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CRIMES AGAINST HUMANITY AND IMPENDING GENOCIDE IN GAMBELLA

Legal Memorandum

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CRIMES AGAINST HUMANITY AND IMPENDING GENOCIDE IN GAMBELLA

Executive Summary

The Ethiopian government and Highlander militias have undertaken a sustained campaign of violence and discrimination against the Anuak people of Ethiopia. Numerous reports from international organizations, NGOs, and media sources describe the widespread killing and raping of Anuak civilians and the destruction of Anuak villages. The sheer magnitude of these acts, coupled with the continuing Ethiopian military presence in Gambella, strongly implies the presence of a state policy to destroy or weaken the Anuak community. Further, some witnesses have directly implicated Ethiopian government officials in the formation of such a policy.

The Rome Statute of the International Criminal Court establishes the three elements that constitute crimes against humanity: 1) the perpetration of an enumerated act, 2) committed as part of a widespread or systematic attack directed against civilians, 3) with the perpetrators having knowledge of the widespread or systematic attack. Although Ethiopia has not ratified the Rome Statute, crimes against humanity constitute customary international law and are thus applicable to, and enforceable upon, all states. Based on a careful application of international legal standards to the crimes committed, it appears that a *prima facie* case exists against the Ethiopian government for committing the crimes against humanity of murder, deportation or forcible transfer of a population, rape, and persecution of a group.

If the Ethiopian government continues its abuses against the Anuak people, a determination of genocide on the part of the Ethiopian government may also be found. The criteria for genocide are 1) The perpetration of one of five enumerated acts, 2) with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. It appears that the Ethiopian government has committed three of the five crimes enumerated in the Genocide Convention: 1) killing members of the group, 2) causing serious bodily or mental harm, and 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. If the actions of the Ethiopian government can be found to be systematic in nature and directed against the Anuak with the intent to partially or wholly eliminate the group, the requirements for genocide will be fully satisfied.

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CRIMES AGAINST HUMANITY AND IMPENDING GENOCIDE IN GAMBELLA

Statement of Purpose

This memorandum will apply the facts of the conflict in the Ethiopian region of Gambella and evaluate whether crimes against humanity have been committed by the Ethiopian Government. In addition, this memorandum will examine whether the crimes committed in the conflict satisfy the legal requirements for genocide.

Introduction

The Anuak people are a minority group in Ethiopia but the predominant landowners in the southwestern Gambella region. Since the fall of the Dergue regime in 1991, the Anuak's relationship with the central government and "Highlander" (e.g., Tigray) populations has been strained, due to concerns over land encroachment and regional autonomy. In December 2003, the conflict turned violent, as the ambush and killing of several United Nations and Ethiopian government officials prompted open attacks on Anuak in the Gambella region. Violence and regional instability have continued, leaving hundreds dead and thousands displaced.

International Law and Crimes Against Humanity

Crimes against humanity have existed under international law since the adoption of the Nuremberg Charter in 1945.¹ More recently, the charters of the International Criminal Tribunal for the former Yugoslavia (Yugoslav Tribunal)² and the International Criminal Tribunal for Rwanda (Rwanda Tribunal)³ each established definitions for crimes against humanity for their respective jurisdictions. Currently, the Rome Statute of the International Criminal Court ("Rome Statute")⁴ defines the elements for crimes against humanity.

¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, 82 U.N.T.S. 280, entered into force Aug. 8, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

² Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), available at <http://www.un.org/icty/legaldoc/index.htm>.

³ Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994), available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html>.

⁴ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute].

The Rome Statute and Crimes Against Humanity

Article 7(1) of the Rome Statute generally follows the precedent of the Nuremberg Charter, the Yugoslav Tribunal, and the Rwanda Tribunal and defines crimes against humanity as follows:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) Torture;*
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- (i) Enforced disappearance of persons;*
- (j) The crime of apartheid;*
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁵*

This language gives rise to three distinct elements. First, the perpetrator must commit one of the enumerated acts. Second, the Rome Statute requires the act to be committed as a part of a widespread or systematic attack directed at

⁵ *Id.*, art. 7(1).

civilians. Third, the perpetrator must have knowledge of the attack. Each of these elements must be present for the act to constitute a crime against humanity.

Applicability to the Government of Ethiopia

The Ethiopian government has not ratified the Rome Statute. Yet crimes against humanity are treated as *jus cogens* – an absolute norm of international law that is binding on all states.⁶ (Actions such as slavery and genocide are other examples of *jus cogens*.) In other words, due merely to its existence as a state, Ethiopia must abide by international law that prohibits crimes against humanity. Accordingly, the Ethiopian government cannot rely on its failure to ratify the Rome Statute as justification for any acts that appear to constitute crimes against humanity.

The Rome Statute Applied to the Conflict in Gambella

As indicated previously in this memorandum, the crimes committed by the Ethiopian government against the Anuak must satisfy the three requisite elements of the Rome Statute.

Has the Ethiopian government perpetrated any of the acts enumerated in the Rome Statute against the Anuak people?

The Ethiopian government's discrimination against the Anuak people of Gambella and the violence in the region beginning in December 2003 constitute crimes against humanity under Article 7(1) of the Rome Statute. Specifically, the facts of the current conflict in Gambella indicate that the Ethiopian government may have committed the crimes against humanity of murder, deportation or forcible transfer of a population, rape, and persecution against an identifiable group.

Murder: The legal definition of murder under the Rome Statute is relatively straightforward. According to the Report of the First Session of the Assembly of States Parties to the Rome Statute ("First Session Report"),⁷ the

⁶ See generally M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, 1999, pp. 210-217; *Prosecutor v. Furundzija*, No. IT-95-17/1, para. 227, Dec. 10, 1998 ("In many areas, the [Rome] Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of states.").

⁷ Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, Sept. 10, 2002, Doc. No. ICC-ASP/1/3, [hereinafter First Session Report].

perpetrator must kill one or more persons.⁸ The term “kill” is interchangeable with “caused death.”⁹ Both the Rwanda Tribunal and the Yugoslav Tribunal further note that the killing must occur through “an unlawful act or omission of the accused.”¹⁰

Multiple non-governmental organizations (NGOs) have reported similar accounts of Ethiopian military forces and Highlander militias killing Anuak in the Gambella region since December 2003. A joint report released in February 2004 by Survivors’ Rights International and Genocide Watch, based on interviews of eyewitnesses, field research, and investigation into mass graves, destroyed property, and other physical results of the violence, assessed the actions of the Ethiopian government in the Gambella region. The report found that Ethiopian military personnel and Highlander militias killed 424 Anuak in Gambella on December 13, 2003 after surrounding a number of villages and proceeding into the homes of Anuak citizens.¹¹

Further, the World Organization Against Torture notes continuing incidents of smaller-scale killings and puts the total number of dead at over 1,100.¹² An October 2004, Genocide Watch and Survivors’ Rights International joint Field Report highlights similar numbers of civilians killed in the conflict by the Ethiopian government and the Highlander militias. That report estimates between 1,500 and 2,500 Anuak civilians dead.¹³

The Ethiopian government disputes both NGOs’ figures and their claims that Ethiopian military personnel are responsible. Government officials first contended that other rebel factions, such as the Oromo Liberation Front, were responsible for the December 13, 2003 massacre, and then insisted that Highlander militias caused

⁸ *Id.* at 116.

⁹ *Id.* at 116, note 7.

¹⁰ *Prosecutor v. Akayesu*, No. ICTR-96-4-T, para. 589 (Sept. 2, 1998); *see also Prosecutor v. Kupreskic*, No. IT-95-16-T, para. 560 (Jan. 14, 2000).

¹¹ Genocide Watch and Survivors’ Rights International, “Today is the Day of Killing Anuaks,” Feb. 25, 2004, p. 4, available at <http://genocidewatch.org/Today%20is%20the%20Day%20of%20Killing%20Anuaks.htm> [hereinafter GW-SRI February 2004 Report].

¹² “World Organization Against Torture and Genocide Watch respond to Ethiopian Prime Minister’s denial of massacres of Anuaks in interview with Reuters,” May 5, 2004, available at <http://www.omct.org/base.cfm?page=article&num=4856&consol=close&kwr=OMCT&cfid=1305405&cftoken=60023615> [hereinafter OMCT – Genocide Watch Response].

¹³ “Operation Sunny Mountain? Soldiers, oil, & ongoing state terror against Anuak and other indigenous minorities of Southwestern Ethiopia.” Genocide Watch and Survivors’ Rights International Field Report, Oct. 1, 2004. [hereinafter GW-SRI October 2004 report].

the violence.¹⁴ A specially appointed Ethiopian commission placed the number of Anuak dead at 65.¹⁵ Other estimates, however, differ greatly. For example, one journalist provided names of 400 killed in the December 13, 2003 attack.¹⁶ Further, the Special Commission limited its investigation to interviews of Highlanders and failed to question any Anuak refugees or Ethiopian military personnel.¹⁷ At a minimum, the various NGO reports strongly indicate that there is a *prima facie* case against the Ethiopian military for participating in the killings of hundreds of Anuak.

Deportation or forcible transfer of population: “Forcible transfer” means “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”¹⁸ This definition requires a showing of force, but that force need not be physical or even actual. The threat of force or fear of violence may also suffice.¹⁹

Violence and destruction occurring in the Gambella region since December 2003 has clearly established a sufficient showing of force, and numerous NGOs have reported that the conflict has displaced thousands of persons. Representatives of Oxfam International affirmed that approximately 51,000 Anuak have been displaced in the region.²⁰ Oxfam further reported that Ethiopian military forces and Highlander militias burned over 1,500 homes, slaughtered Anuak livestock, and destroyed Anuak crops.²¹

Additionally, a representative for the United Nations High Commissioner for Refugees, after conducting an investigation, found that 8,500 Anuaks had fled

¹⁴ Doug McGill, “Secret genocide across Sudan’s border,” *Scotland on Sunday* (quoting Barnabas Gebre-Ab, Ethiopian Minister of Federal Affairs for the State of Gambella), available at <http://news.scotsman.com/topics.cfm?tid=1160&id=1208522004>

¹⁵ “Members of the Defense Forces involved in the Gambella killings,” *Gambella News*, July 7, 2004, available at <http://www.gambellanews.com>.

¹⁶ See “Anuaks Massacred in Gambella Town on December 13-15, 2003,” available at <http://www.mcgillreport.org/list%20of%20dead.htm>.

¹⁷ Anywaa Survival Organization, “Gambella Update: situation remains tense,” May 22, 2004; “Members of the Defense Forces involved in the Gambella killings,” *Gambella News*, July 7, 2004, available at <http://www.gambellanews.com>.

¹⁸ Rome Statute, *supra* note 4, art. 7(2)(d).

¹⁹ First Session Report, *supra* note 7, at 118. The given elements in the First Session Report also require the persons to have been lawfully present in the area from which they were deported. *Id.* Given that Gambella is the ancestral homeland of the Anuak, this element is readily met.

²⁰ “Oxfam’s assistance improves life for thousands in Ethiopia’s Gambella region,” Aug. 31, 2004, available at <http://www.reliefweb.int/w/rwb.nsf/0/873012cf9ca1245c85256f0100726f33?OpenDocument>.

²¹ *Id.*

Ethiopia to reach a Sudanese refugee camp at Pochalla.²² Further, the Ethiopian Disaster Preparedness and Prevention Bureau (DPPB) estimated in August 2004 that approximately 25% of Gambella's population had been displaced.²³ Given that this displacement coincides with continued violence, during which witnesses have heard Ethiopian military personnel declare, "There will be no Anuak land,"²⁴ these actions qualify as forcible transfer under international law.

Rape: Under Article 7 of the Rome Statute, the crime of rape has two elements: 1) the physical sexual act, and 2) the inability of the victim to genuinely consent due to force or the threat of force.²⁵ The Rwanda Tribunal has similarly defined the crime against humanity of rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."²⁶

The February 2004 report by Survivors' Rights International and Genocide Watch documented a high number of rapes in the Gambella region. The report noted that one Gambella police officer recorded 138 incidents of rape in Gambella town before being told to stop taking new reports,²⁷ and found evidence of 26 gang-rapes after that point.²⁸ Further, the February 2004 report indicated that Ethiopian military personnel and Highlander militiamen would rape Anuak women at gunpoint,²⁹ clearly demonstrating a threat of force.

In a May 2004 press release, the World Organization Against Torture observed that mass rapes of Anuak women were continuing.³⁰ The October 2004 Genocide Watch and Survivors Rights International Field Report heard additional firsthand and eyewitness accounts of rapes conducted by Ethiopian military forces from Anuak women.³¹ Based on this evidence, it is reasonable to argue that there is a *prima facie* case against the Ethiopian military for committing the act of rape as defined by the Rome Statute.

²² See Sudan Transition and Recovery Database, July 2004, p. 2, available at

<http://www.unsudanig.org/STARBASE/reports/Regional-reports/South/UpperNile/Pochalla.pdf>

²³ GW-SRI October 2004 Report, *supra* note 13.

²⁴ GW-SRI February 2004 Report, *supra* note 11, p. 4.

²⁵ First Session Report, *supra* note 7, p. 119.

²⁶ *Akayesu*, *supra* note 10, para. 598; see also *Prosecutor v. Delalic*, No. IT-96-21-T, para. 479 (Nov. 16, 1998) (using identical language to define the crime against humanity of rape).

²⁷ GW-SRI February 2004 Report, *supra* note 11, at 14.

²⁸ *Id.*

²⁹ *Id.* at 5.

³⁰ OMCT—Genocide Watch Response, *supra* note 12.

³¹ GW-SRI October 2004 Report, *supra* note 13.

Persecution against an identifiable group: The First Session Report denotes three elements for persecution. The perpetrator must: 1) deprive persons of their rights in violation of international law, 2) target the victims by reason of their group identity, and 3) commit the act in conjunction with another of the enumerated acts under Article 7(1) of the Rome Statute.³² The deprivation must be one of “fundamental rights,” as well as “intentional and severe.”³³ The severity of the persecution, in turn, refers not to the act of persecution, but rather to the nature of the deprivation of rights.³⁴

During the buildup to its campaign against the Anuak people, the Ethiopian government disenfranchised the Anuak politically. In the Gambella regional elections of May 2000, the Gambella People’s Democratic Front, a branch of the ruling national party, won only narrowly.³⁵ The central government subsequently appointed all regional officers and disbanded all democratically elected regional institutions, denying the Anuak their rights to political participation.

This disenfranchisement was aimed at the Anuak people, and later accompanied by the disarmament of all Anuak police officers and the incarceration of Anuak political leaders. These latter tactics occurred just days before the December 13, 2003 killings,³⁶ leaving the Anuak people with little ability to defend themselves and linking the persecution efforts of the Ethiopian government to its larger attacks on the Anuaks.

Regarding the group distinction, it appears the Ethiopian government has targeted the Anuak people specifically, and reports of persecution and discrimination against the Anuak by national and local authorities date back to at least 1980.³⁷ The Ethiopian government disarmed only the Anuak forces following the collapse of the Dergue in 1991, signaling a continued pattern of discrimination. The more recent disarmament of Anuak police forces does not appear to have applied to Highlander authorities. Further, Anuak villages and civilians have suffered the majority of violence in Gambella since December 2003. Based on the evidence provided, it is reasonable to argue that the Ethiopian

³² First Session Report, *supra* note 7, p. 122.

³³ Rome Statute, *supra* note 4, art. 7(2)(g).

³⁴ *Kupreskic*, *supra* note 10, para. 622 (“Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be determined ‘inhumane.’”).

³⁵ World Organization Against Torture, Press Release, Ethiopia: concerns about a Commission of Investigation attempting to cover up State involvement in acts of genocide, Apr. 27, 2004, available at <http://www.omct.org/base.cfm?page=article&num=4838&consol=close&kwr=OMCT&cfid=1305415&cftoken=60720513>.

³⁶ GW-SRI October 2004 Report, *supra* note 13.

³⁷ *Id.*

government has specifically targeted the Anuak people as a group in its persecution efforts.

Did the Ethiopian government engage in the aforementioned acts as part of a widespread or systematic attack against a civilian population?

Article 7(2)(a) of the Rome Statute specifies that a “widespread or systematic attack against a civilian population” contains two elements: the “multiple commission of [enumerated] acts” and the commission of such acts pursuant to a “State or organizational policy to commit such attack[s]”.³⁸

Multiple Violations of Enumerated Acts: The multiplicity of the acts is sufficiently “widespread” if the acts are “committed on a large scale by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”³⁹ In other words, either multiple attacks had to have been committed against civilians over a period of time, or a single act that resulted in harm to an especially large number of individuals must have occurred.

The prolonged conflict in the Gambella region contains multiple examples of acts enumerated in the Rome Statute. According to Genocide Watch, at least 424 people died in the December 2003 killings alone,⁴⁰ and both Survivors’ Rights International and the World Organization Against Torture have reported killings, persistent violence, and intimidation as recently as September 2004.⁴¹ Additionally, a series of reports in *Cultural Survival Quarterly* have pointed to massacres of Anuak since 1981.⁴² Regarding forcible transfer, Oxfam indicates that over 51,000 people in the Gambella region are still currently displaced.⁴³

According to the evidence and testimony provided, it appears that Ethiopian military personnel and Highlander militiamen have raped many Anuak women as well. A non-Anuak police officer in Gambella reported an average of seven rapes per day in January 2004,⁴⁴ and many of these offenses have been gang-rapes.⁴⁵

³⁸ First Session Report, *supra* note 7, at 116.

³⁹ *Prosecutor v. Blaskic*, No. IT-95-14-T, para. 206 (Mar. 3, 2000); *see also Akayesu*, *supra* note 10, para. 580 (“massive, frequent, large scale action, carried out collectively”).

⁴⁰ GW-SRI February 2004 Report, *supra* note 11, p. 4.

⁴¹ GW-SRI October 2004 Report, *supra* note 13, p. 32.

⁴² For the most recent report, *see* Ochalla, Nyikaw and Deirdre D’Entremont, “Oil Development in Ethiopia: a Threat to the Anuak of Gambella,” *Cultural Survival Quarterly*, Oct. 31, 2001, available at <http://www.culturalsurvival.org>

⁴³ “Oxfam’s assistance improves life for thousands in Ethiopia’s Gambella region,” Aug. 31, 2004, available at <http://www.reliefweb.int/w/rwb.nsf/0/873012cf9ca1245c85256f0100726f33?OpenDocument>.

⁴⁴ GW-SRI February 2004 Report, *supra* note 11, p. 5.

Based on this evidence, the conflict in Gambella contains multiple examples of the Rome Statute's enumerated acts constituting crimes against humanity.

State or Organizational Policy: The 'state or organizational policy' requirement exists to distinguish crimes against humanity from isolated and random acts of violence. Accordingly, the First Session Report requires the State or organization to "actively promote or encourage such an attack." However, the Yugoslav Tribunal has held that the policy need not be formal, and that it can be deduced from the way in which the acts occur.⁴⁶ The Yugoslav Tribunal further identified several relevant factors, including a "political objective [or] ideology ... to destroy or weaken a community," "the repeated and continuous commission of inhumane acts linked to one another," "the preparation and use of significant public or private resources," and "the implication of high level military and/or military authorities."⁴⁷

There is ample evidence to support the existence of a state policy to attack the Anuak. In an interview, Okello Akway Ochalla, the former regional governor of Gambella who is now living in exile in Europe, claimed that he was with Tsegaye Beyene, the regional commander of Ethiopian military forces, when Beyene received a call from Barnabas Gebre-Ab, Ethiopia's Minister of Federal Affairs for the State of Gambella, just hours before the start of the killings on December 13, 2003.⁴⁸ Okello declared that Beyene then ordered Ethiopian troops to attack Anuak in Gambella. When he pleaded with Beyene to stop the killings, Beyene responded, "All Anuak are the same, they are butchers."⁴⁹ Okello further asserted that he called Gebre-Ab to ask for an end to the violence, but the Minister only told him to tell Beyene to increase the military force.⁵⁰

Other evidence also supports the existence of an Ethiopian policy of violence against Anuak. The Ethiopian military continues to maintain a significant presence in Gambella. Reports in April 2004 indicated that 15,000 troops remain in the region,⁵¹ and there are multiple accounts of helicopter gunship attacks. Such

⁴⁵ *Id.* at 14.

⁴⁶ *Prosecutor v. Tadic*, No. IT-94-1-T, para. 653 (May 7, 1997).

⁴⁷ *Blaskic*, *supra* note 39, para. 203.

⁴⁸ Doug McGill, "Secret genocide across Sudan's border," *Scotland on Sunday*, available at <http://news.scotsman.com/topics.cfm?tid=1160&id=1208522004>.

⁴⁹ *Id.*

⁵⁰ Doug McGill, "Ethiopia's Genocide of the Anuak Broadens to Women, Children, and Small Villages," *The McGill Report*, May 16, 2004, available at <http://genocidewatch.org/EthiopianGenocideofAnuakContinuesMcGillReport6May2004.htm>.

⁵¹ Obang Metho, Anywaa Survival Organization, Statement to the United Nations Commission on Human Rights, 60th Session, Apr. 8, 2004.

evidence indicates major military activity within Gambella and implies complicity in the attacks on the Anuak people.

Other Considerations – A Civilian Population: An implicit element of crimes against humanity is that the victims belong to a civilian population. The Yugoslav Tribunal has observed that “the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack.”⁵² However, the Rwanda Tribunal noted that “the fact that there are certain individuals among the civilian population who are not civilians does not deprive the population of its civilian character,”⁵³ and therefore the people attacked need only be “predominantly” civilian.⁵⁴ Given this broad interpretation of “civilian population,” the Ethiopian government cannot justify its treatment of Anuak civilians in Gambella as collateral damage of its campaign against rebel factions. Attacks against Anuak have been primarily against civilians. In addition, the number of victims in Gambella far outpaces any estimates of armed rebels in the area.

Did the Ethiopian government have knowledge of attacks against the Anuak?

The Reporting Committee of the Rome Statute provides that this element can be satisfied relatively easily. The perpetrator of the enumerated acts need not know the exact details of the state policy or the characteristics of the larger pattern of attacks. Rather, the perpetrator satisfies this condition if he “intended to further such an attack.”⁵⁵ The Yugoslav Tribunal and Rwanda Tribunal have similarly articulated their knowledge standards as “know[ing] that there is an attack on a civilian population and that [the perpetrator’s] act is part of the attack.”⁵⁶ According to those tribunals, however, such knowledge can be actual or constructive,⁵⁷ as well as inferred from the circumstances of their commission.⁵⁸

Given that the evidence indicates that the Ethiopian government formed the state policy, there is little question that the Ethiopian government intended for its actions to further that policy. Okello’s statements directly implicate the Ethiopian government in the attacks on the Anuak people. Further, in the absence of any

⁵² *Prosecutor v. Kunarac*, No. IT-96-23&23/1-A, para. 92 (June 12, 2002).

⁵³ *Prosecutor v. Musema*, No. ICTR-96-13-A, para. 207 (Jan. 27, 2000).

⁵⁴ *Prosecutor v. Kayishema*, No. ICTR-95-1, para. 128 (May 21, 1999).

⁵⁵ First Session Report, *supra* note 7, at 116.

⁵⁶ *Kayishema*, *supra* note 54, para. 133; *see also Tadic*, *supra* note 46, para. 248 (the act “must comprise part of a pattern of widespread or systematic attack directed against a civilian population and that the accused must have known that his acts fit into such pattern”).

⁵⁷ *Tadic*, *supra* note 46, para. 659; *Kayishema*, *supra* note 54, para. 134.

⁵⁸ *Blaskic*, *supra* note 39, para. 259.

government justifications, the continued massive military presence in Gambella strongly suggests complicity in the ongoing attacks against the Anuak.

Conclusion

After carefully analyzing the events in Gambella in light of international standards, it is reasonable to assume that a *prima facie* case exists against the Ethiopian Government for committing crimes against humanity. First, several enumerated acts have been committed including murder, deportation or forcible transfer, rape, and persecution. Second, the crimes have been committed on a widespread and systematic basis with violence occurring across Gambella over a span of time. Finally, evidence demonstrates that the perpetrators understood that their actions were part of a larger government policy of targeting the Anuak in Gambella.

The Impending Genocide

The criminalization of genocide under international law also dates from the post-World War II era. In 1948, the United Nations passed the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).⁵⁹ As with crimes against humanity, the Rwanda Tribunal and the Yugoslav Tribunal have also addressed charges of genocide, but the Genocide Convention governs here.

Article II of the Genocide Convention defines genocide as follows:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, such as:

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group.*⁶⁰

⁵⁹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, entered into force Jan. 12, 1951, available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

⁶⁰ *Id.*, art. II.

There are three important elements that are highlighted by this language. First, a determination must be made regarding what constitutes a national, ethnical, racial, or religious group. Second, the Convention dictates that one or more of the enumerated physical acts must have been carried out upon members of a particular group. Third, those acts of harm must be undertaken with the intent to destroy or partially destroy the group. Each of these three elements must be present for an act to constitute genocide.

Are the Anuak members of a specific group?

The first element of the crime of genocide is the group status of the victims. Article II of the Genocide Convention requires the victims to belong to a “national, ethnical, racial, or religious group.” In evaluating charges of genocide, the Rwanda Tribunal and Yugoslav Tribunal have offered definitions for various Article II groups. In the case of *Prosecutor vs. Akayesu*, the Rwanda Tribunal ruled that, “the Tutsi did indeed constitute a stable and permanent group and were identified as such by all,” thus the accused could be charged with genocide for the violent acts committed or ordered against the Tutsi in Rwanda.⁶¹ In the *Jelusic* case, the Yugoslav Tribunal argued that objective criteria alone were insufficient and believed it appropriate to evaluate group status “from the view of those persons who wish to single that group out from the rest of the community.”⁶²

The Anuak people share racial and ethnic characteristics that are different from those of other groups in Ethiopia. The majority of Anuak live specifically in the Gambella region of Ethiopia (though disproportionate amounts currently live in refugee camps in Sudan due to the violence currently taking place in Gambella). Additionally, they are recognized as a group by the Ethiopian government, peoples from other ethnic groups within Ethiopia, and by the international community. Within Ethiopia, the Anuak have been termed “African” as opposed to “Ethiopian” by other groups, and the Anuak are perceived to be different ethnically and linguistically.⁶³ Thus, the Anuak people can be termed a recognizable, stable, and permanent group, and the first criterion for a determination of genocide can be satisfied.

Have any of the acts enumerated in the Genocide Convention been perpetrated against the group?

⁶¹ *Akayesu*, *supra* note 10, para. 702.

⁶² *Prosecutor v. Jelusic*, No. IT-95-10, para. 70 (Dec. 14, 1999).

⁶³ GW-SRI October 2004 Report, *supra* note 13.

Killing members of the group: Under the Genocide Convention, the legal definition of a killing is interchangeable with a “caused death”.⁶⁴ The Rwanda Tribunal identified two elements: a deceased, and an unlawful act or omission which causes the death.”⁶⁵

As outlined in greater detail in the “International Law and Crimes Against Humanity” section of this memorandum, multiple NGOs have reported similar accounts of Ethiopian military forces and Highlander militias killing Anuaks in the Gambella region since at least December 2003. According to a joint report of Survivors’ Rights International and Genocide Watch, Ethiopian military personnel and Highlander militias killed 424 Anuaks in Gambella on December 13, 2003 after surrounding a number of villages and proceeding to the homes of Anuak civilians.⁶⁶

Further, the World Organization Against Torture notes continuing incidents of smaller-scale killings and puts the number of dead at over 1,100.⁶⁷ An October 2004 Genocide Watch and Survivors’ Rights International joint Field Report estimates that between 1,500 and 2,500 Anuak civilians have been killed.⁶⁸ Thus, the element of “killing members of the group” as defined by the Genocide Convention is clearly met.

Causing serious bodily or mental harm to members of the group: “Serious bodily or mental harm” requires proof of actual harm, but the injury need not be permanent in nature.⁶⁹ In the *Kayishema and Ruzindana* case, the Rwanda Tribunal defined this requirement as “harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”⁷⁰ The Yugoslav Tribunal also suggested that torture and degrading treatment may qualify as genocidal acts.⁷¹

Regarding mental harm, the Preparatory Committee of the International Criminal Court indicated that mental harm “is understood to mean more than the

⁶⁴ “Addendum: Part II – Finalized draft text of the Elements of Crimes,” *Report of the Preparatory Commission for the International Criminal Court*, U.N. Doc. PCNICC/2000/1/Add.2, Art. 6(a)1, footnote 2. Nov. 2, 2000.

⁶⁵ *Akayesu*, *supra* note 10, para 588.

⁶⁶ GW-SRI February 2004 Report, *supra* note 11, p. 4.

⁶⁷ OMCT – Genocide Watch Response, *supra* note 12.

⁶⁸ GW-SRI October 2004 Report, *supra* note 13.

⁶⁹ *Akayesu*, *supra* note 10, para 501.

⁷⁰ *Kayishema*, *supra* note 54, para. 109.

⁷¹ *Prosecutor v. Karadzic and Mladic*, Nos. IT-95-5-R61 and IT-95-18-R61, Transcript of Hearing, p. 986 (July 11, 1999).

minor or temporary impairment of mental faculties.”⁷² In *Kayishema and Ruzindana*, the Rwanda Tribunal considered mental harm established only where “at the time of the act, the accused had the intention to inflict serious mental harm.”⁷³ In *Akayesu*, the Rwanda Tribunal further affirmed that “rape...certainly constitutes infliction of serious bodily and mental harm.”⁷⁴

As noted in greater detail in the preceding sections of this memorandum, it appears that Ethiopian government forces as well as Highlander militia have inflicted widespread physical and mental harm on the Anuak people. Instances of beatings, torture, rape, unlawful detention, and destruction and looting of property have been reported by numerous sources present in the Gambella region. Therefore, based on the evidence provided, the abuses committed by the Ethiopian government and the Highlander militias qualify for the criterion of causing physical and mental harm.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part: Regardless of whether death occurs, this act is completed by imposing conditions that do not immediately kill, “but ultimately seek [the victims’] physical destruction.”⁷⁵ The United Nations Preparatory Commission for the International Criminal Court confirmed that this category may include “deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”⁷⁶ The Rwanda Tribunal has affirmed that rape fits under this category as a “method of destruction which do[es] not immediately lead to the death of members of the group.”⁷⁷

It is reasonable to argue that the Ethiopian government and the Highlander militias have deliberately attempted to impose conditions on the Anuak people so as to bring about the destruction of the group. In addition to the systematic killing and physical harm of Anuak, government and Highlander military forces have also destroyed or confiscated homes across the Gambella region, causing Anuak to flee their property and head to refugee camps in Ethiopia or Sudan. Livestock and crops were also destroyed during the attacks. Additionally, documentation and

⁷² “Report of the Preparatory Committee on the Establishment of an International Criminal Court.” Part 2. Jurisdiction, Admissibility, and Applicable Law, U.N. Doc. A/CONF. 183/2/Add.1, 14 April 1998, p.11.

⁷³ *Kayishema*, *supra* note 54, para 112.

⁷⁴ *Akayesu*, *supra* note 10, para. 731.

⁷⁵ *Akayesu*, *supra* note 10, para. 505.

⁷⁶ Addendum: Part II – Finalized draft text of the Elements of Crimes,” Report of the Preparatory Commission for the International Criminal Court, p.6, n.3, U.N. Doc. OCNICC/2000/1/Add.2, Nov. 2, 2000.

⁷⁷ *Kayishema*, *supra* note 54, para. 116.

testimonials assert that government and Highlander forces have specifically targeted men for execution, and have raped scores of women in an attempt to impregnate them with children who are not wholly ethnically Anuak. Reports indicate that one woman was told, while being raped, that, “We are going to kill your men and the next generation of Anuak will be produced by us.”⁷⁸ Based on this evidence, it is reasonable to assert that the actions by the Ethiopian government and Highlander militias have been deliberately undertaken so as to bring about the physical destruction of the Anuak as a group, and thus satisfy this criterion.

Have any of the acts enumerated in the Genocide Convention been undertaken with the intent to destroy or partially destroy the group?

Intent represents the final element of the crime of genocide. Article II of the Genocide Convention requires not only the intent to engage one of the enumerated physical acts, but also the specific “intent to destroy” a group “in whole or in part.”

Intent to destroy: To commit genocide, a perpetrator must engage in an enumerated physical act with the intent of destroying the protected group, not merely the person or persons attacked or otherwise affected. Public statements calling for genocide or tangible documentation of genocidal plans can establish this specific intent, but the intent may also be inferred from the acts of the perpetrator.⁷⁹ The Yugoslav Tribunal and the Rwanda Tribunal have considered a number of factors when evaluating intent in past cases. These factors include the scale of the atrocity, evidence of systematic planning, and statements of the perpetrators.⁸⁰

Due to the December 2003 massacres and continued violence against the Anuak, evidence to support the genocidal intent on behalf of the Ethiopian government and Highlanders is growing. Of the 100,000 Anuak living in Ethiopia and Sudan, at least 1,500 and perhaps as many as 2,500 Anuak civilians have died, while hundreds remain unaccounted for or have disappeared.⁸¹ Of the three minority groups living in Gambella (the Anuak, Majenger, and Nuer), approximately 25%, or about 50,000 people, have been displaced according to the Ethiopian Government.⁸² Estimates of Anuak in refugee camps in Sudan and

⁷⁸ GW-SRI February 2004 Report, *supra* note 11, p. 14.

⁷⁹ *Akayesu*, *supra* note 10, para. 523.

⁸⁰ *Kayishema*, *supra* note 54, para. 93.

⁸¹ GW-SRI October 2004 Report, *supra* note 13, pp. 5-8.

⁸² Cited in *id.*, p. 5.

Kenya range from 7,000 to 9,000 people.⁸³ Given the relatively small population of Anuak, these numbers show the high level of atrocities occurring in Gambella.

According to the recent Survivors' Rights International and Genocide Watch joint Field Report, government forces and highland Ethiopian settlers deliberately targeted the indigenous Anuak minority in Gambella.⁸⁴ Credible sources describe a "coordinated military operation to systematically eliminate Anuak people from Gambella" in December of 2003.⁸⁵ Genocide Watch reports that the High Commander in Chief of the Ethiopian Army in Gambella, Tsegaye Beyene, under the authorization of Dr. Gebrhab Barnabas, an Ethiopian government official, ordered the December massacre of the Anuak people.⁸⁶ It is clear that the national government and its military remain the principal agents behind the violence still occurring in the Gambella region.⁸⁷

NGOs have also recorded numerous statements made by Ethiopian soldiers and government officials. Anuaks who survived the attacks testified that the Ethiopian soldiers shouted, "Let's kill them all" and "From today forward there will be no Anuak."⁸⁸ Survivors' Rights International reports that government officials declared in public that "We will wipe you [Anuak] out of this place."⁸⁹ Such statements in conjunction with sanctions by the highest levels of the government indicate a manifest intent to destroy the Anuak in Ethiopia.

In whole or in part: The perpetrator need not intend to completely annihilate a group in all parts of the world. It is only necessary that intent exists to destroy the group "in part" in order to satisfy the Convention language. The Rwanda Tribunal has interpreted this provision as requiring "the intent to destroy a considerable number of individuals,"⁹⁰ and the Yugoslav Tribunal understands it to mean a "substantial" part.⁹¹ However, the tribunals have not further defined "considerable" or "substantial," and international law scholars believe the Genocide Convention drafters included the "in part" language largely to prevent

⁸³ *Id.*, p. 23.

⁸⁴ *Id.*, p. 5.

⁸⁵ *Id.*, p. 19.

⁸⁶ *Id.*, p. 22.

⁸⁷ *Id.*, pp. 16, 20.

⁸⁸ *Id.*, p. 20.

⁸⁹ *Id.*, p. 23.

⁹⁰ *Kayishema, supra* note 54, para. 97.

⁹¹ *Prosecutor v. Sikirica, et.al.*, No. IT-95-8, Judgment on Defense Motions to Acquit, para. 65 (Sept. 3, 2001).

perpetrators from claiming they intended only the partial destruction of a group, such as the total destruction of a group's population within a given state.⁹²

Considering that there are only 100,000 Anuak, the reported killings may represent a substantial part of the Anuak group – up to 2.5% of the total population based on the numbers of reported dead by the Genocide Watch and Survivors' Rights International Field Report. Some Anuak villages have been entirely depopulated, with all people (Anuak and others) killed or driven out of the region.⁹³ Furthermore, evidence is present regarding Ethiopian soldiers systematically raping large numbers of Anuak women in an attempt to destroy the Anuak ethnic group in part. Most Anuaks killed were intellectuals, leaders, and members of the educated and student classes – individuals with the most capability of leading a resistance. In *Jelusic*, the Yugoslav Tribunal considered the targeting of “the total leadership of a group” as relevant in its ‘in whole or in part’ analysis.⁹⁴ Based on the mounting evidence, the growing number of people affected by the violence demonstrates the government's intent to destroy the Anuak “in part.”

Conclusion

The acts committed in Gambella are perilously close to satisfying the definition of genocide. It is evident that the Anuak are a distinct group as recognized by the Ethiopian government and other ethnic groups in the area. In addition, several acts enumerated in the Genocide Convention have been committed against the Anuak. The only element as to which any ambiguity remains is intent, and the case for the presence of genocidal intent has gained credibility as more information is made known to the public.

Evidence has emerged which implicates high Ethiopian officials in a planned campaign against the Anuak. If this information can be substantiated, the intent element, and therefore the definition of genocide, will be satisfied. In addition, the gravity of the situation can be taken into account to determine intent. To this point, up to 2.5% of the entire Anuak population has been killed in recent violence. There is no specific number of victims necessary to determine intent to destroy a group under the Convention language. However, further violence will strengthen arguments that the campaign against the Anuak is a coordinated effort

⁹² William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2000, p. 235.

⁹³ GW-SRI October 2004 Report, *supra* note 13, p. 27.

⁹⁴ *Jelusic*, *supra* note 62, para. 82.

to destroy the group in whole or in part. Unless the violence is halted immediately, it is very likely that the definition of genocide will be satisfied.

Closing Summary

In examining the existing facts, a *prima facie* case exists against the Ethiopian government based on their actions in the current conflict in Gambella constituting crimes against humanity. The Anuak have suffered acts of murder, physical and sexual violence, and sustained persecution and forced transfer from their homes as a direct result of the actions of the Ethiopian government and Highlander militias. The Ethiopian government has perpetrated the acts as part of a larger policy of attacking the Anuak and therefore had knowledge of the policy. Thus, the Ethiopian government has been directly involved in the perpetration of a number of the enumerated acts required to fulfill a finding of crimes against humanity. Furthermore, if the actions of the Ethiopian government and Highlander militias continue, and if the government is found to have committed these crimes as part of a broader intent to destroy the Anuak people wholly or partially as a group, the definition of genocide will be satisfied as well.

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