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Ray Murphy

UN must refer atrocities to international court

The situation in the Darfur region of Sudan poses a serious challenge for the UN, the African Union, and the International Criminal Court (ICC). A UN commission has concluded that systematic, government-backed violence is not genocide, but that there is evidence of crimes against humanity with an ethnic dimension.

Although Sudan has not ratified the Rome statute of the ICC, the court may, nevertheless, acquire jurisdiction to carry out an investigation there if the UN Security Council votes unanimously (under chapter VII of the charter) to refer the issue to it. That is, however, problematic.

The US has consistently opposed the new court, preferring instead to see the creation of special ad hoc tribunals. China, Russia and France all have political and economic reasons to oppose sanctions and intervention in Sudan. Internal squabbles and lack of resources have left the African Union emasculated. The UN has been consistently sidelined by the narrow political agendas of its most powerful members.

But a refusal by the Security Council to refer the situation to the ICC would be a betrayal of the victims of atrocities in Darfur, and a further blow to the power and reputation of the UN. It would also be a serious setback for the court itself.

According to the recent high-level report on UN reform, the Report on Threats, Challenges and Change, commissioned by the Secretary General, Mr Kofi Annan, military intervention for human rights protection may be necessary as a last resort.

It is the responsibility of the Security Council to authorise such action in the event of genocide or other large-scale killing, ethnic cleansing or other violations of international humanitarian law which a sovereign government proves powerless or unwilling to prevent.

Intervention in Darfur, by these criteria, would not only be justified, but long overdue.

From a humanitarian point of view, the key question is not the classification of the crimes taking place in Darfur, but how to prevent further atrocities. Nevertheless, it is important to determine the nature of the atrocities, especially when victims seek redress in international law. The prosecution of the perpetrators of international crimes must be based on objective investigation and analysis, not narrow political agendas or ill-informed emotional reactions.

Genocide is taken to mean the commission of certain acts with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Proving genocide in any circumstances is difficult. It is the intentional killing, destruction, or extermination, of entire groups or members of a group, and although the term is commonly invoked today, its essential characteristics are often not understood. The definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 has been followed in later statutes, including the Rome statute of the ICC.

But where acts do not meet the high threshold of intent required under the definition of genocide, they may still constitute crimes against humanity or war crimes. Those unhappy with the findings of the UN commission should bear in mind that their specific legal classification does not change the international community's responsibility to prevent such atrocities.

A crime against humanity was defined in the charter of the International Military Tribunal at Nuremberg. It envisaged the prosecution and punishment of atrocities that are so abhorrent that they shock our senses of human dignity. And it is significant that the charter recognised certain acts perpetrated by a regime against its own civilian population as crimes against humanity. These can constitute any number of enumerated acts, including murder, enslavement, deportation or forcible transfer of population, torture, rape, or any other form of sexual violence of comparable gravity. These must be committed as part of a widespread or systematic attack directed against any civilian population.

War crimes are crimes committed in violation of international humanitarian law applicable during armed conflict. At the outset then, one of the most important issues to be determined when investigating war crimes is whether or not there is or was an armed conflict, and then whether this was international or internal in nature. This is not a straight-forward question. In any event, there is evidence of atrocities by all sides in this conflict.

The ICC offers an efficient means of prosecuting the perpetrators. Although prosecutions have done little to facilitate reconciliation in Rwanda or the former Yugoslavia, making those most responsible for international crimes accountable will deter future criminality there and elsewhere.

But many states still oppose the principle of humanitarian intervention. This is not surprising, as most cases of so-called humanitarian intervention have been motivated by other political agendas.

Why then is the United States invoking the term genocide for what is occurring in Sudan? It is difficult to accept that the motivation is simply the wellbeing of the local non-Arab population. What is certain is that a few troops and monitors from the African Union in a place the size of Darfur will be of little value. The government-supported Janjaweed are resilient fighters whose immediate disbandment, with free access to the area to relieve the humanitarian crisis, has been called for by Amnesty International.

The UN commission to determine the nature of the crimes is useful, but those being killed, raped and ethnically cleansed care little for the legal classification of individual atrocities. Prevarication by members of the UN Security Council in the face of such a crisis is not an acceptable option.

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