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Rape in Darfur: A Crime against Humanity?

Replies and Comments

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Focus

Amnesty International

Darfur: Rape as a weapon of war: sexual violence and its consequences, AFR 54/076/2004, 19 July 2004

Human Rights Watch

Darfur destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan, Vol. 16, No. 6(A), May 2004

The recent events in the Darfur region in Sudan have once more highlighted rape and other types of sexual offences being used as a method of ethnic cleansing. One of the most heavily debated questions at the moment is whether genocide is taking place in Sudan. For example, the US House of Representatives adopted a resolution in which it called the atrocities perpetrated in Darfur "genocide". Yet, the Secretary-General of the United Nations stated that he had not seen enough evidence to convince him there is genocide in Darfur. Given the lack of accurate information, especially relating to the intent of the perpetrators (see in particular *Prosecutor v. Sikirica*, ICTY, para. 89) of these acts, it is not possible to discuss in depth whether sexual offences perpetrated in Darfur can be considered as acts of genocide.

On the other hand, one may investigate whether such acts qualify as crimes against humanity. Although Sudan has only signed and not ratified the Statute of the International Criminal Court, one may still use it as its provisions pertaining to crimes against humanity can be considered of customary nature.

According to article 7(1)(g) ICC Statute, acts that may be considered as falling within the purview of crimes against humanity are "rape [...] [and] any other form of sexual violence of comparable gravity". From various reports published by non-governmental organisations it seems that the sexual acts perpetrated against Sudanese women fall within the various definitions of rape expounded by the jurisprudence of international tribunals (*Prosecutor v. Akayesu*, ICTR, para. 597; and *Prosecutor v. Furundzija*, ICTY, para. 174) and spelled out in the ICC elements of crime.

In addition, in pursuance of article 7 ICC Statute, the act must be committed as part of a widespread or systematic attack against a civilian population. From the same reports it can be taken that the targets of sexual acts are female members of the civilian population. Whether the acts are of a widespread or systematic nature is more difficult to examine. Indeed, one would need to demonstrate that rapes occurred on a wide and/or mass scale and were organised. The mere accumulation of instances of rapes does not fulfil the criterion of "widespread or systematic" as article 7(2)(a) of the ICC Statute clearly requires the acts to be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack". The threshold is hence higher than the one used by the ICTY which declared that the existence of a policy or plan was evidentially relevant, yet not a legal element of a crime (*Prosecutor v. Kunarac*, ICTY, para. 98). This means that to be characterised as crimes against humanity by the ICC the rapes must be inscribed in the general policy of the Janjaweed militias and/or of the government of Sudan. Hence, it appears that the rapes and other acts of a sexual nature are not the product of individuals or individual groups but are part of a wider policy aimed to expel and destroy a certain part of the Sudanese civilian population.

Further, article 7 of the ICC Statute specifies that knowledge of the attack, i.e. that the perpetrator was aware that his/her act was part of a wider attack, must be demonstrated. Yet, the elements of crimes stress that this element of the crime does not necessitate proving that the perpetrator was aware of all the details related to the attack. Given the scale of the attacks it is difficult to consider that the perpetrators do not know that the same acts are occurring in other places and that their actions fall within the framework of a general attack against a certain part of the Darfur population.

As a result, it is safe to declare that, should the UN Security Council or Sudan refer the matter to the ICC, the perpetrators of the rapes and other sexual offences of similar nature may be prosecuted for crimes against humanity according to article 7 ICC Statute.

Responsibility

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