Establishment of a Compensation Commission**

[...]

##### ***(i.) Justification for suggesting the establishment of a Compensation Commission***

[...]

1. Serious violations of international humanitarian law and human rights law can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or state-like entity) on whose behalf the perpetrator was acting. This international responsibility involves that the

State (or the state-like entity) must pay compensation to the victim.

2. At the time this international obligation was first laid down, and perhaps even in 1949, when the Geneva Conventions were drafted and approved, the obligation was clearly conceived of as an obligation of each contracting State towards any other contracting State concerned. In other words, it was seen as an obligation between States, with the consequence that (i) each relevant State was entitled to request reparation or compensation from the other State concerned, and (ii) its nationals could concretely be granted compensation for any damage suffered only by lodging claims with national courts or other organs of the State. National case law in some countries has held that the obligation at issue was not intended directly to grant rights to individual victims of war crimes or grave breaches. [...]
3. The emergence of human rights doctrines in the international community [...] had a significant impact on this area as well. In particular, the right to an effective remedy for any serious violation of human rights has been enshrined in many international treaties. Furthermore, the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985, provides that States should develop and make readily available appropriate rights and remedies for victims.
4. The right to an effective remedy also involves the right to reparation (including compensation), if the relevant judicial body satisfies itself that a violation of human rights has been committed; indeed, almost all the provisions cited above mention the right to reparation as the logical corollary of the right to an effective remedy.
5. As the then President of the ICTY, Judge C. Jorda, rightly emphasized in his letter of 12 October 2000 to the United Nations Secretary-General, the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State responsibility for war crimes and other international crimes. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.
6. In light of the above [...] the proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as *de jure* or *de facto* organs, to make reparation (including compensation) for the damage made.
7. Depending on the specific circumstances of each case, reparation may take the form of *restitutio in integrum* (restitution of the assets pillaged or stolen), monetary compensation, rehabilitation including medical and psychological care as well as legal and social services, satisfaction including a public apology with acknowledgment of the facts and acceptance of responsibility, or guarantees of non-repetition. As rightly stressed by the U.N. Secretary-General in 2004, it would also be important to combine various mechanisms or forms of reparation.
8. [...] A similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished.

[...]

### III. POSSIBLE MEASURES BY OTHER BODIES

1. While referral to the ICC is the main immediate measure to be taken to ensure accountability, the Commission wishes to highlight some other available measures, which are not suggested as possible substitutes for the referral of the situation of Darfur to the ICC.

#### 1. Possible role of national courts of States other than Sudan

[...]

##### *(i.) Referral by the Security Council and the principle of complementarity*

[...]

1. [...] [A] referral by the Security Council is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so. Therefore, the principle of complementarity will not usually be invoked in casu with regard to that State.
2. The Commission's recommendation for a Security Council referral to the ICC is based on the correct assumption that Sudanese courts are unwilling and unable to prosecute the numerous international crimes perpetrated in Darfur since 2003. The Commission acknowledges that the final decision in this regard lies however with the ICC Prosecutor.

##### *(ii.) The notion of "universal jurisdiction"*

[...]

1. It seems indisputable that a general rule of international law exists authorising States to assert universal jurisdiction over war crimes, as well as crimes against humanity and genocide. The existence of this rule is proved by the convergence of States' pronouncements, national pieces of legislation, as well as by case law.
2. However, the customary rules in question, construed in the light of general principles currently prevailing in the international community, arguably make the exercise of universal jurisdiction subject to two major conditions. First, the person suspected or accused of an international crime must be present on the territory of the prosecuting State. Second, before initiating criminal proceedings this State should request the territorial State (namely, the State where the crime has allegedly been perpetrated) or the State of active nationality (that is, the State of which the person suspected or indicted is a national) whether it is willing to institute proceedings against that person and hence prepared to request his or her extradition. Only if the State or States in question refuse to seek the extradition, or are patently unable or unwilling to bring the person to justice, may the State on whose territory the person is present initiate proceedings against him or her.
3. In the case of Darfur the second condition would not need to be applied, for, as pointed out above, Sudanese courts and other judicial authorities have clearly shown that they are unable or unwilling to exercise jurisdiction over the crimes perpetrated in Darfur.

### **(iii.) Exercise of universal jurisdiction and the principle of complementarity of the ICC**

1. [...] The Commission takes the view that complementarity would also apply to the relations between the ICC and those national courts of countries other than Sudan. In other words, the ICC should defer to national courts other than those of Sudan which genuinely undertake proceedings on the basis of universal jurisdiction. [...] [T]here is [...] no reason to doubt *a priori* the ability or willingness of any other State asserting either universal jurisdiction or jurisdiction based on any of the basis for extra-territorial jurisdiction mentioned above. The principle of complementarity, one of the mainstays of the ICC system, should therefore operate fully in cases of assertion of universal jurisdiction over a crime which had been referred to the ICC by the Security Council.

[...]

## **Paras 632 to 650**

### **SECTION V: CONCLUSIONS AND RECOMMENDATIONS**

[...]

#### **I. FACTUAL AND LEGAL FINDINGS**

[...]

1. The Commission finds that large scale destruction of villages in Darfur has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government may not have participated in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene of destruction are sufficient to make them jointly responsible for the destruction. [...]
2. The Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed both by the Government of the Sudan and the Janjaweed. It is undeniable that mass killing occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing and the participation of officials or authorities are amongst the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.
3. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a *crime against humanity*. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to rape as a crime against humanity, or sexual slavery as a crime against humanity.
4. The Commission considers that torture has formed an integral and consistent part of the attacks against

civilians by Janjaweed and Government forces. Torture and inhuman and degrading treatment can be considered to have been committed in both a widespread and systematic manner, amounting to a crime against humanity. In addition, the Commission considers, that conditions in the Military Intelligence Detention Centre witnessed in Khartoum clearly amount to torture and thus constitute a serious violation of international human rights and humanitarian law.

5. It is estimated that more than 1,8 million persons have been forcibly displaced from their homes, and are now hosted in IDP sites throughout Darfur, as well as in refugee camps in Chad. The Commission finds that the forced displacement of the civilian population was both systematic and widespread, and such action would amount to a crime against humanity.
6. The Commission finds that the Janjaweed have abducted women, conduct which may amount to enforced disappearance as a crime against humanity. [...]
7. In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence against civilians was of such a discriminatory character and may constitute persecution as a crime against humanity.
8. While the Commission did not find a systematic or a widespread pattern to violations committed by rebels, it nevertheless found credible evidence that members of the SLA and JEM are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.

## **II. DO THE CRIMES PERPETRATED IN DARFUR CONSTITUTE ACTS OF GENOCIDE?**

1. The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led members of African and Arab tribes to perceive themselves and others as two distinct ethnic groups. The rift between tribes, and the political polarization around the rebel opposition to the central authorities has extended itself to the issues of identity. The tribes in Darfur supporting rebels have increasingly come to be identified as "African" and those supporting the Government as "Arabs". However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.
2. The Commission does recognize that in some instances, individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination

that only a competent court can make on a case-by-case basis.

3. The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from the gravity of the crimes perpetrated in that region. Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur [...].

### **III. WHO ARE THE PERPETRATORS?**

[...]

1. The Commission decided to withhold the names of these persons from the public domain. This decision is based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will list the names in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission's recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor.
2. The Commission's mention of the number of individuals it has identified should not, however, be taken as an indication that the list is exhaustive. [...] [T]he Commission has gathered substantial material on different influential individuals, institutions, groups of persons, or committees, which have played a significant role in the conflict in Darfur, including on planning, ordering, authorizing, and encouraging attacks. These include, but are not limited to, the military, the National Security and Intelligence Service, the Military Intelligence and the Security Committees in the three States of Darfur. These institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

### **IV. THE COMMISSION'S RECOMMENDATIONS CONCERNING MEASURES DESIGNED TO ENSURE THAT THOSE RESPONSIBLE ARE HELD ACCOUNTABLE**

#### **1. Measures that should be taken by the Security Council**

1. With regard to the judicial accountability mechanism, the Commission strongly recommends that the Security Council should refer the situation in Darfur to the International Criminal Court, pursuant to Article 13(b) of the Statute of the Court. Many of the alleged crimes documented in Darfur have been widespread and systematic. They meet all the thresholds of the Rome Statute for the International Criminal Court. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes.
2. The Commission holds the view that resorting to the ICC would have at least six major merits. First, the International Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under Article 13(b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and



security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice be done. The fact that trials proceedings would be conducted in The Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might impel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish ad hoc tribunals or so called mixed or internationalized courts). Sixth, the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.

3. [...] [T]he Commission also proposes the establishment of an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body.

## **2. Action that should be taken by the Sudanese authorities**

1. [...] The Commission of Inquiry therefore recommends the government of Sudan to:

[...]

1.
  - i. grant the International Committee of the Red Cross and the United Nations human rights monitors full and unimpeded access to all those detained in relation to the situation in Darfur;

[...]

# **Discussion**

## **I. Qualification of the conflict and applicable law**

1. How would you qualify the conflict? If Sudan had been a party to it, would Protocol II have applied? Did the non-applicability of Protocol II have any impact on the Commission's conclusions?
2. Are the rebels bound by exactly the same rules as the government? In the field of international humanitarian law (IHL)? Of international criminal law? Of international human rights law?
3. Which human rights norms apply? In which circumstances may the government derogate from some norms? What are these norms? Are certain norms partially derogable? Did the Sudanese government actually derogate from any of its obligations?
4.
  - a. How does the Commission identify customary IHL? Does it look into the actual practice of the

- parties to non-international armed conflicts? Should it have done so?
- b. On what kind of practice are the customary rules listed in para. 166 based? Are you able to identify different categories of such rules according to the supporting practice mentioned by the Commission in the footnotes?
  - c. How can the prohibition of attacks on civilian objects be customary if it is not mentioned in Protocol II? Is the Commission's reference to the provisions of the Geneva Conventions on grave breaches relevant?

## **II. Violations of IHL**

1. Is the determination of a systematic pattern of violations relevant for IHL? For international criminal law? To identify war crimes? To identify crimes against humanity? To identify genocide?
2. Do the irrefutable facts of massive population displacements and large-scale destruction of villages necessarily indicate a violation of IHL? In the case of Darfur, which facts indicate an obvious violation of IHL?
3. Could the attacks on villages described in paras 240-251 possibly be justified if some or many rebels were present in those villages? Is the government correct in stating that when rebels were within a certain village, the latter became a military objective (para. 249)?
4. Are the obligations to take precautionary measures and to respect the proportionality principle as prescribed in Art. 57 of Protocol I the same in international and in non-international armed conflicts? Why? Because they can be derived from the actual practice of belligerents? Because they are necessary in order to comply with the substantive provisions?
5. Is the Commission correct in holding (paras 291-292) that even civilians used by rebels as shields or possessing weapons may not be killed? In which circumstances would civilians lose their protection?
6. Can the aim to deprive rebels of the support they receive from the civilian population justify the forced displacement of that population?
7. Do the instances of rape and sexual violence mentioned in the report raise any question regarding the interpretation or adequacy of the applicable IHL?
8. Must every detention in non-international armed conflicts be subject to control by a court? In international armed conflicts?
9. Are police forces legitimate targets of attacks: in non-international armed conflicts? In international armed conflicts? What could justify a different status of police forces in the two kinds of armed conflicts?

## **III. Repression of violations**

1. Which elements of the crime of genocide were fulfilled in Darfur? Which elements were not fulfilled? Why could the genocidal intent not be deduced from the pattern of violations?
2. What are the modes of criminal liability for international crimes? For which crimes may a participant in the commission of international crimes be held liable? Only for those covered by the common purpose, or also for those committed by some other participants but that go beyond the common purpose?
3. May leaders of rebel groups escape command responsibility more easily than leaders of government armed forces?
4. Why should the perpetrators of international crimes committed in Darfur be brought before the International Criminal Court (ICC)? How was this achieved?
5. a. When may third States exercise universal jurisdiction over international crimes? Even in non-

international armed conflicts? Do they have an obligation to exercise such jurisdiction?

b. When a case is referred to it by the Security Council, does the ICC have precedence over the obligation of third States to exercise universal jurisdiction over international crimes?

6. Who must pay compensation for violations of IHL? Who has the right to receive such compensation? How is it that the obligation to pay such compensation also exists for non-international armed conflicts, even though in treaties it is only foreseen for international armed conflicts?

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