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Famine Crisis and International Crimes

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“Famine Crisis and International Crimes”

Summary: Introduction – 1. Famine Crises and Human-Made Disasters– 2. Famine Crises through the Lens of International Criminal Law – 3.The Case of Darfur (Sudan) – 4.The Case of North Korea – Conclusions.

Introduction

This paper seeks to highlight the use of certain disasters, in particular phenomenon such as famine and drought crisis, as tools used by States to implement their policies of displacement, dispossession and elimination.

In this regard, the paper looks at the currently applicable international legal framework established in order to properly tackle such an issue, focusing in particular on the application of international criminal law. It argues, in fact, how profiles related to international criminal responsibility can arise in situations where certain individuals may bear responsibility under international criminal law for originating, exacerbating or by intentionally failing to address famine crisis.

In order to prove the compelling nature of the issue, the paper refers to two concrete cases – Darfur (Sudan) and North Korea – which refer to situations where allegedly the governing regimes bear a certain degree of responsibility for the catastrophic effects of famine crisis on the civilian population. It looks at them from the perspective of international criminal law, referring to the analysis and determinations made by competent international bodies charged with investigating those specific situations.

On these grounds, the paper advocates for a more comprehensive approach in future responses to situations of disasters, capable of including mechanisms ensuring international criminal responsibility in case circumstances so requires.

1. Famine Crisis and Human-Made Disasters

The traditional approach that sees famine and drought crisis as exclusively natural events has been recently put into question. In particular, certain trends from the practice have shown that an inherent link can be drawn between natural catastrophes and the policies designed and implemented by certain governments. Such policies often have been led by economic, social or political motives and sometimes have unveiled the State's aim to target certain segments of the population or to consolidate the hegemony of particular elites.

In particular, a new tendency has emerged that looks at famine as a social construction rather than as a purely technical one.¹ Based on this assumption, it is important to highlight the “political, social and economic determinants that mark the onset of the process” leading to the eruption of famines and drought crisis.² In this context it is crucial to assess the role played by a Government in the different phases of the process, in particular looking at the responsibilities that public authorities have both in relation to the causes of a disaster and to the kind of reaction they are willing and able to provide to such events. As most experts and scholars have argued, if

¹ Maya Graham, ‘Considering the environmental situation in Sudan, were the disastrous famines of 1980s inevitable?’ Sudanese Online Research Association http://sora.akm.net.au/history.php?subaction=showfull&id=1065561920&archive=&start_from=&ucat=1& accessed 1 November 2014.

² Amrila Rangasami, ‘Failure of Exchange Entitlements’ Theory of Famine: a Response’ (1985) 20(41) Economic and Political Weekly, 19.

certain destructive trends are rectified, the environmental situation may not lead necessarily to famine.³

In this regard it is important to look at certain patterns that emerge from recent practice. The Government of Sudan, for example, consciously delayed and obstructed the intervention of the international community to provide humanitarian assistance with regard to the famine that shook the Country during the years 1983-85. Evidence has emerged that it not only failed to promptly alert international actors on the level of gravity of the situation but that it also actively obstructed relief once the international response's machinery was put into action.⁴ The same approach seemed to have been adopted more recently by the Sudanese regime of Omar Al Bashir with regard to the humanitarian crisis that was spreading in 2003 in connection with the conflict in Darfur.⁵

The case of Sudan is not isolated and it is possible to draw similar inferences from response patterns related to other situations of famine crisis and disasters. As an example, the regime governing the Democratic People's Republic of Korea (hereinafter North Korea or DPRK) adopted a number of decisions and measures that played a key role in exacerbating the famine crisis erupting during the 1990s, in this way fuelling the process of starvation of the civilian population which led to thousands of deaths during the period of 1994-1998. More recently, in relation to the Cyclone *Nargis* that hit Myanmar in 2008, the military junta ruling the country repeatedly

³ Graham (n 1) Rangasami (n 2) 20.

⁴ Alexander De Waal, *Famine that Kills: Darfur, Sudan, 1984-1985* (Oxford University Press 2005); David Keen, *Benefits of Famine: a political economy of famine and relief in south western Sudan 1983-1989* (Princeton N.J., Princeton University Press 1994).

⁵ *Prosecutor v Bashir* (Prosecutor Application) ICC-02/05-157-AnxA (14 July 2008) para 185.

interfered and obstructed the delivery of humanitarian assistance provided by the international community to the affected population.⁶

Looking at the above examples one can more easily agree with Graham that “[f]amine is consciously political and so is its relief”.⁷ It, in fact, becomes evident that, while famine can be naturally sparked, governments can provide the kindling and play a crucial role in fuelling the crisis.

In this light, it is important to turn to international law in order to assess which tools are available in order to prevent certain actors from exacerbating the effects of such calamitous events.

2.Famine Crises through the Lens of International Criminal Law

A preliminary remark should be made. There are a number of branches of international law that regulate international actors’ rights and obligations in the event of disasters. They range from the developing International Disaster Response Law to International Humanitarian Law in case of mixed situations of disasters and armed conflicts, passing through the application of, inter alia, international human rights law, international environmental law, international refugee law and, finally, international criminal law. These bodies of law provide in certain cases a detailed set of duties and obligations facing states, international organizations, non-governmental organizations and individuals in case of disasters.

⁶ For an analysis of the situation in Myanmar from the lens of international criminal law see, in particular, Francesca Russo, ‘Disasters Through the Lens of International Criminal Law’ in Andrea de Guttry and others (eds), *International Disaster Response Law* (TMC Asser Press 2012) 456.

⁷ Graham (n 1).

The scope of this paper is not to provide an account of the different sets of obligations that these systems of law entail or to dwell on the possible interactions and conflicts that may arise between them. On the contrary this contribution is more concerned with a less documented issue confronting today's situations, namely how events such as famine crisis (and more in general disasters) that are apparently natural or beyond human control can activate individual criminal responsibility under international law.

Prior to analysing in a more in-depth manner how positive international norms can effectively ensure responsibility for those human conducts aimed at provoking or exacerbating certain natural catastrophes, it is important to clarify a number of concepts pertaining to the area of 'disasters' under international law.

A first important distinction should be made between 'natural hazard' and 'natural disaster'. According to the World Meteorological Organization (WMO), natural hazards are defined as "severe and extreme weather and climate events that occur naturally in all parts of the world".⁸ A natural hazard does not itself necessarily produce damages to individuals and livelihoods. On the contrary, it is when people's lives and livelihoods are affected that natural hazards turn into disasters. Among those variables that may trigger the shift from the first to the second condition, the role played by human-led decision-making should not be underestimated. In particular, still in accordance with the WMO, it is also "by issuing accurate forecasts and warnings in a form that is readily understood and by educating people on how to prepare against such hazards, before they become disasters, that lives and property can be protected".⁹

⁸World Meteorological Organization, http://www.wmo.int/pages/themes/hazards/index_en.html accessed 1 November 2014.

⁹ *Ibid.*

Hence, from the perspective of international law, ‘disasters’ can be the result of both nature and human actions or omissions, which, acting concurrently, may lead to the calamitous result. In particular, the International Law Commission (ILC) Draft Articles on the Protection of Persons in the Event of Disaster do not expressly exclude human action from the triggering factors of the calamitous event. According to Article 3 of the Draft Articles, disaster is defined as “a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society”.¹⁰ A similar approach has been adopted in relevant international treaties and conventions.¹¹

Thus, human action can play a role in turning a situation characterized by certain natural hazards into a disaster, particularly in the cases of ‘slow onset disasters’, such as drought and famine crisis.¹² As will be explained in the course of the article, these conditions can in some cases represent the ideal environment for the commission of certain international crimes.

Looking at international criminal law, and in particular at the definitions of the main international crimes (genocide, crimes against humanity and war

¹⁰ International Law Commission, Report of the Special Rapporteur on the protection of persons in the event of disasters’ (15 May 2014) A/CN.4/L.831, 1.

¹¹ For example in the ‘Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations’, disaster is defined at Art. 1.6 as meaning “a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or *human activity*, and whether developing suddenly or as the result of complex, long-term processes” (emphasis added). Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005).

¹² According to UN OCHA a slow-onset disaster is defined as “one that does not emerge from a single, distinct event but one that emerges gradually over time, often based on a confluence of different events”. OCHA, ‘OCHA and slow-onset emergencies’, (April 2011) para 2 http://reliefweb.int/sites/reliefweb.int/files/resources/report_36.pdf accessed 1 November 2014.

crimes) under customary law, there is no explicit clause excluding their applicability in situations of disasters. But which particular crimes may be concretely relevant in situations where human actions generate or contribute to the worsening of a natural catastrophe?

In this regard, it is essential to provide a detailed account not only of the relevant international legal framework but also to devote attention to certain concrete cases in order to understand that such an issue should not be confined to the realms of theoretical debate but also bears practical and compelling ramifications.

Indeed, international criminal law as developed after World War II under international customary law was not shaped with situations of disasters and famine crisis in mind. These events, traditionally conceived as falling beyond a person's control and determination, seem *prima facie* difficult to combine with one of the essential elements in the conceptualization of international crimes, namely the attribution of responsibility to an individual or, in other words, his or her criminal intent (*mens rea*).

However, since the first conceptualizations of international crimes, a tendency has emerged concerning the criminalization of conducts that use the effects of events that are apparently natural for the realization of a criminal plan. In particular, the United Nations Convention Against the Crime of Genocide of 1948 (hereinafter Genocide Convention) defined Genocide not only as involving the act of killing but also as those measures intended at deliberately inflicting on the protected groups conditions of life calculated to bring about its physical destruction in whole or in part. That definition was recently included in Article 6 of the Statute of the International Criminal Court (hereinafter ICC Statute). Furthermore, the ICC Elements of Crimes have interpreted the expression 'conditions of life'

as including, but not necessarily restricted to, the “deliberate deprivation of resources indispensable for survival, such as food and medical services, or systematic expulsions from home”.¹³

Such important developments in the legal framework are mostly related to a recurring trend that seems to be emerging from the practice.¹⁴ In this light, the situation in Darfur represents the latest example of a series of policies of state-led elimination that took place in the past. For examples, one can easily think back to the actions of the Ottoman Empire regime during World War I to deprive Armenian populations of food during forced marches with the intent to undermine the capacity to sustain group life, or the conditions to which Jews were exposed while confined in ghettos during the Holocaust throughout World War II.

These examples refer to particular circumstances where members of a particular group, although not targeted by an immediate policy of extermination, are subjected to conditions of life calculated to bring about the same result over a prolonged period of time.

Also the crime against humanity of extermination can be applicable to a situation where certain individuals are using disasters and famine crisis as tools to pursue criminal policies. In particular, the ICC Statute, which has conceptualised the notion of crimes against humanity as emerging from customary international law, defines at Article 7(2)(b) extermination as including “the intentional inflictions of conditions of life, *inter alia* the

¹³ International Criminal Court, ‘Elements of Crimes’, Article 6(c), <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> accessed 1 November 2014.

¹⁴ Physicians for Human Rights, ‘Darfur: Assault on Survival’ (2006) Cambridge, 39 https://s3.amazonaws.com/PHR_Reports/darfur-assault-on-survival.pdf accessed 1 November 2014.

deprivation of access to food and medicine, calculated to bring about the destruction of part of a population” (emphasis added). In addition, the ICC Elements of Crimes suggest, with regard to extermination, that the conduct could be committed by different methods of killing, either directly or *indirectly*.¹⁵

Finally, in relation to cases where natural disaster are associated with situations of armed conflicts, the ICC Statute criminalises as a war crime the action of “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.¹⁶

These definitions tend to suggest that international crimes can be perpetrated also through indirect means. It means that international criminal law does not circumscribe the commission of international crimes to situations where certain violations are the immediate and direct consequences of the criminal actions and policies of the perpetrators. In relation to genocide, crimes against humanity and war crimes, international customary law seems on the contrary to pave the way for criminalising also those actions that intentionally and deliberately use certain events to pursue the criminal plans of the perpetrators.

It is important now to turn to some practical examples in order to show how competent international bodies have from time to time included among such criminal actions those policies aimed at fuelling and exacerbating famine

¹⁵ International Criminal Court, ‘Elements of Crimes’, Article 7(1)(b), <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> accessed 1 November 2014.

¹⁶ See Rome Statute of the International Criminal Court (adopted 18 July 1998, entered into force 1 July 2002), Article 8(2)(b)(xxv).

crisis together with obstructing the international delivery of relief. This will raise awareness of the fact that the application of international criminal law to situations of disasters should not be considered remote.

3.The Case of Darfur, Sudan

The confrontation in Darfur between the Government of Sudan and the rebel groups of JEM (Justice and Equality Movement) and SLM/A (Sudan Liberation Movement/Army) which escalated into an armed conflict in 2003 following a number of attacks on government offices and installations, has rapidly caused a collapse in agriculture and a drastic increase of the price of food in local markets. This situation quickly deteriorated into a hunger crisis resembling the famines that characterized the region in the 1980s.¹⁷

For many experts and scholars familiar with the Sudanese context there always has been a strong interaction between environmental conditions and social and political motives that have fuelled inter-ethnic conflict and tensions in Sudan. In particular, it seems that, by the 1980s, “the intertwined processes of desertification and famine aggravated disputes over land and water and intensified the socially constructed, racially tinged division between Arabs and other Africans”.¹⁸ According to these authors, understanding the interconnection between environmental and land issues, and social conflicts from the other is crucial in order to explain the policy of

¹⁷ Feinstein International Famine Center, ‘Darfur – Livelihoods under Siege’ (June 2005) Tufts University, Medford, USA, 18 http://www.sarfn.org/documents/d0001277/PNADC475_Darfur_Febr2005.pdf accessed 1 November 2014; UNICEF ‘Averting Famine in Darfur’ Newslines (9 March 2005) http://www.unicef.org/infobycountry/sudan_25447.html accessed 1 November 2014.

¹⁸John Hagan and Joshua Kaiser, ‘The displaced and dispossessed of Darfur: explaining the sources of a continuing state-led Genocide’ (2011) 62 *The British Journal of Sociology*, 5.

dispossession and discrimination that characterized the Sudanese regimes both during the 1980s and in relation to the more recent conflict in Darfur.

Indeed, during the 1980s, desertification and the reduction in rainfall alone changed the natural environment.¹⁹ The severe drought and famine that plagued Sudan from 1980 to around 1984 intensified migration patterns, a factor that led to tribal clashes. These conditions are also present in the conflict that flared up in Darfur in 2003. In this regard, there are many opinions that attribute responsibility to the Sudanese government for taking special advantage of the climate of insecurity and vulnerability that especially the so-called ‘African tribes’²⁰ in particular experienced in those periods. Notably, many reports and accounts have highlighted a clear pattern of attacks systematically targeting food and water supplies. These attacks have been linked to the intention of displacing African tribes from their farms and villages into areas subjected to harsh climatic conditions.²¹

As stated by Gottfredson and Hirschi, “explanations of state-led elimination by displacement in Darfur must attend to the motive and intent of the perpetrators and the vulnerability, and especially the food and water

¹⁹UNEP ‘Sudan: Post-Conflict Environmental Assessment’ (2007) http://postconflict.unep.ch/publications/UNEP_Sudan.pdf accessed 1 November 2014.

²⁰The importance of the dynamics governing the relationship between African tribes and the ‘Arab ruling tribes’ as triggering factor for the conflict in Darfur has been highlighted also by the International Commission of Inquiry on Darfur, according to which “[i]n the context of the present conflict in Darfur, and in the years preceding it, the distinction between so-called African and Arab tribes has come to the forefront, and the tribal identity of individuals has increased in significance. The distinction stems, to a large extent, from the cumulative effects of marginalization, competing economic interests and, more recently, from the political polarization which has engulfed the region. The ‘Arab’ and ‘African’ distinction that was always more of a passive distinction in the past has now become the reason for standing on different sides of the political divide. The perception of one’s self and of others plays a key role in this context”. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, (25 January 2005) para 60, http://www.un.org/news/dh/sudan/com_inq_darfur.pdf accessed 1 November 2014.

²¹Hagan and Kaiser (n 18). See also Report of the International Commission of Inquiry on Darfur (n 20) para 195; *Prosecutor v Bashir* (n 5) para 177.

insecurity, of the victims. It can be argued that, when it comes to crime, vulnerability is opportunity and that opportunity itself provides the motivation that shapes intent”.²²

It is important to turn to the question of whether a genocidal policy in Darfur was pursued at governmental level in relation to the counterinsurgency campaign implemented by the Government of Sudan in 2003. In this regard, the notion of genocide as an ‘unfolding process’ requires a more progressive interpretation of the notion of elimination of certain protected groups. According to this view, the definition of genocidal policy cannot be limited only to practices such as killing and extermination but should also encompass patterns of elimination through marginalization, displacement and confinement of certain targeted groups in desert and dire areas where they can become extremely vulnerable to starvation, dehydration, poor hygienic conditions and disease. This is precisely the situation that today millions of Darfurians face while stranded in Sudanese internal displacement camps or refugee camps in Chad.

Attacks on food and water supplies as weapons for displacement and long-term elimination have been a distinctive feature of the counter-insurgency campaign implemented by the Government of Sudan with the support of the irregular militia of Janjaweed against several villages of Darfur. In particular, certain scholars have argued how “the widespread and systematic poisoning of wells is perhaps the most striking evidence of the intent of jointly attacking [...] to dislodge and displace Black African groups from their villages and farms, but the further evidence of killing, looting, burning, and, more generally, of completely destroying these villages with scorched-

²² Michael R. Gottfredson and Travis Hirschi, *A General Theory of Crime* (California Stanford University Press 1990) 24.

earth tactics fills out the picture of the intent to exterminate and eliminate these groups”.²³ This is probably the reason that an argument has been made according to which the policy implemented by the Sudanese Government in Darfur constitutes the most striking example of the overlapping explanatory importance of famine and genocide to one another.²⁴ In this light, the view adopted by an expert of Sudan such as Alex de Waal, who has characterized the governmental policies during the 1980s’ conflict as ‘famine crimes as well as crimes of genocide’, might assume a certain relevance in Darfur today.²⁵ In particular, according to de Waal, “ethnographers of famine and genocide have much to learn from one another [...] In Darfur today, where much violence is directed at destroying livelihoods [...] the convergence is evident”.²⁶

In order to find out whether these arguments, expressed and supported mainly by sociologists and political scientists, can be substantiated from the point of view of international law, it is important to turn our attention to the legal evaluations and findings that competent bodies have expressed with regard to the 2003 armed conflict in Darfur. In particular, from one side, there seems to be little discussion about the fact that the dispossession, displacement and confinement of certain African tribes in dire and desert areas at risk of famine are the consequences of the policy implemented by the Government of Sudan in its counter-insurgency campaign against rebel groups in Darfur. On the other side, whether this link may unveil a conduct amounting to an international crime – and whether in particular this conduct may amount to genocide or crime against humanity – has been a matter of debate amongst different international bodies.

²³ Hagan and Kaiser (n 18) 20.

²⁴ *Ibid* [10].

²⁵ Alexander De Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa* (James Currey Publishers 1997).

²⁶ De Waal, (n 4) 12.

In particular, the United Nations International Commission of Inquiry (COI) on Darfur – set up pursuant to the United Nations Security Council Resolution 1564/2004 – was established with international criminal law and the issue of genocide in mind. Its mandate was “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable”.²⁷

The Commission extensively analysed in its report the policy of dispossession and displacement of African tribes and the conditions of life to which civilians were subjected to in desert areas and IDPs camps. It has done so particularly while approaching the question of whether genocide had been perpetrated in Darfur. In particular, the Commission recognized that attacks on food and water supplies as weapons for displacement of certain African tribes coupled with the creation of an hostile environment where these tribes, once displaced, became vulnerable to drought and famine were and still are a distinctive feature of the Government’s counter-insurgency campaign. However, it determined that these actions could not be considered as committed pursuant to a genocidal policy.

The Commission argued in fact that, despite the seriousness of the offences documented, the extremely high threshold set up in order to determine the mental element pervading the crime of genocide – namely, the intention to physically destroy in whole or in part a specific protected group – was not met.²⁸ “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

²⁷ Report of the International Commission of Inquiry on Darfur (n 20) para 2.

²⁸ Report of the International Commission of Inquiry on Darfur (n 20) paras 507-522.

and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare”.²⁹

The same reasoning has been applied with regard to the effect of the policies of displacement in dire and desert areas and to the conditions of life experimented in IDP camps. In this regard, the Commission found that the treatment and conditions of IDP camps, while envisaging a conduct that may be in breach of the Sudanese Government’s obligations under international human rights law, could not be indicative of any intent to annihilate a group and thus amount to the crime of genocide.³⁰

As the Commission stated, “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. Suffice it is to note that the Government of Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicines and logistical assistance (construction of hospitals, cooking facilities, latrines, etc.)”.³¹

Thus, the Commission dismissed the claim according to which the Government of Sudan had pursued *a policy of genocide* in Darfur. This, however, does not automatically rule out from its point of view the possibility “that in some instances individuals, including Government officials, may commit acts with genocidal intent”. Whether this was the case in Darfur, the Commission added, is a determination that only a competent court can make on a case-by-case basis.³²

²⁹ *Ibid* [4].

³⁰ *Ibid* [para 515].

³¹ *Ibid*.

³² *Ibid* [paras 518-20].

Indeed, one of the merits of the Commission led by Professor Cassese has been to highlight, from a legal point of view, the difference between the existence of a State-led genocidal policy and the commission of genocide as a crime perpetrated by an individual, regardless of his or her links with the State apparatus. The Commission seems to argue the existence of the latter rather than the former in relation to the situation in Sudan, a view that has not been shared by the ICC Prosecutor at the time, Luis Moreno Campo. The situation in Sudan was in fact referred to the ICC by Security Council Resolution 1593/2005. By triggering the jurisdiction of the Court, the Council implemented one of the final recommendations included in the Commission of Inquiry's report. Nevertheless, the ICC Prosecutor apparently did not share the Commissions' opinion on genocide. By requesting an arrest warrant for Sudanese President Omar Al Bashir charging him with three counts of genocide, the Prosecutor seems in fact implicitly to believe in the existence of a genocidal policy implemented at a State level, as it would be difficult to consider the conduct of the President of Sudan as separate from that of its Government.

The interconnection between famines and harsh environmental conditions and the crime of genocide seems to represent an important element in the Prosecutor's request, in particular in relation to the count of "deliberately inflicting conditions of life calculated to bring about the physical destruction of a group". In particular, the Prosecutor draws attention to the fact that "deliberations preceding adoption of the Genocide Convention concluded that '*[m]ass displacements of populations from one region to another [...] do not constitute genocide [...] unless the operation were attended by such circumstances as to lead to the death of the whole or part of the displaced population. If for example, people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation,*

thirst, hunger, cold and epidemics”³³

On that basis, the ICC Prosecutor determined that “Al Bashir’s forces pursued thousands of fleeing members of the target groups, and displaced them into harsh desert conditions, with no potable water or animals for food, milk or transport, and where, in the absence of assistance, many succumbed to starvation, dehydration, disease and death”.³⁴ According to some scholars, while “previous cases have concerned conditions which were established by the perpetrator and then imposed on the victims, for example starvation diet and inadequate medical care, [...] here, the Prosecutor holds the perpetrator [is] responsible for forcing the victims into *very harsh conditions in the natural world*” (emphasis added).³⁵

According to the Prosecutor and again in opposition to the Commission’s findings, the treatment of IDPs and the conditions of IDP camps also amounts to genocide. Looking at the high mortality rates in the camps during the year 2003, it is the opinion of the Prosecutor that the government, by taking advantage of certain hostile environmental conditions, deliberately inflicted conditions of life calculated to bring about the physical destruction of the targeted groups.³⁶

Such stance in a certain way contradicts the opinion of a number of scholars on the difficulty to prove the causality nexus between certain kinds of acts (such as those described above) and the intent to physically destroy a particular group.³⁷ In particular, an opinion has been expressed that “the failure to provide adequate accommodation, shelter, food, water, medical

³³ *Prosecutor v. Bashir* (n 5) para 173.

³⁴ *Ibid* [para 177].

³⁵ Andrew T. Cayley, ‘The Prosecutor’s Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide’ (2008) 6 *Journal of International Criminal Justice*, 834.

³⁶ *Prosecutor v Bashir* (n 5) para 185.

³⁷ Russo (n 6) 445.

care or hygienic sanitation facilities will not amount to genocide if the deprivation is not so severe as to contribute to the destruction of the group. Living conditions, which may be inadequate by any number of standards may, nevertheless, be adequate for the survival of the group”.³⁸ On the contrary, the Al Bashir Application seems to allege that, while such acts do not produce the immediate elimination of members of the targeted groups, their purpose leads to the groups' physical destruction.

The Application goes on to describe in the detail the conditions experienced by Darfurians in the IDP camps as well as a series of political and legal measures adopted by the Sudanese Government to prevent or obstruct the delivery of humanitarian assistance by international organizations and NGOs.³⁹ Nonetheless, numerous practitioners familiar with the situation in Darfur have dismissed the Prosecutor's stance.⁴⁰ In particular, the former *Médecins sans Frontières* President Rony Brauman has described the Prosecutor's assertion that the camps are the sites of on-going genocide as 'insane'.

The Prosecutor's decision to charge Al Bashir with genocide was initially dismissed by the ICC Pre-Trial Chamber, before its ruling was reversed on appeal.⁴¹ As a result, the ICC Pre-Trial Chamber finally ordered the arrest warrant for offences including three counts of genocide, and determined that “the conditions of life inflicted on the Fur, Masaleit and Zaghawa groups [in Darfur] were calculated to bring about the physical destruction of a part of

³⁸ Cayley (n 35) 835.

³⁹ *Prosecutor v Bashir* (n 5) para 189.

⁴⁰ Rony Brauman, 'The ICC's Bashir Indictment: Law against Peace' (2008) World Politics Review <http://www.worldpoliticsreview.com/articles/2471/the-iccs-bashir-indictment-law-against-peace> accessed 1 November 2014; Alexandre De Waal, 'A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir, Making Sense of Darfur', (23 February 2009) Politics Forum.co.uk <http://www.politicsforum.co.uk/forum/viewtopic.php?f=105&t=36149> accessed 1 November 2014.

⁴¹ *Prosecutor v Bashir*, (Judgment in the Sentencing Appeals) ICC-02/05-01/09-OA (3 February 2010) para 30.

those ethnic groups’ and that ‘forcible transfer by resettlement by member of other tribes, [was] committed in furtherance of the genocidal policy’.

Whether or not the policy implemented by the Government of Sudan in Darfur amounts to the crime of genocide, the case of Sudan represents an important example of how measures aimed at fuelling and exacerbating the effects of famine and drought crisis on the civilian population can be tackled from an international criminal law perspective. Leaving aside the debate around genocide, it should be noted that other international crimes, whose applicability to the conduct of the Sudanese regime appears less controversial, are equally relevant for the purpose of the present debate. In this regard, it is worth mentioning that the abovementioned actions have been considered in the Prosecutor’s Application as also amounting to the crime against humanity of extermination.⁴²

4. The Case of North Korea

The issue of how inadequate responses to disasters may be associated with the criminal conduct of individuals and states’ representatives has received further attention with the publication of the Report of the International Commission of Inquiry (COI) on North Korea in February 2014.

The COI - established in March 2013 by the United Nations Human Rights Council “to investigate the systematic, widespread and grave violations of human rights in the State, with a view to ensuring full accountability, in particular, for violations that may amount to crimes against humanity” – determined in its report both the State’s responsibility and individual criminal liability of its leaders for a number of violations, including the manifest violation of the right to food and the practice of starvation of the

⁴²*Prosecutor v Bashir* (n 5) para 235.

civilian population during the famine of the 1990s.⁴³

The North Korean famine (which together with the accompanying general economic crisis were known as the ‘Arduous March’) took place in North Korea from around 1994 to 1998. Such calamitous events have been linked by historians to a variety of different causes.⁴⁴ First of all, the loss of Soviet support due to the fall of the Berlin Wall caused the food production and imports to decline rapidly. In addition, a series of floods and droughts played a crucial role in exacerbating the crisis. North Korea’s national system proved too inflexible to effectively curtail the disaster. Estimates of the death toll vary widely: out of a total population of approximately 22 million, it is estimated that between 900,000 and 3,500,000 people died as a result of starvation or hunger-related diseases.⁴⁵

In the ‘Report of the detailed findings’ annexed to its main report, the Commission – in the section dedicated to the policy of ‘starvation’ – determined that North Korea officials have committed the crimes against humanity of murder, extermination and other inhuman acts “by implementing actions, decisions and policies known to have led to mass starvation, death by starvation and serious mental and physical injury”.⁴⁶

For the purpose of this paper it is important to focus the attention on the

⁴³ UNHRC, ‘Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea’ (7 February 2014) A/HRC/25/63 <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx> accessed 1 November 2014.

⁴⁴ For a comprehensive review of the main causes and factors that led to the crisis see, in particular, Marcus Noland – Sherman Robinson – Tao Wang, ‘Famine in North Korea: Causes and Cures’ (1999) Peterson Institute for International Economics Working Paper Series <http://www.iie.com/publications/wp/99-2.pdf> accessed 1 November 2014; Stephan Haggard and Marcus Noland, *Famine in North Korea: markets, aid and reform* (Columbia University Press 2007).

⁴⁵ Noland, Robinson and Wang (n 44) 2.

⁴⁶ UNHRC, ‘Detailed Findings annexed to the Report of the International Commission of Inquiry on North Korea to HRC’ (7 February 2014) A/HRC/25/63, 1115 <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx> accessed 1 November 2014.

arguments developed by the Commission in relation to the crime of extermination. Firstly, it is interesting to note how the Commission considers the issue of the mental element required for establishing individual criminal responsibility in relation to a phenomenon, such as the starvation of the civilian population as a consequence of the famine crisis, that cannot be entirely dependent on human-led policies. In this regard, the Commission argues how, while “it is sufficient that the perpetrators deprive the population of necessary food in calculated awareness that these conditions will cause mass deaths in the ordinary course of events [...] mere recklessness, such as decisions taken despite full knowledge of the risk that they would cause or aggravate mass starvation and deaths, would not meet the threshold of extermination as a crime against humanity”.⁴⁷

Nonetheless, the Commission’s report points out that the food shortage and mass starvation that caused thousands of deaths during the famine of the 1990s are linked to a series of governmental policies intrinsically related to the nature of North Korea’s regime. In particular, the Commission notices how, by the end of 1993, North Korea’s authorities were perfectly aware that there was no external actor capable of providing the aid necessary to prevent starvation and consequent mass deaths. With a famine already underway, the DPRK high-ranking officials “adopted a series of decisions and policies that violated international law, aggravated mass starvation and increased the death toll of victims”.⁴⁸ In particular, the Commission refers to a series of measures scrupulously implemented at a governmental level which include providing misleading information to humanitarian actors, restricting the delivery of humanitarian aid, diverting funds in order to cover questionable military expenses and distributing food in an unequal and discriminatory manner.

⁴⁷ *Ibid* [para 1118].

⁴⁸ *Ibid* [para1120].

It is interesting how the Commission, despite acknowledging that it could not determine that DPRK officials acted with the subjective purpose of starving the civilian population to death, nevertheless considered the level of their criminal intent sufficient for the crime against humanity of extermination. According to the report, “the authorities were fully aware that a number of decisions they took in the 1990s would greatly aggravate mass starvation and the related death toll in the ordinary course of events”. They nevertheless took these decisions because they prioritized the preservation of the political system of the DPRK, the Supreme Leader and the elites surrounding him”.⁴⁹ The circumstances in which these decisions were taken notwithstanding the awareness of their impact on the civilian population, entails a level of responsibility that goes beyond mere recklessness and, according to the Commission, meets the threshold of criminal intent required for the crime against humanity of extermination.

Another important remark made by the Commission is related to the idea that providing misleading information to humanitarian actors by authorities that are aware of the extremely dire conditions experienced by the civilian population can amount to the crime against humanity of extermination if it causes mass deaths. This view seems to find echoes also in a number of authors and experts’ opinions.⁵⁰

In its concluding remarks, while examining the widespread and systematic character of the attack against the civilian population as a contextual element for a crime against humanity, the Commission recalls that an attack against a civilian population, which gives rise to crimes against humanity,

⁴⁹ *Ibid* [para1121].

⁵⁰ *Ibid* [para 1122]. For similar remarks see ‘Report of the United Nations Panel of Experts on Accountability in Sri Lanka’ (31 March 2011) paras 212, 251 http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf accessed 1 November 2014; Christa Rottensteiner, ‘The denial of humanitarian assistance as a crime under international law’ (1999) International Review of the Red Cross <http://www.icrc.org/eng/resources/documents/misc/57jq32.htm> accessed 1 November 2014.

does not need to be perpetrated using armed force. It is sufficient – as also stated by the ICTY in *Kunarac* – that it encompasses the mistreatment of the population.⁵¹ In the case of North Korea, this mistreatment took the form of state decisions, policies and actions, which – implemented on a systematic basis over an extended and critical period – aggravated the starvation (and the subsequent death toll) originated by a negative regional economic situation in conjunction with natural causes. In this regard the COI observes that “the underlying objective of the State policy may not have been to starve the population”.⁵² This is because crimes against humanity do not require that the State policy underlying them is driven by the sole and ultimate purpose of harming a civilian population. In the words of the Commission, “it is in the nature of crimes against humanity as ‘state crimes’ that they are often unscrupulously committed as a means by which to pursue ulterior political objectives of the state”. In the view of the Commission, it is sufficient that the senior officials setting the State policy were fully aware of the direct causal relationship between the State policy and the harm done through the effects of aggravated starvation and famine.

The report of the Commission of Inquiry on North Korea not only represents the first comprehensive investigation that sheds light on a situation that for too long has remained on the sidelines of human rights mechanisms’ radars. It also represents one of the few examples of the application by an international monitoring body of international criminal law standards to situations of famine and drought crisis that are not linked to armed conflict. Thus, its findings should be considered particularly relevant in light of a comprehensive approach to situations of disaster where elements of international individual criminal responsibility come into play.

⁵¹Detailed Findings annexed to the Report of the International Commission of Inquiry on North Korea (n 46) para 1133. See *Prosecutor v Kunarac et al* (Judgment in Sentencing Appeals) IT-96-23& IT-96-23/1-A (12 June 2002) para 86.

⁵²*Ibid* [para 1135].

Conclusions

The examples of Darfur and North Korea have demonstrated how disasters, such as famine and drought crisis, may be used by certain regimes as catalysts for their policies of displacement, dispossession and elimination in order to preserve a given political system or elite. These actions, as underlined by certain competent international bodies, may amount to international crimes and trigger the responsibility of individuals.

In this regard, future models of response to disasters should take into account the potential and advantages that international criminal law offers as tools to tackle the human component in certain situations of disaster.

The first advantage relates to the pivotal role that criminal investigations and prosecutions can play in deterring certain policy makers from adopting measures aimed at exacerbating and fuelling natural catastrophes for the sake of maintaining their supremacy and control. As it has been shown, international criminal provisions can be applicable to these kinds of situations. As a result, political leaders and statesmen should be aware that measures adopted by certain regimes pursuant to policies intentionally directed at triggering or aggravating disasters and resulting in the death and suffering of civilians can potentially fulfil the requirements set out for genocide, crimes against humanity and war crimes and trigger judicial investigation and prosecution both at national and international levels.

The second advantage concerns the use of international criminal law as a window for the international community to intervene in situations of disasters where the affected State has put obstacles on any form of external interference. Customary international law does not allow for foreign intervention in situations of disasters when the consent of the affected State

is missing. In this regard, States, within the context of the UN General Assembly, have restricted the applicability of the Responsibility to Protect (R2P) framework to situations that do not encompass disasters, a stance that has been implicitly endorsed by the United Nations Secretary General in its implementing report.⁵³ Different is the case where it is demonstrated that the State has failed to protect its citizens in the event of disaster by perpetrating international crimes. Under the framework of the Responsibility to Protect (R2P), where a State has failed to protect its citizens by committing genocide, war crimes, crimes against humanity and ethnic cleansing the international community is entitled to react with coercive measures. It can even use force and military intervene with the authorisation of the Security Council as last resort.⁵⁴ Drawing a link between disasters and the commission of these crimes may thus enable international actors and stakeholders to legally intervene in the territory of a reticent State in order to provide humanitarian relief.

This paper advocates for a more comprehensive approach to disasters that would take into account potential elements of international criminal responsibility. Such an approach is required not only because of the role that human action can sometimes play in fuelling or exacerbating disasters but also in light of the potential advantages that the application of international criminal law paradigms can bring to the efforts of the international community to protect civilians and provide relief.

⁵³ UNGA, '2005 World Summit Outcome' A/RES/60/1 (24 October 2005); UNGA, 'Implementing the Responsibility to Protect, Report of the Secretary General' A/63/677, 12 (January 2009); International Bar Association, 'The responsibility to protect in the case of humanitarian crises: an emerging norm of international law?' (10 December 2008) http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/Responsibility_to_Protect.aspx accessed 1 November 2014.

⁵⁴ UNGA, '2005 World Summit Outcome' (n 53).



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