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Is Hungary's Treatment of Roma Gypsies a Violation of European Union Law?

In December 2000, European Union leaders proclaimed that “protecting fundamental rights and creating a European area of freedom, security and justice” are two of the main goals of European integration.¹ These goals come from four main sources: the EU Treaty, the case law from the European Court of Justice, European Union Member States’ constitutional traditions and the European Convention on Human Rights.² The European Convention on Human Rights (ECHR) was drafted in the 1950’s by the Council of Europe in order to protect human rights and fundamental freedoms.³ Furthermore, the European Union has begun developing new policies, especially discouraging discrimination by the state against its citizens or certain classes of its citizens.⁴

In order for a state to become a member of the European Union, the state must not only comply with, but also ratify the ECHR - and that is just the beginning.⁵ This requirement is the “lowest common denominator,” that all states must adhere to, and states are encouraged to develop even higher standards.⁶

In the very beginning, the European Court of Justice (ECJ) began claiming legal protection for human rights in an unusual way: by granting economic rights to the victims.⁷ Over time, human rights protection has seen a surge in expansion – both legislative and through the ECJ.⁸ Because of this expansion, some member states have expressed concerns that their autonomy is being encroached upon, since generally national constitutions and the ECHR have been the sources of human rights law.⁹ This concern is overcome by the European Union because “there are two

¹ European Commission website: http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_intro_en.htm

² European Commission website: http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_intro_en.htm

³ <http://www.hri.org/docs/ECHR50.html>

⁴ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 397

⁵ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 385

⁶ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 385

⁷ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 381

⁸ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 381

⁹ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 381

primary sources of ‘inspiration’ for the general principles of EC [now EU] law: first, the common national constitutional traditions, and secondly, international human rights agreements.”¹⁰

The ECHR is not treated as “formally binding” by the ECJ, rather, as a source of “inspiration.”¹¹ It is also the most common “source of reference for fundamental EU rights.”¹² In this ingenious move by the ECJ, the ECJ retained the power to “go beyond” what is in the ECHR and give additional protections for victims.¹³ The ECHR has 18 Articles including, but not limited to: the obligation to respect human rights (Art. 1); the right to life (Art. 2); prohibitions of torture and slavery (Art. 3 and 4, respectively); right to liberty and security (Art. 5); right to respect for private life (Art. 8); right to freedom of thought, conscience and religion (Art. 9); right to freedom of expression (Art. 10); right to freedom of assembly and association (Art. 11); the prohibition of discrimination (Art. 14); and prohibition of abuse of rights (Art. 17).¹⁴ These articles set out the framework for the basic human rights that each member state must adhere to. If not followed, an individual who feels their rights have been violated under the Convention by a state party can take a case to the European Court of Human Rights; the decisions are legally binding, and the Court may award damages.¹⁵ To this day, the ECHR is still the only international human rights agreement providing such a high degree of individual protection.

As mentioned earlier, Member States must treat the ECHR as a floor, and not a ceiling; and are even encouraged to have higher standards of human rights than are set out in the ECHR.¹⁶ The contents of the ECHR are basically those standards which are *common* to all the Member States.¹⁷ Further, the ECHR is “supposed to reflect precisely the collectively shared commitments of all Member States.”¹⁸ The EU wanted to provide more extensive protection, and that is what led to the drafting of the EU Charter on Fundamental Rights – but this charter has not yet been adopted.¹⁹ One problem with the ECHR being a “floor” is that the “Court would give EU recognition only to those rights shared by all (or most) States, and might ignore the

¹⁰ Nold v. Commission ECR 491 (1974)

¹¹ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 384

¹² *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 394

¹³ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 384

¹⁴ <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

¹⁵ <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

¹⁶ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 385

¹⁷ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 385

¹⁸ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 386

¹⁹ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 386

protection given by a sole State to a right considered fundamental within that legal order.”²⁰ In *Nold v. Commission*, the court discussed where the fundamental rights will come from:

*In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States...Similarly, international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law.*²¹

However, an argument exists on the other side as well, that if the ECHR is seen as a ceiling, then that approach “could lead to the contrary situation where one particular Member State’s recognition of a specific right, even if shared by no other, would be imposed by the ECJ on the rest of the States through the general principles of EU law.”²² Fortunately, the Court is aware of this problem and “is prepared to recognize a particular right as part of the general principles of EU law when several Member States, even if not all of them expressly recognize that right, and... has also been more careful than the CFI not to dismiss a State’s claim for recognition of a particular right on the basis that it is recognized by that State only.”²³ The Court has further refused to endorse either approach, rather identifying and interpreting rights on a case-by-case basis.²⁴

In the past, only states have had an active role in the international arena, and the establishment of a Court to protect individuals from human rights violations is an innovative feature for an international convention on human rights.²⁵ However, individuals are not the only way that a case gets brought to the attention of the Court: state parties can also take cases against other state parties to the Court. Member States are bound to the general principles of the EU law and must act and legislate in a way which respects the rights set out in the ECHR when “acting as ‘agents’

²⁰ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 388

²¹ *Nold v. Commission* ECR 491 (1974)

²² *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 388

²³ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 389

²⁴ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 394

²⁵ <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

of EC law, implementing or enforcing EC measures, when... interpreting and implementing Community law;” even if the community law does not “embody the particular right claimed.”²⁶

This paper will examine how Hungary, a recent EU member, complies with the ECHR, with special emphasis on the treatment of the Roma (gypsy group) within Hungary. Some of the Articles mentioned above will be broken down and analyzed according to the facts that are available. Since Hungary became a member of the EU in 2004, only information published since then will be used to identify any possible violations of the ECHR. Also the Hungarian treatment of the Roma will be looked at, since there is a strong EU emphasis on anti-discrimination. It must be noted that the facts used from the reports are assumed to be true, and they are just being used to facilitate the analysis of the relevant law.

Was there a violation of Article 2 of the ECHR?

In July 2004, a young Roma man was chased and tackled by an off duty police officer in Kecskemet.²⁷ Two separate medical examiners concluded that the man died of a congenital heart defect; but the man’s family and Roma community did not accept these conclusions as there was unexplained sand in the suspect's windpipe and water in his lungs.²⁸ The officer had been suspended until the second medical examiner’s report confirmed what the first had – that there was “no relation between the man’s death and the officer’s actions.”²⁹ Still, The Office of the Minority Affairs Ombudsman was also investigating the incident but the investigation is still pending.³⁰ With this fact pattern in mind, the first article to be considered is Article 2 of the ECHR, which deals with the right to life and states:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defense of any person from unlawful violence;

²⁶ *EU Law: Text, Cases and Materials* (Fourth Edition) by Paul Craig and Grainne De Burca (OUP 2007) p. 395-396

²⁷ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

²⁸ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

²⁹ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

³⁰ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

*c. in action lawfully taken for the purpose of quelling a riot or insurrection.*³¹

In order for this incident to qualify as a violation of the ECHR, the police officer must have *intended* for the man to die, and, if so the state must condone the actions of the police officer. There are no facts indicating the police officer's intent, so it may or may not have been to kill the Roma man. Either way, however, the State did not condone his actions, and that is an essential element for a finding of an Article 2 violation. The police officer was suspended until two medical examiner's reports confirmed that the victim died of a congenital heart defect, and not as a result of the altercation. Based on these facts, Hungary did not violate Article 2 of the ECHR.

The U.S. Department of State notes that in 2005 and 2006 there were no reports of any Article 2 violations. There has been an improvement by the Hungarian government in this area of human rights.

Was there a violation of Article 3 of the ECHR?

Article 3 of the ECHR says that: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."³² Hungary has struggled in the past with this Article as it relates to the Roma. There are many reports of police using excessive force, as well as beating and harassing Roma suspects.³³ One report describes an incident where a couple was in custody on suspicion of pickpocketing, and the epileptic man had to seek treatment at the hospital for his kidney and lung injuries after being released.³⁴ A report was filed, and that was the only action taken by the state regarding this incident.

A second report of misconduct occurred when a Roma man was dragged from his home by eight police officers, and driven by car for ten minutes; the whole time being beaten.³⁵ When the police were on trial for illegal restraint, maltreatment during an official procedure, assault and battery,

³¹ <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

³² <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

³³ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

³⁴ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

³⁵ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

and committing a breach of duty, they revealed that the reason for the abuse was to try to dissuade the man from pressing charges against another deputy in another abuse case.³⁶

It is against Hungarian law for the government to compile statistics on race or ethnicity, however NGOs estimate that half of the police abuse allegations involved Roma victims.³⁷

Both of these incidents involved a person being subjected to torture or to inhuman or degrading treatment or punishment at the hands of law officials. The European Court of Human Rights helps to illustrate what inhuman or degrading treatment or punishment is in the case of *Sandor Balogh v. Hungary*.³⁸ In this case, Mr. Balogh was in police custody for several hours, on suspicion of stealing fuel vouchers.³⁹ During his questioning, the police slapped him across the face and punched him in the shoulder.⁴⁰ Mr. Balogh went to the hospital and the doctors discovered a ruptured eardrum, which had to be operated on.⁴¹ The Hungarian Public Prosecutor's Office declined to file charges against the police officers involved, citing that it was impossible to substantiate Mr. Balogh's allegations.⁴² On July 21, 2004, the European Court of Human Rights found that Article 3 had been violated, and that Mr. Balogh was entitled to damages from Hungary in the amount of 17,000 Euro.⁴³

The case of the Roma couple, arrested on suspicion of pick pocketing is analogous to the case of Mr. Balogh. It doesn't appear that the Hungarian officials did anything, other than file a report, to punish the police officers who inflicted serious bodily injury to another human. On the other hand, the case of the man dragged from his home by police officers can be distinguished from the *Balogh* case because the government did take some action to punish the police officers who had caused the harm – they were tried in court. Based on these facts, it appears that Hungary violated Article 3 in the case of the pick pocketing couple since it took no action whatsoever, but did not violate Article 3 in the second case, as Hungary did initiated court proceedings to punish those who had caused the injury.

³⁶ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

³⁷ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

³⁸ *Balogh v. Hungary*, no. 47940/99 (Sect. 2) (Eng) – (20.7.04)

³⁹ *Balogh v. Hungary*, no. 47940/99 (Sect. 2) (Eng) – (20.7.04)

⁴⁰ *Balogh v. Hungary*, no. 47940/99 (Sect. 2) (Eng) – (20.7.04)

⁴¹ *Balogh v. Hungary*, no. 47940/99 (Sect. 2) (Eng) – (20.7.04)

⁴² *Balogh v. Hungary*, no. 47940/99 (Sect. 2) (Eng) – (20.7.04)

⁴³ *Balogh v. Hungary*, no. 47940/99 (Sect. 2) (Eng) – (20.7.04)

The US Department of State publishes a report each year on human rights practices for each country. In 2005 and 2006, the reports were very similar to the one in 2004. The Romani were singled out and beaten by police, with few repercussions. For example, in 2005 police officers severely beat a Roma man in custody. Two days later, they returned to his home and beat his brother as well, breaking his ribs.⁴⁴ The government initiated an investigation; however, nothing has come of that investigation.

Was there a violation of Article 5 of the ECHR?

In April 2004, a 15-year old Roma boy was arrested on suspicion of robbery.⁴⁵ Despite the alleged victim immediately confessing to police that he had lied about the robbery, the Roma boy was kept in custody for several weeks – without any charges ever being filed.⁴⁶ These facts bring up a violation of Article 5, which states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

d. ... the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

1. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

2. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

3. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

4. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

⁴⁴ <http://www.state.gov/g/drl/rls/hrrpt/2005/61652.htm>

⁴⁵ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

⁴⁶ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

Here, the boy was deprived of his liberty when he was in jail. His detention did not fall under exception (d) as he was not held for either educational supervision or for the purpose of bringing him before a competent legal authority. During that time that the police *knew* that the victim had lied about being robbed, and still didn't release the Roma youth. Because of this deprivation of liberty, the boy is entitled to seek compensation since Article 5(5) allows for recovery.

Fortunately, there was an improvement in this area as well for the Hungarian government, as there were no reports in 2005 or 2006 of arbitrary detentions or deprivations of liberty.

Was there a violation of Article 14 of the ECHR?

Even though there seems to be an improvement in some areas such as the rights to life and liberty, discrimination against the Roma continues to be a major problem in Hungary. Article 14 states that: "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."⁴⁷ While Hungary's human rights practices are overall in accordance with the ECHR, Hungary struggles with the treatment of the Roma people.

In 2004, living conditions were significantly worse for the Roma than the general population; they were significantly less well educated; and had below average income and life expectancy.⁴⁸ Further, the unemployment rate for Roma was estimated at approximately 70 percent, more than 10 times the national average, and most Roma lived in extreme poverty.⁴⁹ Furthermore, there was widespread discrimination and stereotypes about the Roma, as being both poor and socially burdensome.⁵⁰ These statistics remained valid in 2005 and 2006.

In the ECJ decision of *Ministere Public v. Mutsch*, the court held that nationals of one Member State cannot be discriminated against by another Member State.⁵¹ In that case, Luxembourg national who resided in Belgium was arrested on criminal charges.⁵² The man requested to have

⁴⁷ <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

⁴⁸ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

⁴⁹ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

⁵⁰ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

⁵¹ *Ministere Public v Mutsch* [1985] ECR 2681

⁵² *Ministere Public v Mutsch* [1985] ECR 2681

the court proceedings in German, which was denied.⁵³ The court held that because the ECHR allows for the free migration of workers from one Member State to another, having court proceedings in a language that the accused doesn't understand discourages this free movement of migrant workers and is therefore discriminatory.⁵⁴ According to the *Mutsch* decision, discrimination does not have to be obvious to violate the ECHR. Unfortunately for the Roma in Hungary, the discrimination against them is obvious, and the court would likely find that the facts alleged are enough to find that there has been a violation.

In 2004, a textbook name "Etika" was published that portrayed the Roma as "people who can hardly resist committing crimes and who burden society by living on social assistance."⁵⁵ Etika is intended for use in schools for children ages 13 - 14, even though it is openly derogatory and discriminatory, and 25,000 of these books have already been distributed to schools.⁵⁶ Even the Minister of Education acknowledges the derogatory nature of the book, but has not done anything to remove it from the classroom or discourage its use.

Pregnant Roma women also get discriminated against in Hungarian hospitals. Sometimes they are segregated from the other non-Roma women, other times, their care is far below the standard of care given to non-Roma women. In September 2004, after having contractions, and being without medical attention for 2 ½ hours, a Roma woman got up from her hospital bed to go to the toilet.⁵⁷ While on the toilet, in response to pain, she began to push and ended up giving birth to her daughter in the toilet of her hospital room.⁵⁸ Did the doctors and hospital directors respond with horrified apologies? No. They laughed at her.⁵⁹ After she filed a complaint alleging a breach of care, the hospital initiated an "investigation," and concluded that the doctor who ignored her for 2 ½ hours and then laughed at her did not violate his duties.⁶⁰

Clearly, discrimination against the Roma is rampant. From their unemployment rate to unequal treatment in hospitals to the government perpetuating stereotypes in textbooks, Hungary is not doing anything to change the situation. Not only is the government violating Article 14, but it is also completely ignoring the EU emphasis on anti-discrimination.

⁵³ *Ministere Public v Mutsch* [1985] ECR 2681

⁵⁴ *Ministere Public v Mutsch* [1985] ECR 2681

⁵⁵ <http://www.errc.org/cikk.php?cikk=2180&archiv=1>

⁵⁶ <http://www.errc.org/cikk.php?cikk=2180&archiv=1>

⁵⁷ <http://www.errc.org/cikk.php?cikk=2181&archiv=1>

⁵⁸ <http://www.errc.org/cikk.php?cikk=2181&archiv=1>

⁵⁹ <http://www.errc.org/cikk.php?cikk=2181&archiv=1>

⁶⁰ <http://www.errc.org/cikk.php?cikk=2181&archiv=1>

As mentioned above, the guidelines set out by the EU are a floor, not a ceiling and are the bare minimum that a country is expected to comply with. Hungary is not complying at all. For the past three years, since its membership into the EU became official, Hungary has been aware of its violations.⁶¹ From cases filed in the European Court of Human Rights to the reports published by the U.S. Department of State as well as articles published by the Roma Rights Center, Hungary has known, but done nothing to change its behavior. An argument exists that perhaps Hungary can't change the way that people feel about the Roma, however, Hungary must stop perpetuating stereotypes by using discriminatory textbooks in class and by not punishing the people who commit human rights violations, such as the doctor who laughed at the woman who gave birth in a toilet. Otherwise, the EU will realize that Hungary does not take its obligations to EU seriously, and there may be serious repercussions for Hungary -repercussions that are no laughing matter.

⁶¹ <http://www.state.gov/g/drl/rls/hrrpt/2004/41685.htm>

Sudanese History X: Genocide in Darfur? What genocide?

Today the words “Darfur” and “genocide” have become almost synonymous. The world media almost succeeded in creating an impression, that genocide indeed takes place within the western province of Sudan, where “Arabs are exterminating the African minority”. Would you enter “Darfur” in any search engine on the internet, among the first links the word “genocide” will certainly pop-up. Since ordinary people have a vague perception of what genocide really is, they usually tend to believe it to be a war crime, when a certain ethnical group faces elimination. A good example here could be a quote from the upcoming Rambo IV movie. “Burma’s a war zone” – says Rambo. “It’s more like genocide” – an instant reply follows. International criminal law does not allow such free interpretations however, and calls for a precise and exact use of terminology, therefore for a lawyer the question whether the word “genocide” is applicable to the situation in Darfur or not, has a tremendous meaning.

Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 constitutes that genocide is an act, which is committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such and which involves 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; or e) Forcibly transferring children of the group to another group. The ICC Statute adopted this definition without any change. Though some claim that it is incomplete and misses certain important conducts, which too should definitely be covered by the term “genocide”, this definition is the one on which the international community has agreed on and deviations from its wording could prove dangerous and leading to anarchy in the common language of international criminal law. Even in the case of Khmer Cambodia, where socio-political cleansing clearly took place, and allegations of genocide were cried out throughout the world, the UN chose to avoid defining such actions as “genocide” and in the end came to a conclusion that the ruling regime *was* among other crimes responsible for genocide, but that is because they were deliberately exterminating

Vietnamese, Chinese and other ethnical groups, which lived in Cambodia during that time. Nevertheless, the Cambodian example further fueled a dangerous, but worthy theory, which claims that “as such” in the common definition should be interpreted in the sense of “as it is”. Therefore an elimination of intellectuals or other class within Cambodia could be seen as auto-genocide, i.e. a situation, where a national group was destroying its own existence as such (as it was in socio-political sense). The author of this article is not rejecting this theory, however he believes, that promoting it could lead to future abuse, where a political or other cleansing, not within the scope of the definition, would be named “genocide” and ordinary persons, who drain their knowledge from official sources, will find themselves misinformed, for they will only see the “top of the iceberg” (i.e. the word “genocide”) and associate it with the classical 1948 definition. A cautious approach should therefore be preserved, also when talking about Darfur.

The bloodshed in Darfur started when two local rebel groups – the Sudan Liberation Movement and Justice and Equality Movement accused the government of oppressing non-Arabic population and conducted raids on state institutions in 2003. Instead of fighting the rebels itself, the government of Sudan chose to arm a group of nomads called Janjaweed, who beside fighting the SLM and JEM also adopted a policy of terrorizing villages friendly to the rebels. Though the government of Sudan now claims that the Janjaweed are out of control, that they exercise no control over this group and that their actions are condemned by the government, certain sources suggest, that the Janjaweed are still supported by Al Bashir and his followers, and some reports indicate that air-strikes, which precede the “terror-raids” are carried out by Sudanese aircrafts. The situation is further bolstered by the recent discoveries of oil fields in Darfur, which gives a reason to suggest, that the “ethnical cleansing” policy could be dictated by motives of claiming the oil-fields for themselves. According to official sources, the number of persons killed up until now in Darfur conflict varies from 200 000 to 400 000, with 2,5 million displaced. Currently standing African Union peacekeeping forces (AMIS), which proved ineffective in holding off the Janjaweed will be replaced by hybrid UNAMID in March 2008.

International opinion on whether attacks on Darfur population constitute genocide varies. The Bush administration announced in 2004 that genocide was indeed taking place and they have been standing by that position ever since. The term “genocide” has also been constantly used by human rights groups, especially Human Rights Watch. The government of Sudan, backed up by its political ally - China, denies the allegations. European Union after conducting its own research

on-the-spot found no evidence of genocide in the Sudanese region of Darfur, although they did admit that “the killing was widespread, with little evidence of government efforts to protect civilians”. In January 2005 the UNSC by its resolution 1564 established an International Commission of Inquiry to deal with this specific question, which concluded after a 3-month investigation that “the crucial element of genocidal intent was missing” to speak of state policy of genocide in Sudan. The killings, rapes and other crimes however, may in commission’s opinion have been committed by individuals with genocidal intent, therefore the question should be resolved by a competent court. So far the “competent court”, the ICC has issued two arrest warrants: one for Sudan’s Minister of State for Humanitarian Affairs – Ahmed Harun and other for Ali Kushayb – a senior Janjaweed commander. The two are accused of committing crimes against humanity and war crimes, but not genocide.

Contrary to common misconception, the killings in Darfur do not have religious background. Though certain targeted African tribes consider themselves to be Christian, most of them practice Islam. The skin-color is not a discriminative attribute either, since everyone in Darfur is black and can not tell each other apart just by appearance. Years of living side by side has led to merger of the nationalities and the label “African” or “Arab” now has become a political term, chosen by tribes depending on which language they speak and whether they are farmers (Africans) or nomads (Arabs), regardless of their ethnic origins. Since being an Arab has become a political advantage lately, certain groups change their title to Arab once they attain a certain level of wealth.

Although different international research groups could not confirm that genocide was taking place in Darfur, most of them succeeded in proving that the attacks on “Africans” are systematic, and carried out with a clear desire to expel the groups from the region. The policy of the so-called ethnic cleansing is therefore pursued. According to professor William Schabas, it is incorrect to assume that ethnic cleansing is a form of genocide, or that ethnic cleansing amounts to genocide. Ethnical cleansing is a set of different measures, which are carried out with the purpose of changing permanently the ethnic consistence in a single area, whereas the specific intent of genocide is destruction of a group in whole or in part. Nevertheless it is very possible that ethnical cleansing “switches” to genocide, therefore the two phenomenon are not necessarily self-excluding.

The expelling-tactics of Janjaweed include ordinary killings (victims are killed by gun-shots, explosions etc), mass executions, brutal murders (some victims have been reported to be burned or buried alive). Beside leaving injured civilians to rot, Janjaweed sometimes resolves to torture, which is usually applied to receive money from victim's relatives or, in case of live-caught members of rebel-groups, for demoralization purposes. Janjaweed is often reported stealing farmers' cattle, food, money and other objects of any value to the African tribes. All villages are partially or totally burned. Crops, food containers and other items necessary for the storage and preparation of food are being destroyed, sources of fresh water poisoned to ensure that the expelled tribes would not return. If the tribes nevertheless find ways to restore their settlement, they are attacked again. Villagers are not allowed to enter big towns with hospitals and are often denied medical care. Efforts done to keep humanitarian aid from reaching the "undesirables" remain extremely high. Some farmers are reported to be held in special camps, where they are deprived of water and food, those who try to run away are ruthlessly killed. Mass-rape is also a common tactic exploited by the Janjaweed on a large scale basis. Every second raided village reports rapes taking place. Since most of the Darfur population is Islamic, rapes deliver a major blow not only to the gene pool of the African community, but also to the morale and mental state of the victims, since there exists a stigma of raped women in Muslim societies, and they are most likely to be banned and become castaways. This can be seen as conduct described in the Genocide Convention Article 2(d) – imposing measures intended to prevent births within the group. Other than that there is no doubt that the above described actions of Janjaweed also constitute a) killing members of the group, b) causing serious bodily or mental harm c) deliberately inflicting conditions of life calculated to bring destruction of the group in whole or in part. However, in order for this to be true, one needs to prove that African population of Darfur is a group *protected* by the Genocide Convention.

Throughout the years African tribes residing in Darfur, most notably Zaghawa, Massaleit and Fur have developed their own languages, cultures and kinship systems. Although it was noted above that the nationalities are mixed in the region, own language and culture gives a right to speak about distinct communities. Since all nationalities today are more or less mixed, there cannot be a 100% pure ethnical class, therefore this status is mainly applicable to any group, which differs from others by culture and members of which also consider themselves to be part of this different group. Thus Zaghawa, Massaleit, Fur and other tribes can be described as "ethnically distinguished", therefore they are protected by the Convention of 1948.

Coming back to the aforementioned theory, that “as such” should be interpreted in the sense of “as it is”, the ICTY found in the *Jelisić* case that the genocidal intent can take two forms: on the one hand, the intent to exterminate a very large number of members of the group, and, on the other, the intent to pursue a more selective destruction targeting only certain members of the group “because of the impact their disappearance would have on the survival of the group as such”. So far there is no evidence, that Janjaweed are targeting or distinguishing particular elements in African societies they attack. Although reports indicate, that Janjaweed can be bribed and that certain villages pay large amounts of money for “protection”, this of course cannot be considered a distinction on the basis of financial wealth. Therefore it does not matter whether “as such” should be interpreted like “as it is”, because selective destruction is not concerned anyway.

The subjective element (intent to destroy a group in whole or in part) must nevertheless be proven in order to speak about genocide. Janjaweed actions do not suggest that they are trying to exterminate entire tribes of the African population of Darfur (whole groups), rather that they are trying to terrorize parts of tribes in order to force all the African groups to leave the region. It is highly doubtful however, that a number of people necessary to be eliminated for the whole group to “pack up and leave” constitute a particular part of a group in the meaning of Article 2 of the Genocide Convention.

Beside that, the ICTY held in the *Stakić* case, that on subjective level, the perpetrator should always distinguish targeted groups in a positive manner (as opposed to negative), *id est* a targeted group must be made up by including and not excluding. The Human Rights Watch numerously reported that Janjaweed members are always shouting “Kill the *nuba*” when attacking a village. *Nuba* is a collective term used for the tribes who live near the mountains of western Sudan. *Nuba* can not be considered a protected group itself, since it is composed of quite diverse and different ethnic groups. Since Janjaweed do not proclaim, that they will get rid of Zaghawa, Fur or any other tribe in a positive manner, but claim that they will “clear the region of all non-Arabs”, this is another reason to find that the necessary element of intent is missing.

To conclude, even if *genocide* is not being waged in Darfur, Article 1 of the Genocide Convention calls for *prevention*. As described above, there are prerequisites for genocide and the only question which remains is – could Janjaweed obtain genocidal intent in the future? The author of this article believes, that this is not likely to happen, because the Sudanese government will then become a perpetrator of genocide itself, since as the ICTR held in the *Akayesu* case,

those, who are knowingly aiding as well as abetting genocide are also responsible for this crime, and the government surely wants to keep its ability to perform “blade walking” in legal-terms.