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The UN International Commission of Inquiry on Darfur: New and Disturbing Findings

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Following a US referral of the Darfur crisis to the United Nations, the UN undertook the UN Commission of Inquiry into Darfur. In late January 2005, following an analysis of the data collected by the UN's COI team, the UN declared that while it found crimes against humanity had been committed by the government of Sudan (GoS) and the Janjaweed (Arab militia), it did not find evidence that the GoS had perpetrated genocide. Herein, Samuel Totten, argues that a correct analysis of the data collected by the COI team would have been genocide. In addition to offering a critique of the COI's analysis, Totten is critical of the hurried, unsystematic, and underfunded investigation.

Key words: crimes against humanity, Darfur, genocide, government of Sudan, Janjaweed, UN Convention on the Prevention and Punishment of the Crime of Genocide

Introduction

This article presents a critical analysis of the United Nations Commission of Inquiry (COI) into the conflict in Darfur—a conflict in which government of Sudan (GoS) troops and *Janjaweed* (Arab militia) carried out a scorched-earth policy that resulted in the deaths of tens of thousands of people and the displacement of well over two and a half million people from their villages and homes. Following the delineation of key background information vis-à-vis the inquiry, the major finding of the COI is discussed: that crimes against humanity had been perpetrated in Darfur but not genocide. Arguing from the position that genocide had, in fact, been perpetrated, I analyze three possibilities as to why the COI did not come to a finding of genocide: politics, a sloppy and incomplete investigation, and an inadequate analysis of the facts.

Background to the Commission of Inquiry into Darfur

Following a US State Department-sponsored investigation in which over 1,100 black African refugees from Darfur were interviewed in refugee camps along the Chad/Darfur border, US Secretary of State Colin Powell declared, on 9 September 2004, that “based on a consistent and widespread pattern of atrocities—killings, rapes, burning of villages—committed by the *Janjaweed* and government [of Sudan] forces against non-Arab villagers” [Massaleit, Zaghawa and Fur], the State Department had concluded that “genocide has been committed—and genocide may still be occurring.”¹ Subsequently, the US referred the matter to the United Nations and called on it to undertake “a full-blown and unfettered investigation.”²

Acting under Chapter VII of the United Nations Charter, the UN Security Council, on 18 September 2004, adopted Resolution 1564 which called on UN Secretary

General Kofi Annan “to rapidly establish an international commission of inquiry in order to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, *to determine also whether or not acts of genocide have occurred.*”³

In October 2004, Secretary General Kofi Annan appointed the Commission of Inquiry, naming as chairperson Antonio Cassese, the former president of the UN’s International Criminal Tribunal for the former Yugoslavia (ICTY). Annan asked that the members of the COI provide him with a report of their findings within three months’ time.

The COI’s team comprised thirteen members: a chief investigator, four additional investigators; two female investigators “with a specialty in gender violence”;⁴ four forensic experts; and two military analysts. Various commission members and commission staff were also involved in visits to Sudan, Chad, and other parts of the region. Ultimately, the data collected by the COI team were analyzed by the COI Commission members, with the assistance of five legal researchers and one political affairs officer.

Unlike the United States Atrocities Documentation Project (ADP), which was limited to conducting its investigation in refugee camps in Chad, the COI conducted a far broader investigation that included the three states of Darfur (including towns, villages, and internally displaced persons camps); Khartoum, the capital of Sudan; refugee camps in Chad; Eritrea (in order to meet with representatives of two rebel groups—the Sudanese Liberation Movement/Army [SLM/A] and the Justice and Equality Movement [JEM]); and Addis Ababa (in order to meet with officials of the African Union).

The COI team carried out its investigation in November and December 2004 and January 2005. Over and above determining whether or not acts of genocide had been perpetrated, the Commission’s mandate included three other major tasks: “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; to identify the perpetrators of violations of international humanitarian law and human rights law; and to suggest means of ensuring that those responsible for such violations are held accountable.”⁵

Major UN COI Finding—Crimes against Humanity, Not Genocide

Based on its investigation and analysis of the data collected, the COI came to the determination that the government of Sudan and the Janjaweed were responsible for carrying out a scorched earth policy in Darfur. In doing so, the COI concluded that GoS forces and the Janjaweed

conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. *These acts were conducted on a widespread adsystematic basis, and therefore amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children.* The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Masaslit, Jebel, Aranga, and other so-called African tribes.⁶

In its report, the COI delineated a battery of criminal acts perpetrated by the GoS and the Janjaweed, including but not limited to the following:

- “According to some estimates over 700 villages in all three states of Darfur have been completely or partially destroyed. The Commission further received

information that the [local] police had made an assessment of the destruction and recorded the number of destroyed villages at over 2000.”⁷

- “Many villages are said to have been attacked more than once, until they were completely destroyed.”⁸
- Unlike the black African tribes, most of the other tribes in the area—the Arab tribes—“have not been targeted, if targeted at all.”⁹
- Attacks involved air bombardments and the use of Mi-8 helicopters, Mi-24 helicopters, and Antonov aircraft.¹⁰
- “The large number of killings, the apparent pattern of killing . . . including the targeting of persons belonging to African tribes and the participation of officials or authorities are amongst the factors that led the Commission to the conclusion that killings were conducted in both a widespread and systematic manner.”¹¹
- Many of the attacks involved the killing of civilians, including women and children.¹²
- There was widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur.¹³
- “In addition to homes, *all essential structures and implements for the survival of the population were also destroyed*. Oil presses, flour mills, water sources such as wells and pumps, crops and vegetation and almost all household utensils were found scorched or smashed at the sites inspected.”¹⁴
- “*The Janjaweed took everything [the Black Africans] owned, involving all goods necessary to sustain life in the difficult conditions in Darfur, including . . . livestock, representing the key source of income of the affected people.*”¹⁵
- “[T]he Commission finds that pillaging, being conducted on a systematic as well as a widespread basis mainly against African tribes, was discriminatory and calculated to bring about the destruction of livelihoods and the means of survival of the affected populations.”¹⁶
- Black African females were forced to “take off their maxi (large piece of clothing covering the entire body), and if they [the perpetrators] found that they were holding their young sons under them, they would kill the boys.”¹⁷ (UNCOI, 2005, paragraph 272)
- In certain instances, the GoS and Janjaweed carried out large scale massacres of men (reportedly “mainly intellectuals and leaders”).¹⁸
- Black African civilians were killed after they reached IDP camps.¹⁹

In light of the fact that it seems apparent that the the GoS and Janjaweed carried out such atrocities with the intent, at least to a certain extent, to destroy the black Africans of Darfur in whole or in part, numerous scholars and human rights activists²⁰ have questioned why and how the COI concluded, based on the evidence it collected, that the GoS did not “pursue a policy of genocide.”²¹ That is not to say that the COI neglected to provide a rationale for its determination, for it did (see below); rather, for many, the rationale was not convincing and thus questions have been raised about the logic of (and/or politics and/or bias behind) the rationale vis-à-vis the final determination.

A Determination That Was Possibly Politically Influenced and/or Biased

Some scholars suspect that Egypt might have been, at least in part, behind the COI’s determination that the GoS had not perpetrated genocide in Darfur.²² First, they note, Egypt vigorously defended Sudan’s sovereignty despite the atrocities perpe-

trated by GoS troops and the Janjaweed in Darfur; and second, a powerful and influential Egyptian, Mr. Mohammed Fayek, was one of the five COI Commissioners.

Eric Reeves spelled out some of the main concerns that have been voiced about Egypt and its relationship with Sudan as it relates to the crisis in Darfur:

Few countries have provided more diplomatic or political cover for the NIF regime [than Egypt], particularly in its efforts to forestall humanitarian intervention. Cairo has offered an unqualified defense of Sudan's claim to national sovereignty (Egyptian Foreign Minister Ahmed Aboul Gheit insisted last month that Khartoum would have to approve the dispatch of U.N. troops to Darfur). And so long as Khartoum can count on Egyptian support, it can count on support from the Arab League as a whole. The group has served mainly as an extension of Egyptian foreign policy (it was no surprise last week when former Egyptian Foreign Minister Amr Moussa was named to a second five-year term as secretary general).²³

Whether or not Egypt or Fayek actually influenced the COI determination is hardly conclusive, but that is not to say that it didn't happen. Additional digging among researchers is needed before such a conclusion can be made.

On a different note, at least one major figure with the COI, Antonio Cassese, seemingly had a preconceived notion as to what the data collected by the COI would add up to in the end. Whether it was a politically motivated opinion or a quick and dirty analysis on his part is hard to tell. More specifically, Debb Bodkin, a police officer based in Canada and the only person who served as an investigator with the US Atrocities Documentation Project and the UN's COI, told this author that while the COI team was in Geneva for its initial briefing prior to flying to Darfur, Antonio Cassese seemingly suggested that the COI would not result in a finding of genocide. In regard to this matter, Bodkin reported the following:

Commissioner Antonio Cassese, who had traveled to Khartoum and some parts of Darfur for a few days and had conducted some interviews, stated that he felt that we would find that there were two elements of genocide missing: (A) target group (asserting that the victims were from mixed tribes, not a single one) and (B) *mens rea* (the actual intent to destroy in whole or in part). He talked for a while and my personal opinion was that he was telling us that the outcome of the investigation would show that it was not genocide, which was occurring. He did not specify how long he had visited or how many interviews he had conducted but I don't believe either was extensive. I felt it was very inappropriate for him to plant this opinion in the investigators' minds prior to starting the investigation and other investigators felt uncomfortable about it as well.²⁴

It is possible, of course, that Cassese was simply offering a casual hypothesis with no intention of swaying the investigators' thoughts and actions. Whether or not that was the case, it was not a wise way to begin an investigation in which objectivity should have been paramount. No matter what, it raises a red flag in regard to how the data were ultimately analyzed and whether the COI (or at least certain members of the team responsible for conducting an analysis of the data) was, in one way or another, biased against a determination of genocide. If such a bias existed, then the investigation was compromised from the start.

A Rushed and Seemingly Unsystematic Investigation

Based on a careful reading of the COI report *and* a first-person report by one of the COI investigators there is no doubt that the investigation was understaffed, hurried, and rather unsystematic.

At the outset of the COI report, the authors comment on the constraints faced by the investigatory team:

There is no denying that while the various task assigned to the Commission are complex and unique, the Commission was called upon to discharge them under difficult conditions. First of all, it operated under serious *time constraints*. [Second,] given that the Security Council had decided that the Commission must act urgently, the Secretary-General requested that the Commission report to him within three months of its establishment. The fulfillment of its complex tasks, in particular those concerning the findings of serious violations and the identification of perpetrators, required the Commission to work intensely and under heavy time pressure.²⁵

This statement raises a host of critical issues that not only call into question the seriousness with which the UN undertook its investigation and its commitment to truly discovering the full extent of the nature of the crimes committed by the GoS and the Janjaweed, but, ultimately, the validity of the Commission's findings. In light of the seriousness of the investigation (ascertaining whether genocide had been perpetrated or not), it is unfathomable why the investigatory team would be forced to work under "serious time constraints" and under "heavy time pressure."²⁶ From the very outset, both Secretary General Kofi Annan and the Commissioners had to know that a rushed investigation would result in an incomplete study. As cynical as it sounds, one has to question whether *that* was the intent.

A key question that arises is: Why was there such a rush to complete the investigation?²⁷ This is a major concern, particularly in light of the fact that the UN ostensibly did not perceive a need to undertake the investigation until prodded to do so by the United States (in other words, the UN was hardly proactive in this regard).²⁸ If such an investigation was so critical to conduct—and in such a timely fashion—then why wasn't it undertaken a lot sooner? Indeed, why did the UN wait until until two years into the crisis, by which time an estimated 180,000 plus people had already been killed and over 1 million people had been forced from their villages into IDP or refugee camps?²⁹

Furthermore, it is a fact that once the investigation was completed, the UN did not show a real sense of urgency in prodding the GoS to halt the killing, and ongoing rape. Yes, it passed one resolution after another, but it could not seem to find the political will to force the GoS to comply with key UN requests and demands inherent in the resolutions.³⁰ And while some sanctions were issued, they were relatively soft sanctions and hardly implemented in a way that spoke to their seriousness. The UN also did not display a sense of urgency in attempting to find a way to provide real protection for the black Africans of Darfur—not for those still residing in villages or for those eking out a mean existence in IDP camps, both of which continued to be viciously attacked by the GoS and the Janjaweed over the years.³¹

On a related note, the COI report states that "both [the COI's] fact-finding mission and its task of identifying perpetrators would have benefited from the assistance of a great number³² of investigators, lawyers, military analysts, and forensic experts. The Commission's budget, [however,] did not allow for more than thirteen such experts."³³ It is not a little perplexing as to why such a significant undertaking was underfunded to the point that it could not hire the full complement of experts needed to carry out the most comprehensive investigation possible. Such a lack of funding calls into question the seriousness of UN officials vis-à-vis their commitment to protect people facing potential and actual death and rape at the hands of those who commit crimes against humanity and genocide. For all of the promises of "never again!"; all of the UN-issued

reports and statements on the need to prevent genocide and protect people from becoming victims of genocide;³⁴ all the meetings, conferences, and summits by UN officials in Khartoum, Darfur, Addis Ababa, and Abuja over the years (and all of the costs incurred for such), it seems as if the UN could have come up with enough funding to conduct a comprehensive investigation with enough experts to do the job right. Instead, what the UN ended up doing was conducting an investigation on the cheap, thus neglecting to collect all the data it could or should have due to self-imposed time constraints that were exacerbated by an inadequate number of personnel and funding dedicated to the effort. Seemingly, it was a classic case of “fiddling while Rome—read Darfur—burns,” literally!³⁵

Ultimately, the lack of funding also calls into question just how serious the UN was in regard to not only carrying out a thorough investigation but meeting its stated goal of ascertaining whether or not genocide had been perpetrated against the black Africans. Everyone is well aware of the huge UN expenditures to keep its bureaucrats well paid, situated in nice offices in beautiful cities, housed in nice and costly abodes, and chauffeured in comfortable and expensive vehicles. Surely, for an investigation whose focus was to ascertain whether genocide was taking place, adequate funding could have been found if there was the will to do so.

Another concern is how the actual investigation was undertaken—that is, how the investigators were prepared to undertake the interviews, whether the investigators were expected to ask the same questions of all like actors (meaning, using one set of questions for internally displaced persons, another set for Sudanese officials, and still another for members of the rebel groups). Again, Debb Bodkin provides valuable insights into such concerns:

During our briefing [about the COI] in Geneva, we were given no format or indication as to how the investigation and interviews were to be conducted. As a result, every investigator conducted his/her investigation and interviews in whatever fashion he/she preferred. I cannot believe that with the vast difference in expertise of each investigator there would be any semblance of consistency in regard to the gathering of evidence . . . The UN investigation did not provide any parameters whatsoever and an untrained interviewer could easily have asked questions in a manner that would have elicited whatever response he or she hoped to obtain.³⁶

Again, it is unfathomable as to why a single questionnaire was not developed and printed by the COI so that each investigator had the same set(s) of questions to ask specific members of a group throughout the investigation.³⁷ Having a single set of questions for each group of interviewees would not, of course, have precluded investigators from asking interviewees follow-up questions. Allowing each investigator, however, to ask his/her own questions, as the COI did, is likely to have resulted in a mish-mash of information (whether this was the result or not is unknown for the COI report does not comment on this matter), possibly resulting in a situation in which the full range of human rights violations were not reported, and critical information about ethnic slurs and threats issued by the perpetrators during the attacks possibly under-reported and/or not even collected by certain investigators.

As for the directives provided the COI investigators, Bodkin reports that

Because I had never been involved in a UN investigation before I truly didn't know what was going on. We were never instructed to be anywhere at certain times so when briefings did occur, some investigators were there and some were not . . . A few of us took notes during the briefings, but many did not. So, as far as everyone being on the same page about everything, impossible.³⁸

According to Bodkin, the briefings did not address the need to collect information about any epithets made by the GOS troops and/or the Janjaweed during their attacks on the black Africans. The collection of such information is, however, critical in helping to establish what the perpetrators' thoughts, purposes, and animus were toward specific groups under attack—all of which could help to establish whether such attacks were being perpetrated against a group as a result of their ethnicity, race, and so on. In regard to the issue of racial epithets, Bodkin commented as follows:

I do not recall anything about the need to collect information regarding racial epithets. But I believe that it definitely should have been. I noted [such information] in a number of my interviews because I realized the importance due to the CIJ [Coalition of International Justice, which organized and carried out the U.S. State Department's ADP in Chad in July and August of 2004] questionnaire. However, I presume many of the investigators did not know to ask a question about such matters.³⁹

Bodkin also pointed out that once in the field, each investigator was open to choose who they interviewed and how.⁴⁰ That included asking any questions that they thought particularly pertinent, but not asking the same set of questions.

Finally, a problem arose in regard to the background of some of the interpreters the COI hired for the investigation. The UN reportedly hired interpreters from Arab tribes, so the investigators had to convince the victims whom they were interviewing that it was safe for them to speak in front of the interpreters.⁴¹ This matter, alone, could have greatly influenced the information (or lack thereof) collected by the COI investigators. It is very possible that, out of fear of being reported to the GoS authorities, the victims were not as forthcoming about various matters as they might have been had they had more trust that their words would not be used against them at some future point in time. Knowing full well that the victims were being attacked by a government that favored the Arab population and that there was a distinct possibility that some interpreters could be in the pocket of the GoS, it makes no sense at all for the UN to have hired Arabs as interpreters.

A Shoddy or Skewed Analysis?

Since the express purpose of the UN's Commission of Inquiry in Darfur was to ascertain whether or not the government of Sudan had perpetrated genocide against the black Africans of Darfur, this section focuses on the evidence collected by the COI, the analysis of the evidence, and the rationale used in making the determination that crimes against humanity, not genocide, had been perpetrated in Darfur.⁴² Under the heading entitled "Have Acts of Genocide Occurred?" the authors of the report state the following:

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. 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 the purpose of counter-insurgency warfare.⁴³

Prior to addressing the issue of intent, there is a need to address the problematic nature of the following assertion in the above statement: “the crucial element of genocidal intent appears to be missing, *at least as far as the central government authorities are concerned.*”⁴⁴ The problem is that the COI was not given the sole task of determining whether or not the GoS committed genocide. It was responsible for investigating “*reports of violations of international humanitarian and human rights law in Darfur by all parties, [and] to determine whether or not acts of genocide have occurred.*”⁴⁵ What, then, about the Janjaweed and their actions? Did their actions amount to genocide? The way in which the language is couched, it sounds as if the Commissioners are suggesting that that is a distinct possibility. If the Commissioners believed that the *Janjaweed* were responsible for genocidal actions, if not outright genocide, then that should have been boldly and clearly stated in the report.⁴⁶

Furthermore, if the Janjaweed did commit genocide then the GoS is still culpable because the Janjaweed were recruited, outfitted, and paid by the GOS to help carry out the attacks.⁴⁷ This goes directly to the issue of command responsibility.⁴⁸

Concomitantly, since the Janjaweed and GoS worked hand-in-hand in carrying out a vast majority of the attacks, there is no way—without outright lying—that the government can claim it did not know what the Janjaweed were doing throughout 2003 to early 2005. Concomitantly, the GoS cannot—at least not legitimately—blame the attacks on the Janjaweed alone. Not only were the hundreds of attacks largely carried out in the same fashion, but Janjaweed frequently rode on GoS vehicles (Land-Cruisers) during the attacks. So, it must be asked, did the COI purposely avoid accusing the Janjaweed of genocide in order to avoid casting aspersions on the GoS? If so, that constitutes simply one more flaw in the COI’s determination that genocide had not been perpetrated in Darfur.

Now for the issue of intent. Again, the key question is this: Was there the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such? There is no doubt that the issue of intent is, generally, the stickiest issue in determining whether or not genocide has been perpetrated.⁴⁹

Most génocidaires are wily enough not to leave a written or oral record of their intentions. Indeed, most know better than to record their genocidal intentions in formal government records or statements, issue their genocidal directives via written orders, broadcast directives over radio and television (unless they simply do not care and/or are intent on calling on all actors to take part in the killing, as was the case in Rwanda in 1994 when Radio-Television Mille Collines urged all Hutu to kill all Tutsi). But, it is also true that intent can be ascertained from the events unfolding on the ground. For example, the ICC Elements of Crimes states that “existence of intent and knowledge can be inferred from relevant facts and circumstances.”⁵⁰

After asserting that “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,” the COI goes on to argue that the main purpose of the GoS was to drive the black Africans from their homes and villages “primarily for purposes of counter-insurgency warfare.”⁵¹ As part and parcel of explaining its determination, the COI report goes into great detail as to what *could* constitute proof of genocidal intent. In doing so, it cites various cases at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). For example, it states that “whenever direct evidence of genocidal intent is lacking, as is mostly the case, this intent can be inferred from many acts and manifestations or factual circumstances.”⁵² Furthermore, in the Jelisić case at the ICTY, the appeals chamber noted that

as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.⁵³

The report goes on to say,

A number of factors from which intent may be inferred were mentioned in Akayesu 523–4: “the general context of the perpetration of other culpable acts systematically directed against that same group where ... committed by the same offender or by others”; “the scale of atrocities committed”; the “general nature” of the atrocities committed “in a region or a country”; “the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups”; “the general political doctrine which gave rise to the acts”; “the repetition of destructive and discriminatory acts” or “the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundations of the group—acts which are not in themselves covered by the list ... but which are committed as part of the same pattern of conduct, in Musema (166) as well as Kayishema and Ruzindana (93 and 527): “the number of group members affected”; “the physical targeting of the group or their property”; “the use of derogatory language toward members of the targeted group”; “the weapons employed and the extent of bodily injury”; “the methodical way of planning”; “the systematic manner of killing” and the proportionate scale of the actual or attempted destruction of a group.”⁵⁴

A number of these factors were evident during the course of events involving the GoS troops and the Janjaweed in Darfur between 2003 and January 2005, which I outline here:

1. The perpetration of culpable acts systematically directed against the same group committed by the same offender or by others

Over and above the systematic bombings and shootings of the black Africans by the perpetrators, the perpetrators committed the following acts time and again in a fairly systematic manner between early 2003 and early 2005: (1) poisoned wells by throwing dead human bodies and/or the carcasses of animals into them, which, in certain areas of Darfur that reach 90 to 130 degrees Fahrenheit, constitutes an effort to deprive the people of a basic source of sustenance; (2) blocked humanitarian aid from entering internally displaced persons camps, thus preventing desperately needed food, water, and medical supplies from reaching those in dire need; and (3) raped an untold number of girls and women.⁵⁵

2. Scale of atrocities committed

The estimate of the number of those killed as a result of bombings, shootings, or stabbings and as a result of a lack of water or medical treatment after having been wounded ranged from a low of 120,000 to a high of 400,000.⁵⁶ The UN largely settled on the number of 200,000.⁵⁷ Since the government of Sudan continually blocked efforts by researchers to enter Darfur, it was (and continues to be) impossible to make an exact determination of the number who perished as a result of the attacks. While the number of black Africans who had been killed by the time of the COI investigation was certainly much, much lower than those who died in the Holocaust, Cambodia, or Rwanda, close to a quarter of a million dead is not insignificant.

3. The systematic targeting of victims on account of their membership of a particular group

It is irrefutable that the GOS and the Janjaweed targeted, specifically and solely, the black Africans of Darfur (particularly the Massaleit, Zaghawa, and the Fur). Hundreds upon hundreds of their villages were attacked, looted, and burned to the ground and their crops and orchards were destroyed. Black African villagers reported seeing and hearing attacks on villages miles away, knowing that it was only a matter of time before their own village would be attacked in much the same way (and that is exactly what happened). Month after month throughout 2003, 2004, and early 2005, attacks were carried out on a regular basis against black African villages, while their non-black African neighbors were largely unscathed.⁵⁸

Concomitantly, in one attack after another, black African females (some as young as eight years old) were raped and gang-raped by the Janjaweed and the GoS troops, thus constituting another aspect of “the systematic targeting of victims on account of their membership of a particular group.”

4. The general political doctrine that gave rise to the acts

It is well known that the government of Sudan is an adherent of so-called Arab supremacism and supportive of the Arab Gathering. More specifically,

In Darfur, the first signs of an Arab racist ideology emerged in the early 1980s ... Around this time, leaflets and cassette recordings purporting to come from a group calling itself the Arab Gathering began to be distributed anonymously, proclaiming that the *zurga* [a derogatory term equivalent to the word “nigger” that is used by some to debase black Africans] had ruled Darfur long enough and it was time for Arabs to have their turn. The speakers claimed that Arabs constituted a majority in Darfur and should therefore prepare themselves to take over the regional government—by force if necessary ... The notion of Arab superiority had been a feature of northern Sudanese society for centuries, but this was something new. This was militant and inflammatory.⁵⁹

5. The perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundations of the group [and] which are committed as part of the same pattern of conduct

Three main acts perpetrated by GoS troops and the Janjaweed are germane to this issue: the mass rape of black African females, the poisoning of the wells, and the effort to block humanitarian goods from reaching those in internally displaced persons camps. Individual rape, mass rape, and other types of sexual violence by GOS forces and the Janjaweed against black African females, both during the attacks on villages and on females venturing outside of IDP camps, were regular occurrences.⁶⁰

Furthermore, a great amount of testimony collected by the ADP, various human rights groups, and the press attest to the fact that comments made by the rapists suggest that the rape was perpetrated, at least in part, as a direct attack on the racial and ethnic identities of the black African females. More specifically, various black African survivors have reported the following:

It happened last August [2004] when we were in our farms outside the village [in West Darfur]. We [three black African women, ages 25, 30, and 40] saw five Arab men who came to us ... [They] told us that we should have sex with them. We said no. So they beat and raped us. After they abused us, they told us that now we would have Arab

babies; and if they would find any Fur woman, they would rape them, [too,] to change the colour of their children.⁶¹ In the town of Mukjara, two men separately described women being brought into a prison where they were being held and raped for hours by *Janjaweed*. They said the assailants said that they were “planting tomatoes”—the reference to skin red” because they are slightly lighter-skinned than ethnic Africans.⁶²

A Fur male reported that in December 2003, a few months before his village in West Darfur (near El Geneina) was attacked, *Janjaweed* raped his daughter and two other girls (ages 14, 15, 16) and said, “We will take your women and make them ours. We will change the race.”⁶³ During a ground attack in western Darfur (near Seleya) in November 2003, a Eregnan man reported hearing, “We will kill all men and rape women. We want to change the color. Every woman will deliver red. Arabs [will be] the husbands of those women.”⁶⁴

The perpetrators knew that by raping female black Africans they were creating pariahs who would be shunned by their families and fellow villagers; that young girls and women who were not married would be hard pressed to find husbands as a result of having been defiled; and that any babies born of the rapes would result in “red” or “lighter” babies who would not be considered black African but Arab and that they, too, would be considered pariahs within the larger community.⁶⁵

In discussing the the ostensible reasons or purposes for the perpetration of the mass and gang rapes, the COI concluded: “The patterns appear to indicate that rape and sexual violence have been used by the *Janjaweed* and Government soldiers (or at least with their complicity) as a deliberate strategy with a view to achieve certain objectives including terrorizing the population, ensuring control over the movement of the IDP population and perpetuating its displacement. [Certain cases] demonstrate that rape was used as a means to demoralize and humiliate the population.”⁶⁶ It is astonishing that the Commissioners limited the possible purposes of the mass and gang rape of the black African females to the above. More specifically, issuing racial slurs (and threats to make “lighter” and “red babies”) during the mass rape of the black African females, making threats to exterminate all of the black Africans as they raped the black African females, and perpetrating mass rape knowing full well the stigma attached to a female who has been raped in a Muslim society all suggest that the perpetrators did, in fact, have the intent, to destroy, at least in part, a specific group of people.

Furthermore, in all likelihood, girls and women who have been raped by a GoS soldier or a *Janjaweed*, if not a horde of rapists, suffer each and every day of their lives as a result of being raped. Indeed, one has to wonder how they even manage to go on with daily life having both been raped (not once, which is horrific enough, but often gang raped many times over for days and weeks on end) and forced to witness the rape of other girls and women (including their mothers, daughters, sisters, and aunts). The COI, itself, provides information about a victim who was raped “14 times over the period of one week.”⁶⁷ If the latter situation (and others like it) is not likely to “caus[e] serious . . . mental harm to members of the group,”⁶⁸ then what is?

In regard to the GoS’s response to the mass rape in Darfur, the Commissioners state that “on their part, the [GoS] authorities failed to address the allegations of rape adequately or effectively.”⁶⁹ Unfortunately, and ironically, the very same accusation can, and should, be made of the COI. This is true because the Commissioners certainly had to be cognizant of all of the above information (i.e, the racial slurs, the threats to make different color babies, the threats to exterminate the black African people, the stigma attached to rape in such a culture, and the killing of the babies), and at least be somewhat aware of how the trauma of being raped never subsides in a victim’s mind and

heart (e.g., those who suffer rape may relive the horror of the attack[s], which can result in crying jags, a sense of violation that never ends, severe and prolonged depression, the very questioning of the worth of life itself, suicidal thoughts, attempts at suicide, and a fear of being alone and/or around males they do not know).

Tellingly, the International Criminal Tribunal for Rwanda (ICTR) found Jean-Paul Akayesu guilty of genocide for overseeing the rape of Tutsi females during the 1994 Rwandan genocide. More specifically, he was convicted on the following grounds:

The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown . . . The *Interahamwe* who raped Alexia said, as he threw her on the ground and got on top of her, “let us now see what the vagina of a Tutsi woman tastes like.” Akayesu himself, speaking to the *Interahamwe* who were committing the rapes, said to them: “don’t ever ask again what a Tutsi woman tastes like.” *This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.*⁷⁰

By substituting the words “black Africans” or “Massaliet, Zaghawa or Fur” for Tutsi and “Janjaweed” for “*Interahamwe*,” the explanation aptly describes the intent of the rapists in Darfur and the resultant horrors experienced by their female victims.⁷¹

Ultimately, though, the COI concluded the following:

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 . . . It further finds that . . . in some instances the crimes committed in Darfur may amount to the crime of sexual slavery as a crime against humanity. Furthermore, the Commission finds that the fact that rape and others forms of sexual violence were conducted mainly against three “African” tribes is indicative of the discriminatory intent of the perpetrators. The Commission therefore finds that the elements of persecution as a crime against humanity may also be present.⁷²

When all is said and done, and as delineated above, both the context (e.g., the racial slurs, the intent to make different color babies, the threats of extermination) and ramifications of the rapes (the potential and severe ostracism faced by those girls and women who have been raped at the hands of the GOS troops and Janjaweed, for example, outright rejection of the victims by family and community members) are largely ignored by the COI. Oddly, the very real possibility of contracting and spreading the AIDS/HIV virus is also ignored. Granted, a final determination by a court as to what all of this constitutes is needed, but the COI’s stance still leads one to wonder if there was a purposeful disregard of such contextual issues and their ramifications—as well as the skirting the fact that, in one way or another, such acts might constitute genocide.

Over and above the mass rape of black African females, there was another attempt by the GoS troops and Janjaweed to destroy the black Africans in whole or in part and that was stealing and destroying most of the essentials black Africans needed for sustaining their lives. The COI report actually comments on this issue:

A particular pattern recorded by the Commission was the fact that the IDPs and refugees interviewed would place great emphasis on the crime of looting, and explain that the *Janjaweed* had taken everything these persons had owned, involving all goods necessary to sustain life in the difficult conditions in Darfur, including pans, cups, and clothes, as well as livestock, representing the key source of income of the affected people.⁷³

The COI report goes on to assert that “the Commission found that the majority of cases involving looting were carried out by the *Janjaweed* and in a few cases by the Government forces. Looting was mainly carried out against African tribes and *usually targeted property necessary for the survival and livelihood of these tribes.*”⁷⁴ Thus, even the COI readily acknowledges that the survival of the black Africans was left in the balance as a result of such thievery. Such actions seemingly fall under Article 2c of the UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCG): “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” Again, though, the COI does not comment on such actions as they relate or do not relate to the issue of genocide. Rather, the COI calls the actions “war crimes” and asserts that they possibly constitute “a form of persecution as a crime against humanity.”⁷⁵ It just does not seem that the concept/crime of genocide was within the worldview of the COI.⁷⁶

6. The methodical planning of the attacks and atrocities

There are numerous indications that the planning by the GoS and *Janjaweed* was methodical. First, time and again, the attacks were generally carried out in the same manner against hundreds of villages all over Darfur.⁷⁷ Someone had to plan the flight patterns and arrivals of the Antonovs and helicopter gunships and synchronize the arrival of the Antonovs and gunships with that of the *Janjaweed* on horseback and camels and the GoS and *Janjaweed* on land cruisers. Furthermore, in some cases, villagers reported being tricked into toting all of their worldly goods to a central location purportedly to be taxed only to be attacked by the GoS and *Janjaweed*, which allowed for quick and easy theft of all the black African’s goods. This happened to one village and town after another on designated days.⁷⁸ Finally, there is ample evidence that the GoS has whitewashed planes and affixed UN insignias on such planes in order to offload both men and materiel in Darfur. Again, such flights take coordination and planning.

7. Systematic manner of killing

Ample documentation exists that shows the killings took place day after day, week after week, and month after month in the three states of Darfur.⁷⁹ Furthermore, a vast majority of the attacks generally followed the same pattern with Antonovs bombing the fields and villages of black Africans early in the morning, which were followed up by hundreds of *Janjaweed* racing into villages on camels and horses and then GoS soldiers (often accompanied by *Janjaweed*) on four wheel vehicles and *dushkas* (four wheel vehicles with mounted automatic weapons). During the initial part of the attacks, men and older boys were often the target of killing while women and girls were often raped. Almost at once, the villages were ransacked and then torched as the black Africans were chased out into the forbidding hinterland. Before leaving the villages, the perpetrators often tossed the carcasses of dead animals and the bodies of dead black Africans into the wells in order to poison the water. In certain cases, black African men were rounded up and killed en masse in various areas such as in Mukjar.⁸⁰

So, those are the hard facts. In light of the hurried nature of the COI investigation, it is natural to wonder about how much time, care and depth of thought went into the analysis of the data collected by the COI team and how much care and thought went into wrestling with what the findings added up to in the end. No one but those who conducted the analysis knows for sure, but this is what Bodkin had to say:

First, there is absolutely no way that there was any sort of consistent body of information submitted to the Commissioners. Also, in my humble opinion, unless they stayed awake 24 hours a day from Jan. 19–31 to read all the reports that we submitted, I do not see how the five Commissioners actually went through all of the information. It angered me so much when I read the report that I can honestly say I have never gotten through it in its entirety. Is HOGWASH a known legal term?⁸¹

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

The COI's Skewed Rationale for Not Coming to a Determination of Genocide

In a section entitled “Do the Crimes Perpetrated in Darfur Constitute Acts of Genocide,” the COI report provides a rationale for its determination that the GOS troops and Janjaweed had not committed genocide. It opens with the following:

There is no doubt that some of the objective elements of genocide materialized in Darfur. . . . The Commission has collected substantial and reliable materials which tends to show the occurrence of systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle).⁸²

However, it then goes on to assert the following:

Some elements emerging from the facts including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show the lack of genocidal intent.⁸³

Ironically, while the evidence produced by the COI indicating genocidal intent is strong and convincing, the “evidence” it produces to question genocidal intent verges on the absurd. More specifically, the COI notes and argues: “[It is a] fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men . . .”⁸⁴ This line of thinking makes it seem as if the COI is totally ignorant of the UNCG definition of genocide and its wording, which states: “In the present Convention, genocide means *any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.*”⁸⁵ No genocide in modern times has resulted in exterminating the whole population—not the Armenian genocide, not the Holocaust, not the Cambodian genocide, not the Rwandan genocide. The COI also infers that the only individuals targeted for death were rebels or potential rebels, but there is ample evidence that everyone from infants to 100-plus-year-old men (and everyone in

between—girls, women, young boys) were killed; and individuals who were black Africans were targeted and killed as well.⁸⁶

Continuing its argument, the COI next provides what it perceives as an example of the GoS's lack of intent to commit genocide against a group (in this case an ethnic group) protected under the UNCG. More specifically, it cites an attack in January 2004 in which the perpetrators rounded up all those black Africans who had survived the attack and not escaped into the mountains and desert. Scanning a list with numerous names, the perpetrators selected fifteen individuals, including seven *omdas*,⁸⁷ and killed them outright. Later, the perpetrators killed another 205 villagers who they asserted were rebels. Reportedly, they allowed some 800 others to remain alive. Subsequently, the COI argues that "[t]his case clearly shows that the intent of the attack was not to destroy an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local population."⁸⁸ This line of thinking is faulty on several counts. First, the COI seems to take at face value the assertion by the GoS that those who were murdered were rebels. Time and again, the GoS has shown its true colors by lying to the international community, its own people, representatives of different states, and the press, among others. It has, for example, repeatedly denied its responsibility for the ongoing crisis in Darfur,⁸⁹ denied that it carried out ethnic cleansing or atrocities approaching extermination,⁹⁰ and denied that it backs the Arab militias.⁹¹ It has also repeatedly and drastically minimized the number of dead in Darfur. So, why anyone, let alone an investigatory group attempting to ascertain whether the GoS had perpetrated genocide or not, would rely on assertions by GoS personnel is baffling.

Furthermore, as Fowler cogently argues, "The Commission's reference to the fact that the perpetrators did not 'exterminat[e] the whole population' is puzzling . . . The Commission itself had explained in a previous paragraph that international case law establishes that 'the intent to destroy a group in part' requires the intention to destroy a 'considerable number or individuals' or 'a substantial part . . .'⁹² The Commission failed to offer any reason why two hundred twenty-seven out of twelve hundred [actually, it was out of just over 1,000] is neither a 'considerable number of individuals' (in relation to that sample) nor 'a substantial part' of that sample, especially when the community leadership was particularly targeted."⁹³

Fowler also addresses the COI's assertion that the GOS's primary objective was to kill rebels and force those who were suspected of harboring rebels out of the area:

[T]he Commission . . . distinguished[ed] between "the intent to destroy an ethnic group as such" and "the intention to murder all those men they considered to be rebels . . .," [y]et, on just the previous page, the Commission had included a number of quotes in which the perpetrators used ethnic identity, racial epithets, and terms like *Torabora* (slang for rebels) interchangeably. The whole point of the government's campaign against the civilian population of the the non-Arab ethnic groups was equating ethnicity with rebellion, rendering it nonsensical to distinguish an intent to destroy those ethnic groups from an intent to murder rebels. The targets were, by the Government's apparent definition, one and the same.⁹⁴

According to the COI, the second element that demonstrates the GOS's lack of genocidal intent was that after the black Africans' villages were destroyed the black African survivors were "collected in IDP camps": "In other words, the population surviving attacks on villages are not killed outright, so as to eradicate the group; they are

rather forced to abandon their homes and live together in areas selected by the Government.”⁹⁵ There are numerous problems with this line of thinking as well. First, many of the black Africans ended up in makeshift camps in barren desert that they “selected” and erected. Second, hundreds of thousands of black Africans, out of sheer fear, fled to Chad. Third, if the the COI had existed between 1915 and 1919, would it have argued that the Ottoman Turks had not committed genocide due to the fact that “the [Armenian] population surviving attacks . . . [were] not killed outright, so as to eradicate the group; [rather, they were] forced to abandon their homes and live together in areas (e.g., the vast wasteland of Deir et Zor) selected by the Government”? Or, in the case of the deportation of the Jews to ghettos, concentration camps, and death camps, would the COI have offered the same argument about the tens of thousands of Jewish survivors who ended up in displaced persons camps at the end of World War II? As Fowler argues: “This element begs the question of whether the direct violence (i.e., murdering and raping) was of sufficient scale to evince the intent to destroy the targeted groups ‘in part,’ even though there are survivors who are not murdered outright. And the Commission offers no rationale why this element would be more indicative of intent than the scale and systematic nature of direct violence.”⁹⁶

Eric Reeves, a scholar at Smith College in Northampton, Massachusetts, who has written extensively on the crisis in Darfur, is also highly critical of the COI’s assertion about the internally displaced:

This is an incomplete, finally deeply inaccurate characterization of the realities of internal displacement in Darfur (and into Chad). First, . . . mortality is exceedingly high following violent displacement . . . Of note here is a singularly important study of traumatic and early post-traumatic mortality resulting from violent displacement, published in *The Lancet* by authors from Doctors Without Borders/Medecins Sans Frontieres and others⁹⁷ . . . Secondly, a very large percentage of the displaced population . . . have been forced to flee into inaccessible rural areas presently beyond the reach of any humanitarian relief efforts. They are dying in great numbers . . . Moreover, to claim that “Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance” is a shocking distortion of the truth, if we look back as far as November/December 2003 (certainly a period of time within the purview of the Commission’s investigation). At the time, Tom Vraalsen, UN special envoy for humanitarian affairs in Sudan, declared in a memo to the UN humanitarian coordinator for Sudan (Mukesh Kapila) that Khartoum was “systematically” denying access to areas in which non-Arab/African tribal populations were concentrated.⁹⁸

Continuing its argument that the establishment of the IDP camps was proof that the GoS did not intend to commit genocide, the COI claims, “This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the IDPs belong.”⁹⁹ Once again, the COI seems to believe that determination of genocide can only be made when it involves the total eradication of the group or, as it says, its extinction. The aforementioned statement by the COI blatantly disregards the fact that many thousands of internally displaced peoples were bereft when it came to food, water, shelter, and medicine. It also blatantly ignores the fact that the GoS repeatedly and aggressively interfered with the work of humanitarian groups, including the creation of administrative delays; harassing, threatening and intimidating humanitarian personnel; arresting humanitarian personnel;¹⁰⁰ and blocking entrance to camps thus preventing humanitarian aid from reaching the refugees.¹⁰¹

Finally, the COI report relates an incident in which the Janjaweed attacked a village and shot and killed a man who resisted their attempt to steal his camel but didn't kill the man's brother during their theft of his 200 camels. Based on this single instance involving two black Africans, the COI authors wildly and absurdly surmise the following: "Clearly, in this instance the special intent to kill a member of a group to destroy the group as such was lacking, the murder being only motivated by the desire to appropriate cattle belonging to the inhabitants of the village. Irrespective of the motive, had the attackers' intent been to annihilate the group, they would not have spared one of the brothers."¹⁰² The use of an example involving two men out of literally millions affected by the attacks is not only ludicrous but irresponsible. Indeed, this argument by the COI exemplifies the shoddy thinking inherent in its ultimate determination.¹⁰³

What Standard of Evidence Was Needed for a COI Finding of Genocide?

In an attempt to explain its final determination that the GoS and the Janjaweed perpetrated crimes against humanity but not genocide, the COI asserted, "Courts and other bodies charged with establishing whether genocide has occurred must be very careful in the determination of subjective intent . . . Convictions for genocide can be entered only where intent has been unequivocally established."¹⁰⁴ Fowler, who is a Stanford University educated lawyer, raises an important issue that calls into question, once again, the logic used by the authors of the COI report:

[T]his standard [beyond a reasonable doubt] is clearly wrong under these circumstances. The Commission was not a court of law, nor was it adjudicating the fate of individual defendants. The liberty of an accused defendant did not turn on its decision. Quite to the contrary, the Commission was only called upon to make a threshold finding on the basis of which the UN Security Council would decide whether to take additional action, including referring the situation to the International Criminal Court (ICC) for a full-fledged criminal investigation.

A review of the ICC Statute makes clear the Commission's error in applying the "beyond reasonable doubt" standard. The Statute contemplates several stages through which a case proceeds, each stage requiring that a separate weight of evidence be met. When a situation is referred to the ICC, the Prosecutor is required to initiate an investigation unless "there is *no reasonable basis* to proceed" (Art. 51.1). Having conducted an investigation, the Prosecutor may seek an arrest warrant if he/she can establish "*reasonable grounds to believe* that the person has committed a crime within the jurisdiction of the Court" (Art. 58). The Court next is called upon to confirm the charges, which it will do if the Prosecutor offers "sufficient evidence to establish *substantial grounds to believe* that the person committed the crime charged" (Art. 61) [emphasis added]. Finally, at trial, an individual can only be convicted if the Court is "convinced of the guilt of the accused beyond *reasonable doubt*" (Art. 66.3) [emphasis in original].

Between "no reasonable basis to proceed" and beyond reasonable doubt" lies a continuum in which the required weight of evidence steadily, and appropriately, mounts as the process moves forward. *To eliminate that continuum and require a Prosecutor to establish guilt beyond a reasonable doubt as a condition of launching an investigation would be nonsensical. Yet that is the standard of proof apparently applied by the Commission, in spite of the fact that its investigation was prefatory to any judicial action* [emphasis added]. The Commission's application of this standard is all the more erroneous in light of the constraints placed upon it by the amount of time available as well as the continued commission of the very crimes it was supposed to investigate. It was not in any conceivable position to reach a conclusion "beyond reasonable doubt" on an issue as complex and problematic as genocidal intent.¹⁰⁵

It is hard to believe that Cassesse and his team, along with the bevy of lawyers that could have provided advice to the Commission, were not cognizant of the various points that Fowler makes. If they were, then why did they settle on the “beyond a reasonable doubt” argument? Was it a case of planned subterfuge? If they weren’t cognizant of the various points Fowler makes then that calls into question their very level of expertise, which subsequently calls into question the validity of their analysis of the data collected by their investigators.

Conclusion

Following its determination that the atrocities committed by the GoS and the Janjaweed amounted to crimes against humanity but not genocide, the COI recommended that the UN Security Council refer the crisis in Darfur to the International Criminal Court (ICC). Subsequently, on 31 March 2005, the Security Council, in a vote of 11–0, referred the matter to the ICC. Four countries abstained from voting, including China and the United States. It was the first time the Security Council had, as a result of a vote, referred a matter to the ICC. The ICC then began its own investigation into the Darfur crisis. On 14 July 2008, the ICC filed charges against President Omar al-Bashir for having perpetrated crimes against humanity and genocide. Subsequently, Bashir asserted that the ICC did not have the jurisdiction to charge him, decried the charges as “sheer lies,” and swore that he would not allow himself to be tried by the ICC. Time will tell.

Notes

1. US Department of State, *Documenting Atrocities in Darfur* (Washington, DC: Bureau of Democracy, Human Rights and Labor and Bureau of Intelligence and Research, 2004), 4.
2. *Ibid.*
3. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 January 2005), http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (accessed 15 October 2009), Executive Summary, 2 (emphasis added) [UNCOI Report].
4. *Ibid.*, 13.
5. *Ibid.*, 2.
6. *Ibid.*, 3 (emphasis added).
7. *Ibid.*, para. 236.
8. *Ibid.*, para. 303.
9. *Ibid.*, para. 310.
10. *Ibid.*, para. 243.
11. *Ibid.*, para. 293.
12. *Ibid.*, para. 242.
13. *Ibid.*, para. 333.
14. *Ibid.*, para. 311 (emphasis added).
15. *Ibid.*, para. 385 (emphasis added).
16. *Ibid.*, para. 393 (emphasis added).
17. *Ibid.*, para. 272.
18. *Ibid.*, para. 275.
19. *Ibid.*, para. 269.
20. See Jerry Fowler, “A New Chapter of Irony: The Legal Definition of Genocide and the Implication of Powell’s Determination,” in *Genocide in Darfur: Investigating Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen, 127–39 (New York: Routledge, 2006); Gregory Stanton, “Proving Genocide in Darfur: The Atrocities Documentation Project and Resistance to Its Findings,” in *Genocide in Darfur: Investigating Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen, 181–88 (New York: Routledge, 2006);

- Physicians for Human Rights, *Darfur—An Assault on Survival: A Call for Security, Justice, and Restitution* (Cambridge, MA: Physicians for Human Rights, 2006); John Prendergast, “Acting to End Genocide in Darfur,” US House Foreign Affairs Committee (19 April 2007), http://www.americanprogress.org/issues/2007/04/prendergast_testimony (accessed February 2008); John Prendergast, “So How Come We Haven’t Stopped It?” *The Washington Post*, 19 November 2006, <http://home/index.cfm?id=4516&l=1> (accessed February 2008); Eric Reeves, “Report of the International Commission of Inquiry on Darfur: A Critical Analysis,” Parts I and II (2 and 6 February 2005), <http://www.sudanreeves.org> (accessed February 2008); Mika Vehnamaki, “Darfur Scorched: Looming Genocide in Western Sudan,” *Journal of Genocide Research* 8 (2006): 51–82. Certainly not all human-rights activists and scholars question the findings of the COI. Among those who agree with its findings to one degree or another are Jimmy Carter, quoted in Tony Romm, “Carter Says Darfur Not Genocide,” *Eagle: American University’s Independent Student Voice*, 25 October 2007, <http://www.theeagleonline.com/news/2007/10/25/News/Carter.Says.Darfur.Not.Genocide-3055112.shtml> (accessed June 2008); Michael Clough, “It’s Hell in Darfur, But Is It Genocide?” *Los Angeles Times*, 14 May 2006, <http://articles.latimes.com/2006/may/14/opinion/op-clough14> (accessed June 2008); Alex de Waal, “ICC, Making Sense of Darfur: Moreno Ocampo’s Coup de Theatre,” SSRC Blogs, 29 July 2008, <http://www.ssrc.org/blogs/darfur/2008/07/29/moreno-ocampoc-coup-de-theatre> (accessed July 2009); Gérard Prunier, *Darfur: The Ambiguous Genocide* (Ithaca, NY: Cornell University Press, 2005); and William Schabas, “Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide,” in *The Criminal Law of Genocide*, ed. Ralph Henham and Paul Behrens, 39–48 (London: Ashgate, 2007).
21. UNCOI Report, Executive Summary, 4. The definition of genocide has two key parts: *actus reus* (specific physical acts) and *mens rea* (a particular mental state). Without the particular state of mind behind the acts (that is, the actual intent to destroy in whole or in part a specific group protected by the UNCG) then the physical acts do not and cannot amount to genocide. According to the COI, what was not evident was the intent by the GOS to destroy in whole or in part the black Africans as a group.
 22. Nadim Hasbani, “About the Arab Stance Vis-à-vis Darfur,” *Al-Hayat*, 21 March 2007, <http://www.crisisgroup.org/home/index.cfm%3Fid%3D4722> (accessed April 2008); Eric Reeves, “Egypt and Darfur: Cruel Intentions,” *The New Republic* (online), 4 April 2006, <http://www.sudanreeves.org/Sections-article546-p1.html> (accessed April 2008).
 23. Reeves, “Egypt and Darfur,” 1.
 24. Deb Bodkin, e-mail to author, 15 April 2006. In the same e-mail to the author, Bodkin also noted, “The female Commissioner [Ms. Hina Jilani from Pakistan] told the investigators: ‘Go with an open mind.’ During the briefing I got the distinct impression that there was some tension between Commissioner Cassese and Commissioner Jilani as their comments often conflicted with one another and he was expressing what he thought our findings would be whereas she always made comments about us doing our job open-mindedly.” Note: The author sent queries to other investigators on the COI team, but none provided responses.
 25. UNCOI Report, para. 18 (original emphasis).
 26. *Ibid.*
 27. In regard to the issue of the amount of time allocated for the investigation, Bodkin commented as follows:

Besides all the other weaknesses in the investigation (the two big ones being no consistency in how interviews were conducted and no consistency in the expertise of the chosen investigators doing the interviews), the biggest problem was definitely the unreasonable time limit. I have never understood why such a short time frame would be allotted to such an incredibly important investigation. It boggled [my mind] when we all were given a week off at Christmas and flown back to Geneva. In my opinion it was a waste of valuable time and money and we should have stayed [in the field] working. Also, we were told by our drivers, interpreters, etc. that it was known by everyone that the killing would accelerate during the Christmas break as the Government knew we [the COI investigators] were going to be out of the country.

The killing had been going on for two years so why were we given less than three months to look into it I will never understand. When you look at the goals of the investigation and the reality that we would need physical evidence to back verbal evidence, it is blatantly obvious that it could not be successfully completed in that time frame.

When you take into account the days we were stuck in Geneva because the GoS wouldn't issue our visas, about four days in total in Khartoum, the Christmas break, the first day on the ground where we spent the entire day putting our truck together instead of interviewing, etc. . . . the real investigative days according to my notebooks totaled 33 days—days during which we were actually on the ground doing interviews!!! That is an absurd time frame to supposedly be able to figure out what was going on across the entire area of Darfur.

Debb Bodkin, e-mail to the author, 11 May 2008 (original emphases).

28. In October 2006, the London-based Minority Rights Group International issued a report that asserted that the United Nations' authorities were warned of ethnic tensions in Darfur as early as 2001 but chose to ignore the facts:

As early as 2001, the UN Commission on Human Rights' Special Rapporteur for Human Rights in Sudan began paying particular attention to Darfur, visiting the region in early 2002. His August 2002 report highlighted the violence in Darfur and noted Masalit claims that "the depopulation of villages, displacement and changes in land ownership are allegedly part of a government strategy to alter the demography of the region." Despite his concerns, the 2003 Commission on Human Rights removed Sudan from its watch-list and ended the mandate of the Special Rapporteur.

Sharath Srinivasan, *Minority Rights, Early Warning, and Conflict Prevention: Lessons from Darfur* (London: Minority Rights Group International, 2006) 6.

29. Evelyn Depoortere, Francesco Checchi, France Broillet, et al., "Violence and Mortality in West Darfur, Sudan (2003–04): Epidemiological Evidence from Four Surveys," *Lancet* 364 (2004): 1315–20; and US Department of State, *Documenting Atrocities in Darfur* (Washington, DC: Bureau of Democracy, Human Rights and Labor and Bureau of Intelligence and Research, 2004).
30. Samuel Totten, "Talk, Talk and More Talk: The International Community and Darfur," in *The World and Darfur: International Response to Crimes Against Humanity in Western Sudan*, ed. Amanda F. Grzyb, 554–607 (Montreal: McGill-Queen's University Press, 2009).
31. Ibid.
32. It is unclear what the authors mean here: do they mean simply a somewhat larger number was needed, or are they suggesting that a massive number of personnel would have been needed to carry out the investigation in a thorough, systematic and, ultimately, professional manner?
33. UNCOI Report, 13.
34. The International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (New York: United Nations, 2004).
35. In the UNCOI report the authors comment that even though the budget did not allow for more than thirteen experts/investigators, "[n]evertheless the Commission was able to gather a reliable and consistent body of material with respect to both the violations that occurred and those persons who might be suspected of bearing criminal responsibility for their perpetration" (para. 19). When asked if she thought that the small number of experts was adequate to carrying out a solid investigation or whether it was an impediment to the effort, Deb Bodkin first commented on the issue of the budget and then the number and use (actually, lack of use) of the expertise on the team:

The budget could have been better handled if we [had] stayed in Darfur for the entire investigation. I would love to know how much of that budget was eaten up flying us all back to Geneva for Christmas break. If it was felt the investigation could not go on during Christmas then why was this time frame chosen?

[Over and above that,] the thirteen experts were not even used in the fields of their own expertise. The analysts never did any analyzing of the information, they interviewed. The closest the forensic experts got to using their expertise was taking some photographs, otherwise they were trying to do interviews in their very broken English.

Debb Bodkin, e-mail to the author, 10 April 2008.

36. Deb Bodkin, e-mail to the author, 15 April 2008.
37. When asked by the author if she had any inkling as to why the COI investigators were not provided with a questionnaire and expected to use one set of questions, Bodkin replied: "There was never any sort of discussion about us using a questionnaire. There was never any discussion at all about how the interviews were to be conducted. We were just told to conduct interviews . . . and I am pretty certain that due to the variety of different vocations of those who were suddenly becoming investigators and interviewers—military analysts, forensics experts, etc.—that the format varied for each of us." E-mail to the author, 10 April 2008.
38. *Ibid.* It is significant to note that while the briefings were not all that formal and attendance at them was not mandatory, many key issues germane to the investigation were addressed (see below). Still, that still does not excuse the fact that the (1) investigators were not formally and thoroughly prepared to conduct interviews, and (2) that the investigators were not provided with and required to ask the same set of questions. In the same e-mail (10 April 2008), Bodkin reported that the following information was addressed in a briefing:

During this briefing, we were told the four goals of the investigation which were: 1. Investigate reports of serious violations of human rights (we were to try to determine the truthfulness of the responses and make our own findings through facts); 2. Decide whether or not genocide had been perpetrated; 3. Identify perpetrators; and 4. Propose to the UN Security Council possible solutions.

Some of the other comments I noted from a briefing with three of the Commissioners, including Antonio Cassese, were: "HAC men were Government spies; identity perpetrators through detailed questions—a consistent body of elements must exist in order to identify someone as a perpetrator; target two levels of perpetrators (those who killed and raped and those who were in command of ordering the actions); there is no doubt about the displacement, just must prove it was forced; determine rebel involvement, any attacks related to a village's support of rebels; rape is a crime that happened in the context of a larger attack, best to investigate it in that realm [Bodkin's Note: I am not sure what this meant]; be cautious about built-up stories; question military about use of helicopters, Antonovs, as often there are conflicting stories; prioritize, follow-up on investigations that appear to be solveable; note evidence of bombardment; interview airport personnel about schedules of aircrafts; follow-up claims of mass executions and mass graves; also investigate crimes committed by rebels; Categories of Crimes: 1. Indiscriminate acts on villages; 2. Execution/extermination; 3. Rape; 4. Forced expulsion; 5. Looting; 6. Torture; Protection of witnesses—revisit them to ensure they are not harmed after interview [Bodkin's Note: yeah right . . . we barely had time to interview . . . we did check on a few when possible]; SLA and rebel-controlled areas are possibly better and willing to show us evidence and bodies; check on wells when we see them.

With respect to the background, expertise, and abilities of the investigators/interviewers on the COI team, Bodkin made the following observation: "I know that the forensic experts were extremely upset that they were not there to use their expertise, i.e., exhume bodies, etc. and were expected to conduct interviews. Their first [primary] language was Spanish and their English was broken. So they had an extremely difficult time conducting interviews because they did not know the meaning of some of the English words that the translators would use when translating from Arabic" (*ibid.*).

39. *Ibid.* Even assuming, hypothetically, that the issue of racial epithets was addressed in the initial briefing and Bodkin neglected to include such in her notes, it drives home the point that the COI would have been wise to have developed a set of questions that each and every investigator was expected to ask in order to ensure some sort of consistency vis-à-vis the data collection.
40. Bodkin, e-mail to the author, 15 April 2006.
41. Bodkin, e-mail to the author, 10 April 2008.
42. Very little information is contained in the COI report regarding the process of analysis of the data collected by the COI team.
43. UNCOI Report, para. 640 (emphasis added).
44. *Ibid.*, Executive Summary, 4 (emphasis added).
45. *Ibid.*, 2 (emphasis added).

46. Broaching this issue should not be construed as suggesting that the GoS, itself, did not perpetrate genocide.
47. The GoS even went as far as recruiting Janjaweed to serve in the regional police force, which carried out government orders, including attacks on the villages of black Africans. Human Rights Watch, "Sudan: Janjaweed Camps Still Active" August 27, 2004, <http://www.hrw.org/english/docs/2004/08/27/darfur9268.htm> (accessed February 2008).
48. See, e.g., *Prosecutor v. Delalić et al.*, Judgment, ICTY-96-21-T (16 November 1998).
49. Genocidaires know that and they use it to their advantage. A classic example is that of a Paraguayan minister of defense who, when the charge of genocide of the Ache was leveled against Paraguay at the United Nations, said, "Although there are victims and victimizer there is not the third element necessary to establish the crime of genocide—the 'intent.'" Quoted in Leo Kuper, *The Prevention of Genocide* (New Haven, CT: Yale University Press, 1985), 12.
50. UNCOI, para. 18; see International Criminal Court, Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000), <http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html> (accessed 15 October 2009).
51. UNCOI Report, para. 640.
52. *Ibid.*, para. 502.
53. Quoted *ibid.*, 128.
54. *Ibid.*, 128, n. 185.
55. Human Rights Watch, "Sudanese Government Obstruction of Humanitarian" (2006), <http://www.hrw.org/backgroundunder/africa/sudan0506/5.htm> 2006 (accessed February 2008); Eric Reeves, "By Blocking Humanitarian Access, Sudanese Governments Acts to Eliminate Darfur's Population," *Sudan Tribune*, 7 March 2004, <http://www.sudantribune.com/spip.php%3Farticle203> (accessed February 2008); Eric Reeves, "Darfur Mortality Assessment: A Global Analysis of Death from Violence, Malnutrition, and Disease," Sudanreeves (2004), <http://www.sudanreeves> (accessed March 2008); US Department of State, *Documenting Atrocities in Darfur*; UNCOI Report.
56. Julian Borger, "Darfur by Numbers," *Guardian.Co.UK*, 4 September 2007, 1, <http://www.guardian.co.uk/world/2007/sep/04/diplomaticdispatch.julianborger> (accessed March 2008); J. Hagan, and A. Palloni, "Death in Darfur," *Science* 313 (2006): 1578–79; Reeves, "Darfur Mortality Assessment," 1; Jeffrey Gettleman, "Toll of Darfur Underreported, Study Declares," *The New York Times*, 15 September 2006, 1, <http://www.nytimes.com/2006/09/15/world/africa/15darfur.html%3Ffta%3D> (accessed March 2008).
57. In October 2004, based on data collected in refugee camps in Darfur, the World Health Organization (WHO) estimated that 10,000 people had died among the refugees each month between the end of 2003 and October 2004. Those deaths were mainly related to malnutrition and illnesses as the victims fled in the hinterland seeking sanctuary. By March 2005, WHO estimated the number of dead had reached 200,000. Based on the latter findings, the United Nations frequently used the number 200,000 as the estimated number of deaths, as did a vast majority of the newspapers across the globe. In contrast, the US State Department's Atrocities Documentation Study estimated that nearly 200,000 were dead from violent attacks alone. US State Department, *Documenting Atrocities in Darfur*.
58. This point is directly applicable to two other criteria cited by the COI: "the physical targeting of the group or their property" and "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups."
59. Julie Flint and Alex de Waal *Darfur: A Short History of a Long War* (London: Zed Books, 2007), 51.
60. Kelly Askin "Prosecuting Gender Crimes Committed in Darfur: Holding Leaders Accountable for Sexual Violence," in *Genocide in Darfur: Investigating Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen, 141–60 (New York: Routledge, 2006), 142.
61. Testimony quoted in Médecins sans Frontières [MSF], *The Crushing Burden of Rape: Sexual Violence in Darfur. A Briefing Paper by Médecins sans Frontières* (Amsterdam:

- MSF, 8 March 2005), <http://www.doctorswithoutborders.org/publications/reports/2005/sudan03.pdf> (accessed February 2008), 1.
62. Alfred de Montesquiou, "Darfur Women Describe Gang-Rape Horror," *Washington Post*, 28 May 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/27/AR2007052700634.html> (accessed February 2008).
63. Quoted in Askin, "Prosecuting Gender Crimes Committed in Darfur," 147.
64. *Ibid.*
65. The thinking (reasoning) behind such rejection is cultural and it is ingrained in every member of the society. In various societies, such as that of the Muslim world of the black Africans of Darfur, the rape of a female family member brings great shame and dishonour to the family. When females who have been raped are forced from their homes and villages by their families, it makes their survival, and that of their child, if they bear a child as a result of the rape, just that much more difficult. If they are married, they are frequently rejected by their husbands and often scorned by their fellow villagers. If they are single, they are deemed unmarriageable.
66. UNCOI Report, para. 94.
67. *Ibid.*, para. 345. It is important to note that once the black Africans were forced from their villages and began living in IDP camps, the rapes did not stop. As the females went out to forage for wood (which is needed to cook meals), the Janjaweed and some GoS troops attacked them and raped them. The females had no choice but to forage for the wood because the black African males feared they would be killed should they be caught outside of the confines of the IDP camps. Tellingly, the COI report notes that "*the impact of the violence [rape and other forms of sexual abuse] is exacerbated by the fact that women and their families depended on the collection of firewood for their livelihood and survival* (91; emphasis added).
68. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, <http://www2.ohchr.org/english/law/genocide.htm> (accessed 29 September 2009), art. 2b [UNCG].
69. UNCOI Report, para. 336.
70. *Ibid.*, para. 732 (emphasis added).
71. For important insights on how rape can affect a group and how this relates to the group becoming potentially genocidal, see Siobhan K. Fisher, "Occupation of the Womb: Forced Impregnation as Genocide," *Duke Law Journal* 46 (1996): 91–133; Nicole Hallett. "The Evolution of Gender Crimes in International Law," in *Plight and Fate of Females During and Following Genocide*, ed. Samuel Totten (New Brunswick, NJ: Transaction Publishers, 2009), 183–203; Catharine A. MacKinnon, "Rape, Genocide and Women's Human Rights," *Harvard Women's Law Journal* 17 (1994): 5–16; Catharine A. MacKinnon, "Genocide's Sexuality," in *Political Exclusion and Domination*, ed. Melissa Williams, and Stephen Macedo (New York: New York University Press, 2004), 313–56; Valerie Oosterveld, "Prosecution of Gender-Based Acts of Genocide under International Law," *Plight and Fate of Women During and Following Genocide*, ed. Samuel Totten (New Brunswick, NJ: Transaction Publishers, 2009), 205–18; Frances Pilch, "Rape as Genocide," *Plight and Fate of Women During and Following Genocide*, ed. Samuel Totten (New Brunswick, NJ, 2009), 169–82; Noelle N.R. Qunivet, *Sexual Offences in Armed Conflict and International Law* (Ardsley, NY: Transnational Publishers, 2005); C. Schiessel, "An Element of Genocide: Rape, Total War, and International Law in the Twentieth Century," *Journal of Genocide Research* 4 (2002): 197–210.
72. UNCOI Report, para. 360.
73. *Ibid.*, para. 385 (emphasis added).
74. *Ibid.*, para. 389 (emphasis added).
75. *Ibid.*, paras. 391, 393.
76. Again, even if the Janjaweed were primarily responsible for the looting, the fact remains that attacks in 2004 and early 2005 were carried out in concert by the Janjaweed and

GoS troops. Thus, even when GoS troops were not themselves engaged in the looting, they were still culpable for such actions in that they were either purposely “looking the other” way as the Janjaweed carried out their banditry or, more likely, provided the Janjaweed with its (the military’s) imprimatur. In fact, the COI report more or less says as much: “. . . it would appear that the looting carried out mainly by the *Janjaweed* in the context of attacks against villages has been conducted on a large scale and has been condoned by the Government of the Sudan through the propagation of a culture of impunity and the direct support of the Janjaweed” (Ibid., para. 392).

77. US State Department, *Documenting Atrocities in Darfur*.
78. Reported to Totten by interviewees during the US ADT investigation, 2004.
79. UNCOI Report; US State Department, *Documenting Atrocities in Darfur*; Totten, “Talk, Talk and More Talk.”
80. Totten, *ibid.*
81. When asked to rate—using a scale of one to five (one being poor, five being outstanding) how she would rate the overall efficiency, thoroughness and professionalism of the COI investigation, Bodkin replied as follows:

If I compare it to any police investigation I have been involved in and the investigation by CIJ [the Coalition for International Justice, which organized and implemented the US State Department’s Atrocities Documentation Project’s investigation in Chad in July and August 2004], it definitely ranks a 1. Being new to the United Nations way of doing things, I may have had a very naive and unreasonable expectation of how organized an investigation I expected given the organization. But, I can honestly say I found it to be the most unorganized and unfocused investigation I have ever been involved in during my 20 years of policing. Now, again, that might be partially because I was out of my realm of knowledge in regards to genocide and the scope of things required to prove it, but just on the surface it was clear that each of us were doing things in whatever way we thought would work, not in a uniformed, directed manner as it should have been. Couple the lack directions for conducting the interviews with the frustration of initially arriving [in Darfur] and not having translators (had my partner not been fluent in Arabic we would have spent the first two days doing nothing) and, then, the UN having hired translators who were from Arab tribes thus resulting in our having to convince victims they were safe to talk in front of them, the UN forgetting to ship computers for us so we had to start out by spending time finding a market and buying pens and school notebooks to write in, the computers arriving with uncharged batteries in a town that had hydro only occasionally so it took two days to charge them enough to use them . . . etc, etc., it was a mess. There was no portion of the entire investigation which I would say was well thought out. The lead investigator, John Ralston, I believe, tried very hard to put things together as best as possible but he was trying to do that at the same time he was trying to conduct interviews of political officials so I believe it was impossible for him to do that and try and direct the twelve interviewers stationed in three different villages.

Debb Bodkin, e-mail to the author, 11 May 2008.

82. UNCOI Report, para. 507 (emphasis added). Speaking of the discussion that Pierre Richard Prosper, US Ambassador for War Crimes, had with Colin Powell, US Secretary of State, regarding the analysis of the data collected by the ADP, Kostas reported: “Powell and Prosper examined how the [Sudanese] government acted once they were shown to have knowledge of the perpetrators of violence, the targeting of black African tribes, and the scale of human destruction in Darfur. This part was most convincing. The Government of Sudan had knowledge across the board. Let’s *pretend* that it wasn’t coordinated. They knew what was going on and not only did they do nothing to stop it, they intentionally obstructed assistance that would have bettered the situation. So, when you have knowledge, you take no steps to stop it, and then, when people are trying to help, you block the assistance, what else could you want other than for these people to die or to be destroyed.” Stephen A. Kostas, “Making the Determination of Genocide in Darfur,” in *Genocide in Darfur: Investigating Atrocities in the Sudan*, ed. Samuel Totten and Eric Markusen (New York: Routledge, 2006), 122.
83. UNCOI Report, para. 513 (emphasis added).
84. *Ibid.*
85. UNCG, art. 2.

86. Physicians for Human Rights, *Darfur—An Assault on Survival*; US Department of State, *Documenting Atrocities in Darfur*; World Health Organization, “Survey Concludes Deaths in Darfur Exceed the Emergency Threshold” (Switzerland: WHO, 2004).
87. Omdas, who are one step above sheiks, are administrative chiefs. An omda may have up to fifty or more sheiks under his control.
88. UNCOI Report, para. 514.
89. Gail Smith, “The Darfur Catastrophe,” Center for American Progress, 30 May 2004, <http://www.americanprogress.org/issues/2004/05/b84769.html> (accessed February 2008).
90. “Sudan Denies Atrocities in Darfur,” *BBC News* (25 April 2004), <http://news.bbc.co.uk/1/hi/world/africa/3656693.stm> (accessed 15 October 2009).
91. Human Rights Watch, “Darfur Documents Confirm Government Policy of Militia Support” (HRW Briefing Paper, 20 July 2004), <http://www.hrw.org/english/docs/2004/07/19/darfur9096.htm> (accessed February 2008), 1.
92. UNCOI Report, para. 492.
93. Fowler, “A New Chapter of Irony,” 133.
94. *Ibid.*
95. UNCOI Report, para. 515.
96. Fowler, “A New Chapter of Irony,” 133.
97. Depoortere, Checchi, Broillet, et al., “Violence and Mortality in West Darfur, Sudan (2003–04).”
98. Reeves, “Report of the International Commission of Inquiry on Darfur,” 5, 6.
99. UNCOI Report, para. 515.
100. Human Rights Watch, “Sudanese Government Obstruction of Humanitarian Access” (Background Briefing, 2006), <http://www.hrw.org/backgrounder/africa/sudan0506/5.htm> (accessed February 2008).
101. Refugees International, “Humanitarian Access to Darfur Limited, Despite Sudan’s Claims” (13 February 2004), <http://www.globalpolicy.org/ngos/aid/2004/0213darfur.htm> (accessed February 2008); Reeves, “By Blocking Humanitarian Access, Sudanese Governments Acts to Eliminate Darfur’s Population.” Kostas, “Making the Determination of Genocide in Darfur,” reports the following: “Prosper recalls the group examining the concepts of unlawful killing, causing of serious bodily and mental harm, and ‘the real one that got us . . . was the deliberate infliction of conditions of life calculated to destroy the group in whole or in part.’ Looking at the IDP camps, Prosper and Powell could not find any ‘logical explanation for why the Sudan government was preventing humanitarian assistance and medicine into the camps ‘other than to destroy the group.’ The GOS was seen as offering unbelievable excuses, leading Powell to conclude that there was a clearly intentional effort to destroy the people in the camps who were known to be almost exclusively black African” (121–22).
102. UNCOI Report, para. 517.
103. In regard to this example by the COI, Eric Reeves trenchantly asks and then asserts the following: “Does momentary and singular ‘mercy’ have anything to do with the vast patterns of human destruction that define the crime of genocide? There were of course examples of momentary or individual mercies in the Nazi death camps; this does not make them any less sites of genocidal destruction.” Reeves, “Report of the International Commission of Inquiry on Darfur,” 8.
104. UNCOI Report, para. 503.
105. Fowler, “A New Chapter of Irony,” 135–36.