

Chapter I Introduction

The end of the Cold War exposed the existence of internal political wrangling, human rights abuses, and other acts of injustices that hitherto were hidden in authoritarian states as a result of the overall dynamics of the Cold War. Africa has had its fair share of the change in dynamics of post-Cold War; namely from inter-state conflicts to intra-state conflicts. Matters that were regarded as being under the exclusive domestic jurisdiction of states are now interpreted as matters of international concern. A “normal” civil war which was regarded as internal and hence, not a threat to international peace and security in the 1960s, can easily be interpreted to constitute a threat to international peace and security today.

One of the positive aspects of the end of the Cold War is the seeming determination by the United Nations Security Council not to view matters of international peace and security from the myopic lens of ideological differences.¹ Situations which the UN Security Council would hitherto, have dismissed as matters strictly under the preserve of the state are now considered as threats to international peace and security. However, notwithstanding the end of ideological tensions which permeated the Cold War, the UN has failed to protect the civilians in a number of situations. A classical example is the genocide of 1994 in Rwanda. The apparent failure of the international community, and more especially the UN Security Council, to protect Tutsis and moderate Hutu population of Rwanda has continued to haunt the collective conscience of the international community. The genocide in Rwanda revealed once more, that atrocities within a state can also have international consequences,

¹ For instance the UN Security Council Resolution 733 of January 23 1992 on Somalia where it declared that the situation in Somalia was a threat to international peace and security. See also the UN Security Council Resolution 767 of July 24 1992 on Somalia authorizing the deployment of UN Mission in Somalia (UNISOM).

and that such atrocities when they are of such magnitude, requires an obligated action from the international community.

Controversies still exist as to what the nature of such obligated action would be. While some contend that the international community can intervene on humanitarian grounds,² others argue that the UN Charter which prohibits the use of force and intervention in the domestic jurisdiction of a state expressly prohibits humanitarian intervention.³ Since the protection of civilians in violent conflict has become paramount, the international community has been in “search” of the best possible approach to intervening in violent conflicts in the globe for the protection of the civilian population. Diplomatic means and the use of military force are options open to the international community. However, there is no consensus on when, and if such military option should be exercised.

Following the failure of the international community to effectively intervene and protect the civilian population in the conflicts of the 1990s, and more particularly in the case of Rwanda and Srebrenica in Bosnia, the debate on the merits and demerits of intervention has been a major discourse in international relations. While the failures of the international community to prevent and respond to some of these situations were criticized, when the international community did intervene, debates also arose.⁴ The debates mostly dwelled on

² See generally, Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, (2nd ed), (Transnational Publishers, Inc. Irvington-on-Hudson, New York, 1997).

³ United Nations Charter, Article 2 (4) and 2 (7). See generally, Caroline Thomas, “The pragmatic Case against Intervention,” in Ian Forbes and Mark Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention*, (London: Macmillan Press Ltd 1993) pp.91-103. See also Anthony Carty, “Intervention and the Limits of International Law”, in Ian Forbes and Mark Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention*, (London: Macmillan Press Ltd 1993) pp.32-42.

⁴ Cheryl O. Igiri and Princeton N Lyman, “Giving Meaning to ‘Never Again’: Seeking an Effective Response to the Crisis in Darfur and Beyond,” Council on Foreign Affairs Relations, No. 5 September 2004, available at <http://www.cfr.org> accessed March 28, 2006. See also Alex J. Bellamy, “Responsibility to Protect or

the perceived unequal responses to situations in different regions of the world, questions of whether there were options to military response that had not been exhausted, critiques of the failure to respond earlier, and condemnation of the conduct of the intervening forces themselves.⁵

The core of this debate centres on the UN Charter prohibition on the use of force.⁶ In post September 11 2001 era, it has become more apparent to the world that the law on the use of force is more honoured in breach. Following this realisation and the acknowledgment that the gross and systematic violation of human rights affects the principle of humanity, the government of Canada, on the initiative of its former Foreign Minister, Lloyd Axworthy and with the support of several major US foundations, the Switzerland government, and the British government, established the International Commission on Intervention and State Sovereignty (ICISS), in September 2000.⁷ The final report of the Commission was published in December 2001 and this report has given added impetus to the debate.

The Commission re-conceptualised the concept of the “right to intervene” and introduced into the debate “the responsibility to protect.”⁸ The central argument of the concept is that, the primary responsibility for the protection of the people lies with the sovereign state. However, if the sovereign state is unable or unwilling to protect its people, or is itself the source of the threats, the responsibility to protect the population shifts to the international

Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq,” *Ethics and International Affairs*, Vol. 19, 2005.

⁵ Ibid.

⁶ Art. 2 (4) UN Charter 1945.

⁷ Cheryl O. Igiri and Princeton N. Lyman, op cit.

⁸ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, (International Development Research Centre, Canada, 2001) Para. 1.41

community of states.⁹ The concept is an acknowledgment of the African concept of *ubuntu*.¹⁰ The Secretary-General of the United Nations, in furthering his efforts to finding lasting peace in the world, and more particularly in many of the conflict hotspots, set up a High-Level Panel on Threats, Challenges and Change in 2004.¹¹ The panel, in its report to the Secretary-General, *inter alia* endorsed the recommendation of the ICISS regarding the concept of the responsibility to protect. The UN at its 60th General Assembly Summit in 2005 further adopted a declaration in favour of the responsibility of the international community to protect civilians in danger.¹² The UN Security Council in its Resolution 1674 of April 28 2006 acknowledges the concept of the responsibility to protect. The Resolution also states that the deliberate targeting of civilians during armed conflicts and the deliberate, systematic and widespread violations of international humanitarian and human rights law may constitute a threat to international peace and security.¹³ It is hoped that with the adoption of the responsibility to protect, the controversy surrounding the question of intervention will be laid to rest. However, the adoption of the responsibility to protect concept will not by itself offer protection to civilians caught up in violent conflicts. It will take the political will and commitment of all the stakeholders to actualise the spirit of the concept.

Aim

⁹ Ibid Chapter 2.

¹⁰ *Ubuntu* is a Zulu/Xhosa (South African indigenous languages) which means humanity. It is synonymous with the saying “I am because you are”- It encourages the spirit of togetherness and cooperation among African people. The concept is represented in the Kiswahili word ‘*Umoja*.’

¹¹ *A More Secured World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, set up by the Secretary-General of the UN. UN Doc. No. A/59/565.available at <http://www.un.org/secureworld> accessed June 25 2006.

¹² UN, General Assembly, 2005 World Summit Outcome, Sept. 15, 2005, Para. 138-139, available at http://www.unfpa.org/icpd/docs/2005summit_final_outcome.pdf accessed on June 25 2006.

¹³ UN Security Council Resolution 1674 of April 28 2006.

The aim of this study is to deconstruct the evolving concept of responsibility to protect and its application to the conflict in Darfur, Sudan. While the adoption of the concept is a landmark success for civilian protection and human security, it must be recognised that its operationalisation and application will be within the context of a politicised United Nations, hence, situations warranting such responsibility and action will be subjected to serious scrutiny.

Statement of the Problem

In February 2003, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) attacked and captured Gulu, the capital of Jebel Marrah in central Darfur, Sudan.¹⁴ This attack internationalised the conflict that has been part of the Western Sudan for decades. The internationalisation of the conflict was not necessarily as a result of the attack, but more because of the response of the Sudanese government to the attack. The government in responding to the attack, used the regular armed forces, but failing to restore order in the area, introduced the *Janjaweed* militia to intimidate and attack the civilian population directly. Media reports indicate that at least 400,000 civilians have lost their lives and over 2.7 Million people have either been internally displaced or are refugees since the beginning of the conflict in 2003.

The primary responsibility of protecting the civilian population is that of the state to which the people belong. However, where this responsibility cannot be carried out effectively by

¹⁴ See generally, Flint, Julie and de Waal, Alex, *Darfur: A Short Story of a Long War*, (Zed Books, London, New York and Cape Town) 2005. See also, Robert O. Collins, *A History of Modern Sudan*, Cambridge University Press, United Kingdom, 2008 p. 287.

the state in question either due to its inability or unwillingness to do so, the burden of the responsibility shifts to the international community.¹⁵

The question of “right” of intervention into what was hitherto considered to be the domestic preserve of a state has been partially addressed by the adoption of the responsibility to protect concept. However, the spirit of the concept is not as novel as it sounds. The first Geneva Convention of 1864 was crafted to care for the wounded combatants during armed conflicts.¹⁶ In 1949, the Fourth Geneva Convention on the protection of civilians during war situations came into being.¹⁷ A plethora of international and regional human rights instruments that also seeks the protection of civilians have since been crafted.¹⁸ The Genocide Convention for instance, makes genocide an international crime and seeks to prevent and punish the act of genocide whether committed in time of peace or during war situations.¹⁹ It calls for all UN bodies and agencies to prevent and suppress acts of genocide, and requires state parties to enact national laws prohibiting genocide and to punish persons or officials who commit genocide, while allowing extradition of such persons in cases where the state lacks the ability or is unwilling to punish.²⁰ Given that these normative instruments have been in existence for decades, the question, therefore, is whether the responsibility to protect concept will affect state and international community’s behaviour towards the protection of the civilian population.

¹⁵ ICISS, op cit.

¹⁶ Convention for the Amelioration of the Wounded in Armies in the Field, August 22 1864.

¹⁷ See Generally, The Fourth Geneva Convention: Convention (IV) Relative to the Protection of Civilian Persons in time of War, 12 August 1949. U.N.T.S No. 973, Vol. 75, p. 286.

¹⁸ Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social, and Cultural Rights 1966, African Charter on Human and People’s Rights 1981, etc.

¹⁹ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. 1, 102 Stat. 3045, 78 U.N.T.S. 277(Genocide Convention).

²⁰ Ibid.

The principle embedded in the responsibility to protect is that “intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.”²¹ Against this backdrop, the Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights to the Economic and Social Council on the situation of human rights in the Darfur region of Sudan is very instructive.²² The report listed the following gross violations of human rights by the government-backed *Janjaweed* militia. These are indiscriminate attacks against civilians, rape and other serious forms of sexual violence, destruction of property and pillage, forced displacement, disappearances, persecution and discrimination.²³ The crisis has led to a large population of Darfurians becoming either refugees or internally displaced. There is no doubt that this situation affects the human security of affected target population of Darfur. The number of Internally Displaced Persons (IDPs), refugees and deaths vary depending on the source and date of the statistics. However, what is clear is that they are in their tens of thousands. The refugees, who fled across the Chadian-Sudanese border between January and March of 2005, alleged that aerial bombardment of villages and "ethnic cleansing" by pro-government Arab militias was a common occurrence.²⁴ The source of livelihood of the Darfurians has been threatened as they have been prevented from planting or harvesting crops. Humanitarian relief agencies still find it difficult to access Darfur because of the

²¹ ICISS, op cit Para 2.25.

²² UN Economic and Social Council E/CN.4/2005/3 of May 7 2004. See also Report of the Panel of Experts on Sudan established pursuant to Resolution 1591 (2005) available at http://www.eyeontheun.org/assets/attachments/documents/sudan_response_to_panel_report_2-15-06.doc accessed June 25 2006, which reported evidence of ongoing and widespread acts that may constitute a violation of International Humanitarian Law both of a treaty and customary law nature. The report further states that the *Janjaweed* militia continues to maintain its cache of ammunitions and that the Government of Sudan (GoS) is still actively supporting the militia.

²³ Ibid. Chapter IV.

²⁴ Ibid.

ongoing insecurity and the Government of Sudan's denial of travel permits to humanitarian workers.²⁵ The recent action by the government of Sudan in revoking the operating licences of 13 international Non Governmental Organisations (NGOs) in Darfur has compounded the humanitarian situation in the region.

This research focuses on the emerging principle of responsibility to protect and seeks to identify whether the situation in Darfur, Sudan merits the international community's obligated responsibility to protect the civilians. Being an evolving concept, the research will also seek to identify some major challenges that might forestall its operationalisation. It must be stated at the onset that because Darfur is a full blown conflict, this study focuses more on the reaction aspect of the concept. However, the study recognises the importance of the other two aspects – prevention and rebuilding – in achieving a well rounded mechanism for civilian protection. The ICISS has proposed two scenarios that might deserve military intervention, namely; where there is large-scale loss of life or large-scale ethnic cleansing.²⁶ However, the UN Security Council has not given enough attention to the concept despite its adoption of Resolution 1674 of April 2006.²⁷ Notwithstanding the reference to the “responsibility to protect” in both the World Summit Outcome Document and Resolution 1674, it does not ensure that timely and automatic response would be taken by the Security Council. The use of the language “on a case by case basis” in paragraph 139 of the World Summit Outcome Document suggests that the Security Council is still at liberty to use its discretion in determining when to act. The criteria recommended both by the ICISS and the UN Secretary General's High-level panel in the determination of when the Security Council should intervene and sanction the use of military force has not been

²⁵ Ibid.

²⁶ ICISS, *op cit* p. xiii.

²⁷ Reso. 1674, *op cit*.

adopted by the Security Council. More needs to be done both by the Council and the International community at large, if this concept is not to be a dead letter regime.

Research Questions

The following questions are addressed in this research, to bring some clarity to the debate around the responsibility to protect especially its application to the Darfur situation:

- What are the practical challenges envisaged in the application of the concept to the Darfur conflict and other such situations?
- Given the initial resistance by the government of Sudan to the deployment of a UN force to Darfur, what is the best approach possible for the international community in such situations?
- In view of the allegation that the government of Sudan is backing the *Janjaweed* militia, how do we categorize the atrocities in Darfur?
- Does the situation in Darfur, Sudan merit the international community's responsibility to protect?

Limitation and Scope of Study

This research is limited to the study of the emerging principle of the responsibility to protect and its applicability to the Darfur conflict in Sudan. However, other normative concepts associated with the protection of civilians in violent conflict are explored. To that extent, the concept of humanitarian intervention features prominently in the study. The

debate surrounding the use of force, intervention and sovereignty are also addressed by the study. Since the conflict in Darfur is still ongoing, the research will not be predictive as to the outcome of the measures employed by the international community to secure peace. The research will, therefore, not be affected by the inability of the international community to secure peace in Sudan soonest.

Significance/Relevance of Study

As a general principle, international law recognises that matters within the domestic jurisdiction of a state are not to be interfered with by outside parties.²⁸ This principle of non-intervention in the domestic affairs of member states of the United Nations, together with the principle of sovereign equality of all member states, constitutes the bedrock of international relations.²⁹ The United Nations Charter however, provides for interventions endorsed by the Security Council, mainly in situations that constitute a threat to international peace and security.³⁰ During the Cold War, there was a noticeable lack of interest by the UN Security Council to intervene in situations where the strategic interests of the permanent members were involved. This inertia on the part of the Security Council, triggered various unilateral actions of interventions by states, acting alone or as a collective, without the authorisation of the UN Security Council as required by the Charter.³¹ The intervening states while not grounding their claims on the right of humanitarian intervention relied on the doctrine of self defence.³² The concept of

²⁸ Art. 2 (7) UN Charter 1945. This is strengthened by UN General Assembly Resolution 2625 of 1970 (Declaration on Friendly Relations).

²⁹ Ibid, Art. 2.1.

³⁰ Ibid, Art. 39.

³¹ UN Charter, op cit Art. 39.

³² For instance, India invasion of Pakistan (1971), Tanzania action in Uganda (1979), Vietnam invasion of Cambodia (1978).

humanitarian intervention has vexed most international lawyers and international relations experts. NGOs have also engaged in the debate asserting that the use of the word “humanitarian” is an anomaly in the context of a military action. Controversies also exist as to the legality and legitimacy of such interventions. With the introduction into the debate on human protection of the responsibility to protect by the ICISS, the international community seems to be more receptive of the concept than that which asserts the right of humanitarian intervention.

The situation in Darfur, Sudan has been described as the worst case of humanitarian crises. Despite media reports and humanitarian agencies reports citing the situation as reflective of ethnic cleansing or genocide, the international community has not taken a definitive stand on the approach to take to bring an end to the human suffering. The signing of the Darfur Peace Agreement in Abuja in May 2006, and the deployment of a UN AU Mission notwithstanding, reports of killings, pillage, burning and looting of villages and rapes still make the media headlines. The government of Sudan continues to cling weakly onto the concept of sovereignty and non-intervention, in its attempt to prevent external intervention. The study promises not only to bring to the fore atrocities committed against the people of Darfur, but also, emphasises the need for the international community to give life to the concept of responsibility to protect. The study, therefore, challenges the international community to rise above the rhetoric of “Never Again!” and act in order to avoid a repeat of the Rwanda type of atrocities.

Since the concept of responsibility to protect is new in international relations, it is worth studying in order to interrogate the issues involved. The study will, therefore, be

contributing to the body of growing literature on the concept, while at the same time articulating ideas on how the international community can deal with other Darfur-like situations in future. With the adoption of Resolution 1706 by the Security Council on August 31 2006 which authorised the deployment of a UN peacekeeping force to the Darfur region, and the reluctance of the Government of Sudan to accede to the initial deployment, the study becomes important in articulating how such face off can best be resolved in future cases. The study, therefore, promises to dilate on the dilemma that the international community faces, where the government in power fails to cooperate with the international community by giving its consent to the deployment of UN peacekeeping force.

This study could not have come at a better time especially with the much renewed efforts both on the diplomatic front and elsewhere, on the importance of civilian protection especially during violent conflict. The study, therefore, promises to flesh out the issues involved in the debate and take it a step further, by arguing that, it is the moral obligation of states to protect their population and when they fail in this duty, the moral obligation becomes that of the international community. Since the Government of Sudan has been named as a party to the conflict, the indictment indicates that the government has shirked its moral obligations of protecting the civilians. This, therefore, means that the international community must assume the moral responsibility of protecting the civilians of Darfur.

The study further promises not only to emphasize the need for an international standard on intervention for human protection, but also the need for an emphasis on human security while de-emphasizing sovereignty. The current view held by many that sovereignty implies

responsibility will be further explored in this study. The claim by the Government of Sudan that it will be compromising its sovereignty to allow the deployment of a UN peacekeeping force to Darfur is shallow. If the Government of Sudan did not compromise its sovereignty by allowing the AU Mission (AMIS) in Sudan, the question is how then could the “re-hatting” and expansion of the AMIS constitute a compromise of Sudan’s sovereignty? Moreover, there is an existing UN Mission in Sudan (UNMIS) which monitors the implementation of the Comprehensive Peace Agreement (CPA) between the north and south of Sudan. The Government of Sudan’s position that it is capable of deploying more than 20,000 government troops to take over from the AMIS troops at the expiration of the AMIS mandate, if it was allowed to happen, would be tantamount to sanctioning further killings of civilians in Darfur, and more especially, that of the rebels who are not party to the negotiated accord. The study, therefore, exposes the duplicity of the government of Sudan in finding a solution to the conflict.

The study is important because it presents an opportunity to analyse the concept of responsibility to protect *vis a vis* that of humanitarian intervention. While the debate on human protection has moved on to the responsibility to protect, it should be recognised that the concept can be traced to the various humanitarian intervention operations carried out either by states acting alone or as a collective, and the debates that such operations engendered. The study of the two concepts would, therefore, be an enriching exercise. More importantly, the study captures the essence of the three dimensional approach of the responsibility to protect namely; responsibility to prevent, responsibility to react, and responsibility to rebuild. The study, therefore, advocates that the international community’s responsibility to protect civilians in violent conflict should be put in practice and not just an

abstract theory. The study equally posits that the lateness in responding to violent conflict involving deaths of civilians amounts to the legal saying that “justice delayed is justice denied.”

Literature Review

The review of literature covers the following aspects of the study: historical aspects and background to the conflict in Darfur; humanitarian intervention; sovereignty and the use of force in international law; protection of civilians in violent conflict; and the responsibility to protect.

Historical Background to the conflict

The literature on the conflict in the Darfur region of Sudan is not as enriched as that between the north and south of Sudan. This can be understood against the backdrop of its being a relatively new and an almost neglected conflict both by the international community and the academia. This lack of initial interest in the conflict might not be unconnected with the fact that at its outbreak in early 2003, the international community's focus was more on the negotiations that led to the signing of the Comprehensive Peace Agreement between the Government of Sudan and the Sudan Peoples' Liberation Movement/Army (SPLM/A) in Naivasha, Kenya.

Given the interlinking nature of conflicts in Africa and more particularly that of Sudan, a review of the literature of the Darfur conflict would necessarily look at some elements of

the larger Sudanese conflict. Ann Mosley Lesch articulated the racial, political, cultural, and religious differences in Sudan to be a major cause of the overall Sudan conflict.³³ While the author does not specifically address the Darfur conflict, the issues identified by her can also be seen as playing key roles in that conflict. Lesch argues that the Islamization and Arabization of Sudan has often led to different and most times violent reactions on the part of the other peoples in that country. The reactions are basically demands for secession and the restructuring of the political system.³⁴

Ali Abdel Gadir Ali and Ibrahim A Elbardawi for their part, trace the origin of the Darfur conflict to the decades of deliberate political and economic marginalisation of Darfur by successive administrations starting from the British administration up to the granting of independence to Sudan in 1956.³⁵ They argue that Britain's deliberate policy of enhancing the business interests of certain influential families from the central Nile Valley by allocating choice agricultural lands, business contacts, and bank loans converted into grants, contributed to the eventual marginalisation of Darfur.³⁶ They acknowledge however, that the British objective was to minimise the risk of resistance by the Darfur locals to the colonial regime.³⁷

The marginalisation theory is further explored by Millard Burr and Robert Collins, who contend that Darfur has suffered neglect both during the colonial and post-colonial period in Sudan. According to them, the central government had always appointed Commissioners

³³ Ann Mosley Lesch, *The Sudan – Contested National Identities*, (Indiana University Press, Bloomington and Indianapolis) 1998 p. 3.

³⁴ Ibid p. 22

³⁵ Ali Abdel Gadir Ali and Ibrahim A. Elbadawi, "Explaining Sudan's Economic Growth Performance," AERC Collaborative Research Project on Explaining Africa's Growth Performance, May 2002 available at http://www.gdnet.org/pdf/draft_country_studies/Sudan-Ali_FR.pdf accessed May 25 2006

³⁶ Ibid.

³⁷ Ibid.

who neglected the basic needs of the people of Darfur and merely fulfilled the interests of the central government.³⁸

Ibrahim Fouad in his piece concurs with the marginalisation theory, and posits that the problem was further compounded by the phenomenon of ‘exported members’ – parliamentarians from Khartoum who represented Darfur in the National Assembly, but had little or no link and concern for the region.³⁹ This marginalisation, therefore, led to the formation of Darfur Front in 1965 by a group of Darfur elites to challenge the imbalance.⁴⁰ Fouad however points out that there have been violent clashes between the Arabs and the Africans living in Darfur, mainly as a result of the source of their livelihood and specifically because of the frequent droughts in the region.⁴¹

Alex de Waal looks at the conflict from the perspective of regional insecurity. While acknowledging the local dynamics of the conflict, de Waal brings the issue of external influence into the equation. He mentions the influence of Chad and Libya over the conflict, stating that the Government of Sudan has been accused of supporting Chadian insurgents through the provision of arms and offering of Darfur as a place of refuge, while Libya has been accused of providing arms and material support for various Sudanese governments and insurgents. De Waal cites the examples of Sadiq al Mahdi, the Ansar leader, who was exiled in Libya after being expelled by Ethiopia and the armed opposition to Jafar el

³⁸ See Generally, Burr J Millard, Robert O Collins, *Africa's Thirty Years War: Libya, Chad, and the Sudan, 1963-1993*, (Westview Press) 1999. See also, Robert O Collins, *A History of Modern Sudan*, (Cambridge University Press) 2008.

³⁹ Ibrahim Fouad. *Ideas on the Background of the Present Conflict in Darfur*. Germany: University of Bayreuth, 2004: May 2004.

⁴⁰ Ibid.

⁴¹ Ibid.

Numeri together with the invasion of Sudan in 1976 which was orchestrated from Libya to buttress his argument.⁴²

Emphasising the effects of droughts on the conflicts in Darfur, Buchannan Smith sees the constant droughts as a major factor in the depletion of assets and impoverishment of the people in Darfur. He argues that drought, therefore, triggered conflicts which most times lead to internal displacement of persons.⁴³

Michael Clough in his view discounts the influence of religion in the conflict in Darfur. For Clough, unlike the war between the North and South of Sudan where issues of Islam and Christianity as well as animism play an important role, the conflict in Darfur is predominantly between the same followers of Islam.⁴⁴ He, therefore, agrees with earlier authors that the genesis of the current conflict in the region can be traced to the decades of the central government exploitation, manipulation, and neglect of the region. Clough also posits that part of the factor to be considered in analysing the Darfur conflict is the recurrent cases of drought induced famine and its effect on the competition for the lean natural resources (land for grazing and agriculture). He further asserts that the earlier conflict in Chad equally contributed to the (in) security which resulted in the flow of arms and people into Darfur.⁴⁵ Clough, in his analysis of the current conflict in Darfur, posits that the immediate spark of the conflict may be linked to the progress in the negotiations between the north and south of Sudan that ended the twenty one year long civil war. He

⁴² Alex de Waal, "Some Comments on Militias in Contemporary Sudan," in Bleuchot H. (ed.), *Sudan: History, Identity, Ideology* (Oxford: Ithaca Press, 1991 pp. 71-83.

⁴³ Buchannan M. Smith and Davies S., *Famine: Early Warning and Response – the Missing Link*, (London: IT Publications, 1995 p. 106.

⁴⁴ Michael Clough, *Darfur: Whose Responsibility to Protect?* Available at <http://www.hrw.org/wr2k5/Darfur/7.htm> accessed March 25 2006.

⁴⁵ Ibid.

argues that the termination of the conflict must have created fears in the minds of Darfurians that they might be excluded from the power and wealth sharing formula negotiated by the Government of Sudan and the SPLM/A.⁴⁶

Douglas Johnson in his analysis of the root causes of Sudan's civil war, is of the opinion that the recurrent civil war and conflicts, can be traced to the patterns of governance which existed in Sudan even as far back as the 19th century. This system of governance established an exploitive relationship between the central authority and its peripheral units.⁴⁷ He further argues that "the introduction of a particular brand of militant Islam in the late 19th century" further accelerated the divide between the different units.⁴⁸ Johnson contends that economic, educational, and political development in Sudan took an unequal slant during the colonial administration, and that these inequalities were carried over into the post-colonial civilian and military dictatorships of Sudan.⁴⁹ He identifies the following factors as having contributed to the conflict in Sudan; the Arabization of the country; the weakened nature of Sudan's economy in the 1970's; the Cold War politics that saw Sudan acquiring arms at an unprecedented scale through various channels; interest of foreign investors especially in oil and water; and the re-emergence of militant Islam.⁵⁰ However, Johnson concedes that no one single factor can be held to be the cause of the Sudan conflict.⁵¹

⁴⁶ Ibid.

⁴⁷ Douglas H. Johnson, *The Root Causes of Sudan's Civil Wars*, (The International African Institute (Indiana University Press) 2003 p. xviii.

⁴⁸ Ibid.

⁴⁹ Ibid

⁵⁰ Ibid P. xix.

⁵¹ Ibid p.167.

In looking at the Sudan conflict from the lens of a regional conflict, Pat Lauderdale and Randall Amster argue that internal strife in the Horn of Africa is the result of a combination of colonialism and globalisation, irrespective of whether the conflict is a clan war, famine related or repression by a military or civilian dictatorship.⁵² They cite as examples the bombing of the US embassy in Kenya and Tanzania as instances of conflict generated by the disdain for Western policies and practices in the region. Lauderdale and Amster depict the Horn of Africa as a region that has been mired in conflict even before the colonial era. Tracing the history, they recount the incursions of Egypt and Turkey into the southern reaches of the area to source for Ivory, Ostrich feathers, myrrh, and slaves as exports to the Mediterranean.⁵³

Dunstan Wai in analysing the endemic nature of the conflict in Sudan with particular reference to that between the north and the south, argues that the conflict was the result of forced interaction between peoples of different and opposing cultures and races that has a history of antagonism and distrust.⁵⁴ He argues that the African-Arab schism is the main problem in the various conflicts in Sudan.⁵⁵ Agreeing with earlier authors on the marginalisation, race and cultural theory, Wai posits that differences in race and culture within a sharp unequal economic background, together with historical hostilities, psychological fears and lack of well structured and dedicated leadership can give rise to the most intense sort of civil or secessionist wars.⁵⁶

⁵² Pat Lauderdale and Randall Amster, "The Horn of Africa: Local Conflict, Global Order?" in Petro Toggia, Pat Lauderdale, and Abebe Zegeye (ed.), *Crisis and Terror in the Horn of Africa: Autopsy of Democracy, Human Rights and Freedom*, (Ashgate: Dartmouth, USA) 2000 p.1.

⁵³ Ibid pp. 1-2.

⁵⁴ Dunstan M. Wai, *The African-Arab Conflict in the Sudan*, (Africana Publishing Company, New York) 1981 p. 2.

⁵⁵ Ibid p. 16.

⁵⁶ Ibid p.9.

In analysing the problems of conflict in the Sudan, Mohammed Omer Beshir argues that the Southern Policy adopted by the Anglo-Egyptian colonial administration was instrumental in deepening the cleavages between the north and the south.⁵⁷ However, Wai counters this argument by emphasizing the fact that there was an existing hostility between North and South of Sudan even before the ascendancy of the Anglo-Egyptian condominium. Wai instead criticizes the southern policy on the sole ground that it did not bring about economic and social progress in the south as it did in the north.⁵⁸

Following up on the issue of cultural and racial differences, Francis M. Deng contends that the source of conflict does not necessarily lie in the fact of differences of identities, but rather, in the degree to which these differences and interacting identities and their goals are mutually accommodating or incompatible. In other words, conflicts of identities arise when elite members of a marginalised group rebel against such intolerable marginalisation and oppression by the dominant group.⁵⁹ On the aspect of Arabization and Islamization being a factor in the conflicts in Sudan, Deng points out that while the earlier process of Arabization of the northern Sudan was a peaceful process of cohabitation and interaction with Arab traders, the later aspect of Islamization and its Arabization was effected by an “organised force and ruthless use of military power.”⁶⁰ Deng further argues that the view popularly held that the North is uniformly Arabized and Islamized is “both factually incorrect and politically misleading.” He cites the example of the Fur people that have remained more Africans both in features and culture than other northerners.⁶¹

⁵⁷ See generally, Mohammed Omer Beshir, *The Southern Sudan: Background to Conflict*, (London: C.Hurst) 1968. Robert O. Collins, *A History of Modern Sudan*, Cambridge University Press, , United Kingdom, 2008.

⁵⁸ Dunstan Wai, op cit p. 37.

⁵⁹ Francis M. Deng, *War of Visions: Conflict of Identities in the Sudan* (The Brookings Institution, Washington D.C) 1995 p. 1.

⁶⁰ Ibid p. 37.

⁶¹ Ibid p. 44.

Gérard Prunier, in tracing the background to violent reaction of the Government of Sudan to the conflict in Darfur, is of the view that the ruling elites of Sudan have never considered Darfur a problem, and did not expect such uprising from their western relatives. He opines that the violent response of the Khartoum government is linked to its fear that the Muslim family was splintering.⁶² He posits that the perception that the conflict in Darfur is an ethnic cleansing carried out under Khartoum's orders by "Arabs" tribes against "African" tribes is both true and false.⁶³ He tries to disentangle the truth from the falsehood in his *Darfur: the Ambiguous Genocide*. Prunier contends that though there have been clashes between the "Arabs" and "Africans" in the past, it was never along the lines of race.⁶⁴ He also concurs with earlier authors that the seed of conflicts were sowed by the economic and social marginalisation of Darfur during the colonial administration. For instance, as at 1952, only one intermediate school out of the twenty-three that was in Sudan was located in Darfur.⁶⁵ Prunier however maintains that the social and cultural marginalisation was not racially or culturally motivated, but regionally inspired as there is the presence of "Africans" and "Arabs" in Darfur.⁶⁶

While many authors see the north-south dichotomy in Sudan as the core problem in the country, Prunier does not fully agree. He concedes to some extent that it is part of the problem. He however posits that "the North and South are most opposed because they lie at the furthest ends of a continuum which is already massively variegated before you reach its

⁶² Gérard Prunier, *Darfur: the Ambiguous Genocide* (Cornell University Press, Ithaca, New York) 2005 p. xi.

⁶³ Ibid.

⁶⁴ Ibid pp. 22-23.

⁶⁵ Ibid p 32.

⁶⁶ Ibid p. 42.

extremities.” He, therefore, maintains that none of the so-called “parts” of Sudan is homogenous.⁶⁷

From the extensive body of literature reviewed above, both on those that deal directly with the Darfur conflict and the Sudan conflict generally, it can be observed that there are different interpretations of the causes of the conflict. This ranges from political, social and economic marginalisation of Darfur to the racial differences and the Arabization and Islamization of the region. However, the economic social and political marginalisation factor seems to stand out more than the racial and religious factors.

Humanitarian Intervention

Since the re-emergence of the concept of humanitarian intervention in international law and international relations in the 20th century, debates over its legality have been ongoing both in academia and elsewhere. While some scholars are of the view that the concept of humanitarian intervention is a violation of international law as prescribed by the UN Charter,⁶⁸ others are of the view that it is in line with the overall purposes and principles of the UN.⁶⁹

J.L. Holzgrefe defines humanitarian intervention as “the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens,

⁶⁷ Ibid pp. 77-78.

⁶⁸ UN Charter Article 2 (4).

⁶⁹ Ibid Article 1.

without the permission of the state within whose territory force is applied.”⁷⁰ He argues that the narrowness of the definition to exclude interventions to protect a state’s nationals, and other non-forcible interventions like economic sanctions etc, is due to the fact that the question of the use of force by a state to protect the human rights of others is more urgent and controversial.⁷¹ In his support of humanitarian intervention, Holzgrefe cites the example of the Security Council’s determination in Resolution 688 of 1992, that the civil war in Somalia constituted a threat to international peace and security, and the Security Council Resolution 929 of 1994 which determined that the massacre of Tutsis during the Rwandan genocide constituted a threat to international peace and security. Holzgrefe, therefore, maintains that it was the act of genocide itself, and not the trans-boundary effect of it that prompted the Security Council to act.⁷² He further argues that the drafting history of the UN Charter, together with the recent practice of the Security Council, lends credence to the legal realist contention that humanitarian intervention, sanctioned by the UN is a lawful exception to the Charter’s general rule prohibiting the use of force in international relations.⁷³

Michael Reisman for his part maintains that under customary international law, the right of humanitarian intervention exists and that this right is not expressly terminated or weakened by the UN Charter.⁷⁴ Reisman’s argument is that “since humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state

⁷⁰ J.L. Holzgrefe, “The Humanitarian Intervention Debate,” in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p.18.

⁷¹ Ibid.

⁷² Ibid p. 42.

⁷³ Ibid p. 43.

⁷⁴ Michael Reisman with assistance from Myres S. McDougal, “Humanitarian Intervention to Protect the Ibos,” in Richard Lillich (ed.) *Humanitarian Intervention and the United Nations*, (University Press of Virginia, Charlottesville) 1973 p.171.

involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2 (4).”⁷⁵

However, the view that there exists a customary international rule of humanitarian intervention is challenged by some scholars on the ground that a few handful pre-Charter interventions are not enough to establish a customary international law right of humanitarian intervention.⁷⁶ It must be pointed out however, that the paucity of pre-Charter interventions alone cannot affect the nature of customary international law of humanitarian intervention. The question that Holzgrefe failed to address is what the reactions of the international community were to these “handful” interventions. Did the international community view the actions as being borne out of a legal obligation?

Joseph Boyle introduces a moral angle to the argument in favour of humanitarian intervention. He contends that morality imposes on us the obligations to assist not just those who are close to us in any way, but whoever we can in order to promote decent relations. Boyle bases his argument on the common human nature which generates common moral duties. He contends that the general duty to help others is the most basic ground which allows for the interference in the internal affairs of one nation by other nations and the international community. He further states that it is this duty to help others that justifies a state’s interference in another’s internal affairs including the use of force in

⁷⁵ Ibid.

⁷⁶ Holzgrefe, op cit p. 45. Britain, France and Russia in Greece, (1827-30), France in Syria (1860-61), Russia in Herzegovina and Bulgaria (1877-78), Greece, Bulgaria, and Serbia in Macedonia (1903-8, 1912-13).

extreme cases. Boyle however acknowledges that this moral obligation is equally dependent on the recognition of a state's sovereignty.⁷⁷

Tom Farer for his part argues that the trend of governments using the defence of intrusion into their domestic jurisdiction to ward off questions of human rights abuses in their states is becoming obsolete. He contends that humanitarian intervention is now a tool that has made "all gross violations of fundamental human rights the business of the international community."⁷⁸ He, therefore, advocates for a multilateral approach to intervention on the premise that such approach offers a very important guarantee that the intervention was not structured for particular interests of the state, but rather, for the achievement of the principles and purposes of the Charter.⁷⁹ Farer further contends that since there have been abuses of the concept, if humanitarian intervention were to acquire a legal status in international law, it is not, therefore, likely to constitute any important new threat to world order.⁸⁰ However, he advises that caution should be exercised in the normative development of humanitarian intervention principle.⁸¹

Fernando Tesón for his part argues that humanitarian intervention is morally justified in appropriate cases. He bases his thesis on the premise that the major purpose of governments is the protection of individual human rights, and that any government that undermines the major reason for its being in power should not have the protection of

⁷⁷ Joseph Boyle, "Natural Law and International Ethics," in Terry Nardin and David Mapel (ed.) *Traditions of International Ethics* (Cambridge University Press, Cambridge) 1993 p. 123.

⁷⁸ Tom J. Farer, "Humanitarian Intervention before and after 9/11: Legality and Legitimacy," in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p.72.

⁷⁹ Ibid p. 76.

⁸⁰ Ibid p. 79.

⁸¹ Ibid p. 86.

international law.⁸² In what Tesón refers to as the liberal argument, he distinguishes the two components of humanitarian intervention. The first is the situation of tyranny which takes the form of serious injustice towards persons. Examples are cases of crimes against humanity, genocide, war crimes, and mass murder. For this first component, Tesón maintains that even non-interventionist agree that such situations are reprehensible. The second component of Tesón's argument for intervention is that "subject to important constraints, external intervention is (at least) permissible to end that injustice."⁸³ However, the point of disagreement between interventionist and non-interventionist is what needs to be done in such a situation. He argues that if a situation such as outlined above is morally abhorrent, then, neither the sanctity of sovereignty nor the prohibition against the use of force should preclude intervention.⁸⁴ While acknowledging that war in itself is morally wrong, Tesón maintains that it might be morally right sometimes to fight and that "occasionally fighting is even mandatory."⁸⁵

He insists that the only philosophical argument that can be maintained against humanitarian intervention is the pacifist position which abhors violence of all type. He however counters that the critics of humanitarian intervention are not pacifists, since they support the use of force in self-defence, and in carrying out the mandate of the UN Security Council.⁸⁶ On the claim that humanitarian intervention would, if allowed, trigger unjustified interventions and threaten world order, Téson dismisses the claim as a farce. He hinges his argument on the

⁸² Fernando R. Téson, "The Liberal Case for Humanitarian Intervention," in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p. 93. While the argument by Téson above is logical, one wonders if such an argument can be advanced in a situation where the individual head of state who participated in such flagrant human rights abuses claims the protection of human rights law during his/her trial.

⁸³ Ibid p. 94.

⁸⁴ Ibid p. 95.

⁸⁵ Ibid p. 96.

⁸⁶ Ibid.

fact that humanitarian interventions experienced since the 1990s have not opened a torrent of interventions by powerful states as the non-interventionists have argued.⁸⁷ While acknowledging the conflicts that have occurred post-Cold War, he is quick to point out that all these conflicts are not the result of interventions but rather ethnic rivalries that revealed itself after the Cold War. He opines that if there was a well defined mechanism for humanitarian intervention, possibly, those conflicts might not have occurred due to the deterrence and preventive measures humanitarian intervention would have put in place. He however concedes, that one of the reasons why humanitarian intervention might produce the chaos feared by the non-interventionists is that intervention is a costly act and that is a disincentive not to intervene.⁸⁸

In his contribution to the debate, Allen Buchanan re-echoed the meaning of humanitarian intervention defined by Holzgrefe. He argues that the North Atlantic Treaty Organisation (NATO) intervention in Kosovo was borne out of the “deficiency of existing international law concerning humanitarian intervention.”⁸⁹ He further contends that the intervention seems to reveal a widening consensus of the unacceptable gap between what international law allows and what the dictate of morality requires.⁹⁰ He maintains that there is a growing perception that the requirement of a Security Council authorisation for intervention in internal conflicts is an obstacle to the protection of basic human rights. Buchanan, therefore, opines that since the change in dynamics of conflict has shifted from

⁸⁷ Ibid p. 113.

⁸⁸ Ibid pp.113-114.

⁸⁹ Allen Buchanan, “Reforming the International Law of Humanitarian Intervention,” in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p. 131.

⁹⁰ Ibid.

international to internal conflicts, there is the need to also change the rules relating to humanitarian intervention which was created for a different set of dynamics.⁹¹

Oscar Schachter for his part is of the view that a humanitarian intervention needs to be endorsed by the UN Security Council, and failing that, the General Assembly. However, in a situation where the two bodies fail to endorse a situation clearly demanding of such intervention, a state or a group of states that uses force to act in such a necessitous situation evidencing humanitarian intention is likely to be pardoned for such intervention.⁹² He however contends that while there has been such actions by intervening states to protect and save innocent lives from death and injury, it cannot rightly be said that these precedents has been accepted by international law, since the states never claimed any legal right of intervention.⁹³ He argues however that the fact that there is no legal right of intervention does not mean that genocide, mass killings and other egregious violations of the principles of humanity should be condoned, nor does it mean that external powers should never use force to protect civilians when they are in danger.⁹⁴ He, therefore, advocates for an institutional action to guarantee early inquiry and involvement at early stages of such atrocities.⁹⁵

Thomas Franck for his part agrees with Schachter on the mitigating circumstances analysed in determining whether an interventionary action should be condoned or not. Franck is of the view that in determining the legality of a conduct within the international system, a lot

⁹¹ Ibid.

⁹² Oscar Schachter, *International Law in Theory and Practice*, (Martinus Nijhoff, Boston) 1991 p. 126.

⁹³ Ibid p. 124.

⁹⁴ Ibid p. 125.

⁹⁵ Ibid.

depends on the context within which the specific acts occurred.⁹⁶ He argues for instance, that while the NATO intervention in Kosovo was a violation of the strict legal provisions of the UN Charter, NATO acted “in reliance on mitigating circumstances and moral justification.”⁹⁷ He further contends that UN practice indicates that its organs are flexible in the decision on whether or not, and to what extent, it will indict violators of international law when such violations occur in situations of extreme necessity. Advancing his contextual and necessitous argument, Franck states that international law just as in domestic law situation, looks at the cost of each unlawful conduct within its contextual framework, and that it is this contextual flexibility that is the hallmark of fairness in law.⁹⁸

In her contribution to the debate on humanitarian intervention, Jane Stromseth argues that after the Kosovo intervention in 1999 by NATO forces, the legal status of humanitarian intervention without Security Council authorisation remains uncertain. She however, contends that this is a good development for international law as it puts a very high burden of justification on those who would intervene without such authorisation.⁹⁹ Stromseth however suggests, that any effort to codify the legal criteria under which humanitarian intervention can be legal would be counter-productive, and as such, maintains that the best way forward in the dilemma is to identify “patterns and common elements in recent practice as guidance for the future and in strengthening the capacity of the UN and of regional organisations to work with local actors to prevent and respond to human rights

⁹⁶ Thomas M. Franck, “Interpretation and Change in the Law of Humanitarian Intervention,” in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p. 204.

⁹⁷ Ibid p. 215.

⁹⁸ Ibid p.227

⁹⁹ Jane Stromseth, “Rethinking Humanitarian Intervention: The Case for Incremental Change,” in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p. 233.

atrocities.”¹⁰⁰ She agrees with Franck that while the NATO intervention in Kosovo was in strict violation of Article 2 (4) of the UN Charter, the international reaction to the “intervention suggests that a deviation from the strict letter of the UN Charter will be tolerated in exceptional circumstances.”¹⁰¹ She, therefore, suggests that the most promising approach in the humanitarian intervention debate is “to be open to a possible, gradual acceptance of humanitarian intervention as lawful in certain circumstances, based on concrete cases and precedents.”¹⁰²

Introducing the question of motive into the debate, Pierre Hassner is of the view that in a narrow version of intervention, an intervention for humanitarian reasons ceases to be so, if its motives include economic or strategic interests, or if its means or consequences lead it to side with any of the conflicting parties, to be selective among its beneficiaries, or, even worse, to threaten or inflict suffering or death in the name of human protection.¹⁰³ Hassner however argues that in hindsight, it would have been “legitimate and desirable” to have intervened in the 1930s to overthrow Hitler in order to save the victims of his monstrous regime.¹⁰⁴

In his seminal book on Humanitarian Intervention, Fernando Tesón defines the concept as “the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves

¹⁰⁰ Ibid pp.233-4.

¹⁰¹ Ibid p. 243.

¹⁰² Ibid p. 252.

¹⁰³ Pierre Hassner, “From War and Peace to Violence and Intervention: Permanent Moral Dilemmas under Changing Political and Technological Conditions,” in Jonathan Moore (ed.), *Hard Choices: Moral Dilemmas in Humanitarian Intervention*, (Rowan & Littlefield Publishers, Inc. Maryland, USA) 1998 p. 16

¹⁰⁴ Ibid p. 16.

would be rationally willing to revolt against their oppressive government.”¹⁰⁵ Tesón is of the view that despite the International Court of Justice’s (ICJ) statement in *Nicaragua v USA*,¹⁰⁶ to the extent that no general right of intervention by a state to support the opposition of another state exists in contemporary international law, it does not mean that such interventions cannot occur on specific grounds.¹⁰⁷ Tesón, in his support for humanitarian intervention, argues that since a state is justified in going to war under the self-defence exception to Article 2 (4) of the Charter, in order to defend the rights of its citizens as victims of aggression, the state is, therefore, using force to defend human rights. Conversely, the “same principle that justifies self-defence justifies humanitarian intervention in appropriate cases.”¹⁰⁸ Tesón however favours the view that states intervening in other states, to rescue their citizens, cannot claim humanitarian intervention as justification. Such an action would fall under a state’s responsibility to protect its citizens abroad, and hence could also be interpreted as an act of self defence.¹⁰⁹

John Stuart Mills in arguing against humanitarian intervention premised that freedom would not be valued by the victims if it was achieved on their behalf by foreign intervention.¹¹⁰ Tesón, while not agreeing with the above argument, points out that Mills’ argument brings to the fore the fact that though intervention can be done by foreigners to achieve the aim, it would need the cooperation of the citizens of the state to put an end to the tyranny.¹¹¹

¹⁰⁵ Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, (2nd ed), (Transnational Publishers, Inc. Irvington –on-Hudson, New York, 1997). P. 5.

¹⁰⁶ *Nicaragua v USA*, ICJ Reports (1986) p.1.

¹⁰⁷ Ibid pp.13-14.

¹⁰⁸ Ibid p. 120.

¹⁰⁹ Ibid.

¹¹⁰ John Stuart Mills, “A Few Words on Non-Intervention,” in John Stuart Mills, *Dissertations and Discussions*, Vol. III (Spencer Boston, USA) 1867 pp.171-176.

¹¹¹ Tesón, op cit p. 105.

Arguing against humanitarian intervention, Michael Byers and Simon Chesterman states that NATO's intervention in Kosovo was illegal *ab initio*, and that even under customary international law, the actions were still illegal since treaty provisions prevail over customary international law.¹¹² They contend that the only way the intervention could have been legal, was if a right of intervention for humanitarian purposes had achieved the status of *jus cogens*, which it had not.¹¹³

Bryan Hehir for his part traces the historical evolution of military intervention to the time of Thucydides and quoting Thucydides, opines that intervention involves major powers acting in pursuit of their political interests and objectives. He argues that while it is claimed that intervention threatens the autonomy and freedom of state, it protects basic values and principles in international politics.¹¹⁴ Acknowledging the link between human rights violations, genocide, and ethnic cleansing, Hehir argues that not all human rights violations should be the subject of intervention, stating that legitimating intervention on the grounds of violation of human rights alone would be tantamount to the elimination of the restraint on the non-intervention norm.¹¹⁵

Anthony Carty in arguing against intervention sees the *Corfu Channel Case*¹¹⁶ and the United Nations General Assembly Declaration on the Principles of Friendly Relations

¹¹² Michael Byers and Simon Chesterman, "Changing the Rules about Rules?: Unilateral Humanitarian Intervention and the Future of International law," in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p. 182.

¹¹³ Ibid p. 183.

¹¹⁴ Bryan J. Hehir, "Military Intervention and National Sovereignty: Recasting the Relationship," in Jonathan Moore (ed.), *Hard Choices: Moral Dilemmas in Humanitarian Intervention*, (Rowan & Littlefield Publishers, Inc. Maryland, USA) 1998 p. 31.

¹¹⁵ Ibid p. 43-44.

¹¹⁶ *Corfu Channel Case*, ICJ Reports (1949) p. 35.

Among States,¹¹⁷ as two instances where the absoluteness of non-intervention is expressed. Carty also cites the International Court of Justice (ICJ) judgment in *Nicaragua v USA*,¹¹⁸ where the court held that US intervention in Nicaragua through arming, training, financing and supplying the Contra forces, and generally aiding them militarily against the Nicaraguan government, was in breach of its obligations under customary international law not to intervene in the affairs of another state.¹¹⁹ However, the absoluteness of the above can be argued. Firstly, the judgment of the ICJ is not binding on non parties to the suit and cannot, therefore, constitute precedence.¹²⁰ Secondly, the UN General Assembly Resolutions and Declarations do not have the force of law.¹²¹

Caroline Thomas for her part argues against intervention stating that “international law and diplomacy, in which non-intervention plays a key role, are intended to serve the state and the state system.”¹²² Her thesis is based on the notion that the rights and obligations created in the international arena are for states and not individuals, except the right to self determination. She further contends that there is no universality in human rights, and agrees that while some will refer to the Universal Declaration of Human Rights as evidence of such universalism, it still took about “twenty eight years to transform the soft law into a hard law.”¹²³ Thomas argues further that if there are any trans-cultural values in the international system, then it must derive from recognition of sovereignty and the national

¹¹⁷ GA Res. 21311, 20 UNOR (1965); and GA Res. 2625, 25 UNOR (1970).

¹¹⁸ *Nicaragua v USA*, ICJ Reports (1986) p.1.

¹¹⁹ Anthony Carty, “Intervention and the Limits of International Law”, in Ian Forbes and Mark Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention*, (London: Macmillan Press Ltd) 1993 pp.32-42.

¹²⁰ Statute of the International Court of Justice 1945, Article 59.

¹²¹ Marko Divac Öberg, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ,” *The European Journal of International Law* Vol. 16 no.5 EJIL 2006.

¹²² Caroline Thomas, “The pragmatic Case against Intervention” in Ian Forbes and Mark Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention*, (London: Macmillan Press Ltd 1993) pp.91-103.

¹²³ *Ibid.*

self determination. Interestingly, she had argued earlier that the principle of non-intervention was initially meant to govern relations between European States and did not extend to the so called barbarian states. Her view then was that even though the nature and functioning of the international system has changed since 1648, there has been no formal change in the concept to make it better equipped to serve the changing times. While it would have been ideal to formalise changes to existing international law that seems obsolete, state practice and acceptance by the international community can introduce such acceptable changes better than the formal process. She however contends that the three cardinal rules of international relations, namely; sovereignty, state integrity and sovereign equality of states, imply the principle of non-intervention, while conceding that the state is no longer the only player in international relations, and that sovereignty of state is no longer absolute as it once was.¹²⁴

Michael Walzer in his argument contends that while there is a long list of oppressive governments, there is no case of a clear “humanitarian intervention.” He argues that while an action can be humanitarian, the motive might not be strictly humanitarian, suggesting that “states don’t send their soldiers into other states it seems, only in order to save lives. The lives of foreigners [don’t] weigh that heavily in the scales of domestic decision-making.”¹²⁵ Walzer concedes that the situation is different when it is the lives of fellow nationals that are at stake. He cites for instance, the case of the Israeli raid on Entebbe airport in Uganda in 1976, as a classic example in that respect.¹²⁶

¹²⁴ See generally Caroline Thomas, *New States, Sovereignty and Intervention*, (St Martin’s Press, New York, 1985).

¹²⁵ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, (Basic Books Publishers New York) 1977 pp.86-102.

¹²⁶ Ibid.

C.A.J. Coady, points out that the idea of intervention is not a new phenomenon, but that the discussion of its effects are more widespread and felt, now than before. He contends that in most cases of intervention dubbed “humanitarian intervention,” other motives do exist for such actions which are often not just humanitarian. He suggests that the meaning attached to humanitarian intervention is used as interventions which are aimed at “rescuing foreign people from the harm that is being done, or is about to be done, to them by the state authorities who are responsible for their protection.”¹²⁷ While condemning unilateral acts of intervention especially without the blessing of the Security Council sanction, he states that all “interventions that bypass the UN need at least a very strong case to rebut the presumption that they are ethically dubious.”¹²⁸

The humanitarian intervention debate seems to have gained much currency in the post-Cold War era. The Kosovo intervention by NATO and the genocide in Rwanda equally contributed to the need for the international community to find a well defined mechanism to protect civilians in violent conflict or under an atrocious regime. From the literature above, it is clear that the debate is not a settled matter and that international law is unclear on the exact legal status of such interventions.

The Use of Force in International Law

The discussion on the use of force in international law implicates also the issues of sovereignty. This section will, therefore, review both principles. Controversies surround the

¹²⁷ See generally C.A.J Coady, *The Ethics of Armed Humanitarian Intervention*, (US Institute of Peace, Washington, 2002).

¹²⁸ Ibid.

use of force in international law just as it surrounds the concept of humanitarian intervention.

Robert Keohane in discussing the issue of sovereignty and equality of states argues that states are different in terms of their capacities and their legal status, and that notwithstanding the legal fiction of sovereignty, states are not really all equal.¹²⁹ He argues that there are different gradations of sovereignty, and that sovereignty varies and is never constant.¹³⁰

Kofi Annan in his contribution to the debate on the absoluteness of sovereignty opines that sovereignty is no longer absolute, stating that “national sovereignty can be set aside if it stands in the way of the Security Council’s overriding duty to preserve international peace and security.”¹³¹ Annan is of the view that the rule of non-intervention in domestic affairs was never meant to be absolute, arguing that the Charter of the UN was issued in the name of the “peoples” not the government.¹³² Annan further maintains that the objectives and purposes of the UN are not just to preserve international peace and security, but also to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person,” and hence the Charter protects the sovereignty of the people.¹³³

While stating that any violation on the demands of state sovereignty as spelt out in Article 2 (4) of the Charter is a violation of “the global world order,” Annan maintains that the

¹²⁹ Robert O. Keohane, “Political Authority after Intervention: Gradations in Sovereignty,” in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p. 277.

¹³⁰ Ibid p. 286.

¹³¹ See generally Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General*, (United Nations, New York 1999).

¹³² Ibid.

¹³³ Ibid.

notion of sovereignty is undergoing a significant change. Citing satellite communication, environmental degradation, and the globalisation of world markets as a few phenomena that are challenging the extent of state authority, Annan posits that with the unfolding of world events, sovereignty is now viewed as connoting responsibility and not just power.¹³⁴

Michael Glennon for his part interrogates the concept of sovereignty and the related issue of the use of force against a sovereign state.¹³⁵ He argues that in a situation of total collapse of the state structure, consent to intervene need not be an issue, since no authority exists to give such consent. Glennon reasons that the illegitimacy of a government does not affect its status from seeking protection of sovereignty granted under international law. He points out the difference in approach to sovereignty by the Security Council during the Cold War and post-Cold War era, arguing that during the Cold War, the Security Council respected the sovereignty of member states even at the cost of ignoring gross violations of human rights. Glennon, however, remarks that the super powers did actually intervene in the domestic affairs of states that were within their “spheres of influence” to further their own interest, and not that of the international community.¹³⁶

Christine Gray in her contribution to the use of force debate is of the view that the rules of the Charter on the use of force are brief and cannot, therefore, constitute a comprehensive code. She further opines that the provisions of Articles 2 (4) and 51 of the Charter are in response to the harbinger of the UN, which is the World War II (WW II) and are, therefore,

¹³⁴ Kofi A. Annan, “Peacekeeping, Military Intervention, and National Sovereignty in Internal Armed Conflict,” in Jonathan Moore (ed.), *Hard Choices: Moral Dilemmas in Humanitarian Intervention*, (Rowan & Littlefield Publishers, Inc. Maryland, USA) 1998 pp. 56-7

¹³⁵ Michael J. Glennon, “Sovereignty and Community after Haiti: Rethinking the Collective Use of Force”, 89 *American Journal of International Law*, 1995, pp.70-74.

¹³⁶ Ibid.

directed at inter-state conflicts.¹³⁷ Gray argues that the Security Council's or General Assembly's condemnation of a particular use of force might be conclusive or at the very least, persuasive as to the illegality of such actions. She however opines that the non-condemnation by the Security Council does not necessarily amount to evidence of legality of such use of force. This is because there might be various reasons for such non-condemnation.¹³⁸ On the dynamism of the UN Charter provisions, Gray, citing *Nicaragua v USA*¹³⁹ states that the ICJ regarded the provisions on the use of force as dynamic when it stated that, "[T]he UN Charter...by no means covers the whole area of the regulation of the use of force in international law."¹⁴⁰

In making their case against the use of force in international law, and more particularly in interventions, Anthony Arend and Robert Beck state that the value choice underpinning the UN Charter framework particularly with respect to the law on the use of force as prescribed in Article 2(4), was that the maintenance of international peace and security was preferred to the pursuit of justice. They argue then that the Charter made adequate provision for the realisation of the just goals of human rights promotion, rectification of economic problems and other related issues. They, therefore, contend that "[J]ustice, however, was not to be sought at the expense of peace."¹⁴¹ In further support of their argument against the use of force, Arend and Beck cited the Security Council Resolution 479 of 1980 that dealt with the Iran-Iraq war, where the Security Council reiterated the prohibition on the use of force; the 1970 Declaration of Principles of International Law Concerning Friendly Relations and

¹³⁷ Christine Gray, *International Law and the Use of Force*, (Oxford University Press, Oxford) 2004 p.6.

¹³⁸ Ibid p20.

¹³⁹ ICJ Reports, op cit.

¹⁴⁰ Ibid.

¹⁴¹ Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force*, (Routledge: London) 1993 p.34.

Co-operations Among States in accordance with the Charter of the UN (GA Resolution 2625), which also reiterates the provision of Article 2(4) and the *Nicaragua v USA* case, where the court in its judgment held that “the principles of Article 2 (4) were not only treaty law, but the substance of customary international law as well.”¹⁴²

John Harriss notes that there are contradictions in the UN Charter. He asserts that while the UN Charter prohibits the use of force except in certain circumstances, it also recognizes the existence of human rights, which according to Harriss is “implicitly in conflict with the traditional doctrine of non-intervention in the affairs of sovereign states.” He concludes, therefore, that there is a trend towards the recognition of the legitimacy of intervention and that the traditional doctrine of sovereignty should not be permitted to take precedence over individual human rights.¹⁴³

Introducing the proportionality angle to the debate on the use of force, Judith Gardam is of the view that notwithstanding the controversy surrounding the law on the use of force by states, it is generally agreed since the emergence of the Charter that any response to force must be proportionate.¹⁴⁴ She however concedes that despite the legal requirements of the principles of necessity and proportionality in both *ius ad bellum* and international humanitarian law, the practice of states does not show evidence of conformity with the values.¹⁴⁵ Gardam corrects the often misunderstood idea of proportionality, stating that it does not regulate situations where states can use force legitimately, but, how force is used

¹⁴² Ibid pp.34-35.

¹⁴³ John Harriss, “A time of Troubles - Problems of International Humanitarian Assistance in the 1990s” in John Harriss (eds), *The Politics of Humanitarian Intervention*, (Pinter: London) 1995, pp. 3-9.

¹⁴⁴ Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, (Cambridge University Press, Cambridge) 2004 p. 11. See also Rosalyn Higgins, *The development of International Law through the Political Organs of the UN* (Oxford University Press, Oxford) 1963 p 201.

¹⁴⁵ Ibid p. 19

irrespective of its legitimacy. Gardam rejects the argument that state practice supports the use of force in international law and instead argues that notwithstanding considerable state practice, there is a consensus that the use of force by states must be limited to the exceptions provided under Article 51 of the Charter, i.e. individual self defence and collective self defence.¹⁴⁶ Emphasising the illegality of the use of force if not in accordance with the Charter, Gardam submits that despite the inconsistencies of state practice in the law relating to the use of force, the prevailing view since the Charter system is that force can only be legally used as a form of self defence. She however agrees that the possibility exists for an exception to the rule on the use of force in cases of humanitarian intervention.¹⁴⁷

In defending the sanctity of sovereignty, John Jackson acknowledges the concept of sovereignty and its implications in international law and international relations. He traces the origin of the concept from the Treaty of Westphalia 1648 to the meaning as articulated by the UN Charter. Jackson posits that since sovereignty is a fundamental concept in the foundations of international law, jettisoning it, risks undermining international law and certain other principles of the international relations system.¹⁴⁸

With the literature surveyed, it is quite obvious that there is still no consensus on the use of force in international law, particularly when used in the context of human protection during violent conflicts. Use of force as self defence, while clearly understandable, is still limited by international humanitarian law, taking into account the principle of necessity and

¹⁴⁶ Ibid p. 138

¹⁴⁷ Ibid p. 141.

¹⁴⁸ John H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept," 97 *American Journal of International Law*, 2003 pp.782-802.

proportionality. State practice is not consistent in respect of the law and the international community's reaction to the use of force differs from one case to another. This thesis, therefore, offers a new perspective of looking at the use of force from the lens of human protection, arguing that while the letter of the law should be kept to, its interpretation and implementation must reflect the spirit of the law.

Protection of Civilians in Violent Conflict and the Responsibility to Protect

The protection of civilians during violent conflict has been the subject of international humanitarian law and to a lesser extent, international human rights law since the end of WW II. Following the atrocities of the Nazi regime during the war, efforts have been made by the international community through the UN, to find a mechanism for the protection of civilians. Scholars have also contributed to the protection debate. Some scholars are of the opinion that the primary reason for the existence of the state and the international community is to protect civilians both during peace time as well as in war. This school of thought, therefore, maintains that the protection of civilians is paramount and that if international law is violated in achieving this objective, it would be justified. Others are of the opinion that while the protection of civilians is desirable, it should not be done in violation of international law and more especially the non-intervention principle.

John Rawls is of the opinion that states, and conversely, international community, owe a responsibility to protect citizens of states that fail to protect their basic rights and perpetuate such crimes like mass murder and genocide. He however draws a distinction between states that are “decent”, that is, states that do not engage in such crimes as human

rights violation, mass murder and genocide, and the rogue states. In Rawls' view, states are not duty bound to intervene in another state that merely violates such rights like freedom of expression, freedom of association etc.¹⁴⁹

Gardam in her contribution to the debate on civilian protection posits that the idea of civilian protection in armed conflict is not a new development in international law as it has evolved over many centuries. She concedes that this was not originally meant to protect all individuals but restricted to certain occupations like the clerics, monks, friars and others.¹⁵⁰ According to Gardam, the early protection of certain corps of the civilian populace was not done for the sake of humanitarian objective, but more in self-interest of the Christian institutions.¹⁵¹

William Pace and Nicole Deller for their part identify the principle of sovereignty and non-intervention as the two elements which have prevented the UN from effectively carrying out its function of collective security.¹⁵² They are of the view that as a result of the fact that governments have long resisted interference into its internal affairs, the international community has not invested in a collective security mechanism for the prevention of conflicts and protection of civilian populations especially in very poor countries.¹⁵³

The International Commission on Intervention and State Sovereignty (ICISS) in its report introduced the concept of the responsibility to protect. According to the report, the

¹⁴⁹ John Rawls, *The Law of Peoples*, (Harvard University Press, Cambridge) 1999 p.79.

¹⁵⁰ Judith Gardham, op cit p.34.

¹⁵¹ Ibid pp.34-5.

¹⁵² William R Pace and Nicole Deller, "Preventing Future Genocides: An International Responsibility to Protect," 36 *World Order* No.4 2005 p. 15.

¹⁵³ Ibid p. 16.

foundations of the responsibility to protect is based on first, the obligations inherent in the principle of sovereignty as responsibility, second, the responsibility of the Security Council as enshrined in Article 24 of the Charter, and third, on the specific legal obligations under the various international human rights and human protection instruments and national law, international humanitarian law, and finally, on the developing state practice, regional organisations and Security Council itself.¹⁵⁴ In articulating the concept, the report states that the principle is that intervention for human protection, including military intervention in extreme cases where serious harm to civilians is occurring or is imminent is supportable in a situation where the state is unable or unwilling to protect the civilians or in a situation where the state itself is the perpetrator.¹⁵⁵

The report argues that while it is not yet a definite claim that there is an emergence of a new principle of customary international law concept of responsibility to protect, state practice suggests an emerging principle of the concept.¹⁵⁶ While acknowledging that it is the primary responsibility of states to prevent conflicts from occurring, the report affirms that the failure to prevent can oftentimes have wide international consequences and cost, hence prevention needs a strong international support to succeed.¹⁵⁷

The UN High-Level Panel in its report to the Secretary General confirmed that, the concept of state sovereignty entails that states have the obligation to protect their people, and that in situations where the state is unable or unwilling to fulfil the responsibility, the principles of collective security determines that the international community should bear some portion of

¹⁵⁴ ICISS, *op cit.*

¹⁵⁵ *Ibid* Para. 2.25.

¹⁵⁶ *Ibid* Para. 2.24

¹⁵⁷ *Ibid* Para. 3.3.

this responsibility.¹⁵⁸ The panel in its report further stated that, the principle of non-intervention in domestic matters cannot be used as a shield for genocidal acts or other atrocities of large-scale violations of international humanitarian law, which can clearly be seen to present a threat to international peace and security and hence requires Security Council's reaction.¹⁵⁹ It however advises that the primary focus of such responsibility should be the cessation of violence through diplomatic methods and a resort to the use of force where it becomes very necessary.¹⁶⁰ The report further maintains that during war situations, the primary responsibility to protect civilians from suffering untold hardships lies with belligerents, both state and non-state actors, and that all actors in the conflict are expected to abide by the provisions of the Geneva Conventions.¹⁶¹

The Commission on Human Security, in its report "*Human Security Now*" is of the view that in protecting people in violent conflict, placing human security on the security agenda of states, regional and international organisations would go a long way to inspire concern for vulnerable groups during conflict and equally amplify support for protecting all human rights.¹⁶² The report argues that the international security system initiated after WW II was principally aimed at protecting states and peoples from threats beyond their borders. The system, the report further argues, therefore, maintained "collective security" by limiting the rights of states to use force to self-defence after an attack, following a UN Security Council

¹⁵⁸ *A More Secured World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, set up by the Secretary-General of the UN. UN Doc. No. A/59/565. available at <http://www.un.org/secureworld> accessed May 15 2005.

¹⁵⁹ Ibid Para. 200.

¹⁶⁰ Ibid Para 201.

¹⁶¹ Ibid Para 232.

¹⁶² Commission on Human Security, *Human Security Now*, (New York 2003) p. 24.

resolution. However, what the system did not anticipate was the new type of threats being witnessed by states; threats from within.¹⁶³

The Secretary-General of the UN in his *In Larger Freedom: Towards Development, Security and Human Rights for All* argues that preventive actions in the area of conflict must be central to the UN and the international community.¹⁶⁴ He suggests that while the Charter gives the Security Council the authority to use military force to preserve international peace and security, situations of genocide, ethnic cleansing and crimes against humanity must also be part of the contemplated threats to international peace and security. The Secretary-General urged the Security Council to adopt a resolution setting out the following criteria as the determinants on military intervention: seriousness of threat, proper purpose of military action, last resort, proportionate use of force, and reasonable chance of success.¹⁶⁵ The Secretary-General further emphasises that the issue of the responsibility to protect is not merely about the use of force but is also about a “normative and moral undertaking” that requires a state to protect its civilians. He affirms that where a state fails to protect its own civilians, the international community should apply a range of diplomatic and humanitarian measures before resorting to force as the last option.¹⁶⁶ While recognising the controversies involved in the responsibility to protect concept as articulated by the ICISS and the High-Level Panel, the Secretary-General endorses the concept. He, therefore, urges member states “to ratify and implement all treaties relating to the protection of civilians.”¹⁶⁷

¹⁶³ Ibid. P.23.

¹⁶⁴ Kofi Annan, UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN New York, 2005.

¹⁶⁵ Ibid Para.126.

¹⁶⁶ Ibid Para. 122-126, 135.

¹⁶⁷ Ibid Para 135-136.

The Secretary-General in his Action Plan to Prevent Genocide identifies prevention of armed conflict as a key factor towards the prevention of genocide. According to the Secretary-General, “[G]enocide almost always occurs during war.”¹⁶⁸ He advocates that part of the efforts of prevention should be to “attack the roots of violence and genocide: hatred, intolerance, racism, tyranny and dehumanising public discourse that denies whole groups of people their dignity and their rights.”¹⁶⁹ He further suggests that the parties to the conflict, both state and non state actors must be constantly reminded of their responsibility to protect civilians in violent conflict, as stipulated under international humanitarian law.¹⁷⁰

The World Summit Outcome Document released by the UN after its 60th Summit in September of 2005 confirms the responsibility to protect concept. It recognises the primary responsibility to protect civilians from genocide, war crimes, ethnic cleansing and crimes against humanity as that of the state, where they belong.¹⁷¹ The document further recognises that the international community has a responsibility to protect the civilians where the state authorities fail in their responsibility.¹⁷² Pace and Deller are of the view that despite the apparent weakened language of the Outcome Document with respect to the responsibility to protect when compared to the High-Level Panel report, it is still sufficient enough to “be considered as an endorsement of a new set of principles on national and international responsibility.”¹⁷³ They further argue that the content of the Outcome document provides the basis for holding governments and the international community

¹⁶⁸ UN Secretary-General Kofi Annan’s Action Plan to Prevent Genocide, available at <http://www.preventgenocide.org/prevent/undocs/kofiAnnansActionplantopreventgen> accessed June 28 2006.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ UN, General Assembly, 2005 World Summit Outcome, September 15, 2005, Para. 138, available at http://www.unfpa.org/icpd/docs/2005summit_final_outcome.pdf. accessed June 26 2006.

¹⁷² Ibid Para. 139.

¹⁷³ Pace and Deller, op cit p.27.

accountable, when they fail to respond to grave threats to civilian population.¹⁷⁴ On the operationalisation of the concept, Pace and Deller contend that it will require a more serious commitment than mere adoption of the principles and related initiatives to succeed. They, therefore, suggest that for the concept to be meaningful, it requires measures which will ensure accountability on the part of those governments in a position to take action on behalf of those populations at risk.¹⁷⁵

The UN Security Council Resolution 1674 of April 28 2006 reaffirms the adoption of the responsibility to protect concept and states that the “deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict, may constitute a threat to international peace and security.”¹⁷⁶ However, despite the reference to the responsibility to protect in both the World Summit Outcome document and Resolution 1674, it does not ensure that timely and automatic response would be taken by the UN Security Council. The use of the language “on a case by case basis” in paragraph 139 of the Outcome document suggests that the Security Council is still at liberty to use its discretion in determining when to act.

Analysing the implication of the responsibility to protect concept for Africa, Mufisky Mwanasali contends that the letter and spirit of Article 4 (h) of the AU Constitutive Act shows that African leaders unanimously agreed to transform the old interpretation given to the principle of sovereignty, and merge it with the new and more acceptable interpretation

¹⁷⁴ Ibid p.28.

¹⁷⁵ Ibid p. 31.

¹⁷⁶ Reso. 1674, op cit.

of “sovereignty as responsibility.”¹⁷⁷ While acknowledging that the responsibility to protect concept is central to the AU’s mandate, he points out that no AU legal document expressly mentions it. However, according to him, this concept is embodied in Article 2 (4) of the Peace and Security Council (PSC) Protocol approach of prevention, intervention and reconstruction.¹⁷⁸ In Mufisky’s view, therefore, despite the absence of direct and explicit mention of the responsibility to protect by the AU, its Constitutive Act and the PSC Protocol provide enough legal basis for the AU’s operationalising of the norm.¹⁷⁹

Looking at the practical aspect of translating the responsibility to protect concept to action, Henry Anyidoho contends that one of the key challenges facing the AU in implementing the peace and security strategy in Darfur is force generation.¹⁸⁰ Nigeria and Rwanda provided the bulk of the protection force in Darfur, while Senegal, Gambia, Kenya and South Africa also contributed troops.¹⁸¹ Analysing the two “major” African conflicts post-Cold War – Rwanda and Darfur – Anyidoho, charges African leaders to do more than talking if the responsibility to protect can be realised in Africa. He states that the poor support received by the United Nations Assistance Mission for Rwanda (UNAMIR) was a result of the apathy of the international community in deploying troops to any part of Africa, and more especially, as a result of the death of American soldiers in Somalia in 1993.¹⁸²

¹⁷⁷ Mufisky Mwanasali, “Africa’s Responsibility to Protect” in Adekeye Adebajo and Helen Scanlon (ed.), *A Dialogue of the Deaf*, (Jacana Media Ltd, South Africa) 2006 p. 90.

¹⁷⁸ Ibid p. 95.

¹⁷⁹ Ibid.

¹⁸⁰ Henry Anyidoho, “A Tale of Two Tragedies,” in Adekeye Adebajo and Helen Scanlon (ed), *A Dialogue of the Deaf*, (Jacana Media Ltd, South Africa) 2006 p. 157.

¹⁸¹ Ibid.

¹⁸² Ibid p. 151.

Francis Deng for his part analyses the responsibility to protect concept from the perspective of internally displaced persons (IDPs). Deng identifies three causes of internal displacement as conflicts, generalised violence, and human rights violations. He is of the view that these conditions exist as a result of “acute crises of national identity.”¹⁸³ He further identifies race, ethnicity and economic marginalisation resulting in poverty as part of the aggravated factors.¹⁸⁴ While not directly referring to the Darfur conflict, these identified factors are all present in the Darfur conflict. Deng further contends that while diplomacy and the act of persuasion may be necessary in convincing governments of states in conflict to allow access by the international community to assist those in need, “more assertive intervention may be necessary.”¹⁸⁵ He, therefore, argues that state sovereignty should not act as a barrier against international involvement and cooperation, rather, it should be seen as a “state’s responsibility to protect and assist its citizens...” Extending his argument further, he states that where large number of citizens suffers severe deprivation and threats of death, the obligation inherent in the humanitarian and human rights norms, mandate the international community not to sit by and watch such atrocities committed, but to respond.¹⁸⁶ Deng however, acknowledges that the primary responsibility of addressing the needs of IDPs is that of the national authorities where they belong. The role of the international community is to provide complementary protection and assistance to the vulnerable and hold the governments accountable.¹⁸⁷ He identifies three layers of the responsibility to protect civilians viz, the state where the citizens belong to, the neighbouring countries of the state in conflict, and the wider international community.¹⁸⁸

¹⁸³ Francis Deng, “The International Challenge of State Failure and Internal Displacement,” in Adekeye Adebajo and Helen Scanlon (ed), *A Dialogue of the Deaf*, (Jacana Media Ltd, South Africa) 2006 p.113.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid. p.114.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid p.122.

¹⁸⁸ Ibid.

From the above literature surveyed, it is also clear that the international community is at last realising its responsibility to protect civilians at risk. It must be mentioned that there are a vast array of Security Council and General Assembly Resolutions and Declarations that also deal with civilian population. Equally, there exists a whole body of international legal instruments that afford protection to civilians at risk. These are treated extensively in the study.

Justification of Study

The selection of Darfur, Sudan as a case study for this research is based on the following considerations:

The literature on the background to the conflict in Darfur indicates that the competition between the “Arabs” and the “Africans” has its traditional root in the source of their livelihood. The nomadic Arabs are principally herders, while the Africans are more of subsistence farmers. The droughts of the 1970s dried up water sources in Darfur and this led to the diminishing of grazing land, which prompted the nomadic herders to move southward in search of more fertile land and water. However, the Khartoum government has turned what started off as a local conflict for resources into a major conflict with wide reaching effects. Understanding the genesis of the conflict will assist in finding a lasting solution to it. The dearth of analytical literature on the origin of the Darfur conflict and the relative newness of the concept of responsibility to protect makes this research a worthwhile study. The study is, therefore, justified as it will contribute to the growing

literature on the causes of the Darfur conflict and on the normative development of the principle of responsibility to protect.

The study is also justified on the grounds that notwithstanding the different calls by humanitarian agencies that something close to genocide is taking place, the international community has still not been able to respond effectively in stopping the continuous killings and other violations going on. That this study, therefore, examines the provisions and mechanisms for the protection of civilians in order to determine whether the international community is doing enough or whether there are areas of improvement, makes it quite timely and useful.

A further justification of the study is the fact that the conflict has created millions of refugees and internally displaced persons and left thousands dead. The study, therefore, fleshes out the importance of civilian protection during peace as well as during war situations. Granted that in civil wars, civilians usually suffer more than the combatants, in Darfur, the situation is a case of direct attack on the civilian population initially by the *Janjaweed* militia and more recently by the rebels. The study, therefore, could not have come at a better time, when the international community is in dire need of crafting effective mechanisms for guaranteeing world peace.

The further justification of the study is that it promises to expose the complicity of the Khartoum government in the support of the *Janjaweed* militia, and, therefore, makes a strong case for the responsibility to protect concept. The research also highlights the difficulties faced by researchers in a conflict zone, and more especially when the state is

complicit in the escalation of violence. The overall (in)security in the Darfur region, and the refusal by the Sudanese government to allow access into the region to some NGOs and other independent observers is an indication of some of the difficulties faced by the researcher. However, the researcher's ability to surmount these problems enriches the study and hence, a major justification for the study.

Sudan's membership of both the AU and the Arab League provides a unique perspective to the study. It will, therefore, be interesting to understand whether it takes the pressure of the AU or the Arab League to get the Sudanese government to consent to a UN peacekeeping mission. This will, therefore, assist in understanding where the Sudanese government allegiance lies. With the Sudanese government's strong position of not yielding to UN intervention, this study is, therefore, timely in articulating issues involved in such face-off.

Furthermore, the use of Darfur as the case study in this research is premised on the reasoning that Darfur presents a classical case for the testing of the responsibility to protect concept. While other conflict situations exist in Africa and elsewhere, the Darfur conflict has the entire prerequisite for the application of the concept. It should also be remembered that the Darfur conflict was current during the responsibility debate both at the UN and other forum.

The study will definitely be contributing to the body of literature on responsibility to protect, human security and more particularly on the Darfur situation.

Conceptual Framework: Humanitarian Intervention and Responsibility to Protect

The concept of humanitarian intervention has generated a lot of controversy in international relations and international law. This controversy revolves around its interpretation and overall relevance in the international system. While the international community wants to rely on intervention on humanitarian grounds to assist civilians especially in situations of armed conflicts, states have also relied on the doctrine of sovereignty and the principle of non-intervention to ward off these interventions. The concept of humanitarian intervention is not an entirely new one in international relations. However, during the Cold War, there was a noticeable lack lustre attitude by the Security Council to endorse collective action for intervention in situations that could be said to amount to a threat to international peace and security. The end of the Cold War saw the re-emergence of the concept.

The change in the dynamics of conflict is partly instrumental to the re-emergence of the concept. While most conflicts during the Cold War period were of an inter-state nature, conflicts in post-Cold War era are mostly intra-state. With this change in dynamics and the parties to the conflict violating the provisions of international humanitarian law, states, either acting alone or as a collective, have “assumed” the right of humanitarian intervention. However, the series of interventions have increasingly been challenged by states, international lawyers, scholars and NGOs as a violation of UN Charter provisions on non-intervention in matters of domestic concern. A major limit to the concept of humanitarian intervention is the question of abuse. The question that many have asked, therefore, is: what is the basis for reaching a conclusion that a particular conflict situation merits humanitarian intervention?

When interpreted strictly, any intervention in a state without the requisite preconditions of consent of at least that state is a violation of the Article 2 (7) of the UN Charter. However, it could also be argued that given the internationalization of human rights, and international humanitarian law, and the fact that most countries have ratified one treaty, covenant or convention that has a bearing on human rights; matters covered by those treaties are no longer “matters within the exclusive domain of the state.”

In its continuous search for a generally acceptable mechanism for the protection of civilians in violent conflict, the international community through the UN adopted at its 60th Summit the concept of responsibility to protect civilians in violent conflict. The Security Council has also affirmed the concept in its Resolution 1674 of 28 April 2006. The principle is that the primary responsibility of protecting the civilians of any state lies with their respective states. It is only when the state in question is unable or unwilling to protect or is the source of threat that the burden of responsibility shifts to the international community.¹⁸⁹ In applying the concept of responsibility to protect to the Darfur case, the international community has the duty to intervene since the Government of Sudan is unable, if not unwilling, to protect the civilians of Darfur. Moreover, the Government of Sudan has also been implicated as being the source of the threats, as it supports the *Janjaweed* militia. However, the government of Sudan relies on the strict notion of “sovereignty” and protection of its “domestic affairs” to perpetuate what has been referred to as “genocide” by the United States of America and some NGOs.

¹⁸⁹ ICISS, op cit Para 2.18.

In introducing the concept of the responsibility to protect to the international community, the ICISS suggests that in order to carry the debate on humanitarian intervention forward, the choice of the phrase should not be “humanitarian intervention” or “right to intervene”, but “intervention on human protection grounds and responsibility to protect.”¹⁹⁰ The international community, therefore, is obligated to intervene in Darfur for human protection purposes.

It should not be assumed that the international community has discovered the “holy grail” with the introduction of the responsibility to protect concept in the search for the proper mechanism for civilian protection. The same controversies surrounding the inaction of the Security Council in situations where they ought to have acted might still occur. As Pace and Deller point out, notwithstanding the adoption of the responsibility to protect in the Outcome document, the language falls short of the recommendations by the Secretary-General, the High-Level Panel, and many NGOs.¹⁹¹ For instance, the document does not affirm the responsibility to protect as an emerging norm that encompasses the gamut of protection, reaction, and rebuilding as is recommended in the High-Level Report.¹⁹² The criteria proposed by the High-Level panel for determining when to use force was also not adopted at the World Summit. However, despite the non adoption of the criteria, it is expected that since the concept of responsibility to protect has been adopted, it would open up discussion on how force should be used if necessary, to protect civilians. Furthermore, the adoption of the concept equally thrusts on the international community, the obligation not just to react, but also to prevent such massive atrocities as anticipated in the ICISS report, from taking place.

¹⁹⁰ Ibid. para 2.4.

¹⁹¹ Pace and Deller, op cit 146 p. 27.

¹⁹² Ibid. See also *A more Secured World*, op cit.

Just as the concept of humanitarian intervention arose out of the inertia of the Security Council, where the Security Council fails to act, states acting alone or as a collective might intervene for purposes of human protection claiming that they are acting under the concept of the responsibility to protect. The early operationalisation of the concept will, therefore, be in the interest of the international community as well as the civilians needing the protection.

Research Methodology

The methodology used in this study is qualitative as opposed to quantitative, since the study does not involve statistical data collection and analysis. While a visit to Darfur was initially planned in order to get first hand information regarding the nature of the conflict, and its resultant effects in order to critically analyse the assertion that the situation merits the obligated response of the international community and to be able to analyse the challenges envisaged, logistical challenges encountered during the course of the research could not allow for such a visit. For data from Darfur, reliance was, therefore, made on telephonic interviews facilitated mostly by a network of colleagues with contacts with some of the Aid organisations working in Darfur, and they requested anonymity in order to protect their interests in Darfur. It must be stated that the inability to visit Darfur does not in any way affect the findings and conclusion of this research.

The primary source of information consists of interview of representatives of humanitarian and aid agencies working in Darfur in order to throw more light on the assertion above.

Internally Displaced Persons (IDPs) and a few of the UNAMID peacekeepers were interviewed. This helped to elicit the much needed proofs that the two conditions as articulated by the ICISS and the High-Level panel report for military intervention, namely; where there is large-scale loss of life or large-scale ethnic cleansing exists. While this study is not strictly about the parties to the conflict and their respective claims, a few of the rebel groups were nonetheless interviewed telephonically, especially the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). Efforts to interview representatives of the Sudanese government at Khartoum were not successful, though a couple of them spoke on condition of anonymity. However, the constraint in conducting these interviews was the ability to track down those who were willing to disclose information they considered “hot”. Identifying those to be interviewed was done in two ways; first, through personal contacts; and secondly, through their own contacts, particularly those that work in the IDP camps in Darfur. In a research of this nature, one could, therefore, not help it but to rely on the assistance and judgment of fieldworkers in identifying the subjects to be interviewed. This also does not in any way detract from the weight given to the responses of those interviewed. A structured interview was used mainly, but where necessary, the interviewee was allowed to tell the story from his/her perspective. In most cases, as a result of the long distance telephone calls that was involved and owing to the use of interpreter services in some cases, the average time used for each telephonic interview was between 15 and twenty minutes. The use of speakerphone was employed so as to hear the subjects’ voice and, though, while one could not have understood the meanings, determine the weight given to such responses. This is where intuition played a central role. The interpreter equally played a role sometimes in bringing out the underlying meaning and nuances in the responses. While recognising that the

interpreter's analysis might not be the most correct one sometimes, that was a risk one had to take in such circumstances in order to surmount the language barrier. However, being that the interpreters used were mostly students of higher education that understood the implications of the research, one believes that they would have given a correct version of the subjects' responses.

One source of bias which one had to avoid was identifying with the victims interviewed. This was to avoid the clouding of one's perceptions. Much as the ideal should be an unbiased attitude, it might be difficult to maintain a total lack of bias. Qualitative research method requires personal rather than a detached engagement. It, therefore, becomes rather difficult not to pick up a bias during the research period. While interviewing people, especially those interviewed physically, I observed and read the innuendo which were implicated in their answers. This was however difficult in the case of telephonic interviews, especially, where one has to hear them second hand – from an interpreter. Darfurians in South Africa were equally interviewed, and they corroborated to a large extent, the data from the telephonic interview. The answers given to questions were not taken at face value most of the time, especially, when the person interviewed has a vested interest to pursue or protect. My intuition played a great role in the analysis of the raw data collected, especially, during the interview stage. This assisted me in knowing when to believe a participant and when to dismiss the answers as pure fabrication. In order to maintain anonymity and confidentiality, a pseudonym was assigned to those interviewed, especially those that did not want their names in print. However, the gender of the person was not changed in order not to confuse the text of the interview. The selection of the persons interviewed at Darfur was based on a random sampling method, determined to a great

extent by the contact person at Darfur, and the choice of the area was determined by circumstances, especially, security and accessibility. However, there is an equal representation of men and women, and they represent the Darfur civilians affected by the conflict. As a result of lack of funds, extensive interviews that should have been conducted targeting those involved in policy formulation at the UN and the AU could not be conducted. This is one of the limitations experienced during the study, as it would have enriched it more. As a result of the above limitation, reliance was, therefore, made on secondary data to supplement the information and analysis.

The secondary data collection consists of existing literature on the subject of the conflict especially that of Darfur and civilian protection. These include books, journal articles, and reports of investigative panels set up by groups working in the area of conflict, and books on the subject of humanitarian intervention, human security and the responsibility to protect. The University of Witwatersrand library, the South Africa Institute of International Affairs library were consulted in this respect. The libraries of the School of International Law and Diplomacy, University of Lagos, Nigeria, Nigerian Institute of International Affairs in Lagos, policy documents and materials at the African Union and the UN website were consulted. The libraries of the University of South Africa in Pretoria, and the Institute for Security Studies website were very instrumental in getting data during the study.

A critical discourse analysis of the data collected was done in order to reach a conclusion on the study.

Data Collection and Analysis

The evidence presented in the study consists of literature which supports the view that the international community has the responsibility to protect the civilian population. Further evidence is presented to show that the concept of sovereignty and non-intervention are gradually being eroded, in support of intervention in internal conflicts. Evidence is also presented to explore the causes of the conflict and the resultant effect on the civilian population of Darfur. The evidence is analysed to show that the situation in Darfur merits the international community's obligated responsibility to protect.

Part of the evidence are policy documents relating to the responsibility to protect and policy documents relating to the emerging changes in sovereignty and emphasis on intervention for human protection and human security. The study relied on the report of the ICISS, Report of the High-Level Panel, the World Summit Outcome Document, various Security Council Resolutions and General Assembly Resolutions on civilian protection, and International legal instruments on civilian protection. Documents pertaining to United Nations reforms as it affects international peace and security are analysed, as well as documents dealing with human security, international humanitarian law, reports of humanitarian agencies and other research groups working in and around Darfur, and in conflict situations generally. Being that the conflict is still unfolding, the study relied extensively on structured interviews, observations and analysis of reputable newspaper reports as a further source of data.

Study Outline

The study is organised into six chapters. Chapter one outlines the problem investigated exploring the significance of the study, the literature review, the conceptual framework and the research methodology.

Chapter two provides a general overview of the politics of Sudan. It touches on the conflict between the Arab Moslem North and the African Christian/Traditional religious South. The neo-colonisation of the Africans by the Arabs is highlighted. The chapter interrogates issues surrounding the present Darfur conflict and concludes that the root causes of the conflict is embedded in the long decades of political, economic and social marginalisation of the Darfur region which is mostly populated by black Africans.

Chapter three discusses the concept of responsibility to protect and its implications for civilians caught up in violent conflict, with particular reference to the Darfur conflict. The chapter interrogates the uniqueness of this concept and finds that the first and most important unique feature is that it is couched in an acceptable language of legal intervention by states. However, the chapter makes an assertion that the philosophical underpinning of the responsibility to protect is not as unique as it is made out to be. The chapter, therefore, argues that throughout the development of international law and more especially, international humanitarian and international human rights law, civilians have always been provided with one type of legal protection or the other, whether in peace time or during violent conflicts. The chapter further argues that it is not enough to provide such legal instruments, but its operationalisation is of utmost importance. The chapter further

recognises that the responsibility to protect grew out of the humanitarian intervention concept. It, therefore, discusses the humanitarian intervention exception to the principle of non-intervention. It argues that notwithstanding the non express mention or reference by the Charter to this exception, that it must have been contemplated by the drafters of the Charter, more so, since there is a “consensus” of opinion that humanitarian intervention is recognised under customary international law. The chapter further examines the criteria under which the international community is obligated to protect civilians. The chapter concludes that the international community through the UN seems to have welcomed the responsibility to protect concept as a legal principle with its adoption.

Chapter four attempts to categorise the crimes committed by the parties to the Darfur conflict. The chapter discusses the challenges that the application of the concept might face. Looking at the Darfur conflict, the chapter analyses the success or otherwise of its application. The chapter however recognises that it might be too soon to question the efficacy of the application.

Chapter five makes recommendations on how to deal with the Darfur situation and other such future situations. The recommendations proffered are not claimed to be all encompassing or absolute. It is hoped that the research will contribute to knowledge.

The concluding chapter posits that in order to solve the Darfur conflict, the political and socio-economic marginalisation of the region and other regions in Sudan needs to be addressed. Furthermore, for the international community to take up its responsibility to protect seriously, it must interpret sovereignty in the new light of responsibility.

Chapter II Analysis of the Darfur Conflict

The spate of conflicts in Africa especially since the end of the Cold War has left analysts puzzled as to their timing. These conflicts instead of inter-state as experienced earlier are intra-state. Analysts have tried to explain this upsurge in intra-state conflicts as one of the direct consequences of the end of the Cold War, which saw an end to the proxy wars fought in Africa and the decline of the patronage system in international politics.¹⁹³ Other theories however exist which seem to explain this surge in intra-state conflicts. One of the unique, though negative, characteristics of the violent conflicts that have erupted in Africa after the end of the Cold War is the level of violence directed at civilians. In the post-Cold War conflicts in Africa, approximately seventy percent of the victims are civilians.¹⁹⁴ Approximately eighty percent of the wars fought during this period are also intra-state, as opposed to inter-state conflicts witnessed during the Cold War era.¹⁹⁵

Some have argued that the type of conflict witnessed in the post Cold War era can be traced to the geopolitical map bequeathed to Africa by its colonial powers.¹⁹⁶ Somerville's contention is that the imposition of boundaries brought people who were never a "people" together, and this was bound to create conflict. While this might be true, one should not lose sight of the fact that even before the carving up of Africa at the Berlin Conference of 1884, inter-tribal wars were rife.¹⁹⁷ It must also be pointed out that the different conflicts

¹⁹³ Keith Somerville, *Foreign Military Intervention in Africa*, (Pinter Publishers, London 1990). P.183

¹⁹⁴ Alhaji M.S. Bah, "The Intervention Dilemma: The Dynamics of the Post-Cold Era", in Festus Aboagye and Alhaji M. S. Bah (ed), *A Tortuous Road to Peace: The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia*, (Institute for Security Studies, South Africa) 2005 p. 21.

¹⁹⁵ Ibid.

¹⁹⁶ Keith Somerville, op cit P.183.

¹⁹⁷ Ukoha Ukiwo, "The Study of Ethnicity in Nigeria" *Oxford Development Studies*, Vol. 33, Issue 1 March 2005, pp. 7 – 23. See also, Abimbola O. Adesoji, "Colonialism and Intercommunity Relations: The Ifon-Ilobu

that are premised on religious differences, only started to manifest with the introduction of foreign religions to Africa.¹⁹⁸ The failure of African leadership to legitimise and popularise their rule is also one of the theories advanced for the exacerbation of conflict in Africa.¹⁹⁹ The failure of Africa's political elites to democratize their political systems and improve the efficiency of governance mechanisms has been one of the causes of armed conflict, and in the process increasingly undermining human and state security in the continent.²⁰⁰ Greed and economic considerations have also featured as a reason for the proliferation of conflicts in Africa. Scholars and analysts, who share this view, are of the opinion that the one of the drivers of conflicts in Africa is the desire to acquire control over the economic resources of the state, and not because of grievance against the political system.²⁰¹ Michael Ignatieff argues that civil wars endure for three basic reasons; first, because of the existence of a resource base which fuels the conflict; second, the evenly balance of forces of the belligerents; and finally, because it is in the economic interest of armed groups to continue the conflict.²⁰² Conflicts in Africa, especially the one in Darfur, Sudan, are complex and, therefore, require a patient and careful analysis to understand them. Even if the main purpose of starting a conflict is to control the resources of the state, a deeper analysis needs

Example" *History in Africa* 32, 2005, pp.1-19 and Eghosa E. Osaghae and Rotimi T. Suberu, "A History of Identities, Violence, and Stability in Nigeria" CRISE Working Paper No. 6 January 2005.

¹⁹⁸ See Ali A. Mazuri, "Africa and Other Civilizations: Conquests and Counter conquest" in John W. Harbeson and Donald Rothchild (eds.), *Africa in World Politics: Post Cold War Challenges* (Boulder: Westview Press, 1999)

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Paul Collier, "Doing Well Out of War: An Economic Perspective", in Mats Berdal and David Malone (eds), *Greed and Grievance: Economic Agendas in Civil Wars*, (Boulder and London: Lynne Reinner Publishers, Inc, 2000) pp. 43-68. See generally, Mats Berdal and David Malone (eds), *Greed and Grievance: Economic Agendas in Civil Wars*, (Boulder and London: Lynne Reinner Publishers, Inc, 2000). See Aleks Ylönen, "Grievances and the Roots of Insurgencies: Southern Sudan and Darfur," *Peace, Conflict and Development: An Interdisciplinary Journal*, Vol. 7 2005. Paul Collier and Anker Hoeffler, "On Economic Causes of Civil War," *Oxford Economic Papers*, 50 1988, pp. 563-573.

²⁰² Michael Ignatieff, "State Failure and Nation-Building" in J.L. Holzgrefe and Robert Keohane (ed.) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge University Press, Cambridge) 2003 p. 303

to be done in order to ascertain what led to this desire. It is not helpful to paint all conflicts in Africa with the same broad brush.²⁰³

Notwithstanding the possible existence of greed as a factor in African conflicts, the consequences of the end of Cold War could also account for the type of conflicts witnessed post-Cold War. During the Cold War era, external patrons were quick to meet the demands of their protégés depending on the side of the ideological divide they found themselves. In post-Cold War era, the erstwhile protégés were forced to finance their own wars.²⁰⁴ Others have also explained the conflicts as being ethnically motivated.²⁰⁵ However, many have described this view to be lacking in substance. They posit that the resort to ethnic politics is for the protection of a “shrinking power base.”²⁰⁶ While it might be true that the resort to ethnic politics is often to protect a shrinking power base, one should not rule out the possibility of conflicts assuming an ethnic dimension. Ethnic differences and tensions they create should, therefore, not be jettisoned as a factor in conflicts in Africa. For instance, the aftermath of the December 2007 Kenyan election, which result was contested by the Raila Odinga led Orange Democratic Movement (ODM) led to conflict which took an ethnic dimension in its execution.²⁰⁷

²⁰³ Eboe Hutchful and Kwesi Aning, “The Political Economy of Conflict”, in Adekeye Adebajo and Ismail Rashid (ed), *West African Security Challenges: Building Peace in a Troubled Region*, (Boulder and London: Lynne Reinner Publishers, Inc, 2004, p.200.

²⁰⁴ Ibid.

²⁰⁵ See Christian Scherrer, *Ethnicity, Nationalism, and Violence: Conflict Management, Human Rights, and Multilateral Regimes*, (Ashgate Publishing Ltd.) 2003.

²⁰⁶ Eboe Hutchful and Kwesi Aning, op cit p. 199

²⁰⁷ Kenya had its general elections on December 27 2007. Due to the disputations that arose as a result of the declaration by the Electoral Commission of Kenya (ECK) that Mwai Kibaki won the presidency despite evidence to the contrary, the opposition Orange Democratic Movement (ODM) led by Raila Odinga mobilized massive street protests against the declaration. The protest took an ethnic dimension when Kibaki’s Kikuyu tribe’s people became targets of a long nursed ethnic hatred.

One of the major problems in the modern nation-state of Africa can also be traced to the policies adopted by the imperial powers.²⁰⁸ The merging of ethnic groups to form one single state by the colonial administration did not take into consideration the social and political tensions that existed in pre-colonial era. The artificial conglomeration of previously hostile competing groups makes for a difficult overarching loyalty to be extracted from the nation-state, especially in post-colonial governance.²⁰⁹ Sudan is a case in point. The long history of slave raiding by the Arab northerners of Sudan in the deep African enclave in the South has bred a deep-seethed feeling of mistrust and hatred of the Arab. Political leaders often resort to the politics of ethnicity in order to integrate the citizenry, since the civic models of citizenship based on residence in the territory, has difficulty in mobilizing people once the colonial government has been replaced.²¹⁰ The politics of post-independence Africa has, therefore, magnified rather than decreased inter-racial and inter-ethnic conflicts.²¹¹ However, cultural diversity on its own cannot be seen as a source of conflict. Rather, when these differences are highlighted and manipulated by individuals and groups for selfish power acquisition, it can be a source of tension in the society. These manipulations of cultural, ethnic and racial differences are often the handiwork of political elites.²¹² The ongoing conflict in Darfur bears out this analysis. While it is true that there had been ethnic tensions amongst the different ethnic and racial groups in Darfur, these groups had historically resorted to traditional conflict resolution mechanisms to settle their differences. However, with the government's involvement in the conflict through the arming of the *Janjaweed* militia, the situation has escalated.²¹³

²⁰⁸ Ann Mosley Lesch, op cit p. 7

²⁰⁹ Ibid

²¹⁰ Ibid.

²¹¹ Douglas H. Johnson, op cit p. 5

²¹² Ibid.

²¹³ The Fourth Periodic Report of the UN High Commissioner for Human Rights on the Situation of Sudan titled, "Deepening Crisis in Darfur, Two Months after the Darfur Peace Agreement: An Assessment,"

Civil wars in Africa are also often, the result of internal tensions in a country which are exacerbated by the intervention of external interests.²¹⁴ For instance, the conflict in Darfur, while the result of internal tensions, is also fuelled by regional and international interests in Sudan. These range from natural resources to security, since Sudan is located in an area of geo-strategic importance to the West and Asia. It is also alleged that the aircrafts used in the various aerial bombardment of Darfur were supplied by Russia to Sudan.²¹⁵ Interestingly, the Chinese, Indians, Malaysians and French-Belgian companies are current holders of oil and gas concessions in Sudan.²¹⁶ According to Barnaba Benjamin, the foreign stakeholders in the oil industry in Sudan “own” ninety-five percent of Sudan’s oil, while Sudan is left with a mere five percent of its own wealth.²¹⁷ It is, therefore, understandable but not permissible, that Russia and China would be reluctant to support the UN Security Council Resolution sanctioning Sudan, or approving the use of force to protect the civilian population in Darfur as articulated in Chapter VII of the UN Charter.

In understanding the conflict in Sudan, and Darfur in particular, one has to look beyond the racial and ethnic divide, and focus on the politics of economic and political marginalisation exhibited by the Sudanese government. Of course, the decades of marginalisation, the drought and near famine of the 1970s and 1980s, intensified the competition for scarce resources amongst the different ethnic and racial groups inhabiting Darfur. However, one

available at <http://www.ohchr.org/english/countries/sd/docs/4thOHCHR5nov06.pdf> last accessed January 30 2007.

²¹⁴ Douglas H. Johnson, op cit p. xviii

²¹⁵ Amnesty International, “Sudan Still Violating UN Arms Embargo on Darfur,” Press Release, 24 August 2007, available at <http://www.amnestyusa.org/document> accessed on 18 November 2008. See also, Meera Selva, “Russia and Chinese Weapons Blamed for Fuelling Sudan War,” available at <http://www.sudantribune.com/spip.php?article6528> accessed 30 July 2006.

²¹⁶ Barnaba Marial Benjamin, *Prospects for Peace in a Post-Garang Sudan: Panel Discussion*, August 22 2005, University of Witwatersrand, Johannesburg, South Africa.

²¹⁷ Ibid

would be making a grave mistake to dismiss the conflict as an ethnic or racially motivated conflict. This does not in any way suggest that ethnicity and race are not factors to be considered.

The historical development of Sudanese political institutions would help one in understanding the dynamics of the conflict in Darfur. Failing to understand the complex intertwine of economic, geopolitical and historical underpinnings of the conflict will result in advancing the wrong solutions for a lasting peace in Darfur.²¹⁸

Historical Background to Sudan

Sudan is the largest geographical unit in Africa. Its territory is approximately one million square miles, representing 8.3 percent of the area of the African continent and 1.7 percent of the land mass of the world.²¹⁹ The boundaries of the modern day Sudan were established after the British conquest of Sudan in 1898. Before then, the territory was the eastern reaches of what medieval Arabs referred to as *bilad al-Sudan* – land of the black people.²²⁰ Sudan shares boundary with nine countries and the Red Sea. To the North, it shares boundary with Egypt; to the West with Libya, Chad, and the Central African Republic; to the South with Democratic Republic of Congo, Uganda, and Kenya; and to the East with Ethiopia, Eritrea and the Red Sea.²²¹ Ironically, most of the states that surround Sudan are also mired in internal conflicts, with regional implications. The Western region of Sudan is

²¹⁸ Ruth Iyob and Gilbert Khadiagala, *Sudan: The Elusive Quest for Peace*, (Lynne Rienner: Boulder Colorado, USA) 2006 p. 149.

²¹⁹ Khartoum Ministry of Information and Culture, *Facts about the Sudan*, (1973). P.8, cited by Dunstan Wai op cit p.15 See also, Map of Sudan, available at <http://www.infoplease.com/atlas/country/sudan.html> accessed March 22, 2007.

²²⁰ Ann Mosley Lesch, op cit p. 25.

²²¹ Map of Sudan, available at <http://www.infoplease.com/atlas/country/sudan.html> accessed March 18 2007

the second most populated region in the country, while the central region (including Khartoum) is the most populated.²²² Like most capital cities in Africa, Khartoum is a cosmopolitan city where people from different ethnic groups converge. There are more than fifty ethnic groups in Sudan and out of these; at least 570 peoples can be identified.²²³ The largest groups include the Arabs, Dinka, Beja, Neur, Nuba, Nubian, Fur, Bari, Azande, Moru, and Shilluk.²²⁴

Sudan represents a microcosm of the African continent in its language variety, peoples and religion.²²⁵ The identification of a person in Sudan is oftentimes determined by the social and cultural context of the situation. For instance, a northern Sudanese might be considered an Arab in southern Sudan. However, if that same person were in the north, he might not be considered an Arab, but more as a member of a local northern tribe.²²⁶ The proximity of Sudan to North Africa and the Red Sea is a factor contributing to the migration of Arab nomads into the Nile valley and their expansion into the Nubian and Nilotic areas of the northeast and south central respectively.²²⁷

Sudan is the first “black” African territory to gain independence after the World War II. It also has the unenviable record of being the first country to be plunged into civil war in post-independent Africa.²²⁸ The civil war started with the Torit mutiny a few months before Sudan’s independence on January 1 1956.²²⁹ One, therefore, questions the wisdom of

²²² Seekers of Truth and Justice, *The Black Book: Imbalance of Power and Wealth in Sudan*, (March 2004).

²²³ Ann Mosley Lesch, op cit p. 15. See also Ruth Iyob and Gilbert Khadiagala, op cit p. 46.

²²⁴ John Obert Voll and Sarah Potts Voll, *The Sudan: Unity and Diversity in a Multicultural State*, (Westview Press: Boulder, Colorado) 1985 p. 8-13.

²²⁵ Ibid. p. 6.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Douglas H. Johnson, op cit p. 21

²²⁹ Ibid.

granting independence to a country that was already mired in conflict. It has however been argued that the early independence of Sudan was more a ploy or tactic by Britain against Egyptian claim to being recognised as having sovereignty over Sudan.²³⁰ The handing over of sovereign authority by the British to the Sudanese Arab in the middle of an uprising, seem not to have been the right choice. The colonial administration should have addressed the fear of marginalisation expressed by the southerners before eventually divesting of its administrative authority. It is arguable whether the twenty-one years war would have occurred, if the British colonial administration had tidied up its stable, instead of abandoning the country at such a crucial time in its history.

Sudan's history since independence demonstrates that successive governments have found it difficult to accommodate the diversity of its people.²³¹ These governments have been controlled mainly by the Muslim north, and discrimination against non Muslims and non Arabs have occurred both under military and civilian administrations.²³² The continuous efforts of the government to Arabize and Islamize the non Arab and non Islamic parts of Sudan is also a major cause of its lopsided economic and development policies which favour the north that is predominantly Arab. Part of the colonial legacy in Sudan is the fact that during its colonial history, the British colonial administration considered "Sudan to be a basically Middle-Eastern country with an 'African' appendage which was of little consequence."²³³ However, Sudan's interaction with the outside world did not just start with colonialism.

²³⁰ Ibid p. 22

²³¹ Pat Lauderdale and Randall Amster, op cit p. 5.

²³² Ibid.

²³³ Gérard Prunier, op cit p. 76

Pre-Independence Sudan

Sudan had contact with the Middle East via Egypt that dates back to thousands of years before Christ, as a result of its trade in Ivory, Gold and other commodities. The economic interest in Sudan was, therefore, the major reason why the first Arabs settled among the indigenous population.²³⁴ The first attempt to form a centralised administration in Sudan was during the Turko-Egyptian invasion of 1821.²³⁵ However, the invasion by Egypt did not affect the independent Sultanate of Darfur and Sennar in the present day Western and Eastern Sudan respectively.²³⁶ Egypt's Mohammed Ali imposed heavy taxes on the Sudanese, and this led to revolts in various localities in the country.²³⁷ The invasion also occasioned serious increase in the seizure of men to be used as slaves in Libya, Egypt and Arabia.²³⁸

Prior to the Turko-Egyptian domination, slave owning and slave-raiding were the prerogatives of the state, the courts and the Sudanese aristocracy.²³⁹ During the *Turkiya* (as the period is referred to), the use of slaves both in domestic and other uses expanded and became widespread throughout the society in northern Sudan. The introduction of Tax reforms was also instrumental to the economic indebtedness of the southern Sudanese. Economic reforms introduced in the northern Sudan, therefore, contributed to the exploitation and subjugation of the South, as many southerners hired themselves out as cheap and indentured labour. This gave certain Muslim and Arab speaking parts of the

²³⁴ Francis Deng, *War of Visions*, op cit p. 9

²³⁵ Richard Hill, *Egypt in the Sudan, 1820-1881* (London: Oxford University Press, .1959). See also P.M. Holt and Martin W. Daly, *The History of the Sudan* (Boulder: Westview, 1989) pp.47-82.

²³⁶ Gérard Prunier , op cit p 15.

²³⁷ Ann Mosley Lesch, op cit p. 27.

²³⁸ Ibid.

²³⁹ Douglas H. Johnson, op cit p. 5.

north an advantage.²⁴⁰ As a consequence of the fact that the slave population in the north were drawn mainly from the south, it created the impression in the minds of many that “blacks” and slaves were synonymous. Even those blacks who were Muslims were still considered of a lower status because of their “slave” origins.²⁴¹ The Turko-Egyptian invasion of Sudan was primarily of an imperialist nature, unlike the early Arab incursion into Sudan. One of the principal aims of Muhammad Ali Pasha, the representative of the Ottoman Empire in Egypt was the procurement of slaves. The administration was a “good example of a rapacious penetration aimed at a one-sided benefit for the government without any return in protection, services, and development activities.”²⁴²

The Turko-Egyptian domination came to an end in 1881 when Mohammad Ahmad al Mahdi – the *Mahdiya* – overthrew it thereby establishing the first post-colonial attempt at self-rule by the Sudanese.²⁴³ Interestingly, Mohammed Ahmad was convinced that he is the expected Messiah who was to establish the Islamic Kingdom over all kingdoms.²⁴⁴ He was able to garner the support he needed especially in the north from the slave raiding Arab Baggara tribes of Southern Kordofan and Darfur, since they were vehemently opposed to the anti-slave raiding stance of the Turko-Egyptian administration.²⁴⁵ Incidentally, the southern Sudanese had rallied itself around the Mahdist forces thinking of it as a liberation force.²⁴⁶ However, things did not change for the southerners during the Mahdist reign as the slave raiding and slave ownership continued. This was partly as a result of the nature of

²⁴⁰ Ibid

²⁴¹ Douglas H. Johnson, op cit p. 6.

²⁴² Francis Deng, *War of Visions*, op cit pp. 47-48.

²⁴³ Ibid.

²⁴⁴ Ibid p. 49.

²⁴⁵ Ibid.

²⁴⁶ Francis Deng, *War of Visions*, op cit pp. 10-11.

the Jihadist state that drew a sharp distinction between the *Dar-al-Islam* (Abode of Peace) and the *Dar-al-Harb* (Abode of War).²⁴⁷

In 1899, the Anglo-Egyptian condominium was established after the British and Egyptian forces routed the forces of the *Mahdiya*. Much as the agreement was for a joint ruler-ship of Sudan between Britain and Egypt, in reality the British were effectively the rulers, as the Egyptian role was nominal.²⁴⁸ The British colonial administration through its introduction of the southern policy in 1930, governed the south of Sudan as a separate entity from the North.²⁴⁹ The southern policy discouraged interaction between the north and the south. It encouraged the Christianisation of the south and the use of English, and promoted the use of local languages, discouraging the use of Arabic language as a medium of communication for both official and domestic businesses.²⁵⁰ This decision by the colonial administration to administer the North and the South separately, reinforced Arabism and Islam in the north.²⁵¹ The policy of administering the two regions as separate entities was stopped in 1946. However, this was a great error on the part of the British, just as it was a great error on its part not to provide the same kind of social development and constitutional transformation that would have guaranteed the political position of southern Sudan.²⁵² Just as the amalgamation of northern and southern Nigeria by Lord Fredrick Lugard in 1914 did not bring unity in Nigeria, the abandonment of the southern policy which effectively amalgamated the north and south in 1946, did not bring unity to Sudan as a result of decades of mistrust engendered by history. In fact, the condominium decided to treat the

²⁴⁷ Ibid.

²⁴⁸ *Dunstan Wai*, op cit p. 33.

²⁴⁹ Ibid p. 35.

²⁵⁰ Ibid.

²⁵¹ Francis Deng, *War of Visions*, op cit p. 11.

²⁵² *Dunstan Wai*, op cit p.51.

north as an Islamic region and even excluded the proselytizing and spreading of Christianity in the north. However, permission was later granted to Christian missionaries to operate in some few northern towns where there were Europeans or Middle Eastern Christians.²⁵³

Post-Independence Sudan

Sudan got its independence from Britain on January 1 1956. If there was any indication that the independence was to be a sign of much improved relations between the Arab north and the African south, this was shattered even before the official Independence Day. The 1955 army revolt in the south precipitated the eventual twenty-one year war between the two regions.²⁵⁴ One of the original causes of the war was the belief by southerners that their northern Arab brothers regarded and treated them as slaves. This belief is of course embedded in the history of the Arab slave raiding incursions into the southern reaches of the country.²⁵⁵ The European colonial administration's withdrawal from the political scene marked an important turning point in interracial relations. The external restraining influences of the British administration on the cultural and historical differences were no longer there to bear on the evolving conflict.²⁵⁶ Within six months of independence, a new coalition government that emerged rejected federalism, arguing that it would encourage secession. It instead, proposed a constitution that would protect Islam as the official religion and enthrone Sharia as the basic source of law.²⁵⁷ The 46 member National

²⁵³ Ibid p. 54.

²⁵⁴ For a full and detailed account of the Army revolt and the factors that led to it, see, *Report of the Commission of Inquiry*, Khartoum September 8 1955.

²⁵⁵ Cecil Eprile, *War and Peace in the Sudan: 1955 – 1972*, (David and Charles: London) 1974 pp. 15-39.

²⁵⁶ Dunstan Wai, op cit p. 4.

²⁵⁷ Ann Mosley Lesch, op cit p.37.

Constitutional Committee formed in September 1956 recommended a centralised, unitary system. It further recommended that the source of law shall be Sharia, with Arabic as the official language.²⁵⁸ While this arrangement appealed to northern politicians, southern politicians together with the Beja, Fur, and Nuba politicians rejected the recommendations. However, the views of the Islamic-Arab majority were enforced.²⁵⁹

Two years into its independence, the first military *coup d' état* occurred in Sudan on November 17 1958. The coup, which ushered in Major General Ibrahim Abboud, occurred on the same day that the parliament was to vote on the contentious issues of an Islamic constitution and federalism. Fur politicians had planned to support the southern-sponsored demand for a federation. Abboud however, preferred to maintain a unitary system of government and appointed himself the Prime Minister.²⁶⁰ During Abboud's era, he brought pressure on the south to Arabize arguing that "cultural homogenization was essential to Sudan's unity and ...that Christianity was an alien religion that foreign missionaries had imposed on the South."²⁶¹ The Christian Missionaries operating in the south were blamed for the non-Islamization of the south. This resulted in Abboud restricting their operations to medical relief and educational services, expelling 300 of them.²⁶²

On October 30 1964, under intense pressure which culminated in a popular revolution, Abboud resigned and a transitional government was formed, headed by Sir al Khatim al-Khalifa.²⁶³ Under al Khalifa, the Arab north continued with its policy of assimilating the

²⁵⁸ Ibid.

²⁵⁹ Ibid

²⁶⁰ Ibid. p. 38.

²⁶¹ Ibid.

²⁶² Ibid. p. 39.

²⁶³ Ibid. p. 40.

southerners into an Arab-Islamic ethos. It was during this time that a draft constitution of 1968 adopted Islam as the official religion and Arabic as the official language.²⁶⁴ However, the government was overthrown in May 1969 by Jaafar al-Nimeiri. Nimeiri's government gave out the hope of the possibility of a shift in policy from assimilation. However, when he consolidated his power, he became more authoritarian and exhibited a penchant for Pan-Arabism.²⁶⁵ As a result of Nimeiri's unpopular policies – his introduction of Sharia law was not acceptable to all – he was overthrown in April 1985 after a few days of street protests. General Swar ed-Dhahab took over the reins of power as the head of state. He later organised democratic elections the same year in which Sadiq al Mahdi, a descendant of Mohammad Ahmad al Mahdi – the *Mahdiya* – became Prime Minister.²⁶⁶

When the Revolutionary Command Council led by Brigadier Omar Hassan al-Bashir overthrew the civilian government of Sadiq al-Mahdi on June 30 1989, the National Islamic Front (NIF) led by Hassan al Turabi espoused a government based on Islamic principles which turned Sudan into a full fledged Islamic state.²⁶⁷ The proclamation by President Omar al-Bashir on December 12, 1999 of a national state of emergency, forced Hassan al-Turabi to resign from his position as the president of the Sudanese parliament. He went on to form an opposition party, the Popular Patriotic Congress (PPC) and also entered into alliance with the Sudan Peoples Liberation Army to fight the government of Sudan.²⁶⁸ However, because he did not have his own army, Al Turabi resorted to raising

²⁶⁴ Ibid pp. 42-44.

²⁶⁵ Ibid.

²⁶⁶ Robert O. Collins, op cit pp. 94 – 99.

²⁶⁷ “The History and Origins of the Current Conflict in Darfur,” available at http://www.sarpn.org.za/documents/d0001277/PNADC475_Darfur_Feb2005_Chapter2.pdf accessed March 17 2007.

²⁶⁸ Gérard Prunier, op cit pp. 81-86.

such an army from Darfur.²⁶⁹ It is instructive to note that in Sudan's fifty-one years as an independent state, it has experienced only 10 years of real democratic rule – 1956-1958, 1965-1969 and 1985-1989. The other years have been military rule. It is arguable though whether the current government of Omar al Bashir is democratic, since he has suspended most parts of the constitution and there has been a state of emergency in existence since December 12 1999, though there is a scheduled national election for April 2010, this, after two postponements. It remains to be seen whether the April date will be feasible, as the key issue of an acceptable census figure still needs to be resolved between the north and south. .

Islamization and Arabization of Sudan

The introduction of Islam into Sudan was accelerated in part by the itinerant merchants of Arab descent plying their trades in Sudan and more specifically, by wandering holy men given land grants by their hosts. Islamization brought literacy to parts of northern Sudan and also introduced Arabic legal texts.²⁷⁰ It was, therefore, through this medium that the Sudan kingdoms came to be governed in line with Islamic legal principles.²⁷¹ The desertification of the land in the north of Africa can also be seen as a factor that exacerbated the influx of Arabs into Sudan. Some of them were accommodated, assimilated, or subjugated, while others achieved positions of power in Sudan.²⁷² Since the influx of Arabs into present day Sudan, claims to Arab descent has been a source of pride and distinction.²⁷³ The Arab influx and the transformation of Islam into a political ideology

²⁶⁹ Ibid.

²⁷⁰ Salaheldin el Zein Mohammed, University of Witwatersrand, interviewed by Author, Johannesburg, March 3 2007.

²⁷¹ Douglas H. Johnson, op cit p. 3.

²⁷² Ruth Iyob and Gilbert Khadiagala, op cit p. 49.

²⁷³ P. M. Holt and M.W. Daly, *The History of the Sudan: From the Coming of Islam to the Present Day*, (Weidenfeld and Nicolson: London, 3rd ed.) 1979 p. 3.

also introduced an ideological geography that divided the *umma* (domain of believers of Islam) into *dar al-Islam* and *dar al-harb*. In practical terms, it meant that Muslims were at liberty to carry out war where unbelievers inhabit.²⁷⁴ The politicization of religion in Sudan can, therefore, also be seen as one of the destabilizing factors of the current day Sudan.

The Arabs are practically in control of government institutions and the military. However, since the negotiated power settlement between the north and south Sudan, which culminated in the signing of the Comprehensive Peace Agreement (CPA), the black Africans of the south are beginning to be part of the establishment. The trade unions, industries, educational sector and businesses are in Arab control. Being the largest and most centrally located ethnic group, Arabs exercise an overwhelming influence over policy-making and cultural identity of the state. It is, therefore, not surprising that they have tried to craft the identity of the state in their own image, both culturally and religiously.²⁷⁵ As a result of the introduction of the southern policy by the British, and its separation of the north and the south in the 1930s and 1940s, many politicians in the north considered the southern peoples as their “lost brothers.” They are of the view that if not due to that artificial separation, the diffusion of Arabic and Islam would have led to the complete disappearance of southern cultural uniqueness.²⁷⁶ However, from available historical facts, the north does not really relate with the southern blacks as brothers would relate to one another.

With independence, advocates of ethnic nationalism sought to advance the country’s Muslim-Arab identity. From the government of General Ibrahim Abboud in 1958 to the

²⁷⁴ Ruth Iyob and Gilbert Khadiagala, op cit p. 46.

²⁷⁵ Ann Mosley Lesch, op cit p. 15

²⁷⁶ Ibid p. 22

present government, the “Arabization” of Sudan has been a central feature of each government’s policy.²⁷⁷ For instance, when Bashir first seized power in 1989, he argued that he was fighting for Sudan’s Arab-Islamic existence, stating that the law being applied in Sudan was God’s will.²⁷⁸ The attempt at Islamization and Arabization has led to different and most times violent reactions on the part of the other peoples in Sudan. In order to secure an Islamic model state, the NIF started a process of Islamization, Arabism, and mobilisation of armed militia. Darfur became a ripe area for the recruitment of these militias. This would eventually come back to haunt the region through intense looting and robbery by the *Janjaweed* and other groups.²⁷⁹

The development and entronement of Islam in modern Sudan is strongly associated with the efforts of Hassan al Turabi and his followers. He was active in advocating an Islamic constitution for Sudan.²⁸⁰ He was however, not the only person that sought after an Islamic constitution. This quest for an Islamic constitution was supported by former Prime Minister Sadiq al-Mahdi.²⁸¹ In the democratic elections of 1985, Turabi’s NIF won forty percent of votes and also fifty-one seats out of three hundred and one seats in the national parliament. While this was not enough to guarantee NIF control of the national government, it indicated growing support for an Islamic oriented government. It was Sadiq al-Mahdi’s party, the Umma party, which won the majority with 99 seats.²⁸² While the NIF was not part of Sadiq’s government, it continued in its mission of appealing for Arab purity and the creation of an Islamic state from the west to the east.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ The History and Origins of the Current Conflict, op cit

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibrahim Fouad, op cit

The Arabization and Islamization of northern Sudan was achieved through the spread and influence of Islam and through intermarriage and taking of concubines between Arab and slave African women.²⁸³ Due to the Arab lineage system of ascending miscegenation – any child born to a non Arab mother and Arab father becomes Arab – the Arabization of Sudan especially in the north was accelerated.²⁸⁴ The other factor that added to the Arabization of the north of Sudan is the use of Arabic as an identifying factor both for commerce, politics and education.²⁸⁵ This process of Arab acculturation is so complete especially in the north that it is almost impossible to classify pure Arabs and the non pure Arabs. This Arabization and Islamization made many black Africans in the north to become Moslems, because of the myth spread by Arabs that by becoming Muslims, they become free men and respectable members of the community. In order to escape the inferiority complex associated with being black and African, most of the northern Africans converted to Islam and even went to the extent of concocting their lineage as that of true Arab lineage.²⁸⁶ This conversion to Islam did not however offer the blacks the much needed reprieve from discrimination and being treated as inferiors.

Notwithstanding the fact that the north is composed of several ethnic and racial groups, three significant factors have helped to unify them into an Arab culture and identity – the Islamic religion, culture and institutions; the ideological identification with the Arabs of North Africa and Middle East; and the prevalent use of the Arabic language. Islamic religion in Sudan, just as in all other Moslem communities, is a complete way of life which

²⁸³ Dunstan Wai, op cit p.20.

²⁸⁴ Ali Mazrui op cit p.71.

²⁸⁵ Ibid.

²⁸⁶ Francis Deng, *War of Visions*, op cit p. 35.

expects the adherent to live by the five pillars: faith in oneness of God, witnessing prayer, fasting, charity, and pilgrimage to Mecca.²⁸⁷ It is, therefore, natural that in a society where racial differences are highly regarded, those with a claim to perceived superior origin would be treated more favourably by the state that share the same racial origins.

Arab/African Dichotomy in Sudan

Power relation in Sudan is to a great extent determined by racial, linguistic, and religious grouping. Those that reside in the southern part of the country generally practice Christianity or traditional African religions, while the ethnic Arabs and African minorities in the north are mostly Moslems.²⁸⁸ The history of Sudan indicates that the Arab-Islamic peoples of the north assumed the right to rule and define Sudan's national identity according to their own ethnicity. It further reveals their assumption that the non-Arab and non-Muslim lacked cultural identities of their own and should, therefore, be sucked in and assimilated into the Arab-Islamic ethos.²⁸⁹ Nothing can be further from the truth, as the southern non-Arab and non-Moslem Africans have identified through their twenty-one year struggle, that they have their own cultural identities and religious beliefs. The political tension between the north and the south had been simmering pre-independence in 1956. On attainment of Independence, the northern politicians took the advantage of their being the majority in the legislative and executive institutions to position the country on the basis of Arab-Islamic paradigm.²⁹⁰

²⁸⁷ Ibid p. 23.

²⁸⁸ Ann Mosley Lesch, op cit p. 3.

²⁸⁹ Ibid p. 44.

²⁹⁰ Ibid p. 36.

The attempt at assimilation and subjugation of the non-Arab Africans in the south led to the call for secession by the southerners. Those advocating for secession argue that they have the right to self-determination and, therefore, reject the assimilation paradigm where they are accorded a special, if somewhat, limited status as a minority group.²⁹¹ While some proponents of secession base their argument on the belief that the initial formation of the country was illegitimate and coercive, others view the secession paradigm as the necessary upshot after years of discrimination and civil war. They maintain that the continued “marriage” of the two diverse peoples does not guarantee the possibility of gaining equal rights and political status. The call for secession became more pronounced when Islamic laws were promulgated in 1983.²⁹² Some Islamists have also concluded that the north-south polarization is so severe that nothing short of dividing the country into two will solve the problem and end the “illusion” of a united, homogenous country.²⁹³

Prior to the Turkish-Egyptian invasion of southern Sudan, little or no communication, social interaction and political alliance existed between the north and south.²⁹⁴ The Turko-Egyptian and the Mahdist rule instilled in southern Sudanese nothing but hatred and fear of the Arabs. This fear and hatred stem from memories of plunder, slave raiding and suffering the Arabs inflicted on the southerners.²⁹⁵ While the Arab north has succeeded to a large degree in assimilating the non-Arab northerners, the south has continuously resisted this attempt to Arabize and Islamize them. This resistance is connected with the deep and bitter historical and colonial policy of separate development for the two regions.²⁹⁶ It has often

²⁹¹ Ibid p. 22.

²⁹² Ibid

²⁹³ Ibid. See also Abdelwahab el-Affendi, “‘Discovering the South’: Sudanese Dilemmas for Islam in Africa,” *African Affairs*, 89 July 1990 pp. 371-389.

²⁹⁴ Dunstan Wai, op cit p. 27.

²⁹⁵ Ibid pp. 31-33.

²⁹⁶ Francis Deng, *War of Visions*, op cit p. 6.

been argued that the relationship between northern and southern Sudan resembles an internal colonialism, in which case, the British transferred the powers of the overlord to the north, to continue its colonial administration over their arch enemies.²⁹⁷ It can also be argued that the situation is akin to the “independence” granted by Britain to South Africa in 1910 when the Afrikaners took over power and instituted the apartheid policy of governance until 1994, when the regime crumbled under intense domestic and international pressure.

Francis Deng argues that the Addis Ababa Agreement of 1972 that ended the north-south conflict for a decade was a tactically crafted document that was aimed at making the south accept the northern assimilationist aspirations in a more presentable form. He further argues that it was never intended as a genuine recognition and acknowledgment of southern Sudan’s identity or a move for regional or national conciliation.²⁹⁸ He, therefore, posit that the crisis of national identity is at the core of the north-south Sudanese conflict. The question of whether Sudan is an Arab or an African state needs to be resolved in order to address the issues of power sharing, resource distribution and opportunities for participation.²⁹⁹ The presentation of south Sudan to the world during the twenty-one year war has been that of victims of the predatory northern Arab-Muslims. However, a careful and in-depth analysis would also reveal that the south has been mired in numerous feuds, and wars fought between different southern communities that have to do with resources.³⁰⁰ While there might have been some inter-tribal wars fought amongst the southern communities for resources, it should not in any way overshadow the ideologically based

²⁹⁷ Ibid p. 135.

²⁹⁸ Ibid p. 136.

²⁹⁹ Ibid.

³⁰⁰ Ruth Iyob and Gilbert Khadiagala, op cit p. 49.

war fought between northern and southern Sudan. It must be remembered that the north in its recruitment of soldiers and militia, wooed the recruits not just with pecuniary benefits, but also with the belief that they were engaged in a religious war – *Jihad* – against the southern infidels.³⁰¹

Since independence, politics has been sectarian and has been dominated by the two religious houses in Sudan – the house of the Mahdis, and the house of the Mirghai. Incidentally, these two houses also correspond to the two leading political parties, the Umma Party of the Mahdis and the Democratic Unionist Party of the Mirghanis.³⁰² In order to control the leadership of the political parties, they pegged party leadership to religious sect membership and leadership. Since sect leaders must come from the founding families' father of the religious sects, it makes it easy to determine control.³⁰³ Notwithstanding the impression that the north is in control, the actual political domination in the north is by the Shaygiyya, Jaalyeen and Dangala ethnic groups that live along the Nile River, north of Khartoum.³⁰⁴ The other strategy used by northern political elites to exercise control over the rest of the state was the “exportation” of electoral candidates, where candidates from the northern region were encouraged to contest elections in regions other than their own. Through this means, the north was able to secure loyalty from government officials of even the marginalised states.³⁰⁵

³⁰¹ Umda Hamsa Abakr, University of Khartoum, interviewed by Author, Lusaka, Zambia, 20 July 2007.

³⁰² Seekers of Truth and Justice, op cit.

³⁰³ Ibid.

³⁰⁴ Salaheldin el Zein Mohammed, op cit.

³⁰⁵ Ibid.

Marginalisation in Sudan

The development of Sudan has been restricted to Khartoum and the fertile region of El Jezzira where cotton is grown. All other parts of Sudan have been marginalised and this includes Darfur. The effect of the marginalisation and underdevelopment of other regions is that most rural people migrate to the central and northern region in order to escape poverty, illiteracy and ill health. The other consequence of this marginalisation is that some of the Sudanese elites, especially those from the marginalised regions have left the country.³⁰⁶

The largely non-Muslim population in Sudan have continued to suffer marginalisation due to the concentration of political, economic, and cultural power in the hands of the Muslim Arab. This marginalisation has led to revolts which were originally championed by those in the south who are both Africans and non-Muslims. As a result of the oppressive tendencies of Abboud's government, the southerners formed a movement called Sudan African National Union (SANU) in 1960. At its national convention in Kampala, Uganda in November 1964, the Union proclaimed as its goal, the achievement of independence for south Sudan.³⁰⁷ However, the dynamics of the revolt has changed, as dissatisfaction through revolt is also being expressed by many Muslim Africans who believe that the ruling elite suppress and denigrate them due to their ethnicity.³⁰⁸ The current conflict in Darfur, for instance, is one of such revolts which have also awakened the eastern Sudanese to the reality of the marginalisation by the northerners.

³⁰⁶ Seekers of Truth and Justice, op cit.

³⁰⁷ Ibid p. 39.

³⁰⁸ Ann Mosley Lesch, op cit p. 3.

The marginalisation of the south did not however start at independence. During the condominium period, the British also marginalised the black Africans, especially those in the south. This treatment was not an initiative of the British, but the result of inherited prejudices from the Turko-Egyptian rule.³⁰⁹ It has also been argued that the British southern policy initiative to develop north Sudan along “Arab” lines and the south along “African” lines is a factor in the lopsided development in Sudan.³¹⁰ It is instructive to note that from independence to date all the Prime Ministers and Presidents that Sudan has produced are from the northern region. This, therefore, has affected the manner in which the central government relates with the other regions, especially, in representative government positions.³¹¹ The democratic government of Prime Minister Sadiq al- Mahdi was the only one that came close to balancing out the injustices of under-representation at the Federal Executive Council. This notwithstanding, the northern region continued to dominate as it had 55 members out of 116 members in the parliament.³¹² Between 1989 and 1999, Al Bashir’s government had a total of 202 ministerial appointments out of which 120 were northerners.³¹³ The fact that the northern region is being favoured by various governments does not in any way indicate that it is a homogenous entity, or that all ethnic groups are favoured. As mentioned earlier, the ethnic groups favoured are the Shaygiya, the Jaalyeen and the Dangala. Groups like the Manaseer, and the Mahas are subjected to the same injustices and marginalisation others suffer.³¹⁴ The marginalisation of the other ethnic and racial groups has, therefore, eroded the sense of belonging that would have nurtured the nationalistic feelings amongst the different groups. Instead of feeling as part of a whole,

³⁰⁹ Douglas H. Johnson, *op cit* p.11.

³¹⁰ Ibid.

³¹¹ Seekers of Truth and Justice, *op cit*.

³¹² Ibid

³¹³ Ibid

³¹⁴ Ibrahim al Deen, Darfur Refugee, interviewed by the author at Pretoria, South Africa, March 18 2007.

these groups feel as the rejected and unwanted part in the national makeup of Sudan. Thus, they do not feel obligated to the national project of maintaining a one unified and peaceful Sudan. This could have informed some of the restiveness witnessed in post-independent Sudan.

Racial Definition in Sudan

The pertinent question which any observer of Sudan would always ask is who is an African and who is an Arab? This question as mundane as it seems cannot be dismissed as it goes to the root of the Sudanese national identity and racial construct. While forty percent of the population identifies themselves as Arabs,³¹⁵ the real meaning of the term remains vague. An accepted definition of Arab would include those who speak the Arabic language and claim origin in Arabia.³¹⁶ However, many indigenous Africans also refer to themselves as Arabs due to the simple reason that they have, over the centuries, adopted Arabic language, customs, and the Islamic religion. It is also possible that due to the dominant factor of the Arab Muslims in the political, economic, and cultural life of Sudan, indigenous Africans might want to claim a lineage to Arab origins in order to benefit from the politicization of race. The extent to which this claim has assisted them is however debatable.

Two variables that seem to determine one's racial identity in Sudan are language and religion. Slightly over half of the Sudanese speak Arabic as their native tongue. Arabic is the official language and it is used in the north both at home as well as in education and commerce. The pressure for Arabic usage as a sole language in administration and

³¹⁵ Institute for Security Studies, Country Profile: Sudan, available at http://www.issafrica.org/index.php?link_id=188link_type=128tmpl_id=2 accessed on October 28 2008.

³¹⁶ Ann Mosley Lesch, op cit p. 15.

instruction dates back to the Turkiyya and Mahdiyya periods in the 19th century, when Muslim traders and slavers assumed that their culture was superior to that of the southern peoples.³¹⁷ However, in the south, over a hundred indigenous languages are spoken, and English is the preferred language for the educated elite rather than Arabic.³¹⁸ This is the result of a combination of the colonial administration's insistence and preference for English as a medium of communication in the south, and also a sign of rejection of the northern influence by the southern Sudanese. The role of religion in racial determination is also important. The north is overwhelmingly Muslim, while the south is a mixture of Muslim, Christian, and indigenous beliefs.³¹⁹

Despite the apparent ease with which the citizens of Sudan classify themselves racially, the distinction between Arabs and Africans cannot easily be made as most of the races have inter-married. For instance, out of the three dominating tribes of the north, only the Jaalyeen can claim pure Arab blood. The other two – the Shaygiya and the Dangala – are equally a mixed race, i.e., Arab and Africans.³²⁰ Salaheldin el Zein Mohammed in tracing the history of the Zaghawa, the Masaalit and the Fur, the three “African” ethnic groups involved in the Darfur conflict, asserts that they all have Arabic origins.³²¹ While tracing his own origin, one was left confused as to whether he is African or Arab. However, it appears that the determination of one's racial leaning is to a large extent determined by the person in question and the circumstances. The determination of what constitutes national

³¹⁷ Ibid p. 22.

³¹⁸ Ibid p. 19.

³¹⁹ Ibid.

³²⁰ Salaheldin el Zein Mohammed, op cit.

³²¹ Ibid.

identity in Sudan is, therefore, a complex process as the Islamic-African-Arab culture has intertwined over decades and is predominant in the north.³²²

Deng is of the opinion that “[T]he complex and intense history of [the] Sudan indicates that the country is confused in its sense of identity and vision of its destiny.”³²³ There is a general understanding by all the parties involved in the various conflicts in Sudan that to resolve it, the root causes need to be addressed. However, a consensus of what constitutes the root causes seems to be lacking.³²⁴ Suffice it to mention that the cause of conflicts in Sudan is rooted in both the expropriation of vast areas of territories by the dominant group as well as imposition of a theological geography that continues to accentuate the cleavages between members of the polity and those defined as objects of war, violence, pillage and servitude.³²⁵

Contextualising the Conflict in Darfur

The political geography of Sudan is divided into two main regions, i.e., the North and the South. In this broad geographic division, Darfur falls within the northern divide. While historically the north has been the main focus of development, Darfur and other regions of the broad north have been left out of this developmental process. Darfur is geographically located in western Sudan. The region got its name from the inhabitants of the region. While there are many tribes in the area, the Fur were the main inhabitants, hence the name “Darfur” meaning, place of the Fur. It has been argued that Darfur is poorer today than it

³²² Ibid.

³²³ Francis Deng, *War of Visions*, op cit p. 60.

³²⁴ Douglas H. Johnson, op cit p. xiii.

³²⁵ Ruth Iyob and Gilbert Khadiagala, op cit p. 46.

was in the pre-colonial times due to the moribund nature of pre-colonial trade, a larger population, and years of constant drought.³²⁶ While pre-colonial Darfur cannot be defined as a nation-state, it was definitely not a “simply ragged assemblage of tribes,” as it had its distinct entity recognised by its neighbours.³²⁷ The loss of Darfur’s independence in 1916 to the Anglo-Egyptian condominium cursed it to become and remain an appendage of some other bigger entity.

The conflict in Darfur can be analysed at two different levels. The first is that it is a conflict for resources between Arab and African tribes. The second is that it is one between the government of Sudan (and its allied militias) and the rebel groups. It is the second level of conflict that has received the most attention from the international community.³²⁸ This internationalisation of the conflict instead of allowing for a quick solution bolstered the armed opposition, raising their political demands to another level.³²⁹ The first type of conflict which is usual and not too violent was normally dealt with through traditional conflict resolution mechanisms. However, as a result of the government’s creation of the Arab militia group, the *Janjaweed*, the hitherto managed conflicts escalated to its present form.³³⁰

Darfur comprises of three states, namely; North, South, and West Darfur. The area shares a common border with Chad to the West, Libya to the northwest and Central African

³²⁶ Gérard Prunier, op cit pp 3-4.

³²⁷ Ibid p.23.

³²⁸ Fifth Report of Session 2004-2005 Vol.1 of the House of Commons, International Development Committee, *Darfur, Sudan: The Responsibility to Protect*, available at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmintdev/67/67.1.pdf> accessed January 15 2007.

³²⁹ Sara Pantuliano and Sorch O’Callaghan, “The ‘Protection Crisis’: A Review of Field based Strategies for Humanitarian Protection in Darfur,” Humanitarian Policy Group Discussion Paper, December 2006, available at http://www.odi.org.uk/HPG/Papers/discussion_Protection.pdf accessed February 15 2007.

³³⁰ Abubakar Yusuf, Darfur Coalition, interviewed by the author, Lusaka, Zambia, July 19 2007.

Republic to the southwest. Ecologically, the region is divided into three bands, with the desert in the north, and hence, the least populated; a central fertile belt that is very rich in agriculture. This includes the Jebel Marra Mountains. The third ecological band is in the southern zone. Though more stable than the north, it is also subject to drought and severe weather fluctuations.³³¹ Language and occupation are often used to describe the ethnicity of the Darfurians. For instance, the indigenous people do not use Arabic as their only language as they also speak their indigenous African languages, while those that claim Arab descent speak only Arabic.³³² The indigenous Africans are agriculturalists, while those of Arab descent are pastoralists. However, this distinction can sometimes be tenuous.³³³ The non Arabs agriculturalists include groups like the Fur, Masalit, Tama, Tunjur, Bergid and Berti. The pastoralists, who are mainly Arabs, include Arab ethnic groups such as the northern Rizeigat, Mahariya, Irayqat and Beni Hussein and the African Zaghawa. The cattle herding Arabs known as the southern Rizeigat (Baggara), Habbaniya and Beni Halba inhabit the southern and eastern zones.³³⁴

The Fur people of Sudan live in the far west in the area centred around the mountains of Jebel Marra.³³⁵ They have a strong tradition of independence. The Fur Sultanate was established by Sultan Suleiman “Solungdungo” (the pale man) who is reputed to be the son of a Fur father and an ethnic Arab mother.³³⁶ The growth and expansion of the Sultanate was achieved through peaceful and coercive incorporation of territorial and ethnic groups. The Fur who are mainly sedentary, controlled major desert routes and interacted with

³³¹ *Human Rights Watch*, “Darfur in Flames: Atrocities in Western Sudan,” Vol. 16 no. 5(A) April 2004 p.6

³³² Fatma Aziza Adouma, Darfur Refugee, interviewed by the Author, Johannesburg, South Africa, September 20 2008.

³³³ *Human Rights Watch* op cit.

³³⁴ *Ibid.*

³³⁵ Fatma Aziza Adouma op cit.

³³⁶ *Human Rights Watch* op cit p. 8. Also Salaheldin el Zein Mohammed, op cit.

migrants from West Africa, Arabia, holy men from the Nile Valley and other indigenous people.³³⁷ In order to get the immigrants to settle in Darfur, the Sultans granted them land and positions. The other strategy used by the Sultans to populate Darfur was the process of assimilation and acculturation, which also incorporated other groups and territories. The groups included Berti, Mararet, Mime, Daju, Bergid, Tunjur, and Dading among others.³³⁸ The groups, together with the Fur and Masalit and other small tribes, inhabit the centre of the region, where they practice agricultural farming. The Zaghawa and the Bideyat occupy the north-western part of the region, and have done so since the 16th century. They speak the Nilo-Saharan languages. The Nubian language speakers of the Meidob and Bergid occupy the northeast.³³⁹ Broadly speaking, the tribal distribution in Darfur can be summarised in relation to their source of livelihoods and ecology: the northern arid areas cater for camel nomadism; the central areas cater for agriculture due to its rainfall; while the southern wet savannah area cater for cattle nomadism.³⁴⁰ Trade contributed immensely to the expansion of Darfur Sultanate as there were three major trade routes that converged on the Fur Sultanate – the route from the *Bilad al Sudan*, the famous *Darb al Arabin* or the forty days road, and the north westerly route.³⁴¹ As at 1800, the Fur Sultanate was the most powerful state within the present day Sudan. The Fur Sultans adopted Islam as the official religion and Arabic as the official language of religious faith, scholarship and law.³⁴²

The arrival of Arabs in Darfur in substantial numbers is traced to between the fourteenth and eighteenth centuries. These were either individual scholars or traders who arrived from

³³⁷ Rex S. O'Fahey, *State and Society in Darfur*, (C.Hurst and Co.: London) 1980 pp.2-5. See also Burr J Millard, Collins O Robert, *Africa's Thirty Years War: Libya, Chad, and the Sudan, 1963-1993*, (Westview Press) 1999.

³³⁸ *The History and Origins of the Current Conflict*, op cit.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Julie Flint and Alex de Waal, op cit p. 3.

the east and west or the Juhayna Bedouins that came from the north-west principally in search of grass and water for their livestock.³⁴³ While the Fur Sultans gave a large *hakura* (land grants) to each of the four main Baggara groups (cattle people) that settled in the south, their Abbala cousins (camel people) who remained in the north as nomads were not given such *hakura*. Ironically, many Abbala Arabs who are involved in the current Darfur conflict explain that their involvement in the conflict is as a result of the land that was denied them.³⁴⁴

While conflict in Darfur can be traced to a century back, the conflict of the 1980s and early 1990s are seen as the departure point for the type of violent conflicts witnessed in the region today. The war in Darfur at the end of 1980 was not just a war over land, but, the first step in the reconstruction of a new Arab ideology in Sudan.³⁴⁵ A cursory analysis of the conflict in Greater Darfur, which includes the three states of North, South, and West Darfur, reveals that the conflict was ethnic and racial in nature. However, the conflict is more than it seems.³⁴⁶ The Arab herders and the African pastoralists who inhabit the Darfur region had until the mid 1980s co-existed peacefully, despite occasional clashes. There is also evidence of considerable ethnic fluidity and intermarriage.³⁴⁷ This is however, not to suggest that there has been an absence of ethnically motivated conflict in Darfur. The type of weaponry used in executing conflicts of the late 1990s that erupted between the Arabs and ethnic Africans suggests external support in the conflict.³⁴⁸ Prunier argues that while

³⁴³ Ibid p. 9.

³⁴⁴ Abdalla Mukhtar Jamous, Darfur indigene, interviewed by the author, Pretoria, South Africa, November 8 2008.

³⁴⁵ UNDP, *Share the Land or Part the Nation: Roots of Conflict over Natural Resources in Sudan*. Khartoum, Sudan: UNDP, 2003.

³⁴⁶ Michael Clough, op cit.

³⁴⁷ Ibid.

³⁴⁸ Hassan Yahya Hassan, Darfur indigene, interviewed by the author, Pretoria, South Africa, November 8 2008.

ethnic tensions can slip into violence, it often uses local weaponry to perpetrate such violence and do not “present a relentless and systematic character, and do not involve large-scale administrative cooperation from the administration.”³⁴⁹

The genesis of the current conflict in the region can be traced to decades of the government’s exploitation, manipulation and neglect of the region. Partly to be considered also is the recurrent cases of drought induced famine and its effect on the competition for the lean natural resources – land for grazing and agriculture.³⁵⁰ The earlier conflicts in Chad also affected the (in)security of Darfur which resulted in the flow of arms and people into Darfur.³⁵¹ According to Michael Clough, the immediate spark of the conflict may be linked to the progress in the negotiations between the north and the south to end the twenty-one year long civil war. He argues that the cessation of the conflict must have created fears in the minds of the “Darfurians that they might be excluded from the power and wealth sharing formula being negotiated by the government of Sudan and the SPLM/A.”³⁵²

The threat posed by the Darfur insurrection was seen by Khartoum to be much more than that of South Sudan, chiefly because the north had seen the western Sudanese people as their much closer relatives since there was a certain level of inter-mixture, inter-marriage and they all profess the same faith – Islam.³⁵³ Prunier argues that part of the reasons why the violence in Darfur reached genocidal proportion was the continuous contradiction and

³⁴⁹ Gérard Prunier, *op cit* p. 153.

³⁵⁰ Michael Clough, *op cit*.

³⁵¹ *Ibid*.

³⁵² *Ibid*.

³⁵³ *Ibid* p. 106.

political infightings within the government of Sudan.³⁵⁴ According to him, there was a serious lack of consensus amongst Sudanese government officials on how to address the Darfur situation.³⁵⁵ Another reason is the fact that the government continuously sought a “quick” end to the conflict in order to concentrate on its “peace” agreement with the south. The government must have believed that a decisive military incursion in Darfur will intimidate the people and discourage any further insurgency.³⁵⁶

While the Darfur situation captured media attention throughout 2004 especially after the Amnesty International and International Crisis Group released their reports, the Asian Tsunami of 2004 wiped out not just the coastal cities but also Darfur from international news.³⁵⁷ The efforts of civil society activists and journalists in thrusting the atrocities of Darfur on the conscience of the international community need to be mentioned. The gruesome acts of violence in the region has overshadowed the intricate socioeconomic, historical, and political interlink that exist amongst the primary actors in the war.³⁵⁸ Identification of the Darfur conflict as having started in 2003 instead of a century back has misled both the regional and international organisations in seeking to address both the socioeconomic and political roots of the crisis.³⁵⁹ However, Iyob and Khadiagala recognise that:

Although its origins are entrenched in the relations of inequality between its multiethnic inhabitants, the flash-point of Darfur that shocked the world in 2003 needs to be understood as the denouement of a series of struggles of

³⁵⁴ Ibid p. 109.

³⁵⁵ Ibid.

³⁵⁶ Anonymous, Sudanese Government Official, interviewed by author, Pretoria, South Africa, 20 October 2008.

³⁵⁷ Ibid p.128. See Amnesty International Report, *The Looming Crisis in Darfur*, London, July 2003.

³⁵⁸ Ruth Iyob and Gilbert Khadiagala, op cit p.133.

³⁵⁹ Ibid p. 134.

the inhabitants of a formerly autonomous political entity reduced to a periphery of the riverain elites of Khartoum and their clients.³⁶⁰

Flint and de Waal agree with the above analysis. In their view, the tragedy of Darfur that erupted in 2003 had been simmering for over two decades, but due to the long civil war in the largely non-Muslim south of Sudan, the international community had been screened off the Darfur tragedy.³⁶¹ Notwithstanding the fact that the conflict has long been simmering, the government never expected a major armed challenge to it partly because it shares the same Islamic ideologies with the Darfurians, and that accounts for the violent repression witnessed in trying to quash the conflict.³⁶²

The present conflict can be traced to the forced incorporation of Darfur into Anglo-Egyptian Sudan in 1916 and the effective and continued “marginalisation and pauperization of the region and its inhabitants since 1956.”³⁶³ The conflict while exhibiting some of the characteristics of earlier conflicts in Darfur is unique in the sense that, serious racial and ethnic cleavages have surfaced. The conflict is principally between two groups – the government and *Janjaweed* militia on the one side, and the SLA/M and JEM on the other side. However, there have been over twelve splinter rebel groups from the original two. These two rebel groups were initially made up of three ethnic groups, namely, the Fur, Zaghawa and the Masalit. However, due to the incessant attacks on civilians of the other ethnic groups like the Jebel and Dorok people by the *Janjaweed* and the government forces, they have joined the rebellion.³⁶⁴ Initially, the conflict was viewed by the media as one

³⁶⁰ Ibid p. 148.

³⁶¹ Julie Flint and Alex de Waal, *Op cit* p. xii.

³⁶² Gérard Prunier, *op cit* p. xi.

³⁶³ Ruth Iyob and Gilbert Khadiagala, *op cit* p. 134.

³⁶⁴ Abubakar Yusuf, *op cit*.

fought over resources between the “Arabs” and the “Africans”. However, this conflict cannot be traced to a single root cause. Included amongst the causes are historical grievances, local perceptions of race, demands for a fair sharing of power between different groups, the inequitable distribution of economic resources and benefits, disputes over access to and control over increasingly scarce natural resources, proliferation of arms and the issues of lack of a democratic process and good governance structures.³⁶⁵ The current conflict is more or less a continuation of several years of fighting between such Darfuri groups like the Masalit and the Rizeigat; and the Zaghawa and the Awlad Zeid. So sustained are these conflicts that at the end of 1999, over 100,000 people were internally displaced, while about 400,000 entered Chad as refugees.³⁶⁶ While truly tribal clashes, the practice by the government of politicising the conflict and mobilising some militia forces especially Arabs, turned it into a major political and military one.³⁶⁷

Conflict among ethnic groups in Sudan is partly based on their contested identities and histories. Ethnic identities that were relatively fluid in Sudan hardened and became politicized over time.³⁶⁸ For instance, a fight which began in the late 1960s at Rahad Gineid in Darfur, between Zaghawa and Rizeigat Arab herders over the theft of livestock, escalated into three days of armed conflict with rifles. This was the beginning of a pattern of conflict divided along ethnic-ancestry lines and goes to the root of the Dor saying that “conflict defines origin.”³⁶⁹ For over two hundred years, Islam, trade and tribal identity shaped and influenced the political, social and economic life of the Darfur people. These factors, together with the diverse ecology of the region, inform the rationale behind

³⁶⁵ Ibid.

³⁶⁶ Human Rights Watch, *Darfur in Flames*, op cit.

³⁶⁷ Ibid p.2.

³⁶⁸ Ann Mosley Lesch, op cit.

³⁶⁹ Julie Flint and Alex de Waal, op cit p. 7.

distribution and use of agricultural and pastoral resources.³⁷⁰ The competition for water and fertile land is one of the major factors in the conflict of decades between the nomadic Arabs and the sedentary African tribes in Darfur, despite having co-existed and cooperated for centuries. These conflicts had always been resolved through tribal conflict resolution mechanisms.³⁷¹ However, in 1986, during the rule of Al-Sadiq Al Mahdi, the government formed armed militia from the Meressiriya and the Rizeigat tribe to attack the Dinka and equally extended the attack to central Darfur.³⁷² This could, therefore, be regarded as the origin of the use of militia by the government to fight its “wars” in Sudan.

Within two decades after independence, economic improvements were recorded in Darfur. However, the national economic crisis of 1978 and the mismanagement of government economic processes, led to dramatic falls in exports, and widespread corruption. The effect on Darfur’s economic growth and agricultural labour was seriously felt.³⁷³ The famine of the 1980s also exacerbated the existing tensions in Darfur. War has been the major cause of the most severe famine in Darfur, especially in the frontier Chadian border conflicts that had its spill over effects in Darfur.³⁷⁴ Darfur has had a history of conflict induced displacements. There is a link between famine, conflict and displacement in Darfur. For instance, as of September 1991, there were at least 86,000 internally displaced persons in Darfur and the factors responsible for the displacement vacillate between conflict and famine.³⁷⁵ Prunier emphasises the famine factor to the general insecurity in Darfur since the

³⁷⁰ *The History and Origins of the Current Conflict*, op cit.

³⁷¹ Human Rights Report on Darfur, May 2004 – October 2004, Prepared by Sudan Organisation against Torture (SOAT) available at <http://www.soatsudan.org/public/ahrr.asp> accessed March 23 2007.

³⁷² Ibrahim Fouad, op cit.

³⁷³ Alex de Waal, *Famine that Kills: Darfur, Sudan, 1984-1985*, (Oxford Studies in African Affairs) 1989.

³⁷⁴ Ibrahim Fouad, op cit.

³⁷⁵ Buchanan Smith and Davies S, *Famine: Early Warning and Response – the Missing Link*, (London: IT Publications) 1995 p.106.

big 1984-1985 Sahelian famine.³⁷⁶ The mismanagement of the famine situation by the government in Khartoum has often been blamed for contributing to insecurity experienced in Darfur. When it became glaring in 1983 that a famine was looming, Ahmed Ibrahim Diragie, the governor of Darfur informed Nimieri that it was necessary to request international food aid to avert a total famine. However, this advice was never heeded by Nimieri as such a request would puncture a hole in his artificial propaganda edifice that Sudan was “the future breadbasket of the Arab world.”³⁷⁷ The failure to heed Diragie’s warning was followed by Nimieri’s failure to also heed the Food and Agriculture Organisation’s warning that Darfur’s estimated food deficit was about 39,000 tons. However, when in August 1984 Nimieri could no longer deny the existence of the famine, he proclaimed Darfur a “disaster zone” and requested for world’s assistance for 160,000 tons of food aid.³⁷⁸

Drought is another major factor in the depletion of assets and impoverishment of people in Darfur. As a result of drought, livestock perish or their owners sell at prices below the market rate.³⁷⁹ Because of the extended drought of the 1980s, there was an increased movement of people especially, the pastoralists of northern Darfur and Chad into the central farming area.³⁸⁰ The continuous drought and desertification exacerbated the simmering difference and tension between the “Africans” and the “Arabs”. It also affected the core of their livelihood and because of the nomadic nature of the “Arabs”, they were eventually brought into direct confrontation with the sedentary “African” farmers. Due to

³⁷⁶ Gérard Prunier, op cit p. vii.

³⁷⁷ Ibid p. 50.

³⁷⁸ Prunier, citing African Economic Digest, November 23 1984.

³⁷⁹ Ibid.

³⁸⁰ Mohammed Idriss Osman, Darfur indigene, interviewed by the author, at Pretoria, South Africa, November 8 2008.

the changes in the administrative structures (the abolition of Native Administration) in the 1970s, the structures which were originally in place to mediate inter-tribal relations collapsed and the resulting conflicts from the movement between the “immigrants” and the settled population could not immediately be resolved.³⁸¹ The drought induced famine decimated the livelihoods of Darfur rural majority, leading to the large influx of people into the other *dars* that were not so much affected by the drought, in search of provisions.

This, therefore, led to conflicts over access to water and pasture between the herders and the farmers, as farming communities felt threatened by the increased number of displaced persons taking refuge in their villages.³⁸² The herders in a desperate move to save their remaining herds led them to graze on farmlands, thereby, violating an age-old understanding between the two groups which formed the basis of their peaceful co-existence. The antagonists, instead of relying on the traditional conflict resolution mechanism that Darfur was renowned for, resorted to the use of force.³⁸³ The intermittent clashes between the Fur and Arab communities in Darfur evolved into full-scale conflict in the late 1980s and early 1990s. The government, instead of defusing the tensions, was fanning the embers of the conflict with its arming of the Arabs and neglect of the core issues underlying the conflict, namely; that of resources, and the constant political and socio-economic marginalisation of Darfur.³⁸⁴

Another factor which contributed to the local inter-tribal conflicts witnessed was the changes made to the Native Administration after independence by Niamieri’s regime in

³⁸¹ Gérard Prunier, op cit p.139.

³⁸² Ruth Iyob and Gilbert Khadiagala, op cit p. 144.

³⁸³ Ibid.

³⁸⁴ Human Rights Watch, *Darfur in Flames*, op cit p. 8.

1971. The changes which divided the region into regional, district, and area councils triggered tribal conflicts on a wider scale in Darfur. The Local Government Act of 1971 meant that a locality belonging to one tribe could be controlled by another tribe. This Act generated more than sixteen border disputes in southern Darfur alone.³⁸⁵ According to James Morton, the weakening of the Native Administration contributed significantly to increased conflict in Darfur.³⁸⁶

While the above analysis relate more to the inter-tribal/ethnic conflicts witnessed in Darfur prior to the 2003 conflict that made international news headlines, the current conflict between the government and the SLA/M and JEM can be located in other broader factors. The major factor was the long years of alienation and marginalisation by the different governments in Khartoum. The alienation and marginalisation stretch back to the Mahdiya days and run through different stages of Darfur history. As a result of the discriminations and marginalisation of the “westerners” and the “Africans” who were of the Islamic faith, an alliance was formed amongst the western, eastern, and southern regions in the 1990s and this threatened the *awlad al-balad*’s three-century old hegemony in Khartoum.³⁸⁷ The Darfur rebellion pose a far greater threat to the Khartoum government than the twenty-one year war with the South, SPLM/A. This is chiefly because, the Khartoum government is deeply worried about the prospect of the SLA and JEM garnering enough support from the other tribes in the west and other regions against the government. More so, since the majority of Darfurians are Muslims, the government cannot easily explain away the

³⁸⁵ Ateem E.S.M. “Tribal Conflicts in Darfur: Causes and Solutions.” Seminar on the Political Problems of the Sudan, 9-11 July 1999. AKE – Bildungswerk Institute of Development Aid and Policy, Vlotho, NRW, Germany 1999, p. 4.

³⁸⁶ James Morton, *Conflict in Darfur: A Different Perspective*, (Hemel Hempstead, UK: HTSPE) 2004.

³⁸⁷ Ibid p. 148.

conflict as religious.³⁸⁸ There is also the risk that were the Darfurians to succeed in their rebellion, it might trigger similar rebellions in other parts of the marginalised Sudan, especially in the east.

The government's initial response to the conflict was that it was inter-ethnic. However, it failed to make use of traditional conflict resolution mechanisms available for inter-ethnic conflicts in Darfur.³⁸⁹ While the conflict between the Arabs and Africans in the past had resource as its focus, the present conflict has nothing to do with such local resources.³⁹⁰ The resource factor in the present conflict is far more than mere access to water and grazing land for cattle. The resources relate to the government controlled resources which have been denied the Darfurians for up to a century.

The economic and political marginalisation of Darfur dates back to the 19th century. Before this period however, Darfur was as powerful and important as its neighbours.³⁹¹ As a consequence of British interest in the production of cotton in the areas immediately south of Khartoum, central Kordofan and the southern parts of Kassala province, the areas benefited most from the influence of British education and health. Darfur and other peripheral provinces experienced complete neglect. For instance, as of 1947, Darfur had no provincial judge, education officer or agriculturalist.³⁹² The political and economic influence rested in the hands of the privileged group and aggravated the already existing disparities in development in northern Sudan as well as between the north and the south.³⁹³

³⁸⁸ Ibid p. 10.

³⁸⁹ Sudan Organization against Torture, op cit p.3.

³⁹⁰ Ibrahim Fouad, op cit.

³⁹¹ *The History and Origins of the Current Conflict*, op cit.

³⁹² Ibid.

³⁹³ Dougl H. Johnson, op cit.

The first attempt towards a development plan for Darfur was a 1956 survey that recommended that Darfur must strive for self sufficiency like the southern Sudan.³⁹⁴ With regards to education, Darfur suffered serious imbalance. The little education that was available was reserved for the sons of tribal chiefs only.³⁹⁵ For instance, as of 1929, out of 510 students at Gordon College, the only establishment of higher learning in Sudan, none was from Darfur, while 311 were from Khartoum or the Blue Nile province.³⁹⁶ Similarly, as of 1935, Darfur had only one elementary school, one ‘tribal’ elementary school and two ‘sub-grade’ schools.³⁹⁷ This was a deliberate policy by the British colonial government as is evidenced in the statement of the governor of Darfur between 1934-1941 that “[W]e have been able to limit education to the sons of [C]hiefs and native administration personnel and can confidently look forward to keeping the ruling classes at the top of the education tree for many years to come.”³⁹⁸ Instead of being a source of worry to the local British administrators, they glorified the situation.

Darfur, under British rule was administered by commissioners who neglected the basic needs of the people and instead, fulfilled the interests of the central government. This resulted in political marginalisation. The other factor that contributed to the neglect was the phenomenon of “exported members” of parliament. These were parliamentarians from Khartoum who represented Darfur in the National Assembly.³⁹⁹ This act of “exportation” of government officials to serve in Darfur was also witnessed in 1979, when the Regional Government Act was enacted in order to bring provincial governments closer to the needs

³⁹⁴ Daly D.D, *Imperial Sudan: The Anglo-Egyptian Condominium 1934-1956*, (Cambridge University Press) 1991 p. 107.

³⁹⁵ Ibid.

³⁹⁶ Gérard Prunier, op cit p.30.

³⁹⁷ Julie Flint and Alex de Waal, op cit p. 13.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

of the people. While all the provincial governors were local to their provinces, the governor of Darfur, Al-Tayeb al-Mardi was from the Nile Valley province.⁴⁰⁰ However, these representatives had little or no interest in Darfur.⁴⁰¹ This under representation was challenged in 1965 by a group known as the Darfur Front under the leadership of Ahmed Diragie, who later became the governor of north Darfur. Other members of the group include Ali El Hajj, Abdul Rahman Doas, and Mohammed Adam Showa.⁴⁰² Despite the military takeover by Brigadier-General Ibrahim Abboud in November 1958 and the return to civilian rule in October 1964, Darfur's neglect continued, as the men in position of authority in Khartoum paid no attention to the distant Darfur and concentrated more on the Nile valley.⁴⁰³ Successive post-independent government in Sudan continued to follow the trend set out by the British administration. However, following the catastrophic famine of the 1980s and the resultant conflict it brought in its wake between the nomad "Arabs" and the farmer "Africans," Khartoum tried setting up the two communities against each other so as not to share the blame of its neglect of the province, which is at the root of the problem.⁴⁰⁴ The new "democratic" government was, therefore, insensitive to the needs of Darfur; instead, it "added passive incitement to racial hatred and active support for community confrontation to the neglect shown by the former regime."⁴⁰⁵

The representation of 21st century Darfur as a place of war, famine, pestilence, and death is, therefore, partly precipitated by "ill-fated government policies based on ideologies" rooted in racism and a denial of Sudan's slaving past.⁴⁰⁶ Between 1916 and 2008, Darfur's

⁴⁰⁰ Ibid p.47.

⁴⁰¹ Ibrahim Fouad, op cit.

⁴⁰² Ibid.

⁴⁰³ Gérard Prunier, op cit p. 38.

⁴⁰⁴ Ibid p.58.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ruth Iyob and Gilbert Khadiagala, op cit p. 133.

multiethnic and multiracial communities continue to struggle to attain inclusion in the political economy of Sudan, which is dominated by Khartoum's elites.⁴⁰⁷ A chronicle of the imbalance of power and wealth in Sudan published by an anonymous group under the banner of *Seekers of Truth and Justice* emphasises the marginalisation of Darfur even in government appointments. For instance, in the period from 1954 to 1964, out of seventy-three ministerial positions in the central government of Sudan, none was appointed from the Western region.⁴⁰⁸ In the period from 1964 to 1969, out of eighty-one ministerial positions, Darfur had five of its indigenes appointed. It is interesting to note that the northern region which represents five percent of the entire population had fifty-five of its indigenes appointed as ministers in the same period.⁴⁰⁹ The lopsidedness of the ministerial appointments continued through the various governments in Sudan, whether civilian or military. The government of Omar al Bashir was not different. In fact, Bashir initially 'rewarded' Darfur with three appointments to the fifteen man Revolutionary Command Council for being instrumental in forming the ideology that brought him to power.⁴¹⁰ However, it can be argued that it was during Bashir's presidency that Darfur suffered the most.

The marginalisation of Darfur was not just targeted at political appointments. It also extends to health services. For instance, in the entire state of Darfur, there are only two medical specialists in the field of obstetrics and gynaecology to serve a population of about 1.6 million.⁴¹¹ Furthermore, the first X-ray machine for the city of Geneina was procured in 1978 and it worked for about seven years. Ever since it stopped functioning, patients

⁴⁰⁷ Ibid.

⁴⁰⁸ *Seekers of Truth and Justice*, op cit.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

requiring X-ray services would have to make a trip to Khartoum which is about two to six days journey by road.⁴¹² The marginalisation reached the level that the Darfurians decided to confront the government by challenging its authority through violence. As aptly captured by Dustan Wai, "... one cannot discriminate at length against a people without generating in them a sense of isolation and persecution and without giving them a conception of themselves as being more different from others than, in fact, they are."⁴¹³ The political and socio-economic marginalisation of Darfur, therefore, catalyzed into the rebellion that was witnessed by the international community in February 2003.

Another factor which has been postulated as having contributed to the emergence of the conflict in 2003 was the peace negotiations between the north and south which ended the twenty-one year war. The civil war between the north and south officially came to an end on January 9 2005 with the signing of the Comprehensive Peace Agreement (CPA) between the two parties. However, before the signing of the agreement, the long drawn negotiation 'midwived' under the auspices of the international community, was a source of concern for the marginalised Darfurians.⁴¹⁴ While peace between the north and south of Sudan is desired by the Darfurians, the process was perceived as exclusive and only catered for the interests of the northern and southern elites, as it did not take care of Darfur's demand for an all inclusive process.⁴¹⁵ The over simplification of the Sudan conflict into conflict between the north and south, therefore, dampened the enthusiasm of other regions. The claims of marginalisation by the east, west and north (outside Khartoum) seem to have

⁴¹² The cost of travelling by air from Darfur to Khartoum is about US\$700.00 and is, therefore, prohibitive for the citizens who can barely afford the basics of life. Khadija Adam, Darfur indigene, interviewed by the author, at Pretoria, South Africa, November 8 2008.

⁴¹³ Dunstan Wai, op cit p. 25.

⁴¹⁴ Abdel Aziz Bakhour, JEM Senior Official, interviewed by the Author telephonically, 15 August 2008.

⁴¹⁵ Ibid.

been sacrificed on the altar of achieving peace between the north and south.⁴¹⁶ A negative message was also sent by the exclusion of the other regions from the ‘comprehensive’ peace deal, that if any of the regions wants to ‘enjoy’ inclusion into the political process of Sudan, they need to fight for it just like the southern Sudanese did. This may have encouraged the JEM and SLA to continue their armed resistance.⁴¹⁷

The Darfurians had every cause to be sceptical about the provisions of the CPA, since their concerns were not addressed. For instance, the CPA provides for power to be shared between the Khartoum government and the SPLM for a period of six years, after which a referendum on self determination would be held for the south.⁴¹⁸ An argument has been advanced that because of the peace process, Khartoum could not respond effectively and strategically to the Darfur conflict and this led to its use of the *Janjaweed* militia.⁴¹⁹ While the argument seems plausible on the face of it, a deeper analysis would reveal that Khartoum’s resort to the use of the *Janjaweed* militia was not as a result of being over-stretched by the peace-process, but may rather be a result of having over stretched its army in the war in the south, and also due to the fact that most of the soldiers that would have been deployed to quell the rebellion were actually from Darfur.⁴²⁰ Moreover, the use of militia by the government to quell such rebellion was not new in Sudan. It could also be argued that the peace process destabilised the Khartoum government and the “hawks” felt that the government conceded so much to the south during the negotiations of the CPA.

⁴¹⁶ *The History and Origins of the Current Conflict*, op cit.

⁴¹⁷ Ibid.

⁴¹⁸ Comprehensive Peace Agreement signed January 9 2005.

⁴¹⁹ Anonymous, *Report of Conflict Survey and mapping Analysis*, (Khartoum, Sudan: UNICEF and UNDP in collaboration with the Ministry of Higher Education) August 2002.

⁴²⁰ Abdel Aziz Bakhour op cit.

They could, therefore, had wanted to establish that Khartoum was still very much in control and has not gone weak, hence, its use of extreme violence to repel the rebellion.

The use of Arab militia does not in itself suggest that the conflict is between Arabs and Africans; neither does it suggest that the two racial groups have never lived peacefully. There is a history of relative peaceful co-existence between the Africans and the Arabs of the Darfur region. However, as is normal in every multi-racial and multi-ethnic community, tensions and minor conflicts do sometimes erupt. The community however, had a developed conflict resolution mechanism which it uses to address such issues. These traditional conflict resolution mechanisms were oftentimes undermined by Khartoum and through the selective arming of “Arab” militia, the tensions between the two distinct racial groups have escalated.⁴²¹

One can safely, therefore, assert that the conflict is not about race, rather, it is about marginalisation. This is principally because the marginalisation suffered by Darfurians is not targeted at either of the tribes. Secondly, there are Arab and African tribes that live in peace even as the conflict continues to engulf Darfur. For instance, the Beni Hussein and the Zeiyadiya Arab tribes of Northern Darfur live in peace with their African ethnic groups.⁴²² Thirdly, while there is a preponderance of Africans involved in the struggle, there are also some Arabs who have joined the various groups fighting the government. Equally, there are some Arab tribes who refused to support the government and the *Janjaweed* in their atrocities against the African civilians. For instance, Saeed Mahmoud Ibrahim Musa Madibu who is the head of the Baggara Rizeigat tribe, the most powerful

⁴²¹ International Development Committee p. 10.

⁴²² Ibrahim Fouad, op cit.

single Arab tribe in Darfur refused to align his tribe with the *Janjaweed*. He believes that good neighbourly relations are more important than fighting for an unpredictable government in faraway Khartoum.⁴²³ The Baggara tribes do not view the government's war as a legitimate war and hence refused to join the militia. Instead, the *Nazir* (leader), is making efforts to mobilise the Native Administration, a group of tribal aristocrats into resisting the lure of joining the government backed militia and have also offered shelter and protection to non Arabs that sought refuge in their territory.⁴²⁴ It needs to be mentioned however, that most of the Arab tribes (especially the nomadic ones) that joined the government sponsored atrocities against the Africans did not do so because of their love for the Khartoum government or due to enmity between the two racial groups, but rather, they saw the conflict as an opportunity for them to grab land and expand their access to land and water.⁴²⁵ This is partly due to the fact that the nomadic tribes in the northern Darfur have always demanded secure land tenure as they never had any entitlement to a homeland.⁴²⁶

It is however true that the *Janjaweed* militia is drawn from the Arab tribes and that most of the civilians targeted by either the *Janjaweed* or the government are black Africans. However, as earlier stated, the categorisation of Sudanese into Africans and Arabs is not an easy feat. K.M. Barbour captures succinctly the dilemma of identification in Sudan thus:

The term "Arab" is used in the Sudan in a variety of ways and on different occasions its meaning may be based on race, speech, an emotional idea or a way of life. Not all who claim to be "Arabs" would be universally accepted as such and there are those who at one moment claim, 'we are Arabs' and at

⁴²³ Julie Flint and Alex de Waal, op cit p.123.

⁴²⁴ Ibid.

⁴²⁵ Sara Pantuliano and Sorch O'Callaghan p. 2.

⁴²⁶ Ibid p. 3.

another will dismiss a ragged stranger contemptuously as ‘he is only one of the Arabs’.⁴²⁷

Sometimes, such determination is equally dependent on the person’s livelihood. For instance, if the person is a farmer, he might be categorised as an African. If the person were to be a herder, then he might be categorised as an Arab.⁴²⁸ According to Tayeb el-Abdalla, there is no permanency in ethnic identity as a Fur can through the acquisition of cattle after a generation, gravitate into the Baggara ethnic group.⁴²⁹ The sharp division of the ethnic or racial identity of the people of Darfur into “Africans” and “Arabs” belies the existence of a long history of interracial marriages which has produced a ‘hybrid’ of people.⁴³⁰ This division tend to sharpen only at the eruptions of conflicts. As earlier asserted by Salaheldin, the Fur, Zaghawa and the Masalit all have Arabic origins.⁴³¹ The Arabization and Islamization of Sudan also affected the ideological identity of Darfurians. The hybridized Darfurians, that is, the African-Arabs, by adopting the ideology of Arabism, denied their African heritage and altered the demographic and geographical boundaries of Sudan that has been in place since the 18th and 19th centuries.⁴³² Those Africans who had hitherto accepted Islam but had not embraced “the modern Islamic republic forged a bond based on their racialized exclusion as ‘non-Arabs/slaves/Africans.’”⁴³³

The first sign of an Arab racist ideology in Darfur emerged in the early 1980s. After the winning of the 1981 regional elections by Ahmed Diragie, a Fur politician, the Darfur

⁴²⁷ K.M.Barbour, *The Republic of Sudan: a Regional Geography*, (University of London Press, 1961) p. 80 cited by Gérard Prunier, *Darfur: the Ambiguous Genocide* (Cornell University Press, Ithaca, New York) 2005 p. 5.

⁴²⁸ Mohammed Tayeb el-Abdala, Darfur Refugee, interviewed by author, Johannesburg, May 28 2007.

⁴²⁹ Ibid.

⁴³⁰ Ruth Iyob and Gilbert Khadiagala, op cit p. 135.

⁴³¹ Salaheldin el Zein Mohammed, op cit.

⁴³² Ruth Iyob and Gilbert Khadiagala, op cit p. 46.

⁴³³ Ibid.

Arabs argued that if they stand united, taking the Zaghawa and the Fellata ethnic groups into their constituency, they could command an absolute majority to defeat the African Fur.⁴³⁴ It was also at this time that leaflets and cassette recordings started making the rounds, calling on Arabs to take over power from the Africans since they have been in power for a long time. They also advocated the use of force if necessary to achieve their purpose and that the name Darfur should be changed to reflect the new ethnic realities.⁴³⁵ The question that needs to be asked is why did the government not initiate mechanisms to forestall the looming conflict? Could it be that the government was hatching its grand plan of ethnic cleansing and found an opportunity in allowing ethnic rivalries to escalate? Why did the government instead of creating an environment of peace, arm the Arabs with modern and sophisticated weapons? These and other questions lie at the root of the current conflict.

It could, therefore, be said that various factors contributed to the present conflict in Darfur. While earlier inter-ethnic and inter-racial conflicts played a part in the conflict, the major factors are those of political and economic marginalisation of the region. Sequel to that is the politicization by the government of the ethnic and racial divide, and conflicts in the region, especially the conflicts that resulted from the drought and famine in the 1980s. The wider conflict in Sudan could also be said to have affected the (in)security in Darfur as the government's use of militias from Darfur in previous wars created a wealth of opportunity for it to immediately tap into. It could also be argued that due to the secured "peace" and the absence of fighting at the southern front, the government was quick to divert the resources of these militias to the western front in order to engage the militias. Probably, the

⁴³⁴ Julie Flint and Alex de Waal, *op cit* p. 51.

⁴³⁵ *Ibid.*

government was incapacitated to disarm the militias and the conflict in Darfur provided the opportunity of postponing the evil day, rather than confronting it. Of course, the symbolism of the timing of the conflict to coincide with the peace negotiations between north and south Sudan should not be disregarded. The continuous couching of the conflict either in racial modes – “Africans” versus “Arabs,” or in local resource conflict mode – “farmer” versus “herder,” deflects attention from the main driving forces of the conflict, which is the demands of a marginalised group for a better and more “equitable conceptualization of national citizenship with attendant rights to power and wealth sharing.”⁴³⁶

Rise of Rebellion and Government’s Use of Militia

Darfur has suffered decades of marginalisation by different governments ever since its annexation to Sudan in 1916 by the British in the form of political and socio-economic deprivations.⁴³⁷ While the marginalisation during the Anglo-Egyptian condominium was based on the fact that Darfur was not of much economic importance to the colonial government, the marginalisation since independence seems to be based on a systematic approach to exclude the Darfurians from enjoying the benefits of independence. With independence, the Darfurians would have expected their Muslim brothers in the north to incorporate their region into the development map of Sudan. However, this was not to be, despite the fact that Darfurians were instrumental to fighting on the side of the Khartoum government during the civil war between the north and the south of Sudan.⁴³⁸ As a result of the continuous marginalisation by the different governments, the Darfurians formed different pressure groups to seek and agitate for inclusion of Darfur in the development

⁴³⁶ Ruth Iyob and Gilbert Khadiagala, op cit p. 134.

⁴³⁷ Robert O. Collins op cit pp. 272-287.

⁴³⁸ Abdelaziz Brahim, interviewed by the author at Pretoria, South Africa on 12 August 2008.

plan of the government. For instance, the Darfur Development Front (DDF) was formed in 1963 by Ahmed Ibrahim Diraige. The DDF composed of both “Africans” and “Arabs.” The use of the word “development” was a strong indication that the problem of Darfur was that of development and this affected both “Africans” and “Arabs.”⁴³⁹ The government in a bid to stifle these agitations sometimes resort to the use of militias.

The practice of mobilising tribes to support various causes of the central riverrain Arabs dates back to the call of the *Mahdi* in the 19th century. However, in the modern day Sudan, the mobilisation of armed militia was first noticed when Nimieri mobilised the *Murahaleen* militia from the Baggara Rizeigat tribe from southern Darfur and the Misseriya tribe from southern Kordofan to fight the southern Sudanese.⁴⁴⁰ This precedence was followed by Sadiq al Mahdi when in 1986, when he employed the services of the *Murahaleen*. The atrocities of the *Murahaleen* were not limited to war alone as they massacred more than 1000 Dinka people in the south of Darfur without prosecution or sanctioning by the government.⁴⁴¹ The non prosecution of the *Murahaleen* gave the Arabs an air of impunity, strengthening the belief that they could get away with violations of human rights and international humanitarian law. When the National Islamic Front came to power in 1989, the *Murahaleen* was incorporated into the Popular Defence Force (PDF).⁴⁴² The militarization of Darfur through the recruitment process into government launched militia gave rise to many Darfurians being trained in warfare and familiar with operating a war

⁴³⁹ Julie Flint and Alex de Waal, op cit p. 40.

⁴⁴⁰ The History and Origin of the Current Conflict in Darfur, op cit.

⁴⁴¹ See generally, Mahmoud U. A and Baldo S.A, *The Ed Da'ien Massacre: Slavery in the South Sudan*, (Khartoum University Press) 1987. See also Gérard Prunier, *Darfur: the Ambiguous Genocide* (Cornell University Press, Ithaca, New York) 2005 p. 59. Prunier is of the view that the Murahaleen was armed and equipped by the Libyan government.

⁴⁴² Human Rights Watch, *Darfur in Flames: Atrocities in Western Sudan*, Human Rights Watch, April 16 2004 available at <http://www.hrw.org/reports/2004/sudan0404/sudan0404.pdf> accessed July 10 2006.

economy.⁴⁴³ The recent mobilisation of armed militia by the government is in response to the current rebel insurgency.

The history of Darfur's resistance to the "northern" elements started during the first decade of independence (1956-1965). The earliest movement against the oppressions of the north was the *Lahib al-Ahmar* (Red Flame) which was followed by more broadly constructed organisation – Soony. This organisation advocated for political and economic reform of the entire Darfur region.⁴⁴⁴ With the Soony's multi-ethnic membership and large number of its population drawn from Sudan Defence Force, Khartoum reacted decisively by dismissing most of the recruits from the region and placed stringent entry requirement for Darfurians into the Police Academy and Sudan Defence Forces.⁴⁴⁵ The ineffectiveness of the clandestine groups was what led to the formation of Darfur Development Front (DDF) by Diraigie to address the socio-economic and political concerns of the peoples of the Nuba Mountains and the eastern Beja. While its membership was multi-ethnic, the founders were mainly ethnic Fur.⁴⁴⁶

Following the incessant attacks by the *Janjaweed* militia on the Darfurians in late 1990s and early 2000, especially those of African origin, and the government's feigned ignorance of such attacks, the Darfurians started to mobilise once more to protect themselves.⁴⁴⁷ The Sudan Liberation Movement/Army (SLM/A) was one of such groups formed to articulate a challenge against the government's marginalisation of Darfur. The SLM/A was originally

⁴⁴³ Francis M. Deng, "Sudan – Civil War and Genocide," *Middle East Quarterly* (Winter) 2001 available at <http://www.meforum.org/article/22> accessed September 18 2007.

⁴⁴⁴ Douglas H. Johnson op cit, p. 143.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid p. 144.

⁴⁴⁷ Abdelazziz Brahim, op cit.

known as the Darfur Liberation Front (DLF) at a time when it was pursuing a secessionist agenda for Darfur. However, the name was changed through a press release on March 14 2003 issued by the group to reflect its new adopted agenda for a “united democratic Sudan.”⁴⁴⁸ The origins of the SLM/A could be traced to the early formation of self-defence groups that the Masaalit had founded in the mid-1990s to defend itself against the raiding Arabs who steal cattle, burn villages and kill any person in their way. A SLM/A commander Khamis Abakir, who prior to joining the rebellion was enlisted in the Sudanese Armed Forces for 21 years, had predicted that the raids were not ordinary raids, but rather a government plan to change the ethnic demography of the region.⁴⁴⁹ The SLM/A in its objectives declared that despite the fact of its origin and its necessitous development, it is a national movement aimed to address and solve the fundamental problems of Sudan. It advocates for the separation of religion and the state in order to minimize a source of conflict in the state.⁴⁵⁰

The other main rebel group formed to oppose government’s marginalisation of Darfur is the Justice and Equality Movement (JEM). The JEM has its roots in the National Islamist Front (NIF) of Hassan al Turabi. Notwithstanding its link to the NIF, it distances itself from the party accusing it of racism. It also rejects the notion that religion is a root cause of Sudan’s problems. However, unlike the SLA, it does not advocate for a separation of state and religion.⁴⁵¹ There are no distinct features between the SLA and JEM in the field of attack. However, it would appear that the JEM is more politically organised and focused

⁴⁴⁸ The Sudan Liberation Movement and Sudan Liberation Army (SLM/SLA) Press Release of March 14 2003 available at <http://www.sudan.net/news/press/postedr/214.shtml> accessed October 22 2007.

⁴⁴⁹ Julie Flint and Alex de Waal, op cit p. 69.

⁴⁵⁰ Political Declaration of The Sudan Liberation Movement/Army, <http://www.sudan.net/news/press/postedr/214.shtml> accessed February 6 2008.

⁴⁵¹ Julie Flint and Alex de Waal, op cit pp. 93-94.

than the SLA, which appears to rely so much on military victories. The rebellion however is not limited to the two rebel groups above. There are other minor rebel groups that much is not known about. For instance, the National Movement for Reconstruction/Reform and Development (NMRD) is a rebel group that is made up of mainly people from the Kobera Zaghawa sub-tribe, distinct from the Wagi Zaghawa of the SLM/A. Their area of influence and occupation are around the Chadian border town of Tine and in Jebel Moun area in west Darfur.⁴⁵² During the course of the conflict, more than ten different splinter groups have emerged from the main rebel groups. This has, therefore, contributed to the complexity of mediation currently pursued by the UN and the AU. For instance, at the scheduled peace talks at Sirte, Libya on October 27 2007, out of about ten different rebel groups, only four were present. Part of the reasons for the non attendance by the main rebel groups was that the mediation team invited minor rebel groups who did not have grassroots support.⁴⁵³

The JEM and the SLM/A had their main source of recruitment from the young jobless high school graduates and high school dropouts. This may account for the infinitesimal incidence of child soldiers in the conflict. The recruitment base will also affect the rebel groups' lack of well honed negotiating skills.⁴⁵⁴ The flow of arms and ammunitions into Darfur both to the rebels and the *Janjaweed* militia is a major source of concern to the international community. While the *Janjaweed* has its supply line from the government of Sudan, the rebels tap into the various illegal international arms trade that proliferate in war situations.⁴⁵⁵ There is also the notion that the government of Idriss Deby of Chad supports the rebels through the supply of materiel. Deby is of the Zaghawa tribe, though on the

⁴⁵² Abdul al Taha Musa, IDP, interviewed telephonically by author on June 21 2008.

⁴⁵³ Abdulla Ibrahim, JEM negotiator, interviewed by the author telephonically on 3 November 2007.

⁴⁵⁴ Ibid p. 94.

⁴⁵⁵ Musa Abdel Mohammed, Sudan Liberation Army/Movement (SLA/M) Commander, interviewed by author, telephonically, October 15 2007.

Chadian part. Most of the members of JEM are of the Kobe branch of the Zaghawa tribe, unlike the Zaghawa Tuer that populate the SLA. Furthermore, most Kobe Zaghawa unlike their Tuer brothers live in Chad with only a tiny minority living in Darfur.⁴⁵⁶ This however does not suggest that JEM is made up of only Zaghawa, as it also incorporated other marginalised tribes into its structure. Interestingly, some “Arab” tribes have joined the JEM in its resistance against the government sponsored militia.

The attack by the SLA in February 2003 shocked the government of Sudan. In response, the government launched a fierce counter-insurgency campaign against the rebels and their sympathisers in Darfur. The government used a model which it had earlier used in its campaigns against southern Sudan and the Nuba Mountains – the nomadic Arab tribes known as the *Janjaweed* militia.⁴⁵⁷ Having decided on taking the war path and believing that it could crush the dissidents fast enough, the government of Sudan, not trusting the army largely made up of recruits and Non Commissioned Officers (NCO) from Darfur, decided to explore the possibilities of formally incorporating the *Janjaweed* into its military ranks.⁴⁵⁸ This exposed the fact that the government of Sudan does not have the military force to quell the rebellion. Many of the *Janjaweed* recruits were issued with regular army uniform and insignias of office and they operated in full cooperation with the Sudanese Armed Forces (SAF).⁴⁵⁹

The emergence of the *Janjaweed* has been linked to the nomadic status of the Abbala Rizeigat Arabs in the north of Darfur, and their constant centuries-old search for their own

⁴⁵⁶ Julie Flint and Alex de Waal, op cit p. 89.

⁴⁵⁷ Michael Clough, op cit.

⁴⁵⁸ Gérard Prunier, op cit p. 97.

⁴⁵⁹ Ibid.

land.⁴⁶⁰ Through their annual trek and search for grazing land and water for their livestock, series of clashes with other nomads had developed over time.⁴⁶¹ The opportunity, therefore, presented itself during the ensuing conflict for them to grab the lands that Africans were forced to vacate. This was more so the case when, General Abdalla Safi al Nur an influential Abbala Rizeigat was made the governor of north Darfur in 2000. Through his connivance with Musa Hilal, a leading *Janjaweed* commander, all non Arab civilians and police were disarmed and the arms given to Hilal's men.⁴⁶² This tacit government support bolstered Hilal's build up of the *Janjaweed*. It is believed that many of the *Janjaweed* were attracted to the cause, not just because of the conflict, but also more about the prospect of the loot and the assurance of government patronage.⁴⁶³ Musa Mahmoud, an "Arab" of the Irayqat clan, the Camel herding tribe of the Rizeigat, asserts that the Irayqat and Ouled Zed clans of his tribe and the Mahariya and the Beni Hussein are the tribes mostly involved in the *Janjaweed* activities. He explains that because some of the Arabs do not have their own land, and the government's promise that they would be entitled to keep whatever they get from the war, many of his tribe's men joined the *Janjaweed*.⁴⁶⁴

The government of Khartoum played at the simmering enmity between the "Africans" and the "Arabs" in Darfur to instigate the "Arabs" to rise against the "Africans." For instance, at an "Arab gathering" in 1986, "Arabs" from Darfur claimed that they represented the majority in Darfur but are still marginalised.⁴⁶⁵ Through a letter sent to the central government, they called on the government to address the marginalisation. However, the

⁴⁶⁰ Julie Flint and Alex de Waal, op cit p. 42.

⁴⁶¹ Yahya al Deen, Darfur indigene, interviewed by the author, at Lusaka, Zambia July 18 2007.

⁴⁶² Ibid.

⁴⁶³ Safaa Jar al-Aagib, a former *Janjaweed* militia interviewed telephonically by the author April 3 2009.

⁴⁶⁴ Musa Mahmoud, Darfur indigene, interviewed by the author. Johannesburg, South Africa April 23 2008.

⁴⁶⁵ Julie Flint and Alex de Waal, op cit.

central government did not respond formally to the letter.⁴⁶⁶ This claim of representing the Arabs in the Darfur region was seen as a move by the Arabs to undermine the role of the Fur, Zaghawa and Masaalit tribes and to create ethnic divisions.⁴⁶⁷ This led to a conflict between the Fur and the Arabs which lasted for about three years. The Fur lost about 2500 people, 40,000 heads of livestock, with about 400 villages burnt down. About 10,000 residents were internally displaced. The casualty on the Arab side was about 500 dead, 3,000 heads of cattle lost and about 700 tents and residences destroyed.⁴⁶⁸ However, it must be stressed here that not all the Arab tribes are fighting the Africans. In fact, some of the Arabs are actually part of the rebel groups fighting against the government forces. For instance, the Misseriya and the Rizeigat Arabs of south Darfur refused to join the other Arab tribes against the rebels, but rather chose to fight against the government forces.⁴⁶⁹

Through the infusion of the *Janjaweed* with the Popular Defence Force (PDF) – a government of Sudan officially sanctioned militia group⁴⁷⁰ – the activities of the *Janjaweed* became very difficult to monitor. While the use of the term *Janjaweed* refers strictly in the context of the conflict to the Arab militias, it is also used loosely especially by the IDPs to refer to any other attacker on horse-back or camel-back, for instance, the PDF.⁴⁷¹ The distinction between the *Janjaweed* and the PDF militia is a very tenuous one. Since both militia forces attack indiscriminately using the same mode of transportation and perpetrating the same level of atrocities, the distinction actually becomes an academic one.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

⁴⁶⁸ Harir Sharif. “‘The Arab Belt’ and The ‘African Belt’: Ethno-Political Conflict in Darfur and the Regional Cultural Factors,” in Harir Sharif and Terje Tvedt (ed.) *Shortcut to Decay: the Case of the Sudan*, (Uppsala: Scandinavian Institute of African Studies) 1994 p. 144-185.

⁴⁶⁹ Moh’d al Dein, Darfur IDP, interviewed by telephonically by the author on May 29 2008.

⁴⁷⁰ The popular Defence Act of 1989 created the PDF as a Paramilitary Force to “assist the People’s Armed Forces and the Regular Forces whenever needed.” See Article 6 of the PDF Act 1989.

⁴⁷¹ Miss A. (Pseudonym), Darfur IDP, interviewed by telephonically by the author on May 29 2008.

To the victims, the person who kills, rapes, and loots their properties whether dressed up in military fatigue, or dressed up in a religious robe and turban is a *Janjaweed*. Though the *Janjaweed* militia sometimes operate with the support of the regular army, they are distinguishable from them by their sandals and turbans, together with the insignia of an armed man on camel-back, which they wear on their jackets.⁴⁷² The use of horses for combat is a Darfur tradition and it is for this reason that the present day violence of the *Janjaweed* is particularly distasteful. This is mainly because the warriors of the old Darfur had an ethic and honour and the *Janjaweed* that rape women and slaughter children appear to be a mocking echo of the old Darfur warriors.⁴⁷³ The recruitment of the *Janjaweed* and the PDF was overseen by Abdalla Safir al Nur and the then state Minister for Justice, Ali Karti, and a former coordinator of the PDF.⁴⁷⁴ Developments and other improvements to the Arabs' lifestyles were also used as inducement for them to join the militia. For instance, the governor of South Darfur, Major General Hamid Musa, "promised to vaccinate camels and horses, and build classrooms, a health unit and 24 water pumps in eight villages," for the Arabs.⁴⁷⁵

The SLA attacks against the government forces and target of February 2003 coincided with the signing of the Machakos Protocol which signified a breakthrough in the north-south peace efforts. The political leadership of the SLA in its political declaration accused Khartoum of marginalisation, racial discrimination, and economic exclusion.⁴⁷⁶ Its declaration bears a striking resemblance to the Sudan People's Liberation Army/Movement's (SPLM/A) vision of a "united Sudan" and demands for decentralisation

⁴⁷² Ibid.

⁴⁷³ Gérard Prunier, op cit p. 13.

⁴⁷⁴ Julie Flint and Alex de Waal, op cit p. 95.

⁴⁷⁵ Ibid pp. 102-103.

⁴⁷⁶ Ibid p. 151.

and the right to self-determination, while deploring political and economic marginalisation of Darfur and the need for the government of Sudan to be a secular one. The SLA having determined that the best way to protect itself against the government backed militia was through a rebellion started raising funds through their different contacts both home and abroad. They bought arms and ammunition from their kinsmen in the army and distributed them amongst the self defence groups.⁴⁷⁷ Notwithstanding the government's claims that the rebels were made up of criminals, evidence suggests that a vast majority of the rebels were farmers who lost their homes in *Janjaweed* orchestrated attacks. These people were left with the choice of either joining the rebellion or becoming refugees in Chad or to remain as internally displaced persons with the fear of further attacks.⁴⁷⁸

The Zaghawa's involvement in the rebellion arose as a result of government's neglect and lack of action against the *Janjaweed* militia attacks on them. The turning point was the 2001 killing of 125 civilians in Abu Gamra in a *Janjaweed* attack.⁴⁷⁹ Notwithstanding the difficulty of pinpointing the exact date of the beginning of an organised rebellion in Darfur, July 21 2001 could be taken as the most precise date. It was on this day that an expanded Fur and Zaghawa group meeting at Abu Gamra took a solemn oath on the Koran to work together in thwarting Arab supremacist policies in the Darfur region.⁴⁸⁰ Ironically, there had existed a very cordial relationship between the Zaghawa and the Arabs of Darfur and Chad. However, the drought of the 1980s and the lack of enough resources for animal grazing had an effect on the social fabric of the two groups.⁴⁸¹ It is instructive to note that while the majority of the SLA memberships are of African origins, they also have some

⁴⁷⁷ Sharir Abdulah Yusuf, Darfur IDP, interviewed by telephonically by the author on March 19 2009.

⁴⁷⁸ Ibid.

⁴⁷⁹ Julie Flint and Alex de Waal, op cit p. 73.

⁴⁸⁰ Ibid. p. 76.

⁴⁸¹ Ibid p. 73.

Arabs as members. For instance, Ahmad Kubbur, a Rizeigat merchant in southern Sudan was a commander, and in eastern Darfur, Ismail Idriss Nawai, a Hawazma Arab lawyer from Kordofan was also a commander.⁴⁸² This, therefore, dispels the often held belief that the conflict in Darfur is between the different tribal and racial groups. It instead enforces the postulation that the conflict is about marginalisation and neglect of Darfur as a region.

Following the *Janjaweed* attacks on 83 villages in Kebkabiya, Jebel Marra, Zalingei and Kas in 2002 where a total of 420 people were killed and thousands of animals stolen, President Al Bashir formed a committee for the “Restoration of State Authority and Security in Darfur.”⁴⁸³ After the attack on Golo, the committee chaired by General Ibrahim Suleiman detained prominent Fur lawyers, teachers and elders, including Abdel Wahid Mohammed al Nur. A feeling of mistrust and resentment for the government arose out of the fact that it did not do anything to curb the atrocities of the *Janjaweed* militia. “It soon became apparent that the government of Sudan had given a *carte blanche* to *Janjaweed* militias to murder, rape and loot with impunity.”⁴⁸⁴ Despite the eventual proliferation of rebel groups that could be traced to the SLA and JEM, the unifying factor for the two main rebel groups is the deep resentment they have against the government in Khartoum for their marginalisation.⁴⁸⁵

As a result of the non-signing of the Darfur Peace Agreement in 2006, the JEM leaders, the Sudan Federal Democratic Alliance and the SLA faction of Abdel Wahid al Nur formed the National Redemption Front (NRF) to combine its efforts to end the suffering of Darfurians

⁴⁸² Ibid p. 85.

⁴⁸³ Ibid p. 78.

⁴⁸⁴ Human Rights Watch, *Darfur in Flames*, op cit p. 3.

⁴⁸⁵ The Situation in Darfur, op cit.

in particular and Sudanese in general.⁴⁸⁶ However, Khalil Ibrahim, the leader of JEM was not part of NRF. From the time of the signing of the DPA to the present, there have been more splinter groups from the main rebel groups. The question this, therefore, raises is whether this is a tactics by Khartoum to weaken the opposition's strength and, therefore, present them to the international community as a group of self-centred individuals interested only in lining their pockets with proceeds from operating a war economy. The divide and rule tactics is not a new feature of Khartoum's war program in Sudan. Al Bashir employed it during the north south conflict, when it exploited the split in the SPLM/A. It aligned itself with Riek Machar and Lam Akol splinter groups.⁴⁸⁷ This jostling for individual recognition has equally led to attacks by the rebel groups on the Darfur civilians they claim to represent casting doubt on the genuineness of the claims of such representation. While the SLA was originally split between Minni Minawi and Abdel Wahid, it is generally understood by observers that Minawi's group is stronger militarily while Wahid seems to be more popular with the people of Darfur.⁴⁸⁸

With the failure of the Libya Peace talk, the UN and AU launched another peace effort to coordinate the political resolution to the conflict. The appointment of Djibril Bassole in June by the two organisations as the UN AU joint mediator in Darfur signalled a shift in mechanism. Notwithstanding the apparent acceptance of the mediator by the parties, the conflict in Darfur remains unabated. In November 2008, president Bashir made an attempt to unilaterally mediate in the conflict. This was condemned and rejected by many, especially, the rebels, as an attempt by President Bashir to deflect the attention of the

⁴⁸⁶ See generally, Founding Declaration of National Redemption Front (NRF) available at http://www.sudantribune.com/IMG/pdf/Founding_Declaration.pdf accessed November 22 2008.

⁴⁸⁷ Joseph Wani Mayom, Darfur IDP, interviewed by telephonically by the author on November 4 2008.

⁴⁸⁸ The Situation in Darfur, op cit.

International Criminal Court (ICC) from him and also derail the efforts of Bassole towards implementation of his mandate.⁴⁸⁹ Currently, the government of Qatar has equally stepped in as a mediator in the conflict. However, it remains to be seen whether this will be fruitful as the peace talks are already stalling.

The root causes of the conflict are embedded in the Sudanese political and socio-economic culture of over a century and hence the solutions must equally be sought in the Sudanese political and socio-economic culture. To secure this, therefore, stronger political pressure need to be applied by the international community on the parties in order to secure and protect the civilians and encourage a political process towards a resolution of the conflict.⁴⁹⁰ However, it must be made clear that all the international community can do is to steer the parties towards achieving peace, as it cannot impose its will on them to negotiate and reconcile. The interest of a genuine negotiation and reconciliation must come from the parties themselves. Questions that however arise in the Darfur scenario are whether the international community is obligated to assist the Darfurians in their miseries. If it is determined that the international community is obligated to assist them, what is the nature of this assistance? Would it be enough to send in humanitarian aid in the nature of food aid and other emergency relief materials alone and stand aside to watch the continuous killings of the civilians? Or would the nature of this assistance be in the form of a military intervention in Darfur to seek to stop the killings, while at the same time seeking a political solution to the underlying causes of the conflict? Does the international community have a responsibility to protect the civilians in Darfur from the continuous killings and other

⁴⁸⁹ Hassan Mohammed, JEM negotiator, interviewed telephonically by the author on March 24 2009.

⁴⁹⁰ International Development Committee, op cit.

atrocities? Are there limitations to the expected responses by the international community?
These and similar issues will be the subject of the next chapter.

Chapter III Responsibility to Protect - Civilian Protection Debate

With the conflict in Darfur making international news headlines at the same time that the world was commemorating the tenth anniversary of the Rwandan Genocide, the “never again” refrain of the international community sounded like a broken promise or at best, a scratched record. This is because once again, the world is standing by while another “Rwanda” unfolds in Darfur. The Darfur conflict affords the citizens of the world the opportunity to judge whether the international community and the UN in particular, has learned anything from the experience of Rwanda in responding to genocide and crimes against humanity.⁴⁹¹ In Kofi Annan’s address to the UN Commission on Human Rights in Geneva, on April 7 2004 during the commemoration of the Rwandan genocide, he stated that the “international community cannot stand idle while the atrocities of Darfur unfold.”⁴⁹² Earlier at the dawn of the new millennium, Annan had posed a challenge to the international community on what the responses to wide scale atrocities should be, given the controversies surrounding the humanitarian intervention concept. In his statement he asked “[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”⁴⁹³ Despite this challenge raised by Annan in 2004 more than five years later, the international community is still grappling with how to address the Darfur conflict and more especially, the protection of civilians caught up in that conflict.

⁴⁹¹ Hugo Slim, “Dithering over Darfur?: A Preliminary Review of the International Response,” *International Affairs*, 80 (5) 2004 p. 811.

⁴⁹² Kofi Annan, Address to the UN Commission on Human Rights, Geneva, April 7 2004, UN News Service, available at <http://www.un.org/apps/news/printnewsAr.asp?nid=10377> accessed March 17 2007.

⁴⁹³ The Secretary-General, We the Peoples: The Role of the United Nations in the Twenty-First Century, delivered to the General Assembly, UN Doc. No.A/54/2000 (April 3 2000).

The controversies surrounding civilian protection especially in an environment of war or conflict are not novel. While there exists an array of international legal instruments that guarantee civilian protection, the implementation of such instruments have not been effective. This is mainly due to lack of the necessary political will. However, there is also the existing dilemma between issues of sovereignty and civilian protection. For instance, there is the tension amongst international law and international relations scholars and practitioners on the issue of humanitarian intervention. Proponents of intervention base their argument on the fact that the UN Charter provisions when read as a whole, is geared towards the protection of individual human rights. Opponents of humanitarian intervention on the other hand argue chiefly on the principle of sovereignty, and the Charter provisions against the use of force – Article 2 (4) and non-intervention – Article 2 (7). While these arguments have their fine points, the international community has recently recognised and acknowledged that sovereignty, as attractive as it is, is not absolute or sacrosanct and hence entails responsibility. This is the so-called new meaning of sovereignty. With this new meaning, the international community through the UN has acknowledged the concept of responsibility to protect. This emerging norm has strengthened the argument for humanitarian intervention, by advocating that interventions of such are to be predicated on human protection paradigm. The thesis of the principle is that the primary responsibility for the protection of civilians in any given situation is that of the state, to which the people belong. The principle however also advocates that where the state is unable or unwilling to protect its people, or is itself the source of threat to their livelihood, the international community must assume that responsibility.⁴⁹⁴

⁴⁹⁴ ICISS Report, op cit.

While the concept seems to be couched in a more acceptable language of human protection, controversies undoubtedly trail its acceptance. Moreover, it still remains to be seen how the concept will metamorphose into a tangible practice. The Darfur conflict presents the international community with a good opportunity of translating the concept from theory to practice. However, there are challenges that the concept has to overcome before being fully accepted. While the African Union Mission in Sudan (AMIS) was not premised on the concept of responsibility to protect, it can be argued that the provision of Article 4 (h) of the Constitutive Act represents the same philosophy embedded in the responsibility to protect concept, thereby making it the first international treaty that recognises the right of intervention for human protection.⁴⁹⁵ The AMIS efforts in Darfur underscore some of the problems that the concept faces if it has to be operationalised.

Civilian Protection Dilemma: The Tension between Sovereignty and Civilian Protection

The principle of sovereignty in international relations emerged from the ashes of the thirty years war in Europe after the signing of the Treaty of Westphalia in 1648. Sovereignty was understood then to mean the absolute right of a state to do as it pleases within its territory, and with its people. However, this absoluteness in interpretation was given a tilt at the end of World War II which saw the Allies setting up the International Military Tribunal (IMT) at Nuremberg and Tokyo, to try the war criminals. The understanding and philosophy behind the war crimes trials was that while sovereignty is recognised, states do not have absolute right to treat their citizens the way they liked without incurring the ire of the international community. From then onwards, there was an understanding that sovereignty

⁴⁹⁵ See Article 4 (h) of the Constitutive Act of the African Union 2002.

is not as absolute as it had earlier been represented, but that human rights was at the core of state relationship with its citizens. Despite this early understanding, states continued to cling onto the absoluteness of sovereignty, to ward off criticisms against their human rights abuses.

The establishment of the UN quickened the development of international legal instruments for civilian protection. The adoption of the Convention on the Prevention and Punishment of the Crime of Genocide by the UN General Assembly on December 9 1948 and the subsequent, if not simultaneous adoption by the same body of the Universal Declaration of Human Rights on December 10 of the same year, signalled the focus of the new world body; namely, human protection. Other international instruments followed on the heels of these earlier ones.⁴⁹⁶ These instruments set the stage for civilian protection both in times of peace and war. For instance, Article 3 of the Fourth Geneva Convention gives protection to civilians and other protected persons in a conflict situation that is not of an international nature.⁴⁹⁷ However, the idea of civilian protection is an age long requirement that has sought to protect civilians from the effects of warfare.⁴⁹⁸ Broadly speaking, these instruments are categorised under international human rights law and international humanitarian law. While international human rights law protects civilians during peace time as well as during war situations, international humanitarian law operates only in war situations.

⁴⁹⁶ The Four Geneva Conventions of 1949, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966.

⁴⁹⁷ Art. 3, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12 1949. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8 1977.

⁴⁹⁸ Judith Gardham, *op cit* p.14.

The modern international humanitarian law limits the effects of warfare on both civilians and combatants.⁴⁹⁹ However, due to the Cold War, there was a lull in both the development and implementation of mechanisms for civilian protection. For instance, during the Cold War, the use of the UN Chapter VII enforcement action happened only once, i.e. during the Korea debacle in 1950. However, the ability to reach such a consensus was due to the fortuitous absence of the former Union of Soviet Socialist Republic (USSR) from the UN Security Council meeting. The political manoeuvring experienced at the Security Council's proceedings is at the root of its inability to fulfil its responsibility, as the veto-wielding members are able to block actions that are against their national interests. These pursuits of narrow national interests have resulted in the Security Council's failure to protect populations at risk and it goes against the declared and inferred intent of the UN Charter.⁵⁰⁰

The UN High Level Panel report also indicted the UN Security Council for its bias in responding to issues of peace and security in the world. It cited the swift response of the UN to the 9/11 attacks, compared to its slow and inefficient response to the Rwanda genocide and the Darfur conflict.⁵⁰¹ Of course there is a perception by keen observers that the UN and the western states in particular, do not attach the same importance to African conflicts as they attach to those that emanate in the West. This may be due to the false perception by the West that Africa is a dark and barbarous continent, and that no matter what is done by them, Africans would always exhibit their barbarism. In fact, some might even argue that such conflicts in Africa are a way of checking the population explosion in the continent. The other reason may be the perception by westerners that their lives weigh

⁴⁹⁹ Ibid.

⁵⁰⁰ William R. Pace and Nicole Deller, op cit p. 30. See Article 24 of the UN Charter for the Functions and Powers of the UN Security Council.

⁵⁰¹ UN High Level Panel Report, op cit Para 41-42.

higher than those of Africans, on the scale of life. These realities however, should be seen as a wake up call to Africans and especially the African Union, to have a working mechanism to intervene as early as possible to forestall the escalation of conflicts in the continent.

Ironically, while the UN on the one hand was developing laws for the protection of civilians, it was also building barricades against the effective implementation of such norms. For instance, the General Assembly Resolution 375 of 1949 on the Rights and Duties of States calls on states to refrain from intervening in the internal or external affairs of states.⁵⁰² It further calls on states to also refrain from fomenting civil strife in the territory of other states, and to prevent the use of its territory as a venue for the organisation of activities meant to destabilise another state.⁵⁰³ While the resolution might be seen as a restatement of the UN Charter itself, it is argued that the first part – against intervention – contributed to dampening the development and implementation of civilian protection mechanisms. The restatement added the impetus to the sacrosanct nature of sovereignty, whilst at the same time, sentencing civilians to continue to suffer the indignities and human rights violations meted out by the dictators, without any hope for intervention by the international community.

While efforts were made at the normative and treaty level to entrench the mechanism and ethos for civilian protection, the meaning ascribed to sovereignty continued to undermine these efforts. Due to the nature of some human rights atrocities that were witnessed in states, the international community through states developed different intervention

⁵⁰² General Assembly Resolution 375 of December 6 1949.

⁵⁰³ Ibid.

mechanisms to protect civilians caught up in such violent atrocities. These interventionist mechanisms, especially the so-called humanitarian intervention paradigm were criticised by both states and scholars as an assault on sovereignty. However, supporters of the mechanisms anchored their support on civilian protection and human security paradigm, arguing that human rights are independent of history, culture, or national borders since they are rights held or enjoyed by all by virtue of their personhood.⁵⁰⁴

The principle of sovereign equality of member states of the UN represents the cornerstone of international relations.⁵⁰⁵ This sovereign equality notion presupposes that each state is supreme within its territorial boundaries and cannot be dictated to by other states on what to do, at least, within its territorial boundaries. While the sovereign equality principle is jealously guarded, especially by “small” states, the realities of the international system suggest otherwise. This concept of sovereign equality was recognised after the signing of the Treaty of Westphalia.⁵⁰⁶ The Treaty brought a fundamental and noticeable change to international relations because it was then that the authority of the Pope and the Emperor was first challenged.⁵⁰⁷ Sovereignty implied that each state became a master to itself, and a slave to none. The corollary to that status was the principle of non-intervention in a state’s affairs.⁵⁰⁸ Although the doctrine of sovereignty is still the cornerstone of international political legal order, the traditional view of sovereignty is being challenged by the growing norm that the legitimacy of the rights associated with sovereignty is dependent on the

⁵⁰⁴ Fernando Téson, *The Liberal case for Humanitarian Intervention*, op cit p. 94.

⁵⁰⁵ UN Charter, Article 2 (1).

⁵⁰⁶ Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies, October 24, 1648, available at <http://fletcher.tufts.edu/multi/texts/historical/westphalia.tx> accessed August 18 2005.

⁵⁰⁷ Anthony Sammons “The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy in Trials of War Criminals by National Courts”, 21 *Berkeley Journal of International Law*, 2003 p.115.

⁵⁰⁸ Caroline Thomas, *New States, Sovereignty and Intervention*, (St Martin’s Press, New York, 1985). P.3.

respect for human rights and of the principle of representation.⁵⁰⁹ It has also been suggested that the concept of sovereignty is not as absolute as proponents make it out to be even within the state itself, since the power is constrained and regulated by the constitution.⁵¹⁰

There is a growing tension between sovereignty and civilian protection. Advocates of strict observance of sovereignty argue that any intervention in another state amounts to an abuse of the principle of sovereignty. However, proponents of civilian protection argue that sovereignty, where it is used as a shield to perpetrate massive atrocities against the civilian population must be jettisoned in favour of human protection. Human protection is then seen to have more value than the value attached to sovereignty. Téson argues, for instance, that a higher value should be placed on human rights than on sovereignty in order for violations of such human rights to be grounds for intervention. His view is that the preamble to the UN Charter which declares that armed force should not be used “save in the common interest” must be interpreted to include the upholding of human rights. Further, the reaffirmation of faith in the fundamental human rights by the preamble, and the establishment of conditions under which justice can be maintained must be interpreted to incorporate human rights protection.⁵¹¹

The following changes that have occurred in post-Westphalia era and, particularly in post-1945 have affected the dynamics of sovereignty namely; expansion of states, technological advances that have reduced the world into a global village and created borderless markets, communication development, economic globalization, and an increase in number of actors

⁵⁰⁹ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*, (Gullanders, Denmark, 1999) p. 17.

⁵¹⁰ ICISS Report, op cit Para 2.7.

⁵¹¹ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit pp. 231-2.

in the world system.⁵¹² Events in the last two decades have shown that sovereignty, if it was considered absolute before, is no longer absolute. Sovereignty, while still an important principle in international relations, does not suggest or presume the unlimited power of a state to do what it wants with its citizens.⁵¹³ While a sovereign state is empowered under international law to exercise exclusive jurisdiction within its territorial borders, other states are duty bound not to intervene in the internal affairs of a sovereign state.⁵¹⁴ This norm of sovereign equality and the corresponding obligation of non-intervention received its most emphatic affirmation from the newly independent states in the era of decolonization.⁵¹⁵ However, after the realities of World War I and World War II, the international community realized that the absoluteness of sovereignty was not advancing the realisation of global peace. The shift in paradigm of strict adherence to the principles of sovereignty and non-intervention was occasioned by the incessant violence directed mainly at civilian populations in the early 1990s.⁵¹⁶ However, this challenge of sovereignty negates one of the fundamental pillars of the UN – Article 2 of the Charter, that guarantee the sovereign equality of all member states.⁵¹⁷ The prohibition on the use of force set out in Article 2 (4) of the UN Charter by member states in international relations is aimed at both enhancing the concept of sovereignty and curbing its excesses.⁵¹⁸

Sovereignty as envisaged by the UN Charter plays a significant role in international relations. It implies a monopoly of power by the sovereign state, and implies the concept of

⁵¹² ICISS Report, op cit.

⁵¹³ Ibid. Para 1.35.

⁵¹⁴ UN Charter, Article 2(7).

⁵¹⁵ ICISS Report, op cit Para. 2.8.

⁵¹⁶ Alhaji M.S.Bah, op cit pp. 36-37.

⁵¹⁷ David L Scheffer, op cit p. 7.

⁵¹⁸ UN Charter, Article. 2 (4)

equality of nations.⁵¹⁹ The other implication of sovereignty, which is of particular import to the current discussion, is the right against interference or intervention by any foreign (or international) power.⁵²⁰ It can be argued that since the UN Charter came into force on October 24 1945, all member states agreed to cede a little of their sovereignty to the world body. This is more so when one considers the import of Article 24 (1) of the Charter.⁵²¹ Notwithstanding the claim to “absolute” sovereignty by states, it is argued that membership of the UN and other multilateral institutions are recognition by states of the limitations of sovereignty. Since these sovereign states gave up a little of their rights to the various multilateral institutions, it, therefore, means that sovereignty cannot be as absolute as purported by some states and scholars. It is however acknowledged that this might be seen as a voluntary limitation of sovereignty. Annan argues, for instance, that the signing of an international human rights treaty suggests an agreement to submit to the monitoring mechanisms of the treaty bodies.⁵²² This is not to suggest that sovereignty is no longer important in international relations, since “sovereignty of states can constitute an essential bulwark against intimidation or coercion, but it must not be allowed to obstruct effective action to address problems that transcend borders or to secure human dignity.”⁵²³

A state while sovereign is not sovereign to the extent that it can violate the human rights of its people. Just as sovereignty confers on a state the right to do as it pleases, its actions are expected to conform to international law, and hence, where there are violations of

⁵¹⁹ John H. Jackson, *op cit* p. 782.

⁵²⁰ *Ibid.*

⁵²¹ It states, “[I]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”.

⁵²² Kofi Annan, *Peacekeeping, Military Intervention and national Sovereignty*, in Jonathan Moore (ed.), *Hard Choices: Moral Dilemmas in Humanitarian Intervention*, (Rowan & Littlefield Publishers, Inc. Maryland, USA) 1998p. 57.

⁵²³ *Ibid.*

international law by the state or its agents, it should be taken that such a state acted *ultra vires* in the exercise of its powers. Since states do not exist to violate peoples' human rights but, to ensure their welfare, any such violation should be taken not to be within the legitimate powers of the state and hence criminal. Thomas Weiss, in placing a higher value on human rights, argues that respect for human rights is added to the three recognised characteristics of a sovereign state viz; territory, authority, and population.⁵²⁴ It has been suggested that there is a link between human rights violations, genocide and ethnic cleansing. However, not all human rights violations should be elevated to the status that would warrant the setting aside of sovereignty and hence intervention, since legitimating intervention on mere violations of human rights, say, right to freedom of assembly and the like, would be tantamount to elimination of the restraint on the non-intervention norm.⁵²⁵ Even in situations that would warrant such intervention, the requirement of multilateral authorisation accords such an intervention the legitimacy it requires.⁵²⁶

Sovereignty as the absolute power of a state has always been constrained; initially by divine law, respect for religious practices and natural law, and later limitations have developed from state practice.⁵²⁷ The former UN Secretary-General, Kofi Annan in his contribution to the discussion on the issue of sovereignty has advocated the idea that two concepts of sovereignty exist viz; individual sovereignty and state sovereignty.⁵²⁸ The individual sovereignty, which entails the human rights and fundamental freedoms of each individual as enshrined in the UN Charter, "has been enhanced by a renewed consciousness

⁵²⁴ Thomas G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era," *Security Dialogue*, Vol. 35 (2) 2004 p. 138.

⁵²⁵ Bryan Hehir, op cit p.44.

⁵²⁶ Ibid.

⁵²⁷ Charles E. Merriam, *History of the Theory of Sovereignty since Rousseau*, (New York: Columbia University Press) 1958 p. 11.

⁵²⁸ Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General*, (United Nations, New York 1999) p. 37.

of the right of every individual to control his or her own destiny.”⁵²⁹ Reliance on the traditional concept of sovereignty is not, therefore, enough to guarantee fundamental freedom to all.⁵³⁰ For instance, Joelle Tanguy argues that “...the principles of sovereignty and non-intervention were actually designed as dams against the historical flood of imperial interventions by the more powerful states, and that the threat of these is perceived as real.”⁵³¹ He however acknowledges that though the principle of sovereignty is no longer absolute, it still remains sacrosanct.⁵³² For instance, the UN Security Council Resolution 1373 of September 2001 which reaffirmed the right of the United States to use force to defend itself after the September 11 attack whittled down the absoluteness of sovereignty.

The change in dynamics of international relations indicates that sovereignty also attracts responsibility. This means that firstly, state authorities are responsible for the functions of protecting the safety and lives of citizens, and promotion of their welfare. Secondly, the national political authorities are responsible to the citizens internally and to the international community through the UN, and finally, the agents of the state are responsible for their actions, that is, they are accountable for their acts of commission or omission.⁵³³ Contextualising the above, therefore, it means that the government of Sudan is responsible for the protection of the civilians in Darfur just as it is responsible for the protection of the others. Since evidence suggests that the government is complicit in the ongoing atrocities, the international community should hold the government of Sudan accountable for the atrocities. Since governments are not tangible entities, but abstract, those that conduct the

⁵²⁹ Ibid. p. 38.

⁵³⁰ Ibid.

⁵³¹ Joelle Tanguy, “Redefining Sovereignty and Intervention,” *Ethics and International Affairs*, 17 No. 1 2003 p 143.

⁵³² Ibid p. 144.

⁵³³ ICISS Report, op cit Para. 2.15.

affairs of the state, especially those directly involved with the atrocities either at the command level or execution level, should be held accountable for their actions and inactions. In a situation where the UN Security Council has determined that a threat to international peace and security exists, sovereignty cannot be used as an excuse to block the actions deemed expedient by the Security Council.⁵³⁴ The argument by President Bashir that the presence of UN peacekeepers in Darfur would compromise Sudan's sovereignty might, therefore, be seen as spurious, especially since there already is a UN Peacekeeping presence in Sudan to monitor the implementation of the Comprehensive Peace Agreement. While Bashir's argument might be seen as a way of warding off international "supervision" over Darfur, he might also be expressing some fears of the West using the cover of a UN Peacekeeping mission in Darfur to effect a regime change in Sudan. The lessons of US invasion of Iraq and the toppling of the government of Saddam Hussein, under the cover of "disarming" Iraq of its Weapons of Mass Destruction (WMD) is still fresh in many peoples' mind. The fear also exists that due to the discovery of oil in Darfur, the West might want to put in place a regime that it can easily control in order to have access to Darfur's oil, not forgetting the geo-strategic importance and location of Sudan, especially given the United States' proclaimed war on terrorism. However, the invocation of sovereignty to protect tyranny and anarchy is self-defeating.⁵³⁵

Some have argued that sovereignty resides with the people notwithstanding the existence of an effective government.⁵³⁶ It, therefore, means that the loss of a claim to international

⁵³⁴ J.L.Holzgrefe, op cit p. 5.

⁵³⁵ Fernando Téson, *The Liberal Case for Humanitarian Intervention*, op cit p. 108.

⁵³⁶ Martin Griffiths, Iain Levine and Mark Weller, "Sovereignty and Suffering" in John Harriss (ed), *The Politics of Humanitarian Intervention*, (Pinter: London) 1995 p. 59. See also Preamble of the UN Security Council Resolution 794 of 1992 which confirmed that the ultimate responsibility for reconstruction of authority lay with the Somali people, rather than with any one or all factions.

representation of a people can permit international action in line with the implied or expressed desires of a population.⁵³⁷ Given the agitation by the wider population in Darfur against the policies of the government of Sudan, it can be argued that it is gradually losing the claim to represent the population. It is preposterous to imagine that a government that claims to represent a people would be the same instrument to kill those people it is “representing.” Kofi Annan is of the opinion that sovereignty is now viewed as connoting responsibility and not just power. His argument is that ever since the 1948 UN General Assembly debate concerning the state of apartheid in South Africa, there is the assumption that international concern takes precedence over the claim of non-interference in domestic matters.⁵³⁸

The provision of the Charter which has received the most attention especially with respect to the protection of civilians is Article 2(7). This Article specifically rules out intervention by the UN in “...matters which are essentially within the domestic jurisdiction of any state...” This Charter provision has also been subject to different interpretations. Tésón argues that the essentialist interpretation of matters of domestic jurisdiction is that such matters that relate to the sovereignty of the state are essentially within the exclusive domestic jurisdiction of the state.⁵³⁹ In essence, such matters are static and cannot change. This is opposed to the legalist view that the notion of sovereignty cannot be used to determine if a matter is within the exclusive jurisdiction of a state. The legalist view is that such issues are relative and that it depends on the state of international law at any given time in history. A matter which was under the exclusive jurisdiction of a state, therefore,

⁵³⁷ Ibid.

⁵³⁸ Kofi Annan, *Peacekeeping, Military Intervention and National Sovereignty*, op cit p. 57.

⁵³⁹ Fernando Tésón, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. 137.

ceases to be so, if the matter becomes regulated by international law.⁵⁴⁰ Tesson is, therefore, of the view that human rights have long been removed from the exclusive domestic jurisdiction of states, since it is the subject of the UN Charter and a number of multilateral treaties.⁵⁴¹ The UN High Level Panel Report equally emphasised that “...the principle of non-intervention in internal affairs cannot be used to protect genocidal acts or large-scale violations of international humanitarian law or large-scale ethnic cleansing.”⁵⁴² One of the main purposes of the UN is the achievement of international cooperation through the promotion of human rights.⁵⁴³ However, the Charter does not set guidance on when the doctrine of sovereignty should yield to the protection against massive human rights violations.⁵⁴⁴ George Modelski has argued that there is no internal war without international intervention. The question is usually what the nature of such an intervention is. Interventions can occur through action or inaction as these have an effect on the outcome of conflicts.⁵⁴⁵

Necessity as a plea by states for their justification of breaching international obligations is not novel as it started during the 19th century.⁵⁴⁶ This, therefore, means that even if the rule of non intervention and sovereignty were absolute, states intervening in other states, for human protection purposes, can come under the plea of necessity. However, the rule of non intervention is not absolute. ICISS argue that against the backdrop of state practice, Security Council precedents, established norms, emerging guiding principles and evolving

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² UN High Level Panel Report, op cit Para 200.

⁵⁴³ Article 1 (3) UN Charter, 1945.

⁵⁴⁴ William R. Pace and Nicole Deller, op cit p. 18.

⁵⁴⁵ George Modelski, “The International Relations of Internal War,” *Research Monograph, No. 11, Center of International Studies, Woodrow Wilson School of Public and International Affairs*, (Princeton: Princeton University Press, May 1961) p. 9 .

⁵⁴⁶ Bin Cheng, *General Principles of International Law as applied in International Courts and Tribunals*, (Stevens and Sons, London 1953) pp. 70 – 77.

customary international law, the UN Charter's strong bias against military intervention should not be seen as absolute.⁵⁴⁷ There is, therefore, a groundswell of opinion that intervention for the protection of human rights is no longer as anathematic as it was in the early development of international law.

A plethora of new principles, UN resolutions, proposals and recommendations have been targeted at the development of a human security agenda focused on the protection of civilians. For instance, the UN High-Level Panel on Threats, Challenges and Change and the International Commission on Intervention and State Sovereignty, have made recommendations and proposals on civilian protection both in peace times and during conflicts. The UN High Level Panel, while acknowledging the failure of the UN to prevent atrocities against civilians, recommended reforms to enhance the capacity of the world body to effectively carry out its collective security mandate. It also endorsed the emerging norm of an international responsibility to protect civilians in situations where their governments are in default of such responsibility.⁵⁴⁸ The report views sovereignty in the new light of responsibility, arguing that the meaning of sovereignty entails the obligation of states to protect the welfare of their people and not just as understood in the Westphalian sense.⁵⁴⁹ The UN Security Council in its resolution 1265 of 1999 noted that civilian casualties account for a major part of the casualties in armed conflicts, especially since they are increasingly being targeted by combatants and armed elements. The resolution further expresses the Security Council's willingness "to respond to situations of armed conflict

⁵⁴⁷ ICISS Report, op cit Para 2.27.

⁵⁴⁸ UN High Level Panel Report, op cit.

⁵⁴⁹ Ibid Para 29.

where civilians are being targeted...⁵⁵⁰ In Resolution 1296 of April 19 2000, the Security Council stresses the need to approach the protection of civilians in armed conflict situation on a case by case basis. The resolution reiterated the Council's condemnation of the deliberate targeting of civilians in armed conflict and noted that the commission of "systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security..."⁵⁵¹ Subsequent to the report of the international commission of inquiry on violations of international humanitarian law and human rights law in Darfur, Sudan, the Security Council in Resolution 1593 of March 31 2005, made a determination that the conflict in Darfur is a threat to international peace and security. As part of its mandate to intervene and protect civilians caught up in violent conflict, the Council through the resolution referred the situation to the prosecutor of the International Criminal Court (ICC) at The Hague.⁵⁵² It is, therefore, obvious that what is lacking is not the requisite legal instruments for the protection of civilians, but the modalities of transforming the legal rhetoric into practical solutions.

The conflict in Darfur has attracted different actors and different strategies have been advanced towards the protection of civilians. While these strategies were initially mainly targeted at providing of humanitarian aid, the atrocities continue to be perpetrated. This is partly because the international community for a long time treated Darfur as a humanitarian crisis believing that if humanitarian relief workers had access to the IDPs and refugees, the problem would be solved. It failed to take into consideration the fact that it will be difficult

⁵⁵⁰ UN Security Council Resolution 1265 of September 17 1999 on the Protection of Civilians in Armed Conflict.

⁵⁵¹ UN Security Council Resolution 1296 of April 19 2000 on the Protection of Civilians in Armed Conflict.

⁵⁵² UN Security Council Resolution 1593 of March 31 2005 on the Situation in Darfur.

for aid workers to operate in an environment “policed” by the same people responsible for the atrocities.⁵⁵³ There should be a two-prong approach to protecting the civilians in Darfur – one at the humanitarian assistance level, and the other at pressuring the government of al-Bashir to reach a political solution and implement such solution. This notwithstanding, the call on the government of Sudan to disarm the *Janjaweed* militia and bring to justice the leaders of the militia and all those associated with the human rights and international humanitarian law violations, has been ineffective.⁵⁵⁴ This is mainly because the government of Sudan is fully in support of the atrocities committed by the *Janjaweed*. In fact, there is a preponderance of evidence to suggest that the *Janjaweed* militia is a creation of the government of Sudan. While the resolution placed a ban on the sale or supply of arms and related materiel to non government entities, including the *Janjaweed*, the ban was ineffective as a result of the fact that the *Janjaweed* is reputedly sponsored by the government of Sudan.⁵⁵⁵ For any ban on the sale and supply of arms to be effective, such ban should target the source of their supply, namely; the government of Sudan. The ban indirectly targeted the two major rebel groups involved in the conflict thereby giving the government sponsored *Janjaweed* a free rein in the conflict. While the ban is still in place, it is obvious that the *Janjaweed* and the rebel groups are still able to procure arms through their different links – the *Janjaweed* through the government, and the rebels through the different arms supply network that exist in the global system.⁵⁵⁶

⁵⁵³ Gérard Prunier, op cit p. 117.

⁵⁵⁴ UN Security Council Resolution 1556 of July 30 2004 on the Situation in Darfur.

⁵⁵⁵ UN Security Council Resolution 1591 of March 29 2005 on Arms Embargo on Sudan.

⁵⁵⁶ Hassan Mohammed, JEM negotiator, interviewed telephonically by the author on March 24 2009, Bakhour, Abdel Aziz, JEM Senior Official, interviewed by the author telephonically, 15 August 2008. Anonymous, Sudanese Government Official, interviewed by author, Pretoria, South Africa, 20 October 2008.

From the second half of 2004, the proportion of IDPs and war affected persons that could access humanitarian aid in Darfur declined thereby leading to increased mortality. As Prunier puts it, “[T]he campaign of destruction waged against Darfur began to change shape as death by the gun was slowly replaced by death through attrition.”⁵⁵⁷ While the European Union (EU) member states approached the situation through a humanitarian view point, they never considered intervention, as is evident from the statement of Alan Goulty, the British Special Envoy for Sudan that “[H]umanitarian intervention in Darfur would be very expensive, fraught with difficulties and hard to set up in a hurry.”⁵⁵⁸ The statement seems to have the ring of truth as the Darfur situation bears out. The statement raises the same question of bias when dealing with issues concerning black Africans, as opposed to when dealing with those of the lighter skin colour. For instance, the quick response of the UN in approving and mobilising a peacekeeping force for Lebanon after the Israeli/Hezbollah war of 2006 is very instructive, when juxtaposed with its reaction to the Rwanda genocide and the current Darfur conflict. Granted that the two situations present us with different dynamics, one can however argue that if the UN and the international community had acted early in supporting a peacekeeping effort in Darfur, the conflict would not have escalated to what it is presently. However, one cannot lose sight of the intrigues that the Darfur conflict presents, especially with regards to the Arab League’s interest in protecting Sudan as their “ally” and also the interest of China and Russia in doing business with Sudan. If humanitarian intervention is selectively enforced, its legitimacy as a normative principle of international law will be undermined. So long as victims of serious human rights abuses somewhere in the world have the notion that the

⁵⁵⁷ Gérard Prunier, op cit 138.

⁵⁵⁸ Adrian Blomfield, “British-US Rift on How to Deal With Sudan ‘Cleansing,’” *Telegraph*, UK, May 30 2004.

international community did not act to assist them when it should have, the credibility of the internationalization and universal application of human rights will be affected.⁵⁵⁹

Strictly speaking, the UN Charter does not make provision authorizing the UN Security Council to have recourse to Chapter VII powers in response to catastrophic human deprivations within a state as opposed to those that result from inter-state actions. This is understandable given that at the formation of the UN in 1945, inter-state conflicts were more prevalent than intra-state conflicts. Moreover, inter-state conflicts were seen as capable of affecting global peace and security. Intra-state conflicts on the other hand were regarded as having very limited impact on global peace and security. However, in post independence Africa, and post Cold War, the dynamics of conflicts and its effects on global peace and security has changed. Though, in practice, the situation is different as the UN has deployed its forces in cases of internal conflicts in Haiti, Bosnia, Somalia and others tend to reveal.⁵⁶⁰ The Security Council in adopting Resolution 688 of 1991 concerning the situation in Northern Iraq acknowledged for the first time, that humanitarian emergency and massive population displacements which were basically internal, could constitute a threat to international peace and security, thereby setting precedence.⁵⁶¹ Evidence in international practice suggests that 'extreme necessity' trumps absolute legal principles. For instance, India's intervention in East Pakistan in 1971, Vietnam's invasion of Cambodia in 1978, and Tanzania's invasion of Uganda in 1978 to topple Amin, were all

⁵⁵⁹ Shedrack Agbakwa, "Genocidal Politics and Racialization of Intervention: From Rwanda to Darfur and Beyond," *German Law Journal*, Vol. 6 No.2 2005 pp. 527-528.

⁵⁶⁰ Thomas M. Franck, *op cit* p. 216.

⁵⁶¹ Kofi Annan, *Peacekeeping, Military Intervention and National Sovereignty*, *op cit* pp.59-60.

accepted as legitimate, if not legal. As Hugo Slim argues, “[M]any states now share a moral and activist consensus around civilian protection in war and genocide.”⁵⁶²

Keohane posits that interventions sometimes are not only motivated by concern for human rights of victims, but also for the destabilizing effect of continued disorder.⁵⁶³ For instance, interventions in the aftermath of September 11 2001 are more likely targeted against states that present a security or terrorist risk than those that pose pure humanitarian challenges.⁵⁶⁴ Interventions by the US led coalition into Afghanistan and Iraq in 2001 and 2003 respectively, arguably are of the above model. If the above conjecture by Keohane is correct, then the allegation that Al Qaeda operatives are using Sudan as a base might explain why the US without adequate assessment of the situation in Darfur proclaimed the atrocities as genocide. This might have been to whip up the international community’s will to act. Probably, the US needed not just the legitimacy of intervention into Darfur, but also, the cooperation of other states, especially African states to provide the intervening force. It is argued that since the Charter and other international human rights instruments legitimise the offering of foreign material assistance to peoples fighting racial discrimination, it should follow that such material assistance be offered to peoples fighting oppressive regimes generally. This is because, notwithstanding the egregious nature of racial discrimination, mass murder, genocide, torture, enslavement and other massive violations of human rights are more egregious than racial discrimination.⁵⁶⁵ The Darfur conflict incidentally has all the elements above and hence, the argument is more resounding that the

⁵⁶² Hugo Slim, op cit p. 821.

⁵⁶³ Robert Keohane, *Political Authority after Intervention*, op cit p.306.

⁵⁶⁴ Ibid.

⁵⁶⁵ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. 165.

civilian population should receive all the necessary assistance they could, from the international community, even if it means setting aside Sudan's sovereignty.

Notwithstanding that the traditional use of collective military action has been to address issues of threat to peace, especially aggression, it is now generally acceptable in international law that as a matter of practice, collective military action can also be used to address issues of serious human rights violations.⁵⁶⁶ For instance, the UN General Assembly Resolution 2675 of 1970 affirms that "fundamental human rights, as accepted in international law and laid down in international instruments continue to apply fully in situations of armed conflict."⁵⁶⁷ While this is trite and a representation of the practice in international relations, it might be that the Security Council in authorising such actions will be acknowledging the link between massive human rights violations and the threat to international peace and security. This interpretation seems more plausible, especially given that the Security Council would normally in its resolutions acknowledge that such situations of massive human rights violations constitutes a threat to the peace. If interventions in states are viewed from the perspectives of the victims rather than the interveners, it would carve a new path for redefining the legitimacy and legality of interventions that are grounded on human protection.⁵⁶⁸

The protection of civilians in armed conflict owes a major part to the influence of human rights and international humanitarian law. The idea that the unnecessary suffering of combatants and high levels of civilian casualties are unacceptable during wars was largely

⁵⁶⁶ Ibid p. 226.

⁵⁶⁷ See UN General Assembly Resolution 2675 of 1970 – Basic Principles for the Protection of Civilian Populations in Armed Conflicts.

⁵⁶⁸ Thomas Weiss, op cit p. 148.

unknown until the growth of humanism in the eighteenth century.⁵⁶⁹ An argument in favour of civilian protection during armed conflict is succinctly captured by Jean Jacques Rousseau when he stated that:

War is constituted by a relation of things, not between persons...war then is a relation not between man and man, but between State and State, in war individuals are enemies only accidentally, not as men, not even as citizens, but only as soldiers, not as members of their country, but as its defenders.⁵⁷⁰

International humanitarian law imposes the duty of protecting civilians during armed conflicts on all the warring parties.⁵⁷¹ Notwithstanding the controversy around the use of force in international law, when force is used both by belligerents and interventionists, it must be proportionate to what it is intended to achieve.⁵⁷² The modern principle of proportionality in armed conflict can be traced to the just war theory which requires that the overall good that is achieved by resort to force outweighs the evil it sets out to correct.⁵⁷³ This law in contemporary times applies to the level of destruction of enemy territory and the general damage of the state's infrastructure. It also extends to the overall damage caused to civilians and combatants. The determination of such proportionate damage or casualty is determined by the nature of action involved.⁵⁷⁴ Since it is expected that in an armed conflict situation the loss of civilian lives are inevitable, the principle of proportionality ensures that those losses are reduced to the minimum. International law in its development has recognised that civil wars have implications of far greater proportions

⁵⁶⁹ Judith Gardham, op cit p.17.

⁵⁷⁰ Jean Jacques Rousseau, *The Social Contract and Discourses*, (Translated by G. Cole, Dent, London) 1973 pp170-1.

⁵⁷¹ Sara Pantuliano and Sorch O'Callaghan, op cit p. 6.

⁵⁷² Rosalyn Higgins, *The Development of International Law Through the Political Organs of the UN* (Oxford University Press, Oxford) 1963 p.201.

⁵⁷³ Judith Gardham, op cit p. 8.

⁵⁷⁴ Ibid.

for the international community than hitherto recognised, especially in the area of civilian casualties. However, the concept of state sovereignty acts as a barrier to the full implementation of the regulations.⁵⁷⁵

Assuming, without conceding, that the government of Sudan's actions against the rebels falls under the law of reprisals, it is also expected that its reprisal actions should conform to the principles of proportionality in international law. "The requirement of proportionality in relation to reprisals is not therefore in dispute."⁵⁷⁶ This was earlier echoed by the Trial Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY) in *Prosecutor v Kupreskic*, that proportionality is one of the limiting factors in reprisals.⁵⁷⁷ Since the provision of Additional Protocol I to the Fourth Geneva Conventions is that only legitimate objects of reprisals should be the armed forces of the other state, one may be tempted to argue that the rebels do not represent a state. However, it must be understood that when the Additional Protocol I was drafted, the world was experiencing more inter-state conflicts than intra-state conflicts being witnessed presently. Therefore, since the state would be acting within its rights to repel the rebel forces seeking to undermine its security, it would be within its right to target the rebels. One expects also that since the principle of proportionality operates in international conflicts, it should operate more in internal conflicts since in internal conflicts, civilians seem to bear the brunt more.

⁵⁷⁵ Ibid p.122.

⁵⁷⁶ Ibid p. 78.

⁵⁷⁷ *Prosecutor v Kupreskic*, Case No.IT-95-16-T-14, Judgment, January 2000 Para. 535.

Humanitarian Intervention: An Exception to the Principle of Non-Intervention?

One of the most controversial issues in international law is the concept of humanitarian intervention, especially, since the international community has attached a greater premium on human rights and international humanitarian law. This controversy has its roots in the non-intervention principle intrinsic in Article 2 (7), and the prohibition on the use of force articulated in Article 2 (4) of the UN Charter. Notwithstanding the coming into existence of the Genocide Convention three years after the UN Charter, it could not douse the wave of non-intervention principle enunciated in the Charter.⁵⁷⁸ Humanitarian intervention has been defined to include the impartial use of force by governments in another state to assist individuals who are being denied their basic human rights, and who ordinarily are willing to revolt against the repressive government.⁵⁷⁹ The idea of states intervening in another state for the purposes of human protection is not novel in international law. The concept and practice was part of the international legal discourses up till the 19th Century when the principle lost its appeal to the principle of non-intervention.⁵⁸⁰ The world kept quiet in the 1930s when Josef Stalin, the Soviet leader massacred about ten million Russian farmers who did not fit into his overall agrarian reform.⁵⁸¹ However, since the 1990s, there has been a noticeable shift of opinion especially in the political and moral aspect of humanitarian intervention. Javier Perez de Cuellar, as the Secretary-General of the UN in his 1991 Annual Report stated that:

⁵⁷⁸ Gareth Evans, "The Responsibility to Protect: Creating and Implementing a New International Norm." An Address to the Human Rights Law Resource Centre, Melbourne, August 13 2007, and Community Legal Centres and Lawyers for Human Rights, Sydney, August 28 2007, available at <http://www.crisisgroup.org/home/index.cfm?.id=5036&l=1> accessed November 20 2007.

⁵⁷⁹ See generally Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*, (Gullanders, Denmark, 1999).

⁵⁸⁰ Ibid p. 12.

⁵⁸¹ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. viii.

It is now increasingly felt that the principle of non-interference within the essential domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that in diverse situations the UN has not been able to prevent atrocities cannot be accepted as an argument, legal or moral, against the necessary corrective action, especially when peace is threatened.⁵⁸²

Some scholars and states advocate that any intervention by a state or a coalition of states for whatever purpose is a violation of international law. Others however, advocate that the principle cannot be strictly interpreted as to prohibit interventions carried out with the aim of achieving some of the main purposes of the Charter. These scholars couch their argument under the humanitarian intervention concept. The central argument is that it represents an implied exception to the principle of non-intervention. Most of the proponents base their arguments on the universality of humanitarian values, and the undeniable need to subordinate conventional ideas of sovereignty to those of humanitarian imperatives.⁵⁸³ Others also justify the threat of military action, arguing that the impact will be minimal on the civilian population because humanitarian emergency relief follows immediately behind military action.⁵⁸⁴

Humanitarian intervention has been criticized on various fronts. Notable, is the criticism that states oftentimes mask military action against another state as humanitarian action.⁵⁸⁵ Those who favour non-intervention in its strict application have argued that the principle encourages states to resolve their own internal problems without making undue demands

⁵⁸² UN Secretary-General Annual Report 1991.

⁵⁸³ Alhaji M.S.Bah, op cit p. 37 See also Francis M Deng et al, *Sovereignty as Responsibility – Conflict Management in Africa*, (The Brookings Institution, Washington DC) 1991 pp. 1-31.

⁵⁸⁴ Commission on Human Security, op cit p. 27.

⁵⁸⁵ Ibid.

on the international community. The principle is also targeted at preventing such internal problems from becoming a threat to international peace and security. However, there is a consensus of opinion by states that there should be some limited exceptions to the principle of non-intervention. Such situations of violence that so genuinely “shocks the conscience of mankind,” or situations that presents clear danger to international security form part of these exceptions.⁵⁸⁶ A major limit to the concept of humanitarian intervention is the question of abuse. The question that many have asked, therefore, is: what is the basis for reaching a conclusion that a particular conflict situation merits humanitarian intervention? Who determines this? What happens in a situation where the UN Security Council does not act in a timely manner? Can a neighbouring state(s) or regional organization intervene without the endorsement of the UN Security Council, but then do so afterwards? What are the measures being put in place to ensure that military intervention is not embarked upon, for reasons other than humanitarian? Are there adequate plans to ensure that situations that demand humanitarian interventions are responded to, without undue delays by the UN Security Council? While all these questions might be apt, suffice it to say that the limitations make it especially expedient that an international standard be set for determining the future of interventions for human protection.

Regan observes that third party interventions in intra-state conflicts tend to last longer than its expected duration, except in situations where the intervener is biased in favour of one of the belligerents. He, therefore, opines that “neutral interventions are less effective than biased ones.”⁵⁸⁷ The question however, is whether there is a clear cut case of neutral intervention. For intervention to be effective and to achieve its desired aim, the intervener

⁵⁸⁶ ICISS Report, op cit Para 4.13.

⁵⁸⁷ Patrick M. Regan, “Third Party Interventions and the Duration of Intrastate Conflicts,” *The Journal of Conflict Resolution* Vol. 46 (1) 2002 p. 55.

needs to set out its purpose and aim *ab initio* and in achieving this, it is difficult to remain neutral. However, it has been argued that more often than not, the use of force for humanitarian end is self-defeating as it increases human misery and the loss of life it set out to preserve.⁵⁸⁸ While this might be true based on available evidence, what we might not know is the number of people “saved” by such interventions. This is because it would be difficult to extrapolate what the situation would have been if intervention did not take place. For instance, in the ongoing conflict in Darfur, it will be difficult to say how many civilians would have been saved if there was a full scale military intervention by either the AU or the wider international community to put an end to the atrocities. However, the fact that people continue to call for intervention in such situations of flagrant violations of international human rights law and international humanitarian law, is an indication of the popularity of humanitarian intervention with civilian population. The dynamism of the international system is reflected in the groundswell of opinion by both state practice and publicists writing favouring humanitarian intervention.

Hugo Grotius posits that where a tyrant inflicts unwarranted treatment on his subjects, other states have a right to exercise the right of humanitarian intervention.⁵⁸⁹ While states have the right of humanitarian intervention according to Grotius, this does not necessarily translate into a duty as the state is not duty bound to intervene, if by intervening its citizens will become unduly burdened.⁵⁹⁰ Samuel Huntington expanded this view in chastising the US involvement in Somalia after the killing of US peacekeepers by Somalia militia in 1992. His view is that “[I]t is morally unjustifiable and politically indefensible that

⁵⁸⁸ Scott H. Fairley, “State Actors, Humanitarian Intervention and International Law: Reopening Pandora’s Box,” *Georgia Journal of International and Comparative Law*, Vol. 10 1980 p. 63.

⁵⁸⁹ Hugo Grotius, *De Jure Belli ac Pacis*, (Oxford University Press, Oxford) 1925 p 584.

⁵⁹⁰ J.L. Holzgrefe, op cit p. 26.

members of the [US] Armed Forces should be killed to prevent Somalis from killing one another.”⁵⁹¹ While the above statement makes sense when viewed subjectively, an objective analysis of the statement renders it redundant. The United States has assumed the role of the world police and this role attracts responsibilities. If, as it is the case, the US is respected globally and given a place of pride in world affairs, it must play a role in peacekeeping, even if that means losing some of its citizens in the quest for global peace. A former National Security Adviser in the US could not have put it better when he stated that:

There is a moral imperative that is all the deeper with our superpower status. How can America sit on the sidelines when innocent civilians are being slaughtered? We lose credibility on other issues if we turn our back on humanitarian tragedies. More important, it is wrong to do so. With our great power comes great responsibility and leadership in human as well as geopolitical terms. Not acting when you can is as much a decision as becoming involved. This does not mean that we must always act. But there are consequences when we do not.⁵⁹²

If states were to keep away from intervening in situations that warrant it, purely because of the selfish reason of not wanting to put their citizens at risk, then the international community does not have any moral obligation to internationalize human rights and humanitarian law. After all, states do go to war in order to assert their rights, even if ideological, not minding that innocent lives would be lost. It is not enough for states to refrain from human rights violations in their respective territories, states are also expected to participate in the establishment of institutions that prevent and stop such violations either

⁵⁹¹ Samuel P. Huntington, “New Contingencies, Old Rules,” *Joint Forces Quarterly*, Vol. 2 1992 p. 338.

⁵⁹² Anthony Lake, “Peacekeeping as Permanent Band-Aid” in *Six Nightmares: Real Threats in a Dangerous World and How America Can Meet Them*, (New York: Little Brown and Co.) 2000 pp.107-174.

from occurring or when they occur, to assist the victims.⁵⁹³ It must be understood that humanitarian intervention is a morally constrained form of assisting others that acknowledges that harm might sometimes be caused to innocent persons in order to achieve a “goal that is normatively compelling under appropriate principles of morality.”⁵⁹⁴ However, that harm caused to innocent persons is not intended. Since the goal of saving lives and the restoration of human rights and justice is a higher goal, it is, therefore, a compelling reason to authorise humanitarian intervention even at the risk of the death of innocents.⁵⁹⁵

Humanitarian intervention is controversial both when it happens and when it has failed to happen. This is primarily because it is difficult to ascertain a real case of humanitarian intervention. Different motives usually manifest themselves in intervention. However, it is important that in any intervention based on humanitarian needs, the humanitarian reasons should be prominent on the hierarchy of stated and other nuanced reasons.⁵⁹⁶ Humanitarian intervention poses a moral dilemma in the form of a clash between the moral significance of the state and the claims of humanity, and between autonomy and justice.⁵⁹⁷ The question then would be, in a conflict between sovereign inviolability and the preservation of humanity, which of the two issues have a higher value? One argues that the preservation of humanity should take precedence over the preservation of such abstract concept as sovereign inviolability. Any reasonable person would intervene when a child’s life is in danger even if the cause of the danger is the child’s parents. The fact that the child’s

⁵⁹³ J.L. Holzgrefe, op cit p. 27.

⁵⁹⁴ Fernando Téson, *The Liberal Case for Humanitarian Intervention*, op cit p. 117.

⁵⁹⁵ Ibid.

⁵⁹⁶ Coady, op cit p. 11.

⁵⁹⁷ Peter Johnson, “Intervention and Moral Dilemma”, in Ian Forbes and Mark Hoffman (ed.), *Political Theory, International Relations and the Ethics of Intervention*, (London: Macmillan Press Ltd) 1993 p. 65.

parents might be exercising a “legitimate” “domestic” right of discipline over the child does not matter. As much as some might want to deny it, morality plays a part in our daily lives as well as in the lives of states – states after all are made up of individuals and not abstract entities.

The ethical issue involved in intervention is whether it is morally right not to intervene in a situation that warrants intervention and letting people die by non-intervention, or is it morally right to intervene in a situation that warrants it and risk people dying in the process to save others. Tesón is of the view that states and the international community can be morally responsible for not intervening in a situation that demands intervention, as “...the non-interventionist has the burden of explaining why the killings that occur across borders are morally distinguishable from the killings that occur within them.”⁵⁹⁸ He however acknowledges that the moral blameworthiness is not as serious as that of the perpetrator of the violations.⁵⁹⁹ In making a case against humanitarian intervention, scholars have reasoned that no intervener would be guided by humanitarian concerns alone. The elements of political, economic and social issues sometimes are also present in the decision to intervene.⁶⁰⁰ To abandon a deserving case of humanitarian intervention on the flimsy excuse that the intervener might be pushing a political, socio-economic agenda would be placing a higher value on political, socio-economic considerations than on humanity itself. Moreover, a study of the different interventions for instance, the Economic Community of West African States (ECOWAS) intervention in Liberia and Sierra Leone reveal that they did occur after a ‘long simmering’ of the conflict. This, therefore, presumes that enough

⁵⁹⁸ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit.

⁵⁹⁹ Ibid.

⁶⁰⁰ Farooq Hassan, “Realpolitik in International Law: After Tanzania – Ugandan Conflict – “Humanitarian Intervention” Re-examined”, *17 Willamette Law Review* 1981 p. 859.

efforts were not put in place to prevent the conflict from escalating.⁶⁰¹ The essence of international relations is to preserve order in the international system for the benefit of humanity. Anthony Ofodile argues that since no state can successfully claim the absence of human rights violations, then it means that no country is safe from being visited with the “force of intervention”, and that this will indeed render the principle of the use of force useless.⁶⁰² It must be noted that, not all human rights abuses are of such magnitude that could warrant intervention. What the “spirit” of the concept is about are such gross violations of human rights that shock the conscience of humanity. Human rights deprivations like freedom of expression would certainly not attract the same moral or legal opprobrium that violations like, torture and mass murder would attract.

Article 2 (4) of the UN Charter which prohibits the use of force in international relations and Article 2 (7) which prohibits states and the UN from intervening in matters that are essentially within the domestic jurisdiction of any state, has often been cited by most international lawyers and international relations practitioners and scholars as the basis for the illegality of humanitarian intervention. However, a careful analysis of Article 2 (4) reveals that it does not forbid the threat or use of force entirely, but only when it is directed against the territorial integrity or political independence of the other state.⁶⁰³ The UN Charter allows four express exceptions to the prohibition on the use of force. However, only the first two are relevant today and they are first, when force is used by a state in self defence, and second, when the use of force is authorized by the Security Council.⁶⁰⁴

⁶⁰¹ Jane Stromseth, op cit p. 270.

⁶⁰² Anthony Chukwuka Ofodile, “The Legality of ECOWAS Intervention in Liberia”, *32 Columbia Journal of Transnational Law*, 1994 p. 393.

⁶⁰³ Julius Stone, *Aggression and World Order: A Critique of United Nations' Theories of Aggression*, (Stevens, London) 1958 p. 95.

⁶⁰⁴ See Chapter VII powers of the Security Council.

Scholars have often sought to distinguish between international conflicts and domestic conflicts. They suggest that the UN Security Council can only authorize the use of force in situations of international conflicts. However, an argument has been made in the interpretation of Article 39 of the Charter, which empowers the UN Security Council to authorise the use of force in response to “any threat to peace, breach of the peace or act of aggression,” to mean that this includes internal conflicts, since the Charter provision does not expressly limit it to threats to international peace.⁶⁰⁵ Lori Damrosch disagrees with this contention and argues instead that massive human rights violations do not necessarily translate to threats to peace and security, and that non forcible measures such as economic sanctions can be applied instead. She maintains that there is no evidence of a clear authority in the Charter that confers transboundary use of force against violations that do not pose by themselves such transboundary threat to peace and security.⁶⁰⁶ It must be pointed out however, that while there is no definite and clear support of humanitarian intervention either in the Charter or through state practice, there is equally no express prohibition either in the Charter and state practice. Secondly, the dynamics of conflict has changed from what it was when the UN Charter was first drafted. While majority of conflicts witnessed prior to the formation of the UN and during the Cold War were inter-state, in the post Cold War era, the nature of conflicts has been more of intra-state. The question that we should bear in mind while interpreting the contentious articles should be what did the world body set out to achieve? If the answer is world peace and stability, then the best interpretation that gives meaning to the intentions of the drafters should prevail. It

⁶⁰⁵ Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, (Het Spinhuis, Amsterdam) 1993 p. 2.

⁶⁰⁶ Lori Fisler Damrosch, “Commentary on Collective Military Intervention to Enforce Human Rights,” in Lori Fisler Damrosch and David J. Scheffer (ed.), *Law and Force in the New International Order*, (Boulder: Westview) 1991 p. 219.

is, therefore, argued that the use of the word “any” in Article 39 includes domestic conflicts which constitutes threats to peace and security. The reasoning is better understood against the backdrop of the fact that the world is now a global village. As earlier stated however, one does not expect the UN Security Council to react to all manners of human rights violations.

The dynamics of conflict especially in the post Cold War era has contributed immensely to the re-emergence of the concept of humanitarian intervention. The UNDP Report of 1994 recorded three inter-state wars in the period between 1989 and 1992, while within the same timeframe; it recorded seventy-nine instances of intra-state conflicts.⁶⁰⁷ These conflicts gave rise to immense human suffering and to a corresponding sense of need for humanitarian intervention. The continued debate on intervention for human protection is a reflection of how far the world has moved since the formation of the UN in 1945.⁶⁰⁸ Julius Stone, a critic of humanitarian intervention admits that circumstances have changed so much since the adoption of the Charter, that the right of humanitarian intervention should now be recognized.⁶⁰⁹ The excuse of humanitarian intervention as a legal doctrine for states to use force is a recent invention. During the Cold War, states that used force in one way or the other never rested their justification on humanitarian intervention, but more on self-defence, as in India’s invasion of East Pakistan, Tanzania’s action in Uganda and the Vietnamese invasion of Cambodia.⁶¹⁰ Even in the post Cold War era, states and regional organizations often hide behind the excuse of having been invited by the state in question to intervene or that it intervened to restore democracy, as in ECOWAS in Liberia and

⁶⁰⁷ Konrad Raiser, op cit.

⁶⁰⁸ ICISS Report, op cit Para. 1.12.

⁶⁰⁹ Julius Stone, *Visions of World Order* 1984 pp. 54-55, cited by Anthony Chukwuka Ofodile, “The Legality of ECOWAS Intervention in Liberia”, 32 *Columbia Journal of Transnational Law*, 1994 p. 393.

⁶¹⁰ Christine Gray, op cit pp 31-32.

Sierra Leone respectively.⁶¹¹ This is understandable since the law on humanitarian intervention is still very opaque. This new found reason for intervention does not however suggest that humanitarian intervention is an entirely new concept.

Critics of humanitarian intervention do not generally disagree with the general duty of states to assist victims of grievous injustice, but rather “relies on the supposed moral significance of state sovereignty and national borders.”⁶¹² A plethora of international documents exist which interpretatively prohibit the forcible intervention in states.⁶¹³ They include, *The Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* which excludes the right to intervene in states and makes no provision for the humanitarian intervention exception,⁶¹⁴ and *The Definition of Aggression Resolution* which states that “no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”⁶¹⁵ One can however argue that an act of humanitarian intervention does not come under the meaning of aggression. This can be viewed from the point that some of the interventions might even be in favour of the state and hence might be welcomed by it if it did not expressly invite such intervention. Furthermore, *The Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty* is categorical in prohibiting all forms of intervention. It states *inter alia* that “[N]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or

⁶¹¹ J.L. Holzgrefe, op cit p. 48.

⁶¹² Fernando Téson, *The Liberal case for Humanitarian Intervention*, op cit p. 97.

⁶¹³ Christine Gray, op cit p. 33.

⁶¹⁴ General Assembly Resolution 2625 of October 24 1970.

⁶¹⁵ General Assembly Resolution 3314 of December 14 1974.

attempted threats against the personality of the State or against its political, economic and cultural elements are condemned.”⁶¹⁶ However, in determining the value to be placed on the above resolutions, it must be remembered that General Assembly resolutions and declarations are merely advisory and do not have the force attached to UN Security Council resolutions. Moreover, the envisaged intervention is aimed at stopping the egregious violations of human rights and international humanitarian law in most cases. Furthermore, a critical and in depth analysis of the declarations and resolutions as well as their timing would suggest that they were made to protect the newly independent states from external influences, and not to protect the leaders from answering to their human rights violations.

As stated earlier, intervention in another state is not as novel as it seems. Before the Charter, the right of a state to intervene in the affairs of another on humanitarian grounds was recognized under customary international law.⁶¹⁷ This right existed in the 19th Century as exemplified by the 1829 Russian, English, and French intervention in Greece against Turkey; the 1860 French intervention in Syria, and the 1866 Concert of Europe intervention in the Island of Crete.⁶¹⁸ It has also been argued that WW II was an act of humanitarian intervention and not just because of Hitler’s and Mussolini’s aggressive behaviour towards their neighbours but also towards the citizens of Germany whom the Allies sought ultimately to rescue. It would, therefore, be paradoxical to argue that the UN Charter would outlaw the very type of war that it owes its existence to – war for the preservation of human rights.⁶¹⁹ While customary international law allowed for humanitarian intervention in pre-1945, it is not clear if this law survived the Charter, as the

⁶¹⁶ General Assembly Resolution 2131 of December 21 1965.

⁶¹⁷ Ian Brownlie, *International Law and the Use of Force by States* (Clarendon: Oxford 1963) pp. 338-348.

⁶¹⁸ Ibid.

⁶¹⁹ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. 179.

Charter does not expressly forbid it nor does it recognize the right. What is however clear is that proponents of humanitarian intervention are increasing by the day, and it has started reappearing in state practice after its obvious disappearance in the early 20th Century. However, the application of the theory of *rebus sic stantibus*⁶²⁰ to the argument of the failure of the collective security mechanism in international relations, suggests that the customary right of humanitarian intervention has either survived under the Charter or reverted to states.⁶²¹ If, therefore, the UN system of collective security which is basically what made most states to surrender their right to self-help has failed, a fundamental change in circumstances could be said to have occurred thereby negating the strict observance of the non-intervention principle as stipulated in the Charter. This is because states would not have given up self-help to enforce their rights if they knew that the UN system would be unable to effectively and collectively enforce those rights.⁶²² The High-Level Panel on Threats, Challenges and Change, in its report, was emphatic that the principle of non-intervention cannot be used as a shield for genocidal acts, large-scale violations of international humanitarian law, large-scale ethnic cleansing or crimes against humanity, since they can be properly considered as threats to international peace and security, therefore, demanding a Security Council action.⁶²³

Critics of humanitarian intervention argue that the concept is subject to abuse. However, if humanitarian intervention were to acquire a legal status in international law, it is not likely to constitute any important new threat to the world order, since states invariably resort to

⁶²⁰ The doctrine in international law stipulates that where there is a fundamental change in circumstances, a treaty provision may become inapplicable. See the Vienna Convention on the Law of Treaties, 1969, Article 62.

⁶²¹ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit pp.157-8.

⁶²² Ibid.

⁶²³ UN High Level Panel Report, op cit Para 200.

interventions anyway, even without the appropriate UN authorization.⁶²⁴ That in itself is more of an abuse than when it is legalised with properly laid down mechanisms for its activation. Therefore, by intervening to stop massive violations of human rights, genocide, crimes against humanity etc, states are not in violation of international law *ab initio*, but even if it was a violation, that violation was designed to counter a violation of international law. In fact, by not intervening, states would be condoning the violation of international law.⁶²⁵ States not intervening where there are massive human rights violations would amount to reneging on the pledge made under Article 56 of the Charter to “...take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.”⁶²⁶

It has equally been argued that unilateral humanitarian intervention is carried out most times to protect human rights and, therefore, should be accepted as a legitimate exception to the rule in Article 2 (4) and 2 (7) of the Charter. This argument relies partly on moral grounds, state practice and a purposive interpretation of the Charter.⁶²⁷ There is also the risk that states’ yearnings for intervention, if not addressed, might lead to further illegalities and cases of unilateral interventions. For instance, despite the prohibition on the use of force, and the prohibition on intervention into a state’s domestic affairs, it has not cured the practice of intervention. It is, therefore, indicative that the international system is rejecting the idea of non-intervention especially when there is a humanitarian need for it. This view conforms to Robert Keohane’s analysis of international regime creation that “rules of

⁶²⁴ Tom J. Farer, op cit, p.79.

⁶²⁵ Fernando Téson, *The Liberal Case for Humanitarian Intervention*, op cit p. 110.

⁶²⁶ Article 55 (c) of the Charter enjoins the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

⁶²⁷ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. 148. See also Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23 1969.

international regimes are frequently changed, bent, or broken to meet the exigencies of the moment.”⁶²⁸ Thomas Franck, therefore, argues that the ability of law to pull compliance to itself is determined mainly by the public perception of the law being fair. Where a law is perceived to be unfair, it is not only the people that suffer, but the law also suffers. Conversely, where a law prohibits conduct that is generally believed to be just and moral, non compliance with such prohibition might be difficult as “[L]aw...does not thrive when it grossly offends most persons’ common moral sense of what is right.”⁶²⁹ It is, therefore, important for the international community to agree on the concept of intervention, and craft a mechanism to monitor and enforce the agreed threshold for humanitarian intervention.

One of the justifications for the permissibility of humanitarian intervention is the moral principle involved in the need to protect basic human rights. This is regarded as the Simple Moral Necessity Justification.⁶³⁰ This simply means that it is morally justifiable for states to intervene in other states where there are massive violations of human rights. The other is the Lawfulness Justification principle which expresses that an act can be lawful, though illegal if it is in the furtherance of values expressed or embodied in a legal system, for instance, the protection of international human rights law.⁶³¹ The third justification is if such intervention contributes to “the development of a new, morally progressive rule of international law...”⁶³² This is the Illegal Legal Reform Justification. It means, therefore, that illegal acts may be necessary in achieving significant improvements in international legal system, as a result of the difficulty that arises from achieving such reforms through a

⁶²⁸ Robert Keohane, “The Demand for International Regimes”, in Stephen D. Krasner (ed.), *International Regimes* (Cornell University Press, London) 1983 p. 147.

⁶²⁹ Thomas M. Franck, op cit p. 212.

⁶³⁰ Allen Buchanan, op cit p. 132.

⁶³¹ Ibid.

⁶³² Ibid.

purely legal means because of the limitations created by the two sources of international law – treaty and customs.⁶³³ For instance, the criminalisation of genocide at the Nuremberg War Crimes Tribunal was instrumental to the development of genocide as a crime in international law, irrespective of the fact that there was no crime as genocide, prior to the establishment of the tribunal.⁶³⁴ However, the illegal legal reform justification must be discouraged so as to avoid the excuse that every illegal act targeted against the international system was with an intention to change the system. In fact, this fear that states would continue to intervene in other states under the guise of humanitarian intervention even if there is no clear and definite law supporting it, suggests that the international community is in need of an appropriate mechanism for intervention. Franck argues that though some acts might be illegal by their nature, the extreme nature of the circumstances might make such actions justifiable.⁶³⁵ For instance, in most national legal systems, an action may be regarded as illegal, but the degree of its illegality is usually determined with regard for mitigating factors.⁶³⁶ Since international law did not develop in vacuum, it makes logical sense that such situations be recognised in international law. Moreover, the doctrine of humanitarian intervention recommends that force should be used only in situations of serious human rights violations where it becomes obvious that nothing short of the use of force can remedy such situation, provided of course that such intervention is welcomed by the victims themselves.⁶³⁷ However, if the Security Council is able to respond effectively to human rights atrocities and violations of international humanitarian law in future, the issue

⁶³³ Ibid p. 133.

⁶³⁴ Ibid p. 136.

⁶³⁵ Thomas M. Franck, op cit pp. 212-213. See the cases of *Regina v Dudley and Stephens*, 14 Queens Bench Division 273 (1884) where the shipmates killed one of their mates and ate him in order to survive during a shipwreck. See also *US v Holmes*, 276 Fed. Case 360, 1 Wall Journal 1 (1842) where the crew jettisoned some passengers into the sea to prevent the sinking of an overloaded lifeboat. Though the defence of necessity did not preclude a conviction for murder, it however, acted as a mitigating factor in the penalty imposed on the accused persons.

⁶³⁶ Ibid.

⁶³⁷ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. 249.

of unauthorized intervention would not arise, or would at least be reduced to the barest minimum.⁶³⁸

The UN Charter empowers the Security Council to determine situations of threat to international peace and security.⁶³⁹ In making such determinations, the Security Council is also empowered to endorse requests for calls for intervention.⁶⁴⁰ The request for intervention can either be made by states, by the Security Council itself, or by the Secretary-General of the UN, acting under Article 99 of the UN Charter.⁶⁴¹ The question that needs to be addressed is what course of action to take in a situation where the UN Security Council declares that a particular situation constitutes a threat to international peace and security, and yet fails to authorize intervention such as envisaged under the humanitarian intervention concept. An example of such a situation is the UN Security Council Resolution 688 of April 5 1991 which found that the situation in Iraq constituted a threat to international peace and security, without authorizing an intervention. The subsequent intervention by US, France and Britain were explained and justified under the implied authority rule. While this could have been justified *post facto*, it does not bode well for the development of international law. The apparent abandonment by the UN Security Council of its primary responsibility of maintenance of international peace and security when it is expected to act, might lead to further debasing of the international system.

⁶³⁸ Jane Stromseth, op cit p. 261.

⁶³⁹ Jinmi Adisa, "The Politics of Regional Military Cooperation: The Case of ECOMOG" in Margaret M. Vogt (ed.) *The Liberian Crisis and ECOMOG: A Bold Attempt at Regional Peacekeeping* (Gabumo: Lagos) 1992. p. 211.

⁶⁴⁰ UN Charter, Article 42.

⁶⁴¹ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. xiv.

However, if the Security Council fails to act or delays in acting as witnessed in the case of Rwanda and Sierra Leone, the UN General Assembly (UNGA) may consider the matter under the Emergency Special Session “Uniting for Peace Procedure”,⁶⁴² and a regional or sub regional organization within the jurisdiction can act under Chapter VIII of the Charter, subject to seeking subsequent authorization from the Security Council.⁶⁴³ The “Uniting for Peace Procedures” was developed in 1950 specifically to address situations where the Security Council, due to lack of unanimity of the permanent members, fails to exercise its primary responsibility of maintaining international peace and security. This Emergency Session should be convened within twenty-four hours of the request being made.⁶⁴⁴ In the *Certain Expenses of the UN Case*, the ICJ in its advisory opinion of July 20 1962, ruled *inter alia* that peacekeeping missions authorised by either the Security Council or the General Assembly were permissible since the Charter permits the General Assembly to deal with matters of international peace and security, once the Security Council is not dealing with the matter.⁶⁴⁵

It is argued that the situation in Darfur constitutes a threat to international peace and security. Barely one year from the internationalization of the conflict, the UN Security Council in Resolution 1556 of July 30 2004, and Resolution 1564 of September 18 of 2004, made a determination that the situation in Sudan constituted a threat to international peace and security, and to the stability of the region. However, both Resolutions did not authorize the use of force in Darfur. One might argue that the Darfurians are being short-changed by the international community just as the other African states embroiled in conflict were

⁶⁴² See General Assembly Resolution, Uniting for Peace, A/RES/377 (V) A November 3 1950.

⁶⁴³ Ibid. This was the basis under which ECOWAS intervened in Liberia and Sierra Leone.

⁶⁴⁴ Ibid. Para 6.29.

⁶⁴⁵ *Certain Expenses of the UN Case*, International Court of Justice Report 1962 p. 151.

short-changed in the past. Had there been a stronger sub-regional organization existing in the Horn and East Africa, maybe it would have taken the initiative to maintain peace in its backyard, just as ECOWAS did in West Africa. While one is not advocating that the UN should delegate its responsibility of maintaining international peace and security to sub-regional groups, it must be understood that the insecurity created by conflicts normally affect the neighbouring states first. It would be necessary that a mechanism of cooperation be developed between the UN and regional institutions with a goal of maintaining international peace and security. Invariably, it is always in their immediate interest to put an end to it, except where the neighbouring states benefit from the conflict. Darfur's situation is complicated by the fact that most of its neighbours are also caught up in conflict. The inability of the Intergovernmental Authority on Development (IGAD) to mediate and resolve the conflict in Darfur speaks to its weakness as a sub-regional security arrangement.

In debating the legitimacy of intervention, the nature and purpose of the action and the effects of such action should be more significant than the motive of such intervention which would naturally be multifaceted.⁶⁴⁶ It, therefore, follows that if such an intervention did more good than harm, the legitimacy rating of such an intervention becomes higher. It would be absurd if in a given case of human rights violations, about 200,000 people had been killed over a period of five years and same number of people dies as a result of intervention within a six month period. The obvious conclusion that can be reached from the above scenario is that the intervention did more harm than good, hence there was no reasonable prospect of achieving the humanitarian objective with minimal or reasonable loss of lives. If however, about 3,000 were to lose their lives as a result of such intervention

⁶⁴⁶ Jane Stromseth, *op cit* p. 250.

within the same time frame as above, one would argue that the intervention has done more good than harm if the gross violations of human rights were stopped. As stated earlier, the modern principle of proportionality in armed conflict is traced to the just war theory that requires that the overall good that is achieved by a resort to force outweighs the evil it set out to correct.⁶⁴⁷ In the determination of the legitimacy or otherwise of a forcible intervention, the nature of such conflict must be taken into consideration. For instance, it is generally understood and accepted that in a case of civil war, states are not to intervene even at the request of the government without a UN or regional organizations' authorization. However, the acceptable exception to this rule which is also a subject of abuse is in situations where the non-state party to the civil war receives external assistance from another source. The state party may then request another state to intervene on its behalf.⁶⁴⁸ This of course raises the question of who has the right to invite an intervention. When would a government that is at the verge of losing its local political control be said to have lost the right to invite intervention on its behalf? When would a recognized rebel movement be deemed to have the required political and moral control to determine issues within its area of actual military control?

An international consensus on the legitimacy and the lawfulness of humanitarian intervention is likely to emerge over time from the international community's assessment of past interventions than it would emerge from codification,⁶⁴⁹ though through this incremental change, codification of some aspects of humanitarian intervention might later emerge.⁶⁵⁰ John Stuart Mills is of the view that in order to ascertain the legitimacy of an

⁶⁴⁷ Judith Gardham, *op cit* p. 8.

⁶⁴⁸ Christine Gray, *op cit* p. 78.

⁶⁴⁹ Jane Stromseth, *op cit* p. 257.

⁶⁵⁰ *Ibid.*

intervention, the views of the victims of the said human rights violations must be considered and not those who seemingly benefit from the violations, even if they are in the majority. He rejects the views advocated by Michael Walzer in *The Moral Standing of States: A Response to Four Critics*, that for intervention to be morally right, a majority of the population need to support it. This, Mills argues, is wrong because the majority might be complicit in such human rights violations.⁶⁵¹ The Nigerian civil war and the Rwanda genocide are instances where the majority either benefited or supported the massive human rights violations and pogrom of the minority. Assuming that an intervention on humanitarian grounds was contemplated in the case of Nigerian civil war, Walzer's conditionality would have trumped it.

While the Security Council has an important role to play in the maintenance of international peace and security, it is however controversial as to whether its findings on legality and illegality on the use of force are conclusive. Challenges and discussions on the desirability of the Security Council having the final word in the determination of the existence of threat to peace, breach of peace or acts of aggression and in passing a binding resolution under Chapter VII has recently been articulated.⁶⁵² The fact that there exists a gap between the law on the use of force and state practice should not be taken to mean that the law on the use of force is not effective. So also should it not be taken as evidence of the effectiveness of the law, if state behaviour is in compliance with the law.⁶⁵³ Notwithstanding the fact that states and international law commentators agree that the prohibition on the use of force is treaty and customary law, as well as *jus cogens*,

⁶⁵¹ John Stuart Mills, op cit p. 107.

⁶⁵² Christine Gray, op cit pp. 12-13. See Cases Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Indictment at Lockerbie, Jurisdiction and Admissibility, ICJ Reports (1998); 37 ILM (1998) 187.

⁶⁵³ Ibid p. 23.

controversy still exists as to the exact scope of this prohibition.⁶⁵⁴ For instance, the International Court of Justice (ICJ) in *Corfu Channel Case (UK v Albania)* rejected the argument of UK that its use of forcible intervention in Albanian waters does not constitute use of force under the meaning of Article 2 (4) since it was not targeted against the territorial integrity or political independence of Albania.⁶⁵⁵ However, this judgment has been interpreted either to mean a general rejection of the use of force, as stipulated by Article 2 (4) or as a specific rejection of the UK claim given the facts available.⁶⁵⁶ Arguments advanced by states in the Security Council and before the ICJ in *Yugoslavia v 10 NATO States* show the differences of opinion on the law on humanitarian intervention.⁶⁵⁷

It has been argued that since no government has expressly repudiated the provisions of Article 2 (4), the provision still represents the existing international law on the use of force.⁶⁵⁸ However, there is still a divergence of state opinion on the extent of meaning that should be given to the Charter provision of Article 2 (4).⁶⁵⁹ For instance, Arend and Beck agree that the meaning attached to it especially as it relates to the phrases “threat or use of force,” “territorial integrity” or political independence” and “inconsistent with the purposes of the United Nations,” have been controversial, leading to varied interpretations by states and scholars.⁶⁶⁰ Tesón, in interpreting Article 2 (4), argues that the plain language of the article does not support a flat prohibition on the use of force. His contention is that force is only prohibited when its use is “against the territorial integrity and political independence

⁶⁵⁴ Ibid.

⁶⁵⁵ *Corfu Channel Case (UK v Albania)* ICJ Reports (1949) 4 at 34.

⁶⁵⁶ Christine Gray, op cit p. 30.

⁶⁵⁷ ICJ Reports (1999), 38 ILM (1999) 950.

⁶⁵⁸ Louis Henkin, “The Reports of the Death of Article 2 (4) Are Greatly Exaggerated,” 65 *American Journal of International Law*, 1971 pp.544-47.

⁶⁵⁹ Christine Gray, op cit p. 45.

⁶⁶⁰ Anthony Clark Arend and Robert J. Beck, op cit p. 36.

of other states,” or “in any other manner inconsistent with the purposes of the United Nations.”⁶⁶¹ If the drafters of the Charter wanted an outright prohibition on the use of all transboundary force, they could have expressly stated it. Since use of force within a purely humanitarian intervention action is not directed against the territorial integrity or political independence of the target state, the first two tests are easily determined.⁶⁶² The above argument notwithstanding, the authority to decide upon disputed questions of the Charter belongs to the organ charged with its application.⁶⁶³

The question, therefore, remains as to whether such use of force is in any way against the purposes of the UN. However, since the promotion of human rights is one of the main purposes of the UN, it cannot be argued that force in such situation was used contrary to the purposes of the world body. Since humanitarian intervention is in accordance with one of the main purposes of the UN; protection of human rights, it would, therefore, be a distortion to argue that Article 2 (4) prohibits humanitarian intervention.⁶⁶⁴ In arguing that Article 2 (4) admits of humanitarian intervention, it means that it is an emerging right and not a right which existed at the inception of the Charter in 1945. This clearly adopts the interpretation that the Charter provision is not fixed in meaning, but rather evolutionary.⁶⁶⁵ Despite the debates surrounding the non-intervention doctrine, many states have failed to give up the use of intervention as a political, if not a humanitarian tool.

⁶⁶¹ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. 150.

⁶⁶² Ibid.

⁶⁶³ Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations*, (Oxford University Press, Oxford) 1963, p.66.

⁶⁶⁴ Ibid p. 151.

⁶⁶⁵ Ibid.

A new and refined concept has emerged out of debate on the pros and cons of humanitarian intervention. The debate about human protection has, therefore, shifted from the right to intervene, to the responsibility of states to protect people. The concept of humanitarian intervention has led to a very problematic blurring of the fundamental distinction between two ways of exercising the “responsibility to protect”. Konrad Raiser is of the opinion that a military intervention which causes disproportionate number of civilian casualties and vast damage to civilian infrastructure in violation of the Geneva Conventions cannot truly be humanitarian.⁶⁶⁶ It is arguable that since the UN Charter does not expressly provide for the humanitarian exception to the prohibition on intervention, it is, therefore, impliedly prohibited. However, applying the golden rule of interpretation of statutes and legal documents to provisions of the Charter, one is convinced that it did not prohibit intervention on humanitarian grounds either explicitly or impliedly.⁶⁶⁷ This conviction is based on the affirmation made in the second and sixth preamble to the Charter, and Article 1(3) of the Charter, namely “...and for these ends...to unite our strength to maintain international peace and security...” and “[T]o achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...” respectively.⁶⁶⁸

⁶⁶⁶ Konrad Raiser, op cit.

⁶⁶⁷ Golden Rule of interpretation means that in interpretation of laws, where there is ambiguity; one should look at the overall purpose the particular law is aimed to achieve. That is the intention of the legal drafters as at then. In this case, the overall purposes of the UN Charter must be looked at.

⁶⁶⁸ The sixth preamble to the Charter states “...and for these ends...to unite our strength to maintain international peace and security...” Article 1 (3) of the Charter states that one of the purpose and principle of the UN is “[T]o achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”

If the use of military action will help forestall the continuous senseless killings of a large population of the state, it might amount to a dereliction of the responsibility to protect the people if, the international community were to sit back without intervening militarily. The application of a human security approach in its broader sense will assist and inform on the best approach. If the international community does not intervene when the need arises, it risks becoming complicit bystanders in massacres, ethnic cleansings, and even genocide.⁶⁶⁹ Kofi Annan articulated the quandary which the international community is confronted with when he asked “[I]f humanitarian intervention is, indeed, an unacceptable assault on Sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”⁶⁷⁰ The ICISS suggests that in order to carry the debate on humanitarian intervention forward, the choice of the phrase should not be “humanitarian intervention” or “right to intervene”, but “intervention on human protection grounds and responsibility to protect.”⁶⁷¹ The emerging principle is that intervention for human protection purposes is supportable when, major harm to civilians is occurring or is imminent and the state in question is unable or unwilling to end the harm or is itself the perpetrator.⁶⁷² While this emerging principle seems to negate the principle of non-intervention in the domestic affairs of sovereign states, it also acts as a check on the abuse of sovereignty.

Despite the fact that there is no express provision in the Charter for peacekeeping, the UN has since 1988 initiated more peacekeeping efforts than it did in the four preceding

⁶⁶⁹ ICISS Report, op cit Para. 1.22.

⁶⁷⁰ The Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, Address delivered to the General Assembly, UN Doc. No. A/54/2000 (April 3 2000), available at <http://www.un.org/millennium/sg/report/full.htm> accessed April 15 2006.

⁶⁷¹ Ibid. Para. 2.4.

⁶⁷² Ibid. Para. 2.15

decades. This indicates that the Charter provisions are interpreted progressively, depending on the contemporary situation. If the Charter which does not provide expressly for peacekeeping can be relied upon to initiate such missions, then, the interpretation of Articles 2 (4) and 2 (7) should be expanded to accommodate the current view expressed by state practice regarding interventions.

Responsibility to Protect: Real or Farcical?

The debate on whether civilians caught up either in violent conflicts or in situations of large scale violation of human rights deserve the assistance of the international community has been refined by the International Commission on Intervention and State Sovereignty's (ICISS) report of 2001. In introducing the new concept, the report states that:

State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to international responsibility to protect.⁶⁷³

The report rephrased the debate from the right to humanitarian intervention, to the responsibility to protect people. In the phrasing of the right of humanitarian intervention, it admits that the right holder is at liberty to be selective without explaining his or her criteria of selectivity. This, therefore, faults the right of humanitarian intervention and the more

⁶⁷³ Ibid p.xi .

reason why it should give way to the concept of responsibility to protect.⁶⁷⁴ Though there is a seeming resemblance between humanitarian intervention and responsibility to protect principle, the distinguishing factor is that the responsibility to protect places a moral, political, and quasi-legal obligation on states to protect civilians where it becomes apparent that their home state is unable or unwilling to protect them, especially in an armed conflict situation or where there is flagrant violation of human rights.⁶⁷⁵ Humanitarian intervention on the other hand, especially, the type generally debated – which is the unauthorised intervention – does not place such obligation on states. However, the obligations placed on states by the responsibility to protect are still debatable. This responsibility to protect means that the international community is not at liberty to select, since it is a responsibility thrust upon it. However, while this non-selectivity paradigm is a positive feature since it reduces the potential for partiality, it might also be its undoing since the international community might easily be overstretched to respond to all situations requiring response. The principle of responsibility to protect does not per se jettison humanitarian intervention. Instead, it complements it and moves the debate further. It shifts the focus from the right to intervene, to the prioritization of those suffering and the duty of the international community to respond to the atrocities experienced by the victims.⁶⁷⁶ In recognition of the changing role of sovereignty, states adopted the concept of responsibility to protect. This is a sign that intervention is gradually being acknowledged as an evolving norm and hence the need to design a framework under which intervention may be acceptable.

⁶⁷⁴ Ibid.

⁶⁷⁵ “Secretary-general Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event On ‘Responsible Sovereignty: International Cooperation for a Changed World,’” available at <http://www.un.org/news/press/docs/2008/sgsm11701.doc.htm> accessed January 2 2009.

⁶⁷⁶ Thomas G. Weiss, op cit p. 139.

The normative legal foundations of the responsibility to protect include the UN Charter, international human rights treaties, the four Geneva Conventions, and the two additional Protocols, the Convention against Torture, the Genocide Convention, the International Criminal Court Statute and the emerging norm of human security. Others include the AU Constitutive Act, the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, and state practices as evidenced in enforcement actions in Somalia, Kosovo, Liberia and Sierra Leone. Human security and protection of human rights and dignity is equally gaining currency in international relations. The idea behind the concept as articulated by the ICISS is not to make the world safe for the big powers, or to trample over the sovereign rights of small ones but instead, to deliver practical protection for the ordinary civilian population whose lives are at risk, due to their state's unwillingness or inability to protect them.⁶⁷⁷ In introducing the concept, the report argues that the debate for or against a "right to intervene" by one state in another is outdated. The report however acknowledges that a change of language alone does not necessarily affect the substance of the issues involved; but rather, it may make the finding of answers much easier.⁶⁷⁸ Just as the concept determines that the international community's responsibility to protect is triggered only when the state is unable or unwilling to protect, universal jurisdiction and other international judiciary options should be resorted to in cases of genocide, war crimes and crimes against humanity when the national judicial system is unable or unwilling to try such cases.

Buchanan in stating that reform through the UN system might be problematic due to the nature of the UN itself, advocates for a treaty-based approach that will bypass the UN

⁶⁷⁷ ICISS, op cit Para. 2.1.

⁶⁷⁸ Ibid Para 2.5.

itself. This would be the crafting of a treaty that would specify criteria that must be satisfied for an intervention to take place in the absence of a Security Council authorization.⁶⁷⁹ He further states that reform of the humanitarian intervention principle through the normative evolution of a new customary international rule would at the initial stage involve illegality, i.e. a violation of Articles 2 (4) and 2 (7) of the Charter.⁶⁸⁰ It might be easier for states to accept intervention in their international conflicts than for them to accept intervention in internal conflicts. This is factual for obvious reasons. In the case of an international conflict, states, especially the weaker party in the conflict, would readily seek other states' intervention or more appropriately, assistance, to ward off the stronger enemy state. However, in internal conflicts where the state is most times in a stronger position in the conflict, it will abhor any intervention by other states to assist the other party, be it rebel groups or the civilian population. If however, the state is at the verge of being overrun by rebel forces, it would not probably see anything wrong with states intervening on its behalf. For instance, the interventions by ECOWAS in Liberia and Sierra Leone where the incumbents were being overrun by the rebels and ECOWAS Monitoring Group (ECOMOG) forces were used to intervene on the side of the government are reflective of the above analysis. It must be pointed out however, that those leaders who do not actually represent their citizens cannot confer legitimacy on an international process by consenting to intervention.⁶⁸¹ However, due to the strong state centric leaning of the international system, the consent of such leaders even if they are the worst dictators is recognised as that of the state they "represent."

⁶⁷⁹ Allen Buchanan, *op cit* p. 138.

⁶⁸⁰ *Ibid* p. 140.

⁶⁸¹ *Ibid* p. 159.

There is the contention that the unanimous or near unanimous adoption of a General Assembly Resolution is indicative of the acceptance by states that the principle enunciated in such General Assembly Resolution are generally regarded as law or state practice.⁶⁸² However, this view is countered by the reasoning that some states vote in favour of a resolution for various reasons not associated with a general recognition or acceptance of the principle embedded in the resolution as law.⁶⁸³ Article 39 of the Charter confers on the Security Council two functions; first, to determine the existence of a “threat to peace, breach of the peace or act of aggression,” and second, to make “recommendation or adopt measures aimed at remedying the situation.” However, the Charter does not define what the phrases are and this has led to controversies.⁶⁸⁴ The Security Council is also authorised to take “provisional measures” under Article 40. While these measures are not spelled out but is at the discretion of the Security Council, it has been likened to the granting of preliminary injunctions in domestic law, where the courts issue injunctions restricting parties from the continuance of particular actions pending the determination of the case without prejudice to the rights of parties.⁶⁸⁵

Arend and Beck argue that despite the measures in the Charter to provide for a collective security mechanism, the UN, from its inception, was not a true representation of a collective security mechanism. According to them, “[I]n a pure collective security arrangement, no state can ever exempt itself from the collective action of the organisation,” and that “all states, no matter how powerful, would be subject to the imposition of

⁶⁸² Anthony Clark Arend and Robert J. Beck, *op cit* p. 9.

⁶⁸³ *Ibid.*

⁶⁸⁴ *Ibid* p. 49.

⁶⁸⁵ *Ibid* pp. 49-50.

sanctions in the event they committed an act of aggression.”⁶⁸⁶ Arend and Beck fail to take into cognizance the effect of *real politik* on such security arrangements. While it would be desirable that all states be subjected to the impositions of sanctions, the reality of the veto power in the UN Security Council dictates otherwise. The situation can only be different if the Security Council jettisons the veto system, but this is still highly unlikely, at least in the near future.

Post Charter state practice has challenged the validity of the original interpretation or notion of collective security. A self-help paradigm has instead developed, where states resort to self help due to the failure of the institutions set up by the Charter for the maintenance of international peace and security.⁶⁸⁷ States have, therefore, rejected the philosophical underpinnings of the Charter paradigm that peace is of more hierarchical value than justice, and instead, accepted the view that breaking the peace in the name of justice rather than living with injustice can at times be justified.⁶⁸⁸

Tesón argues that no matter the choice of words the Security Council decides to use in authorising the use of force, it is obvious that it does have the power to authorise the use of force in two instances, and these are, first, to counter aggression and restore the peace, and second, to remedy serious human rights violations.⁶⁸⁹ Resolution 794 on Somalia is instructive in that the Security Council authorised the use of force to stop a civil war where human rights violations were committed, and not necessarily because it was a threat to

⁶⁸⁶ Ibid p. 51.

⁶⁸⁷ Ibid p. 178.

⁶⁸⁸ Ibid.

⁶⁸⁹ Fernando Téson, *Humanitarian Intervention: An Inquiry into Law and Morality*, op cit p. 233.

international peace and security.⁶⁹⁰ However, in the Security Council's resolution 688 on Iraq, it drew a link between the massive flow of refugees across international border and threats to international peace and security. The same resolution was the first in the history of the UN where it ordered a state to receive humanitarian assistance from international agencies.⁶⁹¹ The Charter provision of Article 42 requires the Security Council to consider the use of force as a last resort where other non-forcible actions under Article 41 have failed.

The timing of the Darfur conflict when the world was commemorating the tenth anniversary of the Rwandan genocide is instructive. This is because, Darfur would afford the citizens of the world an opportunity to judge whether the UN and the international community has learnt anything from the experience of Rwanda in responding to genocide and crimes against humanity.⁶⁹² In Annan's address to the erstwhile UN Commission on Human rights in Geneva on April 7 2004, during the commemoration of the genocide in Rwanda, he stated that the "international community cannot stand idle" while the atrocities in Darfur unfolds.⁶⁹³ More than four years after the above statement was made, the international community is yet to be accredited with a definite action to end the atrocities in Darfur, and palliate the effect on the civilians.

At the 60th Summit of the UN, the member states agreed and adopted the principle of responsibility to protect.⁶⁹⁴ The significance of the international community's commitment

⁶⁹⁰ Ibid p. 245.

⁶⁹¹ Ibid p. 55.

⁶⁹² Hugo Slim, op cit p. 811.

⁶⁹³ Kofi Annan, Address to the UN Commission on Human Rights, Geneva, April 7 2004, available at <http://www.un.org/apps/news/printnewsAr.asp?nid=10377> accessed July 20 2007.

⁶⁹⁴ UN, General Assembly, 2005 World Summit Outcome, September 15, 2005, Para. 138, available at http://www.unfpa.org/icpd/docs/2005summit_final_outcome.pdf accessed April 5 2006.

to responsibility to protect is that firstly, it emphasizes the importance of human security in the overall agenda of national security. Secondly, it establishes a basis for accountability both for states and the international community, and thirdly, it codifies the responsibility of the international community to prevent massive violations of human rights. With this responsibility comes the responsibility to react in a situation of sort.⁶⁹⁵ Furthermore, it contests the much held belief that Article 2 (7) of the Charter expressly prohibits intervention in matters considered to be “within the domestic jurisdiction of any state.”⁶⁹⁶ However, the adoption of the concept would amount to a dead letter regime if it is not operationalised.

The conflict in Darfur is a good test case for this operationalisation. The principle as articulated by the ICISS is that “intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.”⁶⁹⁷ While it might be too early to draw conclusions on the effectiveness of the concept, suffice it to say that the posture taken by the Khartoum government of scuttling the efforts of the UN/AU peacekeeping force in Darfur does not signal a good start for the operationalisation of the concept. Secondly, the Security Council’s politicization and definition of national interests in a narrow minded way might be the bane of the concept. For instance, the recommendation by the ICISS that the Security Council adopt a code of conduct whereby permanent members of the Council pledge themselves not to use the veto in situations of genocide and massive human rights

⁶⁹⁵ William R. Pace and Nicole Deller, op cit p.17.

⁶⁹⁶ Rebecca J. Hamilton, “The Responsibility to Protect: From Document to Doctrine – But What of Implementation,” *Harvard Human Rights Journal*, Vol. 19 2006, p.290.

⁶⁹⁷ ICISS Report, op cit Para 2.25.

abuses was not agreed to at the 60th Summit of the world body. Vincent and Wilson, for instance, argue that basic human rights impose obligations on everyone and not just the government. However, they also maintain that it is not enough to assert that those obligations exist, but the most important thing is to find ways of implementing them.⁶⁹⁸ Thirdly, the crisis seems to suggest that sovereignty is still sacrosanct despite the interpretation that it entails responsibility. The international community is still wary of offending Sudan's sovereignty while people continue to die in Darfur.

The question that should occupy our minds now, especially, since the diplomatic efforts by the international community to resolve the conflict has so far not yielded any positive results, is whether an intervention for the purposes of human protection as articulated by both the ICISS and the High-Level Panel Report could have been justified in the Darfur context. The adoption of the principle by the international community is not enough. There must be clearly defined guidelines on how to identify cases that require extreme measure like military intervention.⁶⁹⁹ The Darfur conflict is an indication that the international community is still much unprepared to translate the rhetoric of responsibility to protect and "Never Again" into reality.⁷⁰⁰ An analysis of the criteria as enunciated by the High-Level Panel Report is made to determine if the international community could have legitimately intervened in Darfur and other such situations. While conceding that military intervention may not be necessary in the immediate, it is also something that could be contemplated by

⁶⁹⁸ John R. Vincent and Peter Wilson, "Beyond Non-Intervention," in Ian Forbes and Mark Hoffman (ed.) *Political Theory, International Relations and the Ethics of Intervention*, (The Macmillan Press Ltd), 1993 p. 123.

⁶⁹⁹ UN Secretary General Kofi Annan's Action Plan to Prevent Genocide. SG/SM/9197AFR/893/07/04/2004 available at <http://www.preventgenocide.org/prevent/UNdocs/KofiAnnansActionplatopreventgen> accessed June 28 2006.

⁷⁰⁰ Mufisky Mwanasali, op cit p. 95.

the international community, not just for Darfur, but in other such situations that may require such for the protection of civilians and ending atrocities.

The High-Level Panel proposed five basic criteria of legitimacy to be considered by the Security Council in reaching a decision to endorse the use of force. Firstly, the seriousness of the threat, i.e., if the threatened harm to the state or human security is of such magnitude that it justifies a *prima facie* case to use military force. In an internal threat, the question should be whether such threat involves genocide, and other large-scale killings, ethnic cleansing or serious violations of international humanitarian law.⁷⁰¹ Applying this criteria to the Darfur conflict, the actions of the *Janjaweed* and the Sudanese Army of resorting to rape, pillaging, torture, kidnapping and other war crimes, constitutes violation of international humanitarian law. It is common knowledge that thousands of people have lost their lives and millions have been displaced because of the violence.⁷⁰² The International Criminal Court (ICC) has equally issued indictments against 51 members of the Sudanese government and the *Janjaweed* militia for various violations of International Humanitarian Law. It has issued arrest warrants for two of the suspects namely; Ahmed Haroun who is the State minister for Humanitarian affairs in Sudan and the militia commander, Ali Mohammed Ali Abdel-Rahman, also known as Ali Kushayb. Also, arrest warrant has been issued against the president, Omar Hassan al Bashir. From the internationalisation of the conflict in 2003 up to January 2004, the Sudanese government obstructed international humanitarian aid from reaching the displaced civilians in Darfur. It also did not provide any

⁷⁰¹ UN High Level Panel Report, op cit.

⁷⁰² For a detailed and in depth account of the atrocities committed by the *Janjaweed*, see Julie Flint and Alex de Waal, *Darfur: A Short Story of a Long War*, (Zed Books: London & New York) 2005. See also, the Fourth Periodic Report of the UN High Commissioner for Human Rights on the Situation of Sudan titled, "Deepening Crisis in Darfur, Two Months after the Darfur Peace Agreement: An Assessment," available at <http://www.ohchr.org/english/countries/sd/docs/4thOHCHR5nov06.pdf> accessed January 30 2007. See also, Human Rights Watch, "Darfur in Flames: Atrocities in Western Sudan," April 2004, Vol. 16 No.5 (A).

humanitarian assistance of its own to the civilians.⁷⁰³ This does not however suggest that the government of Sudan is presently cooperating fully with the international community to alleviate the sufferings experienced by the civilians. What has changed rather is its tactics. Instead of an outright defiance of international community's efforts, it has set up a deliberate policy of slowing down the efforts by agreeing and giving ridiculous conditions. Furthermore, on September 30 2007, the AU forces stationed at Haskanita, northern Darfur were attacked by armed gangs numbering about 1000. Ten AU peacekeepers were killed and many others injured. About 50 of them were reported missing.⁷⁰⁴

Secondly, the primary purpose of the proposed military action must be aimed at halting or averting the threat in question, notwithstanding other purposes or motives that may be involved.⁷⁰⁵ Despite the resource undertone of the war and the allegations by the Sudanese government of oil being the US interest in advocating for a UN peacekeeping force to be deployed in Darfur, it must be stated that civilians are dying in their thousands. The military action would have been primarily aimed at halting the continued killing and displacement of civilians. Furthermore, in order to avert threat to the peace and security of the state and the sub region, it becomes very important for the international community to intervene. It is very obvious that the Sudanese government is not just unable, but also very unwilling to protect the civilians in Darfur. In his briefing to the UN Security Council after his November 2006 visit to the Darfur region, then UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Jan Egeland, stated that:

⁷⁰³ Human Rights Watch, "Darfur in Flames," op cit p. 33.

⁷⁰⁴ "Bloodiest day for African Union Forces in Darfur," Sudan Tribune, October 1 2007, available at <http://www.sudantribune.com> accessed October 2 2007.

⁷⁰⁵ Ibid.

For more than a thousand days and a thousand nights, the defenceless civilians of Darfur have been in fear for their lives, and the lives of their children. The Government's failure to protect its own citizens even in areas where there are no rebels, has been shameful and continues. So does our own failure, more than a year after world leaders in this very building pledged their own responsibility to protect civilians where the Government manifestly fails to do so.⁷⁰⁶

Thirdly, the use of force must be a last resort. The international community must have exhausted other non-military options and in the prevailing circumstances, no other option other than military force is necessary.⁷⁰⁷ Since the internationalisation of the conflict in 2003, there have been various diplomatic and political efforts undertaken either through individual states', the UN or the African Union (AU), to reach a political settlement to the conflict. The signing of the Darfur Peace Agreement in Abuja in May 2006 notwithstanding reports of killings, pillage, burning and looting of villages and rapes still make the media headlines. The effort by the UN and AU at Addis Ababa in November 2006 to get the Khartoum government into agreeing to the deployment of a UN peacekeeping force alongside the AU Mission is an indication that political efforts alone might not sway the government's strong resolve to continue its atrocities in Darfur.⁷⁰⁸ Despite the consent of the Khartoum government to the establishment of a UN-AU hybrid force, it did everything possible to thwart the effective mobilisation of that force. While the institutionalised protection afforded refugees is very commendable,⁷⁰⁹ the apparent institutionalised neglect of internally displaced persons could be seen as a failure on the

⁷⁰⁶ "Western Darfur on Verge of Abyss, Under-Secretary-General for Humanitarian Affairs." Security Council Document SC/8875 of November 22 2006.

⁷⁰⁷ UN High Level Panel Report, op cit.

⁷⁰⁸ The UN and AU peacekeeping mission formed the "hybrid" peacekeeping mission in Darfur.

⁷⁰⁹ See Convention Relating to the Status of Refugees, 1951, Protocol Relating to the Status of Refugees, 1967, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

part of the international community. There is a need for a well defined and specific UN institution to care for the Internally Displaced Persons (IDPs). The idea of leaving IDPs to the mercy of the state organs, and various international agencies which are target specifics leaves much to be desired. The Igbo of Eastern Nigeria have a saying that a goat owned by the community dies of hunger. For as long as there is no specific institution created by the UN to administer to the needs of IDPs, they would continue to receive crumbs from other UN agencies.

Fourthly, the proposed action must be of such minimum scale, duration, and intensity to address the threat in question.⁷¹⁰ While it might not be easy to determine the duration of a military action in Darfur, especially given the dynamics of racial and religious influences in the country and the region, one can safely assume that since the larger section of the Darfur community would be in support of the action to destabilise the *Janjaweed*, the action would not last for more than two years. However, the military action by the United States of America in Iraq seems to suggest that determination of duration is not an easy feat. Though, one should also recognise the different set of dynamics involved in the US invasion. The continued suffering of the civilians will therefore have to be weighed against the effect of such military action being employed.

Finally, the balance of consequences needs to be considered. That is, does a reasonable chance exist that the military action would be successful in meeting the threat in question, and would the consequences resulting from military action not likely to be worse than the consequences of inaction?⁷¹¹ This is a difficult criterion to analyse especially when viewed

⁷¹⁰ UN High Level Panel Report, op cit.

⁷¹¹ Ibid.

against the backdrop of recent events surrounding the United States invasion of Iraq. However, given the fact that political solutions have not borne any edible fruits in more than six years of conflict, the question is; for how long does the international community have to hold on to the hope that it might bear fruit. How do we then determine a reasonable prospect of success? A clear analysis of the situation should be done before the adoption of a military strategy. There should be no one size fits all approach. In the Darfur situation, for instance, the intervention forces cannot move in to fight the Sudanese Armed Forces as this might replicate the Iraqi situation. In ordering intervention, the issue of avoiding a recurrence of atrocities should equally be addressed. While military force might more likely stop atrocities and restore basic security, addressing the underlying factors that led to the atrocities would better be tackled by a longer term political strategy and civilian presence.⁷¹² Though the impulse and urge to assist suffering civilians may run deep in the veins of the international community, if this is not equally matched with the willingness to commit funds and forces, the tendency is that such a proposed mission will be a failure.⁷¹³ The effect of such a failed mission will haunt other situations that ordinarily should attract intervention. For instance, there is the general feeling that the United States' reluctance in acting to save lives during the Rwanda genocide was as a result of the Somalia debacle where peacekeepers of United States origin were killed in a disgraceful manner. When the Security Council makes calls demanding the restoration of peace and security in a conflict zone and such calls are directed at the belligerents, the question that needs to be addressed is how much effect such calls have on belligerents without any physical attempt at enforcement of such calls. A situation in a domestic court setting might be used as an

⁷¹² Jane Stromseth, *op cit* p. 269.

⁷¹³ *Ibid.*

analogy. Where the judge gives a judgment in a case without the state's enforcement machinery being effective, how would the judgment be obeyed?

The evolution of the responsibility to protect from a mere proposition by the ICISS in 2001 to an acknowledged and broadly accepted international norm, with a potential of evolving into a rule of customary international norm is encouraging. As argued by Gareth Evans; "...the case for [R2P] rests simply on our common humanity: the impossibility of ignoring the cries of pain and distress of our fellow human beings."⁷¹⁴ The responsibility brings clarity to situations where the UN must take action to protect human rights irrespective of the principle of sovereignty. The articulation of the concept of responsibility to protect by the ICISS supports the idea of sovereignty as responsibility and takes the argument further by the notion that the duty of the state to the "individual is so important that it must also be borne by the international community,"⁷¹⁵ in a situation where the state fails in its duty to protect its population or if the state itself is the source of the insecurity.⁷¹⁶ However, "the ongoing crisis in Darfur demonstrates that state sovereignty can still trump human rights with little resulting consequence for the offending state."⁷¹⁷

The Darfur conflict highlights the importance of crafting and improving the international response to such violent conflicts. The conflict demands a timely, sufficient and well coordinated response and the protection of civilians should be the primary focus of the international community while trying to reach a political settlement. The criteria set by the

⁷¹⁴ Gareth Evans, "Making Idealism Realistic: The Responsibility to Protect as a New Global Security Norm," An Address at the Launch of Stanford MA Program in International Policy Studies, Stanford University, February 7 2007, available at <http://www.crisisgroup.org/home/index.cfm?id=4658&l=1> accessed February 16 2007.

⁷¹⁵ William R. Pace and Nicole Deller, op cit p. 19.

⁷¹⁶ Ibid.

⁷¹⁷ Anonymous, "Ensuring a Responsibility to Protect: Lessons from Darfur," available at <http://www.wcl.american.edu/hrbrief/14/2anonymous.pdf?rd=1> accessed October 1 2007.

ICISS and the High Level Panel would help to determine Security Council's actions and inactions in order to improve its accountability and deter unilateral and illegitimate pre-emptive wars.⁷¹⁸ The concept as encapsulated by the report encompasses prevention, reaction and rebuilding. However, the Outcome document does not address the issue of rebuilding post conflict societies. One hopes that the creation of the Peacebuilding Commission would guarantee the effective realisation of the three dimensional trajectory of the principle.⁷¹⁹

Notwithstanding the fact that the UN General Assembly did not adopt the above criteria, it could still be used by the Security Council as a guide in determining when to approve a military intervention. Thomas Weiss, however, argues that the threshold for intervention set by the ICISS is too high, when compared to the definition of crimes against humanity in the Rome Statute of the International Criminal Court. Furthermore, that the AU Constitutive Act sets a lower threshold and equally, practice suggests a lower threshold, like cases of massive human rights violation, and overthrow of a democratically elected government.⁷²⁰ However, it is understood that since authorisation of intervention rests primarily with the UN Security Council, it will not be a surprise if the Council does not authorise such action. This is as a consequence of the probable exercise of veto by countries like China and Russia, which are largely beneficiaries of Sudanese oil. Russia has also been linked with the supply of arms to Sudan. In fact, most of the air planes that the government forces use for the aerial bombardment of Darfur are of Russian make.⁷²¹ What is ironical is that while China and Russia do not want intervention in Darfur, apparently

⁷¹⁸ Ibid pp.21-22.

⁷¹⁹ Ibid.

⁷²⁰ Thomas G. Weiss, op cit p. 139.

⁷²¹ Ismail Ashr, Darfur indigene interviewed by the author at Pretoria, South Africa on November 8 2008.

due to their respective business interests, the Sudanese government is accusing the US and Britain of spearheading the call for UN deployment of peacekeepers due to their own interest in Sudanese oil. While a casual analysis of China's and Russia's interest in condoning the atrocities in Darfur might seem to be their business interests in oil and arms supply respectively, an in depth analysis might reveal more than that. It must be remembered that the two countries involved do not have good human rights record.

Hamilton is of the view that "Darfur presents a textbook example of a government that is "unable or unwilling" to protect its citizens, and an international community equally "unable or unwilling" to take on the default sovereign responsibility that the responsibility to protect envisages."⁷²² The story of Darfur so far seems to be that the world's political leaders have failed to actualise the promises made after the Rwanda genocide of 1994 that they would "never again" stand by and watch such horrors as Rwanda happen without action.⁷²³ For instance, the first time the issue of the conflict was raised in the Security Council was in May 2004, five months after the report of Mukesh Kapila, the UN Representative in Khartoum described the situation as the "world's greatest humanitarian crisis."⁷²⁴ While other factors like lack of access to Darfur, poor security and unfavourable political context contributed to the poor response of the international community to the humanitarian needs of Darfur, by ignoring the early warning about the humanitarian catastrophe, the international community set itself up for failure.⁷²⁵ Possibly, the world's political leaders are yet to witness the level of killings as happened in Rwanda, and only then would they put life into the phrase "never again." A decade after the Rwanda

⁷²² Rebecca J. Hamilton, op cit.

⁷²³ Michael Clough, op cit.

⁷²⁴ Julie Flint and Alex de Waal, op cit p. 126.

⁷²⁵ International Development Committee, op cit p.18.

genocide, it has stared the international community in the face that it is yet to articulate an acceptable and pragmatic approach to prevent armed conflict, strengthen UN peacekeeping and protect civilians during armed conflict, especially women and children. This does not mean that efforts towards identifying an acceptable initiative have not been made. However, the requisite political will needed to transform these initiatives into action seem to be lacking.

For over a year while the situation in Darfur was escalating, the UN Security Council's priority in Sudan was in reaching a negotiated settlement between the north and south Sudan to end the 21 years long civil war. As much as one is not holding brief for the UN for its inertia in the early days of the conflict, it is reasonably expected that ending the civil war would be a top priority than attending to a crisis that was just budding. This, therefore, raises questions on the UN's preparedness in preventing budding crisis from developing into an all out violence. It takes the international community far too long to articulate a rapid response to situations of conflict even when lives are being lost. The so much talked about Early Warning Signs model has, therefore, not been effectively utilised. The UN Security Council President of November 2004, Ambassador John Danforth tried to absolve the world body of blame when he stated that "[T]he Darfur problem is that people are killing, raping, pillaging and removing people from one place to another without their permission. And I [don't] think that it is right to say that suddenly the blame should be shifted from people doing these terrible things to people living half way around the world. I just [don't] agree with that at all."⁷²⁶ That the above statement is really unfortunate is to say the least. If the UN that has assumed the role of maintaining peace and security cannot be blamed, then, one should not blame the state when common crimes like armed robbery,

⁷²⁶ UN Press Release, New York, November 4 2004.

murder, rape, etc are committed within the state though far removed from the central authority. It is probably diplomats like Danforth who would argue against humanitarian intervention. Kofi Annan, the erstwhile Secretary General of the UN was enthused on the adoption of the responsibility to protect concept by the world body in 2005. He stated that:

Perhaps most precious to me is the clear acceptance by all UN members that there is a collective responsibility to protect civilian populations against genocide, war crimes, ethnic cleansing and crimes against humanity, with a commitment to do so through the Security Council wherever local authorities are manifestly failing.⁷²⁷

Following repeated appeals by a growing number of humanitarian and human rights groups, the UN Security Council passed Resolutions 1556 and 1564 demanding that the government of Sudan disarm the *Janjaweed* and bring to justice those that are complicit in the atrocities in Darfur.⁷²⁸ The demands implicated in Resolutions 1556 and 1564 were not well defined and it did not also take into consideration its achievability. To demand that the Khartoum government disarm the *Janjaweed* amounted to giving the government a leeway to claim reasonably that it was unable to do so.⁷²⁹ However, such a claim by the government would strengthen the case for the international community's responsibility to protect the Darfurians. In a letter to the Security Council and the Secretary-General of the UN by the Coalition of International Organisations, the UN was reminded that "[O]ne of the world's most horrific ongoing conflicts is raging in Darfur, where civilians suffer daily from murder and rape, burning and looting of villages, forced displacement, among

⁷²⁷ Kofi Annan, "The UN Summit: A Glass at Least Half Full," available at <http://www.un.org/News/ossg/sg/stories/articleFull.asp?TID=49&Type=Article> accessed September 27 2007.

⁷²⁸ UN Security Council Resolution 1556, July 30 2004 and Resolution 1564, September 18 2004.

⁷²⁹ International Development Committee, op cit p. 53.

others.”⁷³⁰ This emphasis on protecting civilians especially during violent conflict shows a paradigmatic shift from indifference to one of protection.

President Bashir has argued that the restoration of stability and the protection of civilians in Darfur are the responsibilities of the government of Sudan thereby trying to turn the responsibility to protect concept against the international community.⁷³¹ However, what he failed to acknowledge was that the government of Sudan had failed woefully in executing its responsibility. In fact, the government of Sudan is itself a source of threat to the civilian population. Available evidence from witnesses and victims of attacks in Darfur exist to corroborate the fact that the government did not do anything for the protection of civilians under attack. For instance, the victims were refused protection from a military post in Al Fashir when they went there for protection in April 2005.⁷³² Furthermore, the non compliance of the Sudanese government to disarm the *Janjaweed* as spelt out in Resolutions 1556 and 1564 informs us that the government is definitely unable, if not unwilling to protect the civilian population. If the government’s proposed plan to restore peace and stability in Darfur is anything to go by, there should have been peace and stability in the region at the end of 2006.⁷³³ However, it must be stated that the timeframe within which the government intended to achieve peace and stability was not realistic. Events have borne out this fact. Secondly, the military and security components of the plan are seriously flawed. This is because, since the government is still a party to the conflict, it cannot be expected to police itself. The situation in Darfur suggests that serious

⁷³⁰ Open Letter to the UN Secretary-General and Members of the Security Council: Urgent Need for an Effective Resolution on Darfur, dated March 18 2005 available at http://www.justiceinitiative.org/db/resource2?res_id=102611 accessed January 31 2007.

⁷³¹ Letter dated August 17 2006 from the Secretary-General Addressed to the President of the Security Council, S/2006/665 - Annexure of the Letter from the President of Sudan Omer Hassan Ahmad al Bashir.

⁷³² Yusuf Abdullah Musa, Darfur Refugee, interviewed by author, Johannesburg, South Africa July 8 2008.

⁷³³ See Plan of the Government of Sudan for the Restoration of Stability and Protection of Civilians in Darfur, available at http://www.sudantribune.com/IMG/pdf/Bashir_plan_for_Darfur-English.pdf

disagreements still exist between the government and the rebel groups. The fact that it was just one faction of the rebel SLM – Minni Minawi – that signed the Darfur Peace Agreement (DPA) attests to the above. The parties that did not sign the DPA cannot be expected to buckle under the government's forces. Assuming all parties had signed, and all had agreed to a complete disarmament, then, the position of the government regarding its plan could be considered. Even then, it must be done under serious international supervision. This is because, the rebels, assuming they all agree to lay down their arms, would be very suspicious of being disarmed by the same set of people they have been at war with.

A plethora of UN Security Council Resolutions exist that provide for the protection of civilians. For instance, Resolution 1265 affirms that the state bears the primary responsibility of protecting its vulnerable groups and more especially refugees and internally displaced persons.⁷³⁴ Resolution 1556 equally states that it is the primary responsibility of the government of Sudan to respect human rights and maintain law and order in its territory, while protecting its population.⁷³⁵ Resolution 1564 emphasises further that the primary responsibility to protect its population is borne by the government of Sudan.⁷³⁶ The use of the word “primary” in referring to the responsibility to protect the population in the territory of Sudan is indicative of the understanding that where Sudan fails in exercising that responsibility, the international community which bears the secondary responsibility can then step in. While it is the primary responsibility of the government of Sudan, it is not exclusive to it. The rebel groups in Darfur equally bear some of the responsibility to protect the civilians. For instance, UN Security Council Resolution

⁷³⁴ UN Security Council Resolution 1265 of September 17 1999.

⁷³⁵ UN Security Council Resolution 1556 of July 30 2004.

⁷³⁶ UN Security Council Resolution 1564 of September 18 2004.

1674 affirms that the parties to a conflict bear the primary responsibility of ensuring the protection of affected civilians.⁷³⁷ Ambassador Alejandro Wolff of the US articulates this well when he stated that “clearly, the Sudanese government has not fulfilled many of its responsibilities towards its people in Darfur, and the rebel groups continue to put them at risk as well.”⁷³⁸ Article 13 (2) of the Protocol Additional to the Fourth Geneva Convention specifically prohibits attack on civilian population and individual civilians. It further prohibits acts or threat of violence which its primary purpose is to spread fear in the civilian population.⁷³⁹ Notwithstanding the emphasis of the UN Security Council that provision and protection of civilians during an armed conflict must be on a case by case basis, the adoption of the *Aide Mémoire* in March 2002 is considered as evidence that the “culture of protection” as advocated by the UN Secretary General is taking root.⁷⁴⁰

The UN Security Council’s failure to act to protect the Darfurians will have serious consequences both for the Darfurians and for the credibility of the UN. It might also galvanize some states to continue the trend of interventions witnessed in the past, sometimes tagged “coalition of the willing.” When this happens, the relevance of the UN will be questioned.⁷⁴¹ Its role, therefore, will portend how it intends to handle this evolving concept as it affects civilian protection. Three elements to be taken into consideration by the international community in exercising the commitments entailed in the principle of responsibility to protect include; collective action, particularly cooperation with regional

⁷³⁷ UN Security Council Resolution 1674 of April 28 2006.

⁷³⁸ Statement by Ambassador Alejandro Wolff, Deputy US Permanent Representative to the United Nations, December 9 2005, available at http://www.usunnewyork.usmission.gov/05print_236.htm accessed July 31 2007.

⁷³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), July 8 1977.

⁷⁴⁰ Report of the Conference on “The Protection of Civilians in Armed Conflict: Humanitarian Challenges in Southern Africa,” held from 15 – 17 October 2002, in Pretoria, South Africa.

⁷⁴¹ International Development Committee, op cit p.58.

organisations in conflict prevention; concern especially by weak states over intervention by use of force; and emphasis on reconstruction and peacebuilding as priorities in societies emerging from conflict.⁷⁴² In a situation where the international community fails to act, especially where it is blatantly obvious that the sovereign state is unable or unwilling to protect the people, like in the case of Darfur, is there any recourse by the people concerned for justice? This should be a subject of further research to find out if the people concerned can bring a court action against the UN Security Council in any of the international human rights courts.

The major factors in the operationalisation of the concept are the operational capacity, authorisation of mandate and political will of the international community.⁷⁴³ As stated by Annan: “[L]ack of political will, national interest narrowly defined, and simple indifference too often combine to ensure that nothing is done, or too little and too late.”⁷⁴⁴ It is argued that if the United States was serious about protecting civilians in Darfur, the fact of its being “over-stretched” in Iraq and Afghanistan would not deter it. This argument is validated by President Bush’s request in 2007 that the US increase its troop capacity in Iraq by 20,000. Notwithstanding the criticism against the US, it needs to be pointed out that it was the only country in late 2003 and early 2004 that was keen to press on Khartoum to live up to its responsibility to protect the people.⁷⁴⁵ Whether this was as a result of a genuine concern by Washington to the sufferings of the civilian population or not, what is clear is that if Washington’s efforts had succeeded, civilian deaths could have been

⁷⁴² Ibid.

⁷⁴³ Rebecca J. Hamilton, *op cit* p. 297.

⁷⁴⁴ Kofi Annan, Speech given at the International Peace Academy Seminar, “Responsibility to Protect,” New York, February 15 2002, available at <http://www.Un.org/News/Press/docs/2002/sgsm8125.doc.htm> accessed December 20 2006.

⁷⁴⁵ International Development Committee, *op cit* p. 51.

avoided. The draw back in the case of responsibility to protect is that no individual state is charged with that responsibility. Since no particular state is adjudged to bear that responsibility, the “shared responsibility risks degenerating into a game of passing the buck and avoiding responsibilities.”⁷⁴⁶ However, it can be argued that since the UN Security Council is charged with the primary responsibility of maintaining international peace and security, the responsibility devolves to it. The concept, therefore, is an inventive way of looking at humanitarian intervention from the lens of responsibility to protect people at grave risk instead of looking at the right of states to intervene.⁷⁴⁷

Protection by presence is a very vital aspect of responsibility to protect. The assumption is that belligerents will be deterred from committing atrocities by the presence of humanitarian agencies and the military.⁷⁴⁸ In Darfur, for instance, the presence of such agencies did to some extent deter or slow down the incidences of attack.⁷⁴⁹ This experience is more obvious where expatriate humanitarian staffs are present. However, it is not certain if the deterrence is actual or just delayed or attacks transferred to different zones.⁷⁵⁰ However, this emphasis on “protection by presence” paradigm may create a false sense of security in the local civilian community and it may also create a false impression that the international community is living up to its responsibility to protect the civilians.⁷⁵¹ Much as it is ideal for there to be humanitarian personnel present in Darfur and other such conflict zones, the international community should not jettison the political pressure on the Khartoum government. It is very important that pressure be brought on the Arab League to

⁷⁴⁶ Ibid p. 57.

⁷⁴⁷ Gareth Evans, op cit.

⁷⁴⁸ Sara Pantuliano and Sorch O’Callaghan, op cit p.11.

⁷⁴⁹ Anonymous Aid worker, interviewed telephonically by the author on November 8 2008.

⁷⁵⁰ Ibid. p.17.

⁷⁵¹ Ibid.

rein in the Khartoum government as it seems that Khartoum's allegiance lies more with the Arab League than the Africa Union. The international community needs to be committed in its targeted sanctions against the state and individuals involved in committing atrocities. So long as individuals feel that they can get away with atrocities, the responsibility to protect implementation regime will be ineffectual. Allowing that false impression to continue would amount to not doing much to protect the civilians.

The question that this concept raises especially against the backdrop of the Darfur conflict is what constitutes protection for the purposes of fulfilling the responsibility. Humanitarian aid agencies, human rights organisations, and the military have different understandings of the meaning of protection.⁷⁵² The first level of protection that is envisaged is physical protection. At this level, the immediate needs of securing the safety and security of the civilians caught up in the conflict should be paramount. The agencies involved should include the state to which the people belong. However, since the state in this case is unable and unwilling to protect the people, the responsibility for the physical protection should devolve to the international community. The UN should consider the possibility and acceptability of deploying private security agencies, especially around the various IDP and refugee camps. This option would be clearly limited to the protection of civilians in the different camps. It has to be understood that where military force is used to protect civilians, especially during the combative period, the sustenance of such protection invariably depends on a "permanent ceasefire and a durable peace settlement."⁷⁵³ The second level of protection is the provision of humanitarian aid. While it must be mentioned

⁷⁵² Tobias Berkman and Victoria Holt, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, (Washington D C: Henry L Stimson Centre) 2006.

⁷⁵³ David Mepham and Alexander Rambotham, *Safeguarding Civilians: Delivering on the Responsibility to Protect in Africa*, IPPR 2007.

that access to humanitarian assistance does not ensure protection per se, it is however, pivotal to sustaining the lives of people suffering from acute diseases, and acute food shortages. As in the above, the primary duty rests with the state; however, this duty would devolve to the international community since it is manifest that the state is unable and unwilling to protect the civilians. Since it is manifestly impossible for the UN and regional institutions to provide all the much needed humanitarian assistance in Darfur and other such conflict areas, the UN and the regional institutions should work out an effective partnership with such NGOs that have expertise in the various areas of humanitarian assistance, for instance, the International Committee of the Red Cross (ICRC), the *Medecine Sans Frontieres* (MSF), OXFAM, etc. While military force might be very important in securing peace in Darfur, continued access to humanitarian aid is equally important in order to sustain those rescued from dangers of violence. It would be counter-productive if they are saved from the violence only to be claimed by starvation and disease.

There is however the argument by some that the delivery of humanitarian aid, though it offers life saving support to the civilians, does not address the protection from physical harm which most times they are faced with, irrespective of being fed by the aid agencies.⁷⁵⁴ This argument does not in any way diminish the role of humanitarian aid and mediation in alleviating the sufferings of civilians in conflicts. What this, therefore, means is that while the humanitarian assistance is provided by the aid agencies, the international community must not assume that the situation is stable. This was exactly the experience in Darfur, where the international aid agencies were more visible than the AU or UN peacekeeping mission. The third level of protection is psychological protection. This takes the form of trauma counselling with the aim of exorcising the trauma that the victims underwent. This

⁷⁵⁴ Ibid. See also, Berkman and Holt, Op cit.

can be modelled along the lines of a Truth and Reconciliation Commission (TRC) mechanism. At this level of protection, those who were disabled, raped or were individually victimised should be given special attention. This should not be confused with traditional Reintegration process that is a feature of post conflict DDR. It is very often the case that DDR focuses more on the needs of the ex-combatants, than on the civilian population. This level of protection involves the state and the other parties to the conflict, while the international community, religious or faith based organisations and NGOs have roles to play. The state's involvement is very necessary at this level since it is perceived as the perpetrator of the atrocities. Its involvement is with the aim to expiate for the atrocities. The last level of protection is the political level. This involves a thorough analysis of the root causes of the conflict in order to resolve it. The concerns of different parties to the conflict should be adequately addressed, and political compromises reached. The agencies involved at this level of protection are the state, the other parties to the conflict, the NGOs, the Civil Society Organisations and international community. The role of negotiation and mediation in providing protection for civilians cannot be underestimated. Principally, for humanitarian access to be granted to NGOs there must be negotiations between government and humanitarian agencies. It equally takes negotiations to achieve a ceasefire agreement which is equally aimed at the protection of civilians.⁷⁵⁵ It must be noted that while the first priority of protection should be to secure the civilians, the other levels of protection should where possible be simultaneously addressed.

The role of the media in bringing attention to world's hotspots is also very essential in the operationalisation of the concept. The media has the effect of influencing and raising world awareness to issues of international concern. Since President Lyndon Johnson of the United

⁷⁵⁵ Ibid.

States told his advisers while watching pictures of Biafran war to “get those nigger babies off my TV screen,” the response to a humanitarian crisis has too often been in proportion to the media coverage rather than the degree of need.⁷⁵⁶ The lack of proper media coverage contributed to the UN Security Council’s failure to act in Rwanda and delay to act in Sierra Leone, but was quick to act in Kosovo. Ethiopia’s famine in the 1980s captured the world’s attention through Michael Buerk’s exposé of the situation in a British Broadcasting Corporation (BBC) film. Media coverage can also give rise to inadequate balancing of the news. Allied to the role of the media, is the role of NGOs in alerting the international community of impending conflicts, especially those with the capability of affecting international peace and security, or that could develop to crimes against humanity and genocide. Alliance with these institutions must be developed by the UN in enhancing the operationalisation of the responsibility to protect concept.

A major criticism against the concept is that states that are powerful may use the excuse to infringe on the sovereignty of small and weak countries. This, therefore, calls for the need to spell out with exact precision the circumstances and conditions under which intervention by the use of force is acceptable in order to have a consistent application of the principle. Responsibility to protect situations must not be seen by policy analysts and diplomats as arising in every human rights violations situations or every internal conflicts. The triggers to responsibility to protect situations are clearly set out and these are situations where there are actual or potential large scale killings, ethnic cleansing, or other similar mass atrocities.⁷⁵⁷

⁷⁵⁶ John Harriss, “A Time of Troubles – Problems of International Humanitarian Assistance” in John Harriss (ed), *The Politics of Humanitarian Intervention*, (Pinter: London) 1995 p. 64.

⁷⁵⁷ Gareth Evans, op cit.

African Union and its Efforts to Operationalise Responsibility to Protect

With the adoption of the AU Constitutive Act in 2002, pundits thought that the only difference between the AU and the Organisation of African Unity (OAU), which it succeeded, is the change in name. However, with the inclusion of Article 4(h) as part of the principles of the AU, it indicated clearly that the AU is definitely different from the OAU. While the erstwhile OAU was very insistent on the strict observance of the principle of non-intervention and respect for each state's sovereignty, there was a noticeable departure with the AU. The operative Article 4 (h) speaks about the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." This bold step by the AU to recognise the change in dynamics of sovereignty, and security as it relates to civilian protection has been hailed by many, even as it remains to be implemented by the AU. This recognition that the Union has the right to intervene in such situations as outlined above represents a major feature of the "Responsibility to Protect" principle as adopted at the 60th Summit of the UN in 2005.

The first major challenge for the African regional organisation to put rhetoric into action was the conflict in Darfur. The creation of the 15 member African Union Peace and Security Council (PSC) by the AU in May 2004 to facilitate effective responses to threats to peace, and security in Africa is indicative of the AU's commitment to the promotion of peace and security in the continent. In fact, the PSC Protocol in its Article 4 (j) echoed the provisions of Article 4 (h) of the Constitutive Act.⁷⁵⁸ Article 4 (h) of the Constitutive Act raises a fundamental question relating to whether the AU has the power to authorise an

⁷⁵⁸ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2004.

intervention even when the UN Security Council does not sanction such. Where a provision of a regional organisation's Charter is in conflict with the UN Charter, how is it to be resolved? It could be argued that in a situation where the AU acts under the provisions of Article 4 (h) of the Constitutive Act, by extension, it is acting under the auspices of the power granted to it by Article 53 of the UN Charter. However, the provision of Article 53, if strictly interpreted, precludes the AU or any other regional arrangements from authorising the use of force. Such regional arrangements can only be used to effect enforcement actions already authorised by the UN Security Council. However, reality and state practice dictates that this strict interpretation is not the accepted meaning. The PSC provides for partnership between it and the UN in achieving its goals. For instance, Article 17 (1), states that

In the fulfilment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security.⁷⁵⁹

While the UN Security Council is charged with the primary responsibility for the maintenance of peace and security, the Charter recognises the use of regional arrangements for the enforcement of the Security Council's resolutions. For instance, Resolution 1556 of July 30 2004 endorsed the deployment of a protection force by the African Union to the Darfur region. Two conditions exist for the utilization of regional arrangements. One is that no enforcement action should be undertaken by regional organisations without a prior authorisation of the UN Security Council. Secondly, when such actions are undertaken, the

⁷⁵⁹ Ibid.

UN Security Council should be informed.⁷⁶⁰ Though it might be ideal to argue that regional organisations should have the pre-emption right of intervening in conflicts in their areas of influence, there are a lot of obstacles faced by them, especially the AU. Some of the major problems of regional peacekeeping that has been recurring especially in Africa are lack of political will, funding, and operational capacity. However, given the relative strengths in their area of operation, the UN must involve the regional organisations in their analysis and planning of peacekeeping missions, as well as in preventive actions.⁷⁶¹ Past experience, especially the Rwandan genocide necessitates that the AU should be prepared to act “in situations where the UN is unwilling or unable to conduct or even [authorize] an intervention.”⁷⁶² The PSC, therefore, recognises that it is the UN that has the primary responsibility for the maintenance of international peace and security, however, the AU has the primary responsibility for peace, security, and stability in Africa. While this seems a practical response to the apathy of the west to conflicts in Africa, it appears to counter the established norm, where the UN Security Council leads in matters of international peace and security. However, it is argued that the PSC Protocol gave an expansive interpretation to Chapter VIII of the UN Charter, which recognises the importance of regional arrangements in the maintenance of peace and security. It is also in keeping with the philosophy of African Renaissance. This, however, does not mean that the UN should ignore conflicts in Africa, as it will not augur well for international peace and security. The understanding is that the AU should provide leadership, where the UN that is charged with

⁷⁶⁰ UN Charter, Article 53.

⁷⁶¹ Rachel Davies, Benjamin Majekdoumi, and Judy Smith-Höhn, “Prevention of Genocide and Mass Atrocities and the Responsibility to Protect: Challenges for the UN and the International Community in the 21st Century,” *The Responsibility to Protect Occasional Paper Series*, June 2008.

⁷⁶² Powell, K. ‘The African Union’s Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect’, Working Paper May 2005, available at http://www.nsi-ins.ca/english/pdf/NSI_AU_R2P_Working_Paper_May_05.pdf accessed June 10 2008.

the primary responsibility of maintaining international peace and security fails to act, or in time, example in Burundi, Darfur, Madagascar, and Somali.

There seem to be an emerging pattern in peacekeeping, especially where it concerns African conflicts. The UN's reluctance to act has prompted either the AU or sub-regional RECs to step in, and invariably act as a stabilisation force, before the UN takes over. This pattern seems a practical solution, since the conflicts are in the continent, and it would be of paramount importance to the continent that they are resolved quickly to avoid escalation. Notwithstanding the practicality of the arrangement, it has often been criticised. The basis of such criticism is rooted in the fact that the continental forces bear the risks, however, the UN peacekeepers that come in late, end up taking the glory for success. This was the case in Sierra Leone, where the bulk of the 'dirty' job was done by ECOWAS peacekeepers, but the UN peacekeepers eventually took the glory.

Controversy exists in international discourse over regional and international actors, which one is best suited to intervene in a situation of intra state conflict. The euphoria of African independence in the early 1960s, initially led African states placing great hopes in the UN, believing that it would deal with all the security problems on the continent.⁷⁶³ The experience of superpower manipulations during the Congo crisis of 1960-1964 led many African governments to become pragmatic and less trusting of the UN's ability to manage regional conflicts.⁷⁶⁴ It is perhaps not equally surprising that the UN did not lift its finger to assist and resolve conflicts in Africa, especially during the heydays of the OAU. Notwithstanding the risks involved in relying on regional actors, they remain critical entry

⁷⁶³ Jinmi Adisa, op cit p. 320.

⁷⁶⁴ Ibid.

points for the UN to supplement local conflict management initiatives.⁷⁶⁵ With the change in the dynamics of conflicts in Africa, neither international, nor regional actors can intervene alone. The intervention should be organised in such a way that international actors who have better organisation, cannot replace and undermine regional initiatives.⁷⁶⁶

The AU in its proactive stance to the issues of continental peace and security authorised the deployment of a Ceasefire Commission – later named African Union Mission in Sudan (AMIS) in April of 2004, following the signing of the Humanitarian Ceasefire Agreement on April 8 2004 between the government of Sudan and the two rebel groups – the SLA and the JEM. The initial observer mission was made up of 80 military observers and a protection force of 600 troops. In July of the same year, the mission was enlarged to 3,320 staff. This number was later increased to about 7,730 personnel.⁷⁶⁷ While the effort by the AU to deploy troops to Darfur is commendable, it must be pointed out that the deployment of few troops to monitor the desert region was not adequate. The nature of the conflict and the vastness of the region dictated that a more robust mission be activated.

One of the key challenges that the AU faced in implementing its peace and security strategy in Darfur was force generation. For instance, the bulk of the protection force was provided by Nigeria and Rwanda, while Senegal, Gambia, Kenya and South Africa also contributed troops.⁷⁶⁸ The poor number of the AMIS personnel deployed in Darfur was not enough to repel the attacks on civilian population by the militia, nor was it enough to

⁷⁶⁵ Gilbert M. Khadiagala, “Burundi” in Jane Boulden (ed.) *Dealing with Conflict in Africa: The United Nations and Regional Organizations*, (Palgrave Macmillan, New York, 2003) p.241.

⁷⁶⁶ Ibid.

⁷⁶⁷ The Situation in Darfur, available at <http://www.africa-union.org/DARFUR/homedar.htm> accessed September 30 2007.

⁷⁶⁸ Helen Scanlon, “The UN Human Rights Council: From Rights to Responsibility?” in Adekeye Adebajo and Helen Scanlon (ed.), *A Dialogue of the Deaf*, (Jacana Media Ltd, South Africa) 2006 p. 153.

protect themselves against attacks by the militia, rebels, or even the IDPs, who occasionally engage in violent demonstrations. For instance, after the signing of the Darfur Peace Agreement (DPA) at Abuja in May 2006, AMIS personnel were attacked by IDPs in all the IDP camps of Kalma, Otash, Tawila, Hassa, Hissa, and Abu Shouk. Their grievances were twofold; one is the perceived failure of the DPA to address the primary grievances of Darfurians, and the other, a desire for greater involvement of the UN and the international community's intervention in Darfur.⁷⁶⁹ The Peace and Security Council however in a communiqué issued at the end of its meeting of May 15 2006, stated *inter alia* that it considers the DPA comprehensive enough as it “addresses the legitimate demands of the Movements, and meets the aspirations of the Darfur people.”⁷⁷⁰ The legitimacy of the above statement is in doubt, since the Abdel Waheed's faction of SLA and JEM refused to sign the agreement citing as part of their reasons, the fact that some of their demands were not addressed by the DPA. These demands which bother on the political inclusion and safety of Darfur cannot be wished away.

The attack on the AU forces stationed at Haskanita in northern Darfur on September 30 2007 confirmed the long held belief that the AMIS was not capable of protecting the civilians in Darfur. The attack could also affect the morale and capability of troop contributing states to respond to not just the Darfur conflict, but also future conflicts in Africa. In fact, the apathy exhibited by the US in sending troops to African conflicts is often seen as a direct consequence of its peacekeepers being killed in Somalia in 1992. There is no doubt that the presence of AMIS contributed to peace and security of the camps

⁷⁶⁹ Fourth Periodic Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Sudan: Deepening Crisis in Darfur, Two Months After the Darfur Peace Agreement: An Assessment, available at <http://www.ohchr.org/english/countries/sd/docs/4thOHCHRjuly25final.pdf> accessed September 30 2007.

⁷⁷⁰ Communiqué of the Peace and Security Council (51st Meeting) of May 15 2006, PSC/MIN/COMM/1(L1)

and villages. For instance, the AMIS withdrawal from Kalma, Nyala contributed to the deterioration of security in the camp. Crime and inter-tribal tension between the Fur and the Zaghawa increased.⁷⁷¹ The vacillating attitude of some African countries and their motives and roles in the conflict is also a major impediment to the AU's realisation of the responsibility to protect principle. For instance, Libya claimed to encourage the rebels to return to the Abuja peace talks, but it did not provide military observers to serve with the AMIS as requested by the AU.⁷⁷² In fact, analysts believe that Libya is fanning the embers of the conflict. This allegation when viewed against the backdrop of Libya's alleged involvement in exacerbating the conflicts in Liberia and Sierra Leone, begins to throw more light on why Tripoli is not seen as a sincere mediator in Darfur. This played itself out at the Sirte, Peace talk held in October 2007 between the government and the rebels, which was convened by the UN and the AU. Ghaddafi was accused of trivialising the issues involved in the conflict when he referred to the Darfur conflict as a "quarrel over a Camel."⁷⁷³

The weakness of the AMIS mandate is seen as one of its major limitations. The mandate provides *inter alia* the protection of civilians "whom it encounters under immediate threat and in the immediate vicinity, with resources and capabilities."⁷⁷⁴ The mandate, therefore, limited the AMIS' capability of protecting the civilian population in danger to those it "encounters and those in its immediate vicinity." A more robust mandate would have ensured that the civilians would be better protected. The other drawback to the

⁷⁷¹ Fourth Periodic Report of the UN High Commissioner for Human Rights, op cit.

⁷⁷² Kofi Annan, *In Larger Freedom*, op cit p. 158.

⁷⁷³ "Darfur, a Quarrel Over a Camel," BBC October 23 2007, available at <http://www.bbc.co.uk/2/hi/africa/7058671.stm> accessed on March 31 2008.

⁷⁷⁴ AU Peace and Security Council (PSC), Communiqué, PSC/PR/Comm (XVII), 20 October 2004. Addis Ababa.

effectiveness of the mission is the lack of adequate funding. Since AMIS' deployment in June 2004, lack of adequate resources has been the bane of the peacekeeping mission, although, the international community expressed its goodwill towards supporting the mission. The British government through the European Union provided 400 vehicles, and the United States provided accommodation for the entire force. Canada sent in 16 helicopters and the Netherlands sent in 3 helicopters. In 2005, Norway provided office accommodation for the African Union Civilian Police component in the IDP camps.⁷⁷⁵ While these contributions are welcome, a more institutionalised cooperation and collaboration between the AU and these international organisations is advocated instead of relying on ad hoc arrangements. This will better ensure the operationalisation of the responsibility to protect.

The deployment of AMIS to Darfur created a false hope that AMIS would, therefore, shoulder the responsibility to protect the civilians at risk, which is primarily the responsibility of the Sudanese government. Given that the government is unable and unwilling to protect the civilians, the responsibility becomes that of the international community acting through the UN and not just that of the African Union. The UN in order to be effective and protect civilians must go beyond the rhetoric of "never again." It must adopt ways to discourage impending human rights abusers and act on early warning signs to prevent civilian deaths during conflicts.⁷⁷⁶ The affirmation of the responsibility to protect, and the establishment of a peacebuilding commission are not panaceas for prevention and reaction to deadly conflict. However, when combined with other efforts being made by the UN, the International Criminal Court and others, it will greatly enhance

⁷⁷⁵ Fourth Periodic Report of the UN High Commissioner for Human Rights, op cit.

⁷⁷⁶ Michael Clough, op cit.

the ability of the world body and the international community generally, in ensuring a more peaceful environment.⁷⁷⁷

⁷⁷⁷ William R. Pace and Nicole Deller, *op cit* p. 32.

Chapter IV Categorisation of Crimes

Khartoum's Complicity in crimes against Humanity

In the middle to late 20th Century, scholars and practitioners of international law and international relations grappled with the category of crimes labelled “crimes against humanity.” Observers regard and trace the origin of this crime to the Nazi atrocities between 1939 and 1945 in Europe.⁷⁷⁸ Others still trace it further back to the Martens Clause of the Hague Convention of 1907.⁷⁷⁹ One can argue that this set of laws has been in existence and observed by nations prior to both world wars, which led the Russian publicist Fyodor Fyodorovich Martens to make his now famous ‘Martens’ clause declaration in 1907. This was the first time a reference was made to the probable existence of the principles of customary international law resulting not just from state practice but also from the laws of humanity and the dictates of public conscience.⁷⁸⁰ However, it was only in the mid-nineteenth century that the international community started codifying the laws in an attempt to apply them universally. The first of these attempts was the Geneva Convention of 1864.⁷⁸¹ The first real codification of the laws of war in an international treaty occurred

⁷⁷⁸ M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, (1992) p. 179.

⁷⁷⁹ Convention (No.IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, 18 Oct. 1907, preamble 36, statute 2277.

⁷⁸⁰ Antonio Cassese, ‘The Martens Clause: Half a loaf or simply Pie in the Sky?’ *European Journal of International Law* 11(2000) p. 188-189. The Martens Clause states that until a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. They declare that it is in this sense especially that Articles 1 and 2 of the Regulations must be understood.

⁷⁸¹ Geneva Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field, August 22, 1864.

in 1907 and the preamble to the 1907 Hague Convention referred to the “laws of humanity.”⁷⁸²

The Allies condemned the Nazi atrocities of World War II, as “crimes against humanity and civilization.”⁷⁸³ In as much as there was a report that proposed to apportion individual criminal responsibility for violations of the “law of humanity”,⁷⁸⁴ this did not come to fruition immediately. The terminology “crimes against humanity” came to international focus after the atrocities of WWII. After the defeat of the Axis power,⁷⁸⁵ the Allies established an International Military Tribunal (IMT) for the trial of war criminals.⁷⁸⁶ The Charter of the tribunal (Nuremberg Charter) included crimes against humanity as one of the crimes under the tribunal’s jurisdiction. Article 6 of the Charter defined it as:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the forgoing crimes are responsible for all acts performed by any persons in execution of such plan.⁷⁸⁷

⁷⁸² Antonio Cassese op cit.

⁷⁸³ Phyllis Hwang, “Defining Crimes against Humanity in the Rome Statute of the International Court,” 22 *Fordham Int’l. L. Journal*, 459 (1998).

⁷⁸⁴ Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties for Violations of Laws and Customs of War. Excerpted in M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, at p 553-65 (1992).

⁷⁸⁵ Germany, Italy and Japan.

⁷⁸⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, Annex, 59 Stat, 82 U.N.T.S 279, reprinted in 39 *Am. J. Int’l L.* 257 (Supp. 1945) (Nuremberg Charter).

⁷⁸⁷ Ibid.

Of note is the fact that the offences which could constitute crimes against humanity under the Nuremberg Charter, need to have been committed in connection with any of the other crimes within the jurisdiction of the tribunal such as war crimes.⁷⁸⁸ The tribunal judges later interpreted this to mean that crimes against humanity could only be committed in times of war. This means that the Tribunal could not prosecute crimes committed before the outbreak of WW II, despite the court's mandate over crimes committed "before and during the war."⁷⁸⁹ For instance, in the case against Julius Streicher who, though was indicted for preaching hatred against the Jews, was not convicted of the acts because his activities occurred before the war.⁷⁹⁰ An important aspect of Article 6 (c) of the Nuremberg Charter is its extension of "protection to civilians of the same state as the perpetrators." This was the beginning of the recognition that national sovereignty was no longer recognised as a shield against individual criminal responsibility.

The development of the law on crimes against humanity had its origin in the laws of war. The Charter's definition of crimes against humanity was a rehash of the existing laws, codes and customs of war and did not substantively add to what was already established under war crimes.⁷⁹¹ The Allies in an attempt to remove the loopholes in the Nuremberg Charter enacted Control Council Law No. 10 (CCL NO. 10), which in its definition of what constitutes crimes against humanity, removed the war nexus earlier imposed by the

⁷⁸⁸ M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, (1992) p. 182.

⁷⁸⁹ Guénaél Mettraux, "Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", *43 Harvard Int'l L. Journal* 264 (2002).

⁷⁹⁰ Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946, 34.

⁷⁹¹ M. Cherif Bassiouni, op cit p.182 (Noting that the pronouncements of the Allies between 1942 and 1994 revealed a consensus that certain Nazi atrocities constituted crimes against humanity in violation of "general principles of law" which were punishable on the basis of the same rationale as war crimes).

Charter.⁷⁹² The nature of the acts that would constitute crimes against humanity was extended by CCL No.10 with the addition of the words "...including but not limited to..."⁷⁹³ It also included other acts such as imprisonment, torture and rape as constituting crimes against humanity.⁷⁹⁴ The excision of the war nexus was however, not accepted by all.⁷⁹⁵ The non-acceptance eventually led to the introduction of a new element, which called for "proof of conscious participation in systematic government organised or approved procedures."⁷⁹⁶

The development of the jurisprudence of crimes against humanity was also influenced by customary international law. Bunyan Bryant is of the view that as early as the 16th Century, Hugo Grotius recognised the customary international law prohibition of crimes against humanity. He further argues that as at 1474, an "international tribunal" had tried and condemned Peter of Hagenbach to death for "trampling under foot the laws of God and man."⁷⁹⁷ Prior to the codification of crimes against humanity in the Nuremberg Charter, there had been references to phrases like "laws of humanity," "public conscience" and there had always been public outcry and general condemnation in a situation where certain acts were committed against the populace. An example is the condemnation by the Governments of France, Great Britain and Russia in 1915 of the massacre of the Armenian

⁷⁹² Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

⁷⁹³ Ibid. Art. II (1) (c).

⁷⁹⁴ Ibid.

⁷⁹⁵ Kai Ambos and Steffen Wirth, "The Current Law of Crimes against Humanity," *13 Criminal Law Forum*, 6 (2002).

⁷⁹⁶ Ibid.

⁷⁹⁷ Bunyan Bryant, "Codification of Customary International law in the genocide Convention," *16 Harvard International Law Journal*, 1975 p. 686.

people in Turkey by the Ottoman Empire as “Crimes against Humanity”.⁷⁹⁸ Even after WW II, various states incorporated crimes against humanity in their national laws in order to prosecute such acts. Of particular interest is the Bangladeshi Act,⁷⁹⁹ which as pointed out by Bassiouni, in its definition of crimes against humanity, did not link it to any armed situation. The Act defined it thus: “crimes against humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”⁸⁰⁰ The development of international humanitarian law also contributed immensely to the development of the law on crimes against humanity. It helped in raising the world’s awareness that humans should live and act in conformity with the laws of humanity.

The Cold War brought a lull in the treaty development of this law. Events that could have been classified by the United Nations Security Council as constituting “...threat to the peace, breach of the peace, or act of aggression...”⁸⁰¹ were never investigated but enmeshed in the veto power politics of the Security Council permanent members. However, after the collapse of the USSR and hence the end of the Cold War, there was a new and revived spirit within the Security Council associated with a need to cooperate amongst members. The first major act of the Security Council in addressing the global challenge of violence, which it had left to brew since the beginning of the Cold War, was

⁷⁹⁸ M. Cherif Bassiouni, op cit p. 168. See also Vahakn Dadrian, “Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications” *14 Yale Journal of Intl’ L.* 221 1989.

⁷⁹⁹ M. Cherif Bassiouni, op cit p. 229 citing The Bangladesh Gazette 5987, July 20, 1973.

⁸⁰⁰ Ibid.

⁸⁰¹ UN Charter, 1945, art. 39.

the situation in the former Yugoslavia. The Security Council in its 48th Session, and in keeping with its Chapter VII powers under the UN Charter, created the International Criminal Tribunal for the Former Yugoslavia in 1993,⁸⁰² for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY).⁸⁰³ The wording of Article 5 of the ICTY Statute was a rebirth of the humanitarian law origins of crimes against humanity.⁸⁰⁴ The Statute once again revived the war nexus requirement for crimes against humanity. A study of Article 5 reveals that the armed conflict envisaged here could either be of an internal or international nature. This was more like a throwback to the definition in the Nuremberg Charter, which required the enumerated acts in the Charter to have been committed within the context of war. This requirement of an armed conflict has led to interpretational problems in the ICTY. In the case of *Prosecutor v Duško Tadić*, the defence counsel argued that the requirement in Article 5 of “armed conflict” implied a nexus between the acts of the accused and another crime within the jurisdiction of the ICTY, and that any different interpretation would constitute “*ex post facto* law violating the principle of *nullum crimen sine lege*.”⁸⁰⁵ The Appeal Chamber, stating that the requirement of a nexus between crimes against humanity and another crime was “peculiar to the jurisdiction of the Nuremberg Tribunal” and had long ago been abandoned, rejected this argument.⁸⁰⁶ The position by the tribunal is very logical because to tie crimes against humanity only to war situations would obviate the purpose of the law on crimes against humanity. Any of the enumerated acts could be committed by the State in times of peace

⁸⁰² S.C. Res. 808, UNSCOR, 48th Sess., mtg., Annex, U.N. Doc S/RES/808(1993).

⁸⁰³ Statute of the International tribunal for the Prosecution of Persons Responsible for Serious Violations of international Humanitarian Law Committed in the Former Yugoslavia since 1991.1993 (ICTY).

⁸⁰⁴ Kai Ambos, op cit p.10.

⁸⁰⁵ *Prosecutor V Duško Tadić*, Case No. IT-94-1, Judgment, para 139 (July 15, 1999).

⁸⁰⁶ Ibid. para. 140.

especially where the government is of a repressive nature. Gross violations of human rights, which fulfil the elements of crimes against humanity, could qualify as crimes against humanity.

While the events of the former Yugoslavia were shaping the development of the law on crimes against humanity, Africa was witnessing a situation of unimaginable dimensions: the widespread and systematic attack to exterminate the Tutsis by the Hutus in Rwanda. These events though horrific, added to the understanding and further development of the laws of crimes against humanity. It is estimated that between 500,000 and 1,000,000 people were killed in Rwanda during the dark days of the country.⁸⁰⁷ This prompted the Security Council to act, though belatedly, in its adoption of Resolution 955.⁸⁰⁸ Article 3 of the Statute of the International Criminal Tribunal for Rwanda states in its definition of crimes against humanity that:

[T]he International Tribunal for Rwanda shall have power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds, (i) other inhumane acts.⁸⁰⁹

⁸⁰⁷ Organization for African Unity, Special Report of International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, para.2.1 (2000) available at <http://www.oau-oua.org/document/ipep/ipep.htm> accessed September 22 2007.

⁸⁰⁸ SC Res. 955, UNSC, 3453rd Mtg., UN Doc S/RES/955 (1994).

⁸⁰⁹ Statute of the International Criminal Tribunal for Rwanda (Hereinafter referred to as ICTR Statute). Art. 3.

It is necessary to understand that in the development of the law on crimes against humanity, the atrocities that usually gave rise to the setting up of the tribunal influences the definition of the crime. These atrocious events, therefore, have an effect on the definition ascribed to crimes against humanity in the particular statute. The definition takes into consideration whether the event that led to the crimes could be described as, internal or, an international armed conflict. For instance, the definition of crimes against humanity by the Statute of the ICTY took into consideration the type of conflict and hence states that; “[T]he International Criminal Tribunal shall have power to prosecute persons responsible for the following crimes when committed in *armed conflict, whether international or internal in character*, and directed against any civilian population.”⁸¹⁰ Having regard to the fact that what happened in Rwanda was an internal armed conflict, the definition of crimes against humanity by the ICTR statute abandoned the war nexus. It instead, introduced in its definition the phrase “widespread or systematic attack.” It has been variously suggested that since the adjective is in the alternative, then the requirement would be fulfilled if the attack were either widespread or systematic.⁸¹¹ It could be argued that an act cannot be said to be systematic if it is not widespread. However, since both adjectives are chosen as being applicable, any of the elements of widespread or systematic would suffice.

As mentioned above, the exclusion of the war nexus in the CCL NO. 10 led to the introduction of the policy element.⁸¹² This concept has developed to the extent that crimes against humanity are associated with state policy.⁸¹³ In *Prosecutor v Akayesu*, the Trial

⁸¹⁰ ICTY Statute op cit note 31 Art. 5. (Emphasis mine).

⁸¹¹ Guénaél Mettraux op cit at p. 259.

⁸¹² CCL op cit.

⁸¹³ This was evidenced in the statement by the Trial Chamber in *Prosecutor v Tadic* to the effect that “[T]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally, this requirement was understood to mean that

Chamber stated that the concept of systematic conduct might be defined as thoroughly organised and following a regular pattern because of a common policy involving substantial public or private resources.⁸¹⁴ The reasoning on the involvement of the State is right; an attack of such magnitude that could constitute a crime against humanity cannot be carried out effectively if it did not receive the tacit support of the State apparatus, or the organization that exercises absolute control over the geographical area in question. The Darfur conflict is a case in point. The Sudanese government has been accused of complicity in the atrocities committed by the *Janjaweed* militia in Darfur. Human Rights watch reports that “the Sudanese government has armed, recruited and supported the *Janjaweed* militias that (sic) have participated with the government forces and government aircraft in campaigns attacking civilians and villages in Darfur since early 2003.”⁸¹⁵ The argument, therefore, is that if the atrocities as witnessed in Darfur, Sudan do not have the tacit support of the government, then it invariably means that the government is unable to protect the people, and hence should surrender that responsibility to the international community. It is reported that Musa Hilal in August 2004, gave directives to the intelligence and security department, military intelligence and national security, and the ultra-secret “constructive security” or *Amn al Ijabi* to “change the demography of Darfur and empty it of African tribes.”⁸¹⁶

According to Guénaél Mettraux, the requirement that the attack must have formed part of a policy is contradicted by almost all relevant writing on the subject and by overwhelming

there must be some form of policy to commit these acts.” *Prosecutor v Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 653. See Payam Akhavan, “Beyond Impunity: Can International Justice Prevent Future Atrocities”, 95 *Am. Journal of Int’l L.* 2001, p. 10.

⁸¹⁴ *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 para. 580.

⁸¹⁵ HRW Briefing Paper of 20 July 2004, “Janjaweed Camps Still Active.” available at <http://www.hrw.org/english/docs/2004/08/27/darfur9268.htm> accessed October 23 2007.

⁸¹⁶ Julie Flint and Alex de Waal, op cit p. 39.

practice.⁸¹⁷ He went on to cite the cases of *Prosecutor v Kunarac*,⁸¹⁸ and *Prosecutor v Kordic*⁸¹⁹ as further confirmation of the view that it has not yet been settled that the attack must have been part of a policy of a State. It must be said however, that for an attack to be widespread or systematic in nature, there must be an element of ‘Plan’ and ‘Policy’ which most times, might involve the State. However, this “Plan” or “Policy” might also involve an organization that may or not be linked to the State. In the Darfur situation, this widespread or systematic attack has been linked to the state.

Another inclusion in the definition of the crime under the ICTR Statute was the “national political, ethnic, racial or religious grounds” nexus. This introduced the discrimination element into the definition.⁸²⁰ When read together, the understanding is that the acts enumerated must have been committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. If strictly interpreted, then all the acts must have been committed with a discriminatory intent in order to qualify as a crime under the Statute. However, in *Prosecutor v Akayesu*, it was suggested that the inclusion of the discrimination grounds is for jurisdictional purposes and does not add any elements to the definition of crime against humanity.⁸²¹ The jurisprudence from the three notable international tribunals proved that there were still some loopholes in

⁸¹⁷ Guénaél Mettraux, op cit p. 270.

⁸¹⁸ *Prosecutor v Kunarac et al.*, Case No. IT-96-23, Judgment, 22 Feb. 2001, para 432 (Feb. 22, 2001).

⁸¹⁹ *Prosecutor v Kordić*, Case No. IT-95-14/2, Judgment, para. 181-82 (Feb. 26, 2001) The Chamber said that ‘the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity’ rather than as an independent, additional element of the definition of the crime.

⁸²⁰ Statute of the International Criminal Tribunal for Rwanda, Article 3 (Hereinafter referred to as ICTR Statute) 1995.

⁸²¹ *Prosecutor v Akayesu*, op cit. Judgment and Sentence, para. 465 (June 1, 2001)(37 *I.L.M.* 1399 (1998) See also Guénaél Mettraux, op cit p. 268.

the law on crimes against humanity.⁸²² Thus, the International Criminal Court Statute is a step in further development of the law.

The text of the Statute was adopted on July 17 1998 at Rome, with 120 States participating in the conference. The Statute sets out the court's jurisdiction, structure and functions.⁸²³ The Statute entered into force on 1 July 2002.⁸²⁴ The significance of the definition and development of the law on crimes against humanity at the Rome conference is that the definition was not fashioned after the fact of any conflict. It, therefore, represents the feeling of the international community as to what ordinarily should constitute crimes against humanity. The ICC Statute defines crimes against humanity thus:

for the purposes of this Statute, "crime against humanity" means any of the following acts when committed as 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

⁸²² The International Military Tribunal, International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda.

⁸²³ Rome Statute of the International Criminal Court 1998, Art.7 (hereinafter called ICC Statute).

⁸²⁴ "ICC". Available at <http://www.igc.org.icc/html/timeline.htm> accessed September 24 2007.

inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁸²⁵

This definition seems to represent the international customary law view of crimes against humanity. There was also some significant development in the definition and general outlook of the law. For the first time, specific definitive meanings were given to some of the underlying offences, which would in the circumstance of the definition constitute crimes against humanity.⁸²⁶ Earlier statutes that dealt with the crime enumerated the underlying offence and left the courts with the duty of interpretation. The Rome Statute defines for the first time the meaning of “attack directed against a civilian populace.” It states that “[A]ttack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁸²⁷ This definition finally lays to rest the argument over the “Policy element” being part of the elements in proving the existence of “widespread or systematic attack.” It also confirms the thoughts of legal observers, that the policy need not be that of a State alone, but also that of an organisation which is in a position of control over a territory. With this inclusion of “organisation”, it might then be possible to bring rebels before the ICC and charge them for crimes against humanity. In fact, on the strength of this interpretation, the ICC prosecutor has requested the ICC Judges to issue arrest warrants against some of the rebels alleged to have committed acts that amount to crimes against humanity in Darfur.⁸²⁸ It needs to be pointed out that the term “multiple commission of acts” is novel because, the

⁸²⁵ ICC Statute Art.7 .

⁸²⁶ Ibid.

⁸²⁷ Ibid

⁸²⁸ Sudan tribune, “ICC Prosecutor to Request Secret Arrest Warrants against Darfur Rebels,” available at <http://www.sudantribune.com/spip.php?article29313> accessed 5 December 2008.

word “attack” has never been interpreted before in the decades it took the Rome Statue definition to evolve.⁸²⁹

Two main bodies of law apply to the conflict in Darfur. They are international human rights law and international humanitarian law. While both are aimed at the protection of the people’s rights, they apply differently. International human rights law afford protection to individuals at all times, while international humanitarian law applies only in situations of armed conflict as is witnessed in Darfur presently. Sudan is bound by the following conventions in respect to international human rights law; International Covenant on Civil and political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Rights of the Child (CRC), and the African Charter on Human and People’s Rights. It has signed, but not ratified the following; Convention on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the Convention on the Elimination of Discrimination against Women. While it is not conclusive that non-ratification portends the policy thrust of a state, it serves to alert human rights watchers as to the “inner mind” of the state. It is interesting to note that all the treaties mentioned above which the Sudanese government has not ratified, are those that have a bearing on the accusations levied against the state, especially in the Darfur conflict.

Under international humanitarian law, Sudan is bound by the following conventions; the four Geneva Conventions of 1949, the Ottawa Convention on the Prohibition of the Use of Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of

⁸²⁹ Phyllis Hwang, op cit p. 502.

September 18 1997. In determining whether the state is guilty of crimes against humanity, therefore, recourse should be had to the body of international legal regimes available.

For a perpetrator to be convicted of crimes against humanity, the court must be satisfied that all the elements in the definition of the crime have been met. The definition of crimes against humanity is two-layered. The first part of the definition contains the general elements of the crime which distinguishes it from domestic crimes and other international crimes, such as war crimes. The other part of the definition contains the specific offenses (crimes) that if committed within the context of the first part, would amount to crimes against humanity.⁸³⁰ This means that the crime must form part of the attack, since not all crimes committed during the attack can constitute crimes against humanity. A singular crime of murder for instance, which though, committed during an attack against a civilian population, but does not form part of the systematic or widespread attack cannot, therefore, be a crime against humanity. In *Prosecutor v Tadić*, the tribunal was of the opinion that the act of the accused must be “part of a pattern of widespread and systematic crimes directed against a civilian population.”⁸³¹ This implies that the perpetrator’s act by its nature or consequences furthers the attack and that he is also aware that there is an attack against the civilian population and that his act is part of such an attack. For instance, a solitary murder that occurred as a result of a long standing feud between the perpetrator and the victim does not form part of the attack, even if it was carried out during the attack. The distinguishing factor of crimes against humanity from ordinary crimes is that in crimes against humanity,

⁸³⁰ Guénaél Mettraux, op cit p. 239.

⁸³¹ *Prosecutor v Tadić*, Case No. IT-94-1, Judgement, Para. 248, 255 (July 15, 1999).

the criminal act in question, say, murder, is committed in the context of a “widespread or systematic attack” against any civilian population.⁸³²

The attack envisaged under the definition of crimes against humanity need not be directed against an enemy. An attack directed against any civilian population, even if it is against the attacker’s state’s own population, will suffice.⁸³³ It must be pointed out that an attack against a civilian population does not necessarily imply a breach of the laws of war, in a situation where such attack takes place during peace time. Conversely, a military operation is not necessarily an “attack against a civilian population,” for the simple reasons that it either led to civilian casualties or it constitutes breaches of the laws of war. If however, the military operations were directed specifically against the civilian population, then that would amount to the commission of crimes against humanity.⁸³⁴ Since the attack by the *Janjaweed* and the Sudan military were committed within the context of hostilities, the laws of war should be used to determine whether such attacks were justified. The principle of protection of civilians under the laws of war argues that attacks should be limited to combatants and military objectives, and that civilian objects must not be made the target of attack. However, if the government of Sudan argue that its attack on the Darfur villages and towns were targeted against the rebels, the evidence of severe casualties on the civilian population signifies that the government of Sudan failed to observe the principle of proportionality which provides that “even military objectives should not be attacked if an

⁸³² *Prosecutor v Akayesu*, Case No. ICTR-96-4, Judgement, Para 579 (September 2 1998).

⁸³³ M. Cherif Bassiouni, op cit p. 245.

⁸³⁴ Ibid p. 246

attack is likely to cause civilian casualties or damage which would be excessive in relation to the concrete and direct military advantage that the attack is expected to produce.”⁸³⁵

For the court to determine that a particular military operation which probably breached either or both principles of distinction and proportionality constitutes attack within the meaning of crimes against humanity, it has to be proved that such an attack was directed primarily against the civilian population and was not the result of an overzealous use of military power.⁸³⁶ In determining whether an attack upon a civilian population took place, it is irrelevant that the other side also committed such crimes against the enemy’s civilian population.⁸³⁷ Evidence suggests that the Sudanese army and the *Janjaweed* militia have at various times targeted civilians as their primary focus of attack.⁸³⁸

The act need not have been committed in the heat of the attack for it to amount to crimes against humanity. This is because the intensity of the attack is bound to decrease over time. For instance, an attack that takes place two months after the cessation of hostilities might still be regarded as part of the attack for the purposes of crimes against humanity if the perpetrator intended the act to further the attack, knowing that there is an attack on the civilian population. The phrase “directed against” presupposes that the civilian population is the primary object of the attack, not just an incidental victim.⁸³⁹ It, therefore, means that all that is required of the perpetrator is that he “needs to have *intended* to inflict injury upon

⁸³⁵ Protocol 1 Additional to the Geneva Conventions of 12 August, 1949, Relating to the Protection of Victims of International Armed Conflicts, June 8 1977, Article 51 (4).

⁸³⁶ M. Cherif Bassiouni, op cit p. 248.

⁸³⁷ *Prosecutor v Kunarac*, Case No. IT-96-23, Judgment, Para. 580 (February 22, 2001). See also *Prosecutor v Kupreškic*, Case No. IT-95-16, Judgment, Para. 765 (January 14, 2000).

⁸³⁸ Abed Kalbo Yusuf, Darfur IDP interviewed telephonically by the author on November 4 2008.

⁸³⁹ *Prosecutor v Kunarac*, Case No. IT-96-23, Judgment, Para. 421 (February 22, 2001).

the victim(s) of his crime while *knowing* about the context in which his acts occurred.”⁸⁴⁰ Knowledge of the attack and perpetrator’s awareness of his participation can be inferred from circumstantial evidence.⁸⁴¹ The term “civilian population” is desired to exclude random acts from the scope of crimes against humanity. However, this does not mean that the targeted population must be the entire population. If it is proved that the scale, methods, or resources involved indicate that such attack was indeed directed against the civilian population, it will suffice. The reported attack by the *Janjaweed* on Abu Suroj, Sirba, and Suleia villages around the second week of February 2008 where there was no presence of rebels indicates strongly that those attacks were primarily directed against the civilian population.⁸⁴² It will not however, amount to crimes against humanity if the killing was only of a select group of civilians, example, the killing of political opponents, even if they are from the same geographical area.⁸⁴³ In *Prosecutor v Kunarac*, the tribunal interpreted a “population” to mean a sizeable group of people who possess some distinctive features that mark them as targets of the attack. There must be an identifying feature, be it geographical, or other common features that identifies such a group as a “population” within the context of crimes against humanity.⁸⁴⁴ The identifying feature of the Darfur population that has been targeted is their belief in their African origin. It is widely known that most of the villages attacked by the *Janjaweed* are those belonging to the black African population.⁸⁴⁵

If a perpetrator is himself a part of the targeted group, it does not preclude his being convicted for crimes against humanity, if he, also committed such acts against other

⁸⁴⁰ Ibid. See also *Prosecutor v Kayeshima*, Case No. ICTR-95-1, Judgment, Para. 134 (May 21 1999), *Regina v Finta*, (1994) S.C.R. 701-706 (Canada).

⁸⁴¹ *Prosecutor v Tadić*, Case No. IT-94-1, Opinion and Judgment, Para. 657 (May 7 1997).

⁸⁴² Sudan Tribune, “Sudan Accuses UN-AU Peacekeeping Force of ‘Double Standard’” Monday February 11 2008. Eye witness account of the attacks collaborate the above newspaper report.

⁸⁴³ M. Cherif Bassiouni, op cit p. 255.

⁸⁴⁴ Ibid.

⁸⁴⁵ Ibrahim Adam, Darfur IDP interviewed telephonically by the author on May 29 2008.

victims.⁸⁴⁶ This, therefore, means that even if the *Janjaweed* and government forces were to also attack the Arab villages that are in sympathy with the Africans and the rebels, the act would still amount to attack on a civilian population. This would allow the ICC to prosecute rebels who were alleged to have attacked the civilian population in Darfur. Much as attack against combatants cannot amount to crimes against humanity, crimes committed against them can constitute part of the attack against the civilian population if the acts are a consequence, direct or indirect, of the attack. Example, if an attack of a village is occasioned by attacking a handful of soldiers defending the village, the court will construe the attack as being directed against the civilian population.⁸⁴⁷

It must be remembered that the jurisprudence as developed by the Nuremberg Tribunal dispelled all doubts as to the criminal liability of individuals for acts committed under the colour of state. The Tribunal stated that “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁸⁴⁸ This means that those responsible for the attacks on the civilian population in Darfur, whether acting as *Janjaweed* militia or as Sudanese army would be held responsible. This responsibility also extends to those who were issuing the command. There is evidence to suggest that the *Janjaweed* were acting on behalf of the state. For instance, the supply of uniforms, arms and ammunition by the state to the *Janjaweed* and the joint nature of their attacks on civilians, suggests that the

⁸⁴⁶ See *Attorney General of Israel v Enigster*, where the court held that a Jewish fellow, who while imprisoned by the Nazis, committed acts amounting to crimes against humanity against other Jewish inmates, could be found guilty of crimes against humanity.

⁸⁴⁷ M. Cherif Bassiouni, op cit p 258. See also *Prosecutor v Blaškić*, Case No. IT-95-14, Judgment (July 15 1999).

⁸⁴⁸ 1 Trials of Major War Criminals before the International criminal Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, p. 223.

Janjaweed are agents of the state.⁸⁴⁹ However, those other actions of attacks that were carried out by the militia without the acquiescence of the state would not be criminally attributed to the state. Though, it can be argued that even when the *Janjaweed* carry out such attacks without the express command of the state, it could still be attributed to the state if it is proved that at the time of committing such offence, the individual attacker had in mind that there was an existing order by the state. Moreover, the militia might be carrying out such attack in furtherance of the overall objective of attacking the civilians knowing that the government of Sudan will not sanction them if found out. This, therefore, underscores the extent to which impunity for such attacks have been condoned by the government.

There have been various suggestions on how to bring the perpetrators of the Darfur atrocities to justice. While majority seem to favour the use of available international justice mechanism like the ICC, the United States of America does not seem to favour this mechanism. Its objection was based on the fear that its human rights violations, especially in Iraq, might make it liable to prosecution. They instead suggest setting up of a Special Tribunal modelled after the International Criminal Tribunal for Rwanda.⁸⁵⁰ The indictments against Ali Kushyab, Musa Haroun and Al Bashir by the ICC, has signalled the ICC's readiness to rise up to the challenge of fighting impunity in the country. It remains to be seen though, if the arrest warrants issued against the accused persons would be executed. If, the eventual arrest and trial of Charles Taylor, a former president of Liberia, by the Special Court of Sierra Leone is anything to go by, then, hope exists that the indicted persons would eventually face justice. Since the escalation of the conflict in 2003, the government

⁸⁴⁹ Ahmed Hassan Taloub, Darfur IDP, interviewed telephonically by the author on June 15 2008.

⁸⁵⁰ Prunier op cit p. 143.

of Sudan's military strategy has been in violation of the fundamental principles of international humanitarian law and international human rights law. For instance, it has continuously failed to distinguish between military targets and civilians. It has deliberately been targeting the civilian population. In a targeted arrest of SLA leaders in March 2004, the local intelligence chief had about 100 men arrested and 71 of them were shot in the back of the head. In a single night, about 145 men were executed in Deleig and Mukjar.⁸⁵¹ Nine Fur Omdas were arrested a week before the Deleig massacre, and on the same night of the massacre, were shot dead in prisons in Mukjar and Garsida. This cleared the way for the Arab Salamat and Mahariya to take possession of the area.⁸⁵²

The government's attack on civilians especially the Fur, Masaalit, Zaghawa and other small ethnic groups is perceived to be aimed at destroying the support base of the rebels and to weaken their morale. The attack is carried out notwithstanding the fact that in some of the villages attacked by government backed militias or the army, there were no presence of rebels.⁸⁵³ Notwithstanding the possibility of the civilians being in possession of arms, it must not be interpreted to mean that they were taking active part in the hostilities. It is a historical fact that in Darfur, civilians are licensed to own and keep guns which they use to defend their land and cattle.⁸⁵⁴ Moreover, a very unique feature of the attack on the civilians is that it normally takes place early in the morning when they are either sleeping or praying.⁸⁵⁵ Key village assets like water wells and mills have been deliberately destroyed by the *Janjaweed* and government militia to discourage the Africans from

⁸⁵¹ Ibid p. 110.

⁸⁵² Ibid.

⁸⁵³ Hawa Salah Osman, Darfur IDP, interviewed telephonically by the author on November 30 2008.

⁸⁵⁴ Ibid.

⁸⁵⁵ Ibid.

inhabiting the place.⁸⁵⁶ There is a groundswell of opinion by the internally displaced persons in Darfur that the government and the *Janjaweed* want to violently force the rural Africans from their homes and render them destitute.⁸⁵⁷ This is a clear violation of Article 17 of the Additional Protocol II to the Geneva Conventions of 1977 which prohibits the forced displacement of civilians during conflict. However, the Article provides as an exception that civilians can be displaced as a result of “military reasons” or if it were in the interest of the civilians. The methods used by the Sudanese government to displace the Darfurians do not however fall into any of the two exceptions, and hence amounts to a violation of international humanitarian law. Notwithstanding that Sudan has not ratified Protocol II which applies only in non-international conflicts, the provisions provide authoritative guidance. Moreover, most of the provisions are regarded as part of customary international law and does not require the force of treaty to apply. Furthermore, the destruction of food sources and water sources by the government of Sudan and the *Janjaweed* is also a violation of its duty to protect civilians in conflict. Evidence suggests that the major part of the atrocities have been committed by the *Janjaweed* militia.⁸⁵⁸ However, it is reasonable to suggest that they could not have succeeded to the extent they have, if they never had government support. Available evidence also exists of direct and indirect government support of the *Janjaweed*.⁸⁵⁹

The government’s use of Antonov aircraft, MIGs and attack helicopters to bomb villages in Darfur is indicative of the fact that it does not consider the proportionality element in its use of force. For instance, the January 2004 bombing of villages in North Darfur which

⁸⁵⁶ Ibid.

⁸⁵⁷ Fatma Mousa Bakhour, Darfur IDP, interviewed telephonically by the author on November 30 2008.

⁸⁵⁸ Various people interviewed share this view.

⁸⁵⁹ Anonymous, Sudanese Government Official interviewed by the author at Pretoria, South Africa on November 15 2008.

killed about 35 civilians and injured more than 70 indicates a clear disproportionate use of force.⁸⁶⁰ There is also evidence of selective burning and destruction of villages, as those villages in close proximity to the Fur, Masaalit and Zaghawa villages were left untouched. Those untouched villages oftentimes belong to Arabs.⁸⁶¹ This clearly indicates the discriminative element involved in the atrocities. There is also evidence which suggest that many villages were burnt even when the inhabitants had abandoned it and fled.⁸⁶² This suggests a pre-determined policy by the government to expel the population and prevent immediate or long-term return to the villages by the erstwhile inhabitants. A very interesting but worrisome trend in the burning and looting of the villages is the act of poisoning the water wells by dropping the carcasses of cattle into them.⁸⁶³ The importance of water in Darfur need not be over-emphasised. Probably, the act of poisoning the water well was to make sure that who ever manages to escape death by the attacks would not survive due to lack of water. There are various reported cases of rape and other gender based violence committed against women. These crimes take place either at the time of the original attack in the villages or later especially near the IDP camps when the women and girls leave the camp in search of firewood and water.⁸⁶⁴ As in the case with other forms of atrocities, the *Janjaweed* are mostly involved together with the Sudanese Armed Forces.⁸⁶⁵

There is, therefore, evidence of the widespread “and” systematic nature of the attacks targeted against the civilian population of Darfur, by the *Janjaweed* militia and the Sudan Armed Forces. At the very least, the atrocities do amount to war crimes and crimes against

⁸⁶⁰ Ishaq Aziz Abdallah, Darfur IDP, interviewed telephonically by the author on November 30 2008.

⁸⁶¹ Ibid.

⁸⁶² Hafiz Musa Abdallah, Darfur IDP, interviewed telephonically by the author on November 30 2008.

⁸⁶³ Mariam Aki Brahim, Darfur IDP, interviewed telephonically by the author on November 30 2008.

⁸⁶⁴ Fatumah Adam, Darfur IDP, interviewed telephonically by the author on November 30 2008.

⁸⁶⁵ Captain A. (pseudonym) UNAMID Peacekeeper, interviewed telephonically by the author on November 30 2008.

humanity which by themselves are very serious international crimes. A vast array of international conventions to which Sudan is a party to prohibits cruel, inhuman or degrading treatment or punishment.⁸⁶⁶ The government of Sudan has continuously denied its link with the *Janjaweed* militia. In fact, Al Bashir and his government maintain that the *Janjaweed* are a gang of armed bandits operating under the cover of the conflict. However, the government's appointment of Musa Hilal, an acclaimed *Janjaweed* leader as a Special Adviser to the Ministry of Federal Affairs is an indication that the *Janjaweed* is linked to it. Furthermore, the close relationship between the Popular Defence Force (PDF) a state militia force established by law and the *Janjaweed* shows that there exists a strong link between the *Janjaweed* and the government. If the *Janjaweed* is a gang of armed bandits preying on the civilians, why is it only the black African population that they prey on? Why has the government in Khartoum not been able to use its state power to arrest the activities of the *Janjaweed*?

There is however a contradiction with the denials coming from the president of Sudan when viewed against the backdrop of reassurances given to the people of Kulbus in 2003 after the rebels failed to capture the town. Bashir is reported to have told the people that "Our priority from now on is to eliminate the rebellion, and any outlaw element is our target...We will use the army, the police, the Mujahedeen, the horsemen to get rid of the rebellion."⁸⁶⁷ It is, therefore, obvious from the above statement that the president, by his use of the *Mujahadeen* and horsemen, was referring to the armed militias that are not part of the official state structure. The statement by the Sudanese Minister of Justice however,

⁸⁶⁶ See Article 7 of ICCPR, Art. 37 of the Convention on the Rights of the Child and Article 5 of the African Charter on Human and Peoples' Rights, Common Article 3 of the Four Geneva Conventions.

⁸⁶⁷ Associated Press, "Sudanese President Says war against Outlaws is Government's Priority," December 31 2003.

captures the essence of the relationship the government has with the *Janjaweed*, and the existing dilemma the government has found itself in. Speaking to the Committee on Development and Cooperation of the European Parliament in February of 2004, he stated that the “government made a sort of relationship with the *Janjaweed*. Now the *Janjaweed* abuse it. I am sure that the government is regretting very much any sort of commitments between them and the government. We now treat them as outlaws. The devastation they are doing cannot be tolerated.”⁸⁶⁸ The existing evidence does not however suggest that the government treats the *Janjaweed* as outlaws.

The widespread and systematic nature of the attacks which are primarily targeted against the civilian population suggests in no uncertain terms that the government and its allied *Janjaweed* militias should be charged for crimes against humanity. There is no doubt that the conflict has displaced a vast majority of the Darfur Africans, either internally or across the border into Chad and elsewhere. While the actual number of those displaced might be difficult to ascertain due to the nature of the area and the currency of the conflict, most official reports put the number at about 2 million IDPs and 200,000 refugees. While numbers might be important to establish the crime of forcible transfer of civilian population, the exact numbers might not be necessary. Since it is generally estimated that the number of IDPs are in the millions, and especially given the fact that the estimated pre-conflict population of Darfur is 6 million, the number is worrisome. The other worrisome fact which seems to establish the government’s policy thrust of “emptying Darfur of

⁸⁶⁸ Report by an Ad Hoc Delegation of the Committee on Development and Cooperation of the European Parliament of its visit in February 2004, available at www.ecosonline.org/back/pdf_reports/2004/EUreportssudandraft.doc accessed February 20 2007.

Africans” is that Arab tribes are beginning to settle in the homelands of the displaced Africans.⁸⁶⁹

The Big Question: Is it Genocide?

The atrocities committed both by the government of Sudan and the *Janjaweed* militia in Darfur has led many international law and international relations experts to debate whether they fall under the category of the so called crime of crimes – genocide. Notwithstanding the political nature of the debate, in order for the crime of genocide to be established, the international community need to approach the evidence with open minds and not preconceived notions. However, whether the crimes are not of the magnitude to qualify as genocide is a moot issue to the civilians who are constantly in fear for their lives.

The crime of genocide under international law is normatively modern. This is because it was only in 1948 that the world recognised such a crime. Of course, this is not to state that acts which could have been described as genocide never happened earlier than 1948. For instance, the massacre of the Armenians by the Turkish state in 1915 has been variously described as genocide.⁸⁷⁰ The institutionalised origin of the law on genocide can be traced to the atrocities of the Nazi during WW II and the subsequent Nuremberg trials. However, during the trials, there was no charge of genocide against the Nazis due to the non existence of the crime of genocide in international law then. They were instead charged for crimes

⁸⁶⁹ Safaa Imam Yahya, Darfur IDP, interviewed telephonically by the author on November 30 2008.

⁸⁷⁰ Levon Chorbaijan, “Introduction” in Levon Chorbaijan and George Shirinian (ed) *Studies in Comparative Genocide*, (Palgrave, London) 1999 p xv.

against peace and crimes against humanity.⁸⁷¹ However, there were references to genocide during the trial. It was only in 1946 that the General Assembly through a Resolution proclaimed the existence of the crime of genocide.⁸⁷² With the coming into force of the Genocide Convention in 1948 and the recognition that the crime has the status of *jus cogens*, the crime of genocide became a subject of universal jurisdiction.⁸⁷³ While genocide is always organized, planned, promoted and executed by those in authority, it usually requires the support of the general public to succeed.⁸⁷⁴ However, when the government in question is an authoritarian regime like in the case of Darfur, Sudan the support of the general public need not be necessary for genocide to succeed. Genocide normally occurs under the façade of war or colonial conquest and so long as the state or the perpetrators come out victorious, the question of domestic prosecution is never contemplated.⁸⁷⁵ The prohibition of genocide is equal to the provision of the right to life in international human rights instruments. While the instruments concern themselves with the individual's life, the Genocide Convention is concerned with the right to human existence of a group.⁸⁷⁶ The Genocide Convention defines genocide as

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

⁸⁷¹ Johan D. Van der Vyver, "Punishment and Prosecution of the Crime of Genocide," 23 *Fordham International Law Journal* 1999 p. 286. See also 1 Trials of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 Nov 1945 – 1 Oct 1946, pp. 27-92.

⁸⁷² Ibid. See G.A. Res. 96 (1), U.N. GAOR, 1st Sess; Part II (Resolutions), U.N. Doc. A/64/Add.1 (1947).

⁸⁷³ Van der Vyver, op cit p. 287.

⁸⁷⁴ Ray Spangeburg and Kit Moser, *The Crime of Genocide: Terror against Humanity*, (Enslow Publishers Inc, New Jersey) 2000 p. 39.

⁸⁷⁵ William Schabas, *Genocide in International Law*, (Cambridge University Press, Cambridge) 2000 p. 1.

⁸⁷⁶ Ibid p. 6. See General Assembly Resolution 96(1) of December 1946 which declares that "genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings."

- (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.⁸⁷⁷

While the world is right in remembering the 800,000 that lost their lives during the 1994 Rwanda genocide, a befitting memorial for the victims would also be that the world does not allow such fate to befall others. However, barely ten years after the genocide, a fate as gruesome as what befell them is being visited on the Darfurians.⁸⁷⁸ As stated earlier, the Darfur conflict has attracted varied analysis as to whether the atrocities amount to genocide or not. While states are very reluctant to use the “G” word due to its implied obligation on the international community to act, the United States of America was bold to state that the atrocities amounted to genocide. It is usually suggested that genocide is the ultimate crimes against humanity.⁸⁷⁹ This is mainly because the crime of genocide has the capability of destroying all or part of the targeted or protected group, unlike in crimes against humanity where the perpetrator need not have such intention.⁸⁸⁰ The underlying genocidal offences must have the potential, even if remote, to contribute to the complete or partial destruction of the victim’s group. Unlike crimes against humanity, the crime of genocide need not be widespread or systematic attack against a civilian population. It could be planned or committed on a large-scale or as an individual undertaking.⁸⁸¹ While crimes against humanity can be committed against any individual, genocide can only be committed against individuals who belong to the protected groups categorized by their national,

⁸⁷⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 2.

⁸⁷⁸ Shedrack C. Agbakwa, “Genocidal Politics and Racialization of Intervention: From Rwanda to Darfur and Beyond,” *German Law Journal*, Vol. 6 No2 2005 p. 531.

⁸⁷⁹ See Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity, G.A Res.2391, UN GAOR 23rd Sess. Agenda Item 64, UN Doc. A/7342 (1968).

⁸⁸⁰ *Prosecutor v Jelisić*, Case No IT-95-10, Judgment, Para. 182 (February 26 2001).

⁸⁸¹ *Ibid* Para 98 (December 14 1999).

ethnic, racial, or religious identity.⁸⁸² In the case of Darfur for instance, the group can be identified by their belonging to the same ethnic and racial group of black Africans.

In order to sustain a conviction for genocide, it must be proved that the underlying acts were directed with the intention of destroying, in whole or in part, one of the protected groups. With the evidence available, it could be argued that the act by the government of Sudan and its *Janjaweed* militia were directed at the destruction of the black African group in Darfur, even though the destruction so far achieved has been partial. It is, therefore, a matter of conjecture what the level of destruction would have been if the international community did not raise alarm over the atrocities in Darfur. However, if we were to infer from the continued attack of the group by the government and its allied *Janjaweed* militia, it would become obvious that it wants to wholly destroy the group. However, partial destruction of the group will suffice to establish one of the elements of the crime. Ali Nafi Ali, a presidential assistant to Hassan al Bashir is reported as saying that “[W]e have no problem fighting those who fight us. The UN Security Council will not stop us even if the whole world screams.”⁸⁸³ Granted that proving intention is very difficult, it can be inferred “by showing a pattern of purposeful action.”⁸⁸⁴

The ICC statute gives the court the jurisdiction to punish perpetrators of genocide, crimes against humanity, and war crimes in situations where the domestic courts of a country with

⁸⁸² *Prosecutor v Krstić*, Case No.IT-98-33, Judgment, Para. 682 (August 2, 2001) The tribunal held that the protected “group” under the genocide definition differs essentially from a “population” for the purpose of crimes against humanity.

⁸⁸³ See Sudan Tribune, “Sudan Says Will Fight Darfur Rebels Even if the Whole World Screams,” available at <http://www.sudantribune.com> accessed March 22 2008.

⁸⁸⁴ Helen Fein, “Genocide, Terror, Life Integrity and War Crimes: the Case for Discrimination,” in George Andropolous (ed.), *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press) 1994 p. 97.

custody of the suspect are “unwilling” or “unable” to do so.⁸⁸⁵ This is what is echoed by the principle of responsibility to protect. There is, therefore, a two prong approach to the protection of civilians – political and legal. That means that in a situation where the international community fails to exercise its responsibility to protect the civilians and genocide occurs, the international judicial system would have to step in. While the definition of genocide does not bring within its purview the policy elements articulated in the definition of crimes against humanity, it is reasonable to assume that the atrocities in Darfur that has been traced to the *Janjaweed* could not have been possible without the official support of Khartoum. In deciding if the large-scale killings in Darfur constitute genocide, the number of victims is definitely not a key factor. However, the number of victims plays its important role in determining the level of the targeted population that has suffered and also it acts as an appeal to world opinion.⁸⁸⁶ With the international media putting the deaths resulting from the conflict at about 400,000, it must be stated that even if the number of victims was relevant, the number above should suffice.

The question that should occupy our minds as to the atrocities in Darfur is not under which label of atrocious crime it should be grouped, but first a total condemnation of the acts which should be followed by the international community’s efforts at putting a stop to such atrocities, both at Darfur and elsewhere in the world. Prunier captures the cynicism of the international community’s love for labelling when he stated that “[I]t is in fact a measure of the jaded cynicism of our times that we seem to think that the killing of 250,000 people in a genocide is more serious a greater tragedy than that of 250,000 people in non-genocidal

⁸⁸⁵ See Articles 5 and 17 of ICC Statute.

⁸⁸⁶ Gérard Prunier p. 148.

massacres.”⁸⁸⁷ While this might be true, one should also not lose sight of the implication of genocidal attacks. This is an attack targeted at our hypothetical 250,000 who have something in common intended to destroy it in whole or in part. The other 250,000 could have randomly assembled. A case in point is the people that died at the 9/11 bombing. Assuming for the purposes of argument that they were up to 250,000, it definitely cannot constitute a targeted group for the purposes of genocide. Therefore, the effect will not be the same with the effect of targeting about 50,000 people that belong to the same ethnic, racial, or religious group. As discussed previously, international criminal law provides that for such a situation where the attack is widespread and systematic leading to so many deaths, the perpetrators can be charged for crimes against humanity. Crimes against humanity by itself are heinous crime. However, it does not attract the same moral opprobrium and legal obligation as genocide does. The Appeals Chamber in *Prosecutor v Krstić* succinctly captured the grievous nature of the crime of genocide when it stated that:

[A]mong the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm felt not only by the group targeted for destruction, but by all of humanity.⁸⁸⁸

However, Fein cautions that the terminology “genocide” should not be used loosely so as not to lose its meaning. According to her, people use it to “vent outrage and to describe a

⁸⁸⁷ Ibid p. 156.

⁸⁸⁸ *Prosecutor v Krstić*, ICTY Appeal Chamber Para 36.

perceived threat to themselves.”⁸⁸⁹ The use of the word genocide by victims of perceived massive violations of human rights and other atrocities to call world attention to their situation shows the level of opprobrium attached to the crime of genocide, not just in international law, but also in the court of public opinion. It must be acknowledged however, that genocide never occurs as a result of accident. It is always a premeditated action by the architects of the crime calculated to achieve the ends of the perpetrators.⁸⁹⁰ That notwithstanding, sometimes, the genocidal consequences of an act might precede the decision to destroy in whole or in part the targeted group. It is, therefore, the continued persistence to destroy the group that forms the intention to destroy the group.⁸⁹¹ In the case of Darfur, one may argue that while the state could not have set out initially with the intention of destroying in whole or in part, the black African group of Darfur, this intention could have developed as the conflict continued. This argument is given credence by the nature of the continued attacks directed against the black African group over a sustained period of six years. Smith argues that the crime of genocide which is only acknowledged in the 20th century has been an ancient phenomenon, and that the perpetrators of genocide in ancient times were never ashamed of it. However, since the 20th century, no country has acknowledged its involvement in the crime.⁸⁹²

An argument by Irving Horowitz that the survival of a people from total annihilation does not qualify such an act as genocide notwithstanding the means and number of deaths seems to obscure the understanding of the definition ascribed to genocide. His argument was

⁸⁸⁹ Helen Fein op cit p. 95.

⁸⁹⁰ Roger W. Smith, “State Power and Genocidal Intent: On the Uses of Genocide in the 20th Century,” in George Andropolous (ed.), *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press) 1994 p. 4.

⁸⁹¹ Ibid.

⁸⁹² Ibid p. 10.

within the context of the survival of the Igbo of south-eastern Nigeria despite the estimated loss of about 3.1 million during the Nigeria civil war.⁸⁹³ A cursory look at the definition of genocide as contained in the different international legal instruments reveals that the “annihilation” need not be total. It is enough if it intends to “destroy in whole or in part...” If that were not so, why then do we refer to the Jewish holocaust and the Rwanda genocide as genocide, despite the fact that some of them survived?

President Bill Clinton in reacting to the US’ failure to act in Rwanda stated that “we did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe haven for the killers. We did not immediately call these crimes by their rightful name: genocide.”⁸⁹⁴ The question this statement raises, therefore, is whose responsibility is it to declare a situation as genocide? Is it that of the UN Security Council or that of individual powerful states? The Genocide Convention does not create within it a supervisory or monitoring/implementation mechanism with the responsibility of ensuring the prevention and punishment of genocide. However, Article VII of the Convention provides for the parties to the Convention to call upon the competent organs of the UN to take action for the suppression and prevention of such crimes.⁸⁹⁵ From the wordings of Article VIII, it is obvious that the duty of declaring a given situation as genocide is vested on state parties, since their duty is to inform the UN organs to take action in the “suppression and prevention of acts of genocide...” The reasoning is that the particular state must have reached a conclusion given the set of facts available to it that genocide has

⁸⁹³ Irving L. Horowitz, “Science, Modernity and Authorized Terror: Reconsidering the Genocidal state,” in George Andropolous (ed.), *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press) 1994 p. 25.

⁸⁹⁴ Charles W. Corey, “Clinton Addresses Rwanda Genocide Survivors,” United States Information Service (USIS) Washington File, Kigali, Rwanda, March 3 25 1998.

⁸⁹⁵ Genocide Convention, Article VIII.

occurred. The reference to “competent organs” of the UN is anticipatory of the fact that the UN Security Council is not the only competent authority to deal with the issue of genocide.

The determination and eventual declaration that acts of genocide have occurred in such a situation is a process of both legal and political decisions. Meanwhile, while this process of labelling or branding is going on, thousands of lives continue to be lost. It is apposite to mention that while the United States and the world were debating as to the correct labelling of the Darfur situation in 2004, thousands of Darfurians were being killed or forcefully removed from their homes by the government of Sudan backed *Janjaweed* militia. As stated earlier, the United States was bold enough to label the atrocities in Darfur as genocide. However welcoming the labelling was, the expected outcome of such labelling was never seen.⁸⁹⁶ The argument as to the correct labelling of the atrocities in Darfur as genocide or crimes against humanity will be of no use to the victims, if the international community does not assist them. The victims, most of who are not literate enough to read and understand the daily news, and even if they can are far removed from such privileges, cannot definitely understand the legal definitions of genocide and crimes against humanity. What they do know is that civilians are being killed, raped, etc, and that they need help from whichever quarter such help can come.

The international community’s inaction in cases of genocide across the world could be responsible for the modern day genocide that has been witnessed. For instance, in an address to his generals prior to the invasion of Poland, Adolf Hitler asked a rhetorical

⁸⁹⁶ See Secretary of State Collin L. Powell, “The Crisis in Darfur,” Written Remarks before the Senate Foreign Relations Committee, Washington DC, September 9 2004, available at <http://www.state.gov/secretary/rm/36032.htm> accessed September 21 2007.

question “[W]ho, after all, speaks today of the annihilation of the Armenians?”⁸⁹⁷ Similarly, the inaction by the United Nations and the world at large to stop the Igbo genocide of 1966-1970 and punish the perpetrators has been advocated as the foundational genocide in post-conquest Africa.⁸⁹⁸ Ekwe-Ekwe argues that this inaction, shows that the world did not learn much from the genocide of the 1940s, and that “[I]t is precisely because the perpetrators of the Igbo genocide appeared to have been let off the hook for their crimes by the rest of Africa and the wider world, that Africa did not have to wait for long before the politics of the Nigerian genocide-state metamorphosed violently beyond the Nigerian frontiers.”⁸⁹⁹

As has often been stated that the rebel groups might equally be complicit in the atrocities in Darfur, even if this were to be proved, it cannot constitute acts of genocide. Mass killings of the members of the perpetrators own group should not be confused with genocide as it is inconsistent with the purposes of the Convention which is aimed at protecting national minorities from ethnic hatred based crimes. Such mass killings should instead be viewed as constituting crimes against humanity.⁹⁰⁰ The initial phrase of the definition of genocide in the Convention sets out the *mens rea* or mental element of the crime that must be established alongside the *actus reus* before a conviction can be sustained in the court.⁹⁰¹ The mental element is the “intent to destroy, in whole or in part, a national, ethnical, racial,

⁸⁹⁷ G.S. Graber, *Caravans to Oblivion: The Armenian Genocide*, 1915 (New York: John Wiley and Sons,) 1996 p. 128.

⁸⁹⁸ Herbert Ekwe-Ekwe, *Biafra Revisited*, (African Renaissance, England) 2006 p. 5. See also V.N Dadrian “Genocide as a Problem of National and International Law: The World war I Armenian Case and its Contemporary Legal Ramifications 14 *Yale Journal of International Law* 1989, p.221 where the author asserted that “Indeed, that ignored genocide begets another genocide appears to be a historical fact.” See also V.N Dadrian, “The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice,” 1998 *Yale Journal of International Law* p. 503.

⁸⁹⁹ Ekwe-Ekwe op cit p. 9.

⁹⁰⁰ William Schabas Op cit pp. 119-120.

⁹⁰¹ Ibid p. 151.

or religious group, as such.” The *actus reus* of the offence of genocide are as contained in the second leg of the definition. It catalogues exhaustively acts which constitute genocide.⁹⁰² Intent is a critical element in the crime of genocide in the determination of whether a particular set of circumstances amounts to genocide. Unless this intent to destroy the group in whole or in part is expressed, it would be difficult, if not impossible to prove such intent, except in a situation where a large number of the group were killed, intent might be inferred.⁹⁰³ For instance, in *Prosecutor v Kayishema and Ruzindana*, the tribunal clarified that the intent to destroy a group “in part” entails the destruction of a “considerable number of individuals.”⁹⁰⁴ However, in *Prosecutor v Jelisić*, the trial chamber interpreted it to be a destruction of “a substantial part.”⁹⁰⁵

It is instructive to note that the first time the UN Security Council referred to the word genocide was in its Resolution 925 of June 8 1994 with respect to the atrocities in Rwanda, this coming 46 years after the Genocide Convention entered into force and after a lot of vacillation from the Security Council. Scholarly debate exists on whether the crime of genocide attracts universal jurisdiction. In customary international law, offences that attract universal jurisdiction for its prosecution are piracy, slave trade, and trafficking in women and children. This is based on the notion that these offences are committed in “no man’s land,” where no state has jurisdiction. However, multilateral treaties have accorded universal jurisdiction to some other classes of crimes in international law, like, torture, attack on diplomats and others.⁹⁰⁶ Notwithstanding the nature of the crime of genocide, the

⁹⁰² Ibid p. 154 See definition of genocide op cit.

⁹⁰³ Bunyan Bryant op cit p. 692.

⁹⁰⁴ *Prosecutor v Kayishema and Ruzindana* (ICTR Trial Chamber, May 21 1999) Para 97.

⁹⁰⁵ *Prosecutor v Jelisić*, (ICTY Trial Chamber, December 14 1999) Para 82.

⁹⁰⁶ Ibid p. 354. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 and Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1977.

question of it acquiring the un-envious status of universal jurisdiction is still very contentious as can be gleaned from the proceedings and argument at the conference on the Rome Statute before the conference compromised in recognizing only territorial and active personal jurisdiction.⁹⁰⁷ Schabas is however of the view that the UN human rights instruments favour the existence of a universal jurisdiction in the case of genocide.⁹⁰⁸ The practice of universal jurisdiction by states in genocide is not uniformed though. While some states accept it, others do not.⁹⁰⁹ Notwithstanding the non express provision for the imposition of the legal duty of *aut dedere aut judicare* – try or extradite – as is provided by the Geneva Conventions in respect to grave breaches, by implication, the Genocide Convention imposes such obligation especially when Articles I, IV, V, VI, and VII are read together.⁹¹⁰ It is usually difficult for the state where the genocide took place to prosecute the perpetrators especially where the regime is still in power or if they still exert influence over the political system in the state.⁹¹¹

The question of whether the Genocide Convention places a duty upon states to intervene militarily to stop the killings is still elusive and appears largely unanswered. Raphael Lemkin is of the view that “[B]y declaring genocide as a crime under international law and by making it a problem of international concern, the right of intervention on behalf of

⁹⁰⁷ William Schabas op cit p. 362.

⁹⁰⁸ Ibid. See also *Prosecutor v Ntuyahaga* (Case No. ICTR-90-40-T), decision on the Prosecutor’s Motion to Withdraw the Indictment, March 18 1999) where the ICTR recognises the existence of universal jurisdiction for the crime of genocide. The trial of two Rwandan Nuns by the Belgian court for the 1994 Rwandan genocide was also hinged on the Universal Jurisdiction paradigm as it applies to the crime of genocide

⁹⁰⁹ Germany, Denmark, Austria, Switzerland, Belgium for instance accept universal jurisdiction for genocide, while the USA does not. The trial of the two Rwandan Nuns for genocide by the Belgian court was premised on the existence of a universal jurisdiction for the crime of genocide.

⁹¹⁰ William Schabas op cit p. 404.

⁹¹¹ Ibid p. 354.

minorities slated for destruction has been established.”⁹¹² The matter of intervention can however be inferred from Article VIII of the Convention especially with regard to the debate over its adoption.⁹¹³ However, with the adoption of the responsibility to protect principle, the obligations are clearly spelt out now. The language of Article 1 of the Genocide Convention suggests that a certain kind of action is required on the part of the parties to the convention to prevent and punish crimes of genocide. The use of the word “undertake” translates to a promise to do something. Applying the principle of *pacta sunt servanda*,⁹¹⁴ one, therefore, expects action in a situation of genocide. States would not be putting into effect the words of the Convention by sitting idle in the face of genocide. The enabling article in the Convention that allow for states to categorise a particular situation as genocide is Article VIII. The Convention does not stipulate the action that needs to be done in order to stop the genocide from continuing. It does not also require the UN to intervene militarily in order to stop it. While this might be true, literally, the implication of such genocidal actions constituting a threat to international peace and security exists and hence, requires a UN Chapter VII action. With the introduction of the responsibility to protect into the debate on civilian protection, it becomes obligatory for the international community to act in preventing and punishing those involved in perpetrating the act of genocide.

While genocide is regarded as a very serious crime, crimes against humanity are equally no less as grave. The Appeals Chamber in *Prosecutor v Kayishema and Ruzindana* was of the

⁹¹² Raphael Lemkin, “Genocide as a Crime in International law,” 41 *American Journal of International Law*, 1947 pp. 145-150.

⁹¹³ William Schabas op cit p. 491. Article VII states that “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”

⁹¹⁴ See Article 26 of the Vienna Convention on the Law of Treaties.

view that genocide is not the crimes of crimes.⁹¹⁵ It held that there is no hierarchy of crimes under the ICTR Statute and that all the crimes specified therein are “serious violations of international humanitarian law,” capable of attracting the same sentence.⁹¹⁶ It is true that the ICTR statute does not specify the hierarchy of crimes under its jurisdiction. However, it can be argued that since the nature of proof required for a conviction of genocide is more stringent than that required for crimes against humanity and other crimes under the statute, a higher value is placed on the crime of genocide. Moreover, the fact that genocide is an act intended to destroy a protected group makes it more serious.

In considering whether the crimes in Darfur amounts to genocide, the following issues need to be considered. First, do the acts themselves fall within the acts as articulated by the Genocide Convention and the ICC Statute? From the preponderance of evidence available, one can argue that the acts as outlined by the two international conventions mentioned above are in existence, especially the acts of killing members of the group, causing serious bodily or mental harm to the members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.⁹¹⁷ It could also be argued that the act of rape by the *Janjaweed* is aimed at imposing measures intended to prevent births within the black African group. This is especially the case when viewed against the backdrop of the Arab culture of ascending miscegenation. Moreover, all the underlying acts need not be committed by the perpetrator for it to amount to genocide. One of the enumerated acts would be enough to sustain a conviction for genocide if the other aspects of the definition are proved.

⁹¹⁵ *Prosecutor v Kayishema and Ruzindana* op cit.

⁹¹⁶ Ibid.

⁹¹⁷ Various victims of the Darfur conflict interviewed by the author indicate the existence of this element of the crime.

The second consideration in the determination of genocide in Darfur would be whether the targeted groups are part of the protected groups under the relevant international conventions. Recourse to Article II of the Genocide Convention and Article VI of the Rome Statute reveals that the black Africans of Darfur qualify as an “ethnic or racial” group. Evidence suggests that the black Africans in Darfur see themselves as ethnically and racially different from the Arabs.⁹¹⁸ Their culture and language are also different from the Arabs. They would, therefore, qualify as an ethnic or racial group. There is evidence to suggest that the people targeted by the government of Sudan and its *Janjaweed* militia are easily identified as either belonging to the Masaalit, Zaghawa, and Fur ethnic group or are identified as black Africans.⁹¹⁹ Their black “Africaness” is what identifies them and sets them aside for such attacks.

The third consideration will be to determine if there was a genocidal intent in the commission of the enumerated crimes. The determination of human intent is not easily discernible, more so, the determination of the intent of a state.⁹²⁰ However, in determining intent, inferences can be made from utterances of government officials especially those who occupy sensitive positions. For instance, Musa Hilal’s statement to the intelligence and security chiefs in 2004 to “change the demography of Darfur and empty it of African

⁹¹⁸ Adam Yacoub Adam, Darfur IDP, interviewed telephonically by the author on November 30 2008.

Also, Aishatu Ismail, Darfur IDP, interviewed telephonically by the author on November 30 2008.

⁹¹⁹ Musa Ahmed al Nur, Darfur IDP, interviewed telephonically by the author on March 24 2009.

Amina Daregie, Darfur IDP, interviewed telephonically by the author on March 24 2009. Hassan Mohammed, JEM negotiator, interviewed telephonically by the author on March 24 2009.

⁹²⁰ See *Prosecutor v Jelisić* (Appeals Chamber) where the Appeals Chamber noted that “as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.” Also, as Lord Denning, an English Lord Justice stated that even the devil does not know man’s intention.

tribes,”⁹²¹ is an indication of what the *Janjaweed* plans were. Since Musa Hilal has not denied his *Janjaweed* connection, and its link with the government has been established, one can, therefore, safely attribute that intention to the government of Sudan. Secondly, President Al Bashir’s statement that “[O]ur priority from now on is to eliminate the rebellion, and any outlaw element is our target...We will use the army, the police, the Mujahedeen, the horsemen to get rid of the rebellion,”⁹²² is indicative of the government’s intention to employ all extra-judicial means in the elimination of the rebellion. The actions of the government during the conflict would also be able to point to what its intentions are. For instance, it could be argued that the indiscriminate bombing of African villages by the government army and the raiding, raping and burning of the villages by the government backed *Janjaweed*,⁹²³ is an indication of the government’s intention to destroy in whole or in part the African people of Darfur. The encouragement by the government to the Arab people of Darfur to take over the villages abandoned by the Africans during their flight for safety seems to suggest the overall intention of the government – forceful displacement of the black African race.⁹²⁴ The government’s intention could also be inferred from its failure to act to curb the atrocities committed by the *Janjaweed* and the Sudanese military.

If, however, the government of Sudan denies its culpability in genocide, that is, having a direct hand in the attacks that could be interpreted as genocide; they could still be held liable for failure to act in putting a stop to the atrocities. The principle of responsibility to protect civilians places on the government the onus of showing that it did try to the best of

⁹²¹ Julie Flint and Alex de Waal, op cit p. 39.

⁹²² Associated Press, “Sudanese President Says war against Outlaws is Government’s Priority,” op cit

⁹²³ Ahmed Imam Kelai, JEM soldier, interviewed telephonically by the author on May 29 2009. Major SB (surname not included), UNAMID Peacekeeper, interviewed telephonically by the author on May 29 2009.

⁹²⁴ Various civilians at the IDP camps interviewed telephonically by the author indicated that when they tried returning to their homes and villages, they found out that it had been taken over by Arab civilians. The *Janjaweed* prevented them from rebuilding and re-occupying their villages.

its ability to protect the civilians from coming to harm during the conflict. This principle was given a legal interpretation in *Prosecutor v Rutaganda* when the Trial Chamber held that a person can also be held liable for an international crime where there is a duty to act and the person omits to act.⁹²⁵

The report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General in 2004 is instructive in this thesis. The commission which was chaired by Antonio Cassese visited and consulted extensively in Sudan and Darfur in particular. The commission's view is that genocide did not occur in Darfur, though it argues that two elements of genocide might be deduced from the gross violations of human rights and violations of international humanitarian law perpetrated by the government of Sudan and its *Janjaweed* militia. These elements are, the *actus reus*, i.e. "the killing or causing serious bodily harm or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and second, on the basis of subjective standard, the existence of a protected group being targeted by the authors of criminal conduct."⁹²⁶ Notwithstanding the presence of the above elements, the very crucial element of genocidal intent appears not to be present according to the Commission. While the findings of the Commission were as to the available evidence in 2004, it must be stated that if the existing circumstances are re-examined presently, it might be possible to infer the existence of genocidal intent. In fact, the indictment of Omar al Bashir by the ICC prosecutor for crimes against humanity, war crimes and genocide in July of 2008 supports this analysis. Be that as it may, it is a matter for the courts to decide, that is if the matter ever gets to be adjudicated upon by the

⁹²⁵ *Prosecutor v Rutaganda*, ICTR, Trial Chamber Para 41.

⁹²⁶ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of September 18 2004, available at http://www.un.org/news/dh/Sudan/com_inq_darfur.pdf accessed February 16 2007.

International Criminal Court (ICC). Notwithstanding the fact that the ICC judges did not eventually issue an arrest warrant against President Bashir for genocide, evidence against him on this count remains strong.

However, what the victims of the atrocities want is protection from the killings. No reasonable person would prefer that the authorities punish the perpetrator of a grave injustice rather than prevent such person from inflicting the harm on the victim in the first place. The logic, therefore, suggests that instead of the international community engaging in academic gymnastics of determining whether the killing fields of a particular situation qualifies as genocide, crimes against humanity, war crimes or domestic crimes, the international community should strive to prevent further killings even if it later turns out that it made a mistake in its labelling of the situation. As Abbas Bundu, a one time Executive Secretary of ECOWAS argued in favour of ECOWAS' intervention in Liberia that he would rather make a mistake trying to solve a problem than to remain completely indifferent.⁹²⁷ The question, therefore, is what effect do threats of intervention have on a genocidal state? Does it deter or embolden such regime set on a genocidal path?

The UN report of the Independent Inquiry into Actions of the UN During the 1994 Genocide in Rwanda while blaming the UN for its failure to act in Rwanda noted that "[A]cknowledgment of responsibility must also be accompanied by a will for change: a commitment to ensure that catastrophes such as genocide in Rwanda never occur anywhere in the future."⁹²⁸ Four years from the charge to the UN to be more committed in preventing atrocities of such scale, Darfur caught the international community's attention. Six years

⁹²⁷ Jinmi Adisa, op cit p. 215.

⁹²⁸ S/1999/1257 (December 15 1999).

after making international headlines, the international community is still at a loss on the best approach to preventing and putting to a stop the continued loss of lives in Darfur.⁹²⁹ The question that international lawyers and international relations scholars need to address is whether the need to respect Article 2 (4) of the Charter automatically trumps the global duty to prevent genocide.⁹³⁰ Put blandly, should the international community respect the letters of the law, that is, the so called rule of non intervention and use of force, while the spirit of the law – protection of civilians is consigned to the dustbin? Despite the acclaim that welcomed the responsibility to protect concept, its application, especially in Darfur faces a multitude of challenges.

Challenges to the application of the Responsibility to Protect Principle

As have been observed earlier, the philosophical underpinning of the responsibility to protect principle is not a novel idea. The principle however has advanced the international community's approach to civilian protection. It must also be noted that, the trigger mechanism for responsibility to protect which is when the state is unable or unwilling to protect the people, is also not a new trigger mechanism in international law. It is in recognition of the primacy of states in international relations. This complementarity regime first appeared in the Statute of the International Criminal Court (Rome Statute of 1998.) While recognising the primacy of national courts to try crimes of international concern, the ICC's jurisdiction is triggered where the national court is unable or unwilling to try such cases. The central idea, therefore, is that perpetrators of such crimes should not be protected by their national justice system. Notwithstanding the debut of the responsibility

⁹²⁹ Shedrack Agbakwa op cit p. 518.

⁹³⁰ Harold Hongju Koh, "The Spirit of the Laws," 43 *Harvard International Law Journal* 2002 p. 28.

to protect principle and its seeming acceptance by states and the wider international community, its application to civilian protection is still dogged by some challenges.

The key challenges to the implementation of the concept are lack of political will, lack of authorization and lack of operational capacity. For instance, despite the acknowledgment of the concept in 2005, it took the UN Security Council two years to agree to the deployment of UN Peacekeepers alongside the AU Peacekeepers in what has been termed a hybrid mission. Despite Resolution 1769 of July 31 2007, authorizing the deployment of 26,000 peacekeepers, Khartoum has made it difficult for the full realisation of the UN AU Mission in Darfur (UNAMID) mandate by insisting that only African states would be allowed to deploy peacekeepers to Darfur. It however, gave a select few other countries the privilege to deploy, rejecting outright any deployment or equipment support from western countries. While Resolution 1769 is authorised under Chapter VII of the Charter, it is not as robust as envisaged. The watered down version of the resolution was as a result of China's threat of using its veto in the UN Security Council against any resolution that would authorise the use of force against Sudan. It must be noted that Resolution 1769 in its present state is not what the principle of responsibility to protect envisages.

Secondly, despite the recognition of the underlying principles of the concept by the AU Constitutive Act in its Article 4 (h), it could not garner enough political will to authorise an intervention to save the civilian population of Darfur from such grave circumstances as articulated in the Constitutive Act. Even if the AU had the necessary political will to act, the operational capacity seems to be weak. This is evidenced from the weak attempt at peacekeeping by the defunct African Union Mission in Sudan (AMIS) and also the inability

of African states to fully deploy the required 26,000 peacekeepers to make up the UNAMID force. However, the current effort by the AU to establish an African Standby Force (ASF) is acknowledged as a step in the right direction. Through creating the necessary partnerships with the west, the Standby Force arrangement can be in place to be mobilised within short notice provided that the African leaders would have the political will necessary to authorise intervention when the situation demands it.

As the conflict in Darfur raged on, the Khartoum government employed all tactics to make sure that food aid and emergency relief aid never got to the displaced Darfurians. For instance, Aid workers needed visas to Sudan and special travel permits to Darfur before they could be allowed to go into Darfur.⁹³¹ The drugs brought in by UNICEF which were needed to stem the health threat in the displaced camps were taken first to Sudanese labs for testing. It was, therefore, obvious that the government was employing starvation as a military strategy just as it did before in the south Sudan and Nuba Mountains.⁹³² In tackling the issue of operational capacity, the Working Group for a UN Emergency Peace Service (UNEPS) has suggested the formation of a permanent service made up of individuals voluntarily recruited from states worldwide.⁹³³ The establishment of such Peace Service is in line with the envisaged establishment of the ASF by the AU.⁹³⁴

Another challenge to the concept especially regarding its application and operationalisation in Africa is the perception that African lives are not worth the costs associated with

⁹³¹ Amina Abdala, Darfur Relief , interviewed telephonically by the author on May 29 2009.

⁹³² Julie Flint and Alex de Waal, op cit p. 112.

⁹³³ Robert C. Johansen, A United Nations Emergency Peace Service to Prevent Genocide and Crimes against Humanity 1, 6 (2005) <http://www.globalactionpw.org/unepe/UNEmergencyPeaceService.pdf>. accessed January 31 2008.

⁹³⁴ African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 13, 9 July 2002.

interventions. Christian Scherrer's honest statement that the international community ignored the killings in Rwanda because "there were no whites dying there," can also be applied to the Darfur situation.⁹³⁵ There has been the perception of applied racism in the authorisation of peacekeeping missions and also the deployment of financial capacity to such missions. The UN Under-Secretary for Peacekeeping alluded to this in his statement that "[T]he Democratic Republic of Congo, where millions have died, is 200 times as large as Kosovo, yet that province in the heart of Europe has a larger peacekeeping force that is better equipped, better supported and backed by an aid effort that is, per person, several hundred times more generous than the one that feeds Congo."⁹³⁶ A disturbing but true statement by Rubinstein W.D is that "if two collectors had been stationed in any shopping mall in the Western world at the time of the [Rwandan] genocide, one raising money to stop 100,000 Tutsi children from being murdered by Hutus, the other raising money to stop 100 elephants from being slaughtered by poachers, which would collect more? If you had a bet on the elephants, it is safe to say you would have put some change in your pocket."⁹³⁷ While the above statement might sound absurd, if not funny, and while many, especially in the west might cringe at the hidden truth, Rubinstein did indeed speak the hidden truth. To some, the conflicts in Africa reflect the barbaric nature of Africans, hence, is not worth intervening. The Somalia debacle of 1992 where 18 US peacekeepers were killed and dragged through the streets of Mogadishu has left a sour taste on the taste buds of the international community's reaction to conflict in Africa. It has often been argued that

⁹³⁵ Christian Scherrer, *Genocide and Crisis in Central Africa: Conflict Roots, Mass Violence, and Regional War* (Westport, CT: Praeger) 2000 p. 141.

⁹³⁶ UN Under-Secretary-General, Jean-Marie Guehenno, UN News Service, "Africa Needs Europe's Help with Peacekeeping, Senior Official says," available at <http://www.un.org/apps/news/printnews.asp?nid=12247> accessed October 20 2007. A Nigerian army officer that served in both missions confirmed to this author that while in the former Yugoslavia, they got better dietary allocations, but the DRC mission was not well catered for. Anonymous (Lt. Col.) discussion with author in Abuja, Nigeria on December 27 2007.

⁹³⁷ W.D Rubenstein, *Genocide: A History*, (London: Pearson/Longman) 2004 p. 291 cited by Shedrack Agbakwa op cit.

Africa is not of very strategic importance to the West and other dominant world powers, and so, conflicts in Africa are often neglected. However, Darfur presents another side to the coin. Ironically, the Darfur atrocities are being ignored for the simple reason that Sudan is of strategic importance to the West, China and Russia.⁹³⁸

While a General Assembly resolution is helpful in identifying relevant principles that the world body need to focus on, the Security Council still remains the institution with the relevant execution action capability.⁹³⁹ Another challenge facing the operationalisation and concretization of the concept as a norm of international law is that some states still view it as an imperialist agenda to invade states at will. There is, therefore, that persistent misconception by many to look at responsibility to protect only as a purely militaristic interventionary measure: far from it. The concept encompasses other non military aspects of peace making and conflict prevention as well as post-conflict reconstruction and development. Military force, even when it is used, would be used as a tool of last resort signalling that all other efforts at diplomacy has failed and nothing short of the use of force would stop the atrocities from continuing. However, Ruth Wedgwood argues that only an army can put a stop to genocide, notwithstanding the existence of legal norms to dissuade indiscriminate violence.⁹⁴⁰ In order, therefore, to enhance the appeal of the principle and check its chances of abuse, the guidelines recommended by the ICISS, High-Level Panel and the Secretary-General of the UN should be adopted by the Security Council. It is also necessary to build the capacity of international institutions, governments and regional

⁹³⁸ Shedrack Agbakwa, op cit p. 524.

⁹³⁹ Gareth Evans, op cit.

⁹⁴⁰ Ruth Wedgwood, "The International Criminal Court: An American View," 10 *European Journal of International Law* 1999 p. 93.

organisations to respond effectively to such situations.⁹⁴¹ There should be a mechanism to generate the necessary political will needed to effect a response based on the principle when it is necessary.

⁹⁴¹ Ibid.

Chapter V Recommendations and Lessons Learned

The political history of Sudan suggests that Darfur is not the only region in Sudan outside of the south that has been marginalised. It is very pertinent to note the ‘coincidence’ in the timing of the 2003 attack that led to the internationalisation of the Darfur conflict. This happened as the international community was almost winding down its peace negotiations between the north and south of Sudan. Presently, south Kordofan and the eastern region of Sudan are intensifying their demands that Khartoum address their claims of political and economic marginalisation, which is at the root of the Darfur conflict.⁹⁴² Despite the existence of the Eastern Sudan Peace Agreement entered into between the government of Sudan, and the Eastern Sudan Front on June 19 2006 that provides for political inclusion of the eastern Sudanese, the re-emergence of agitations from the eastern front seem to suggest that the agreement is not being implemented. In resolving the conflict in Darfur, therefore, it is also very important that an audit of other grievances in Sudan is done in order to avoid the breakout of conflict in another region at the end of the Darfur conflict.⁹⁴³

In order to operationalise the responsibility to protect concept, states need to embrace it, and see it not as an imperialistic design to intervene and effect regime change in non-deserving situations, but, as a mechanism that is targeted towards civilian protection. The understanding of the concept as a purely militaristic venture needs to be jettisoned. In fact, it is critical that the three trajectories of the concept, that is, prevention, reaction, and

⁹⁴² Yahya Aki Kelai, Darfur indigene, interviewed by the author at Pretoria, South Africa on June 3 2008. See also Sudan’s Southern Kordofan Problem: The Next Darfur?, International Crisis Group Africa Report N°145 – 21 October 2008, available at http://www.crisisgroup.org/library/documents/africa/horn_of_africa/145_sudans_southern_kordofan_problem_the_next_darfur.pdf accessed February 10 2008.

⁹⁴³ Osman Mukhtar, Darfur indigene, interviewed by the author at Pretoria, South Africa on June 3 2008.

rebuilding be presented as a whole. However, since the situation in Darfur has gone past the prevention stage, the reaction and rebuilding aspects need to be emphasised. According to Usman Umda, the escalation of the conflict would have been avoided, if the government of Sudan had addressed the political and economic marginalisation of Darfur that has been a recurrent feature of the region. He further reasoned that following the internationalisation of the conflict in 2003, if the international community had acted promptly, the level of civilian death and displacement witnessed would have been avoided.⁹⁴⁴ Three elements are very vital for the fulfilment of the responsibility to protect in Darfur and elsewhere. They are political pressure, humanitarian relief and protection, and support for the people to rebuild and develop.

The conflict in Darfur has revealed once more, that the international community is not fully committed to its avowed goal of civilian protection. This protection cannot be achieved through the crafting of mechanisms alone, but more through their implementation. The depoliticisation of the UN Security Council for instance, would go a long way in securing the commitment of the international community especially in situations that require the application of the concept. The African Union need to implement to the letter, Article 4 (h) of its Constitutive Act which is targeted towards civilian protection. Since the various attempts at diplomatic solution by the UN and the African Union seem not to yield the desired effect in Darfur, the UN Security Council should consider a more robust approach, maybe through tougher sanctions regimes. However, there would still be the need for the parties to the conflict to negotiate in resolving the root causes of the conflict. The initiative by the government of Qatar to broker peace between the Sudanese government and the rebel groups is commendable. However, such efforts must be coordinated by either the UN

⁹⁴⁴ Usman Umda, Darfur indigene interviewed by the author at Johannesburg, South Africa on May 5 2009.

or the AU, in order to offer it a cloak of credibility, especially against the backdrop of allegations of trying to truncate the UN/AU peace effort, levelled against President Bashir by the rebel groups.⁹⁴⁵ Furthermore, the UN and the AU should work towards strengthening the capacities of states within the continent, in order to dissuade them from choosing the path of genocide, crimes against humanity, and ethnic cleansing. Addressing the causative factors like deep rooted political and economic marginalisation, ethnic and religious differences, and endemic poverty in the continent, would go a long way towards addressing the spate of conflicts in the continent. Through the strengthening of states' institutions, states that have the tendency to veer towards conflict would be able to adopt good governance strategies, thereby reducing most of the factors that lead to violent conflicts in the first place.

Khartoum's claim that deployment of peacekeepers without its consent would be tantamount to a declaration of war on it is premised on the knowledge that the deployment of peacekeepers, especially from the west, would be a more effective tool than what currently exists in Darfur. The international community should, therefore, put more pressure on Khartoum to accept deployment of peacekeepers from the west, since it is very clear that the present makeup of the UNAMID force cannot effectively keep the peace, and protect the civilian population. The Security Council should review the mandate of the UNAMID mission, especially as it affects civilian protection. The mission should be given a more robust mandate for the protection of civilians. At the same time, efforts by the international community to sustain the political negotiations between Khartoum and the rebel groups need to be enhanced, notwithstanding the ICC indictment of Al Bashir.

⁹⁴⁵ Ahmed al-Amin Ismail Suleiman, SLA Commander, interviewed telephonically by the author on May 29 2009.

This research reveals that Sudan has its body in Africa and its heart in the Arab world. What this invariably means is that the Arab states are very instrumental to Sudan's ending its attacks in Darfur. The peace negotiations desired here are sincere efforts, and not based on deceit and personal agenda. At the same time, China and Russia are great allies of Khartoum, and hence, any designed political solution must factor in their support. Since the Darfur Peace Agreement (DPA) of May 2006 has failed to achieve peace in Darfur, the UN AU joint mediation must be intensified. In fact, after the signing of the DPA the security and humanitarian situation in the Darfur region deteriorated, as there were more targeted attacks against the civilians, and the aid workers when compared to the peak of killings in 2004.⁹⁴⁶ The lack of progress on the implementation of the DPA, and the ignorance of its implications, especially amongst the Internally Displaced Persons (IDPs) contributed to the unpopularity of the agreement.⁹⁴⁷ The reasons advanced by JEM and the SLA faction led by Abdul Wahid al Nur for not signing the DPA should be part of the core issues to be determined. Furthermore, it would also be reasonable that representatives of the Internally Displaced Persons from the various IDP camps scattered all over Darfur, and the refugee camps in Chad and elsewhere be part of the discussions, as they form a veritable constituency in the issues under discussion, since they are also directly involved. While it would be unreasonable to force the rebel groups to sign the DPA, it would also be unreasonable to re-negotiate all aspects of the DPA, as it would further stretch the negotiations. What the mediators can do is to adopt all the mutually agreed provisions of the DPA, and further negotiate on the outstanding issues.

⁹⁴⁶ Suliman Baldo, "The African Response to Darfur," in David Mepham and Alexander Ramsbotham (ed), *Darfur: The Responsibility to Protect*, Institute for Public Policy Research, 2006.

⁹⁴⁷ Ibid.

Security and safety of civilians is of paramount importance in the Darfur region, and hence, Khartoum needs to disarm the *Janjaweed* militia and make a commitment not to resort to the use of militia in future. This is key to achieving sustainable peace both in Darfur, and in the whole of Sudan. Where the government of Sudan is unable or unwilling to disarm the militia, the UNAMID mandate should be reviewed to accommodate disarming of the militia. The refugees and the IDPs need to be guaranteed a safe return home, and mechanisms need to be put in place to adjudicate land ownership claims which would be a feature of the post conflict rebuilding. As was revealed during the research, most of the land and property abandoned by the fleeing African refugees and IDPs have been taken over by the Abbala Arabs.⁹⁴⁸ Various participants interviewed confirmed that they were aware that they had lost their land to the Abbala Arabs. In fact, the importance of having a mechanism to adjudicate on land ownership is expressed in these sentiments by this participant; “I will fight to death whosoever has taken over our lands. They killed my husband, and my sons, they must kill me if they want my land.”⁹⁴⁹ Another IDP, Aaliyah Abdallah states that “I am ready to die if I do not get my land from those Arabs who took it after killing us.”⁹⁵⁰ There is a groundswell of opinion amongst the Darfurians that they were driven out of their land because the “Arabs” wanted to occupy it.

Prevention: the Best Tool in Civilian Protection?

While responsibility to protect was enthusiastically welcomed by states in 2005, “some countries that previously endorsed it ...now develop symptoms of buyer’s remorse.”⁹⁵¹ The concept, therefore, seems to be floundering, and in order to rescue it, emphasis need to be

⁹⁴⁸ Ibrahim Bakhour, Darfur IDP, interviewed telephonically by the author on May 29 2009.

⁹⁴⁹ Amina Musa Abakr, Darfur IDP, interviewed telephonically by the author on May 29 2009.

⁹⁵⁰ Aaliyah Abdallah, Darfur IDP, interviewed telephonically by the author on May 29 2009.

⁹⁵¹ Ramesh Thakur, “Should the UN Invoke the ‘Responsibility to Protect’?,” *The Globe and Mail*, May 8 2008.

made on its non coercive sides.⁹⁵² The effective application of the preventive aspect of the concept “will promote the political legitimacy of military intervention when and where it becomes necessary.”⁹⁵³ Since this study has identified lack of political will as a major challenge to the operationalisation, especially as regards military intervention, there is, therefore, the need that stronger emphasis be placed on preventive action instead of reaction. States, especially those who wield more influence in the international arena might be more amenable to act in order to prevent, than to react through the use of force after the fact. What this entails is that the Early Warning Signs coordination of the UN and the AU should be more effective. It is not enough to get the early warning of impending conflict, action on such warning is critical in averting such massive atrocities as witnessed in Darfur. It has been suggested that “[A]lthough Darfur was a particularly remote and isolated corner of the world with very little international presence in 2003/4, the [genocide] did not happen because of a lack of awareness of what was going on, or of a failure in early warning.”⁹⁵⁴ Early warning will amount to nothing if early and decisive action is not followed through. However, early and decisive action must not be reactionary alone, but could be preventive in nature. The danger in invoking the preventive concept is that it could render the notion of responsibility to protect meaningless, as it is not in every of such cases that mass atrocities as envisaged by the concept could be occurring. At what time would it be wise to activate the preventive aspect of the concept? Activating it earlier could be trivialising the concept, while, leaving it latter might be too late.

⁹⁵² Eli Stamnes, “Operationalising the Preventive Aspects of the Responsibility to Protect,” *NUPI Report Responsibility to Protect* No. 1 2008.

⁹⁵³ Ramesh Thakur, op cit.

⁹⁵⁴ Mukesh Kapila, “Why the International Community Failed Darfur,” in David Mepham and Alexander Ramsbotham (ed), *Darfur: The Responsibility to Protect*, Institute for Public Policy Research, 2006.

This is the dilemma that the application of the preventive aspect of the concept faces. It is akin to the same dilemma that the prosecutor faces in a domestic court in trying to prove a case of attempted arson. At what time should an attempted arsonist be arrested and charged for the offence? Is it when the person has the implements of burning a house, or when the match is struck? It could be late then. If earlier, the accused could argue that his intention was something else other than arson. The problem with the preventive aspect of the responsibility to protect is that, by the time a particular situation is adjudged to qualify as fitting a situation that warrants preventive actions, civilians could have been in major danger. What this, therefore, means is that preventive actions like capacity building, etc, can take place outside the framework of responsibility to protect. Preventive action under the aegis of responsibility to protect has the tendency to be widely interpreted. For instance, the appeals that the Georgia conflict be viewed through the prism of the concept highlighted the dilemma associated with giving a wide interpretation to it. This dilemma need to be addressed because, “[B]y invoking the principle in the contexts that are well beyond those outlined in the World Outcome Document, false expectations as well as false fears may be created, and the popular and political support of the principle may well in turn be challenged.”⁹⁵⁵ Secondly, preventive actions within the responsibility to protect framework can still be taken as a post conflict measure to prevent a relapse to conflict.

However, for an effective preventive mechanism to be put in place, the early warning mechanism must be effective together with the requisite political will. Where political will is lacking, just as in the reactive aspect of the concept, states would fail to act. Arguing in favour of the preventive aspect of responsibility to protect, Eli Stamnes states that the truism that prevention is better than cure applies to responsibility to protect concept, and

⁹⁵⁵ Eli Stamnes op cit.

they are also easier and morally defensible.⁹⁵⁶ He further argues that the development of a culture of prevention would go a long way in tackling issues of mass atrocities in the world.⁹⁵⁷ Despite the great appeal this culture of prevention holds for the international community, it is also an elusive concept, since it would not be easy to define how states can contribute to it, and who would be responsible for nurturing this culture.⁹⁵⁸ In the prevention of mass atrocities, therefore, “the prevention of deadly conflict must become a commonplace of daily life and part of a global cultural heritage passed down from generation to generation.”⁹⁵⁹ Despite the UN Charter commitment in its preamble to “save succeeding generations from the scourge of war,” and Dag Hammarskjöld’s identification in 1955 of prevention and conflict resolution as the UN’s most significant function, the world body have not done enough towards achieving this goal.⁹⁶⁰ It has been suggested that “at the UN, conflict prevention is preached more often than it is practiced.”⁹⁶¹ It is only in keeping with this tradition that the international community can succeed in preventing situations of mass atrocities.

African Union: An Instrument in Operationalisation

The African Union has assumed direct responsibility of maintaining peace and security within the African continent. It however recognises the primacy of the UN in matters of

⁹⁵⁶ Ibid.

⁹⁵⁷ Ibid.

⁹⁵⁸ Ibid.

⁹⁵⁹ Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict: Final Report* (Washington DC: Carnegie Commission on Preventing Deadly Conflict) 1997, p. xiv.

⁹⁶⁰ Alex J. Bellamy, “Conflict Prevention and the Responsibility to Protect,” *Global Governance*, Vol. 14 No. 2 April-June 2008, p. 136. See also, Report of the Secretary-General on the Work of the Organisation, General Assembly, A/2911, 15 September 1955.

⁹⁶¹ Fen Osler Hampson and David M. Malone, “Introduction: Making Conflict Prevention a Priority,” in Fen Osler and David Malone (ed.), *From Reaction to Conflict Prevention: Opportunities for the UN System* (Boulder: Lynne Rienner) 2002 p. 4.

international peace and security.⁹⁶² The UN and other regional arrangements should, if they do not already have, maintain a pool of mediators, negotiators and conflict pacifiers for effective deployment to conflict areas. This can be modelled along the same line as the ASF. Since the AU has shown its commitment to the issues of peace and security in the continent, the UN and other members of the international community need to engage with it, especially in seeing to the success of the ASF. This, the international community can do through the provision of equipment and other logistical support, training and funding. Notwithstanding the reactionary nature of the ASF, its capacity to take on non-peacekeeping tasks and preventive deployment should be developed. Considering the high commitment of troop contributing states in existing conflicts, and the high demand that the reactive aspect of responsibility to protect would make on states, the AU's capacity in delivering on the preventive aspect of the concept is worth focusing on. Though in the Darfur situation, the international community should focus more on the reactive and the rebuilding aspect. There is however, a link between prevention and rebuilding, especially when viewed against the backdrop of the goals of the two concepts. Furthermore, it would be easier to secure a Security Council's mandate to prevent mass atrocities, than it would be to secure its mandate to react.⁹⁶³

Notwithstanding the existence of international legal instruments that speaks to civilian protection, civilians in the Darfur conflict could not be protected both by their state, which has the primary responsibility to protect them, and the international community, which has the subsidiary responsibility. The conflict has, therefore, revealed the international community's dilemma in protecting civilians, especially during violent conflict. With the

⁹⁶² Protocol Relating To the Establishment of the Peace and Security Council (PSC) of the African Union, 2002, Article 17 (1).

⁹⁶³ Eli Stamnes, *op cit.*

politicization of the Security Council, and the apparent lack of political will on the part of the African Union to operationalise the responsibility to protect principle, the civilian population of Darfur, and others caught up in such quagmire appear doomed to a cycle of violence. In fact, the common refrain of “African solutions to African problems” seems to indicate that the African Union and its leaders do not really care what happens to the civilian population, so long as they continue in power. For instance, the apparent non condemnation of the Robert Mugabe regime in Zimbabwe by African leaders does not bode well for the concept. Furthermore, the request by the AU that the UN Security Council suspend the ICC prosecution of Sudanese president, Omar Hassan al-Bashir for war crimes and crimes against humanity, is not in keeping with the philosophy of African solutions to African problems. Again, there have been criticisms on the AU’s approach to issues of fraudulent elections in the continent. It appears that the AU is legitimising such frauds that seek to entrench dictatorial governments in power. The Kenya and Zimbabwean elections are two instances where the so called African solutions for African problems, ended up jettisoning the will of the people. However, it must be said that the ‘protection’ of leaders by the AU is not what the African Renaissance, or African solutions to African problems envisages.

The strengthening of the continental security mechanism is very apt in order to make the responses to conflict areas more efficient. Anecdotal evidence seem to suggest that if there was a strong Regional Economic Community (REC) in the Horn of Africa, it could have affected positively, the way the conflict in Darfur was addressed and managed. However, disadvantages exist in this alternative. First, the question of the hegemonic designs of states in the particular region has always been a contentious issue. For instance, this fear was

present when the Nigeria led Economic Community of West African States (ECOWAS) wanted to intervene in the conflict in Cote d'Ivoire in 2003.⁹⁶⁴ Proximity to the conflict, while a plausible reason to get involved in its resolution, often “generates tension and undermines the spirit of impartiality between neighbours, sometimes to the extent that neighbours become part of the problem.”⁹⁶⁵ Furthermore, the AU’s reluctance to consult with the Inter Governmental Authority on Development IGAD with respect to assisting in brokering peace in the region was a shortcoming of the AU’s peace efforts.⁹⁶⁶

Notwithstanding the non adoption by the UN World Summit of the suggestion by the High-Level Panel that “in some urgent situations authorisation may be sought after...operations have commenced,” the established trend in intervention, especially in Africa suggests that the AU or other sub regional RECs that have the necessary political will and capacity would intervene first, and seek authorisation later. Moreover, the PSC Protocol anticipates that the AU could act first and seek authorisation later.⁹⁶⁷ Despite this, what is required at either the UN or the AU level is political will. The legitimacy of the Security Council to deliberate on military intervention in Africa is questioned because there is no African voice occupying the permanent membership position.⁹⁶⁸ However, it could be argued that with the trend that exists within the AU, an African permanent member could work against the authorisation of military intervention. In order to operationalise the responsibility to protect in Africa, the African Union must jettison its culture of protecting African leaders that engage in massive human rights violations.

⁹⁶⁴ Lamin, AR. “The Conflict in Côte d’Ivoire: South Africa’s Diplomacy, and Prospects for Peace,” *Institute for Global Dialogue Occasional Paper* No. 49 2005.

⁹⁶⁵ Sam Ibok, “The Effectiveness of African Regional and sub-Regional Mechanism to Prevent Ethnic and Racial Conflict.” Paper Presented at the Regional Seminar of Experts on the Prevention of Ethnic and Racial Conflicts, Addis Ababa, 4-6 October 2000. pp. 7-9.

⁹⁶⁶ Suliman Baldo, op cit.

⁹⁶⁷ PSC Protocol Article 17(1) op cit.

⁹⁶⁸ Mephram and Rambotham, op cit.

Military Intervention: The Best Option Tool?

Military intervention mostly premised on humanitarian intervention is one of the tools states and the international community uses in protecting civilians under threats from either their states, or from rebel groups. However, there have been ongoing debates on the legality and legitimacy of such interventions. While responsibility to protect is not just about military intervention, it recognises the use of force for human protection. The misconception that the responsibility to protect is limited only to military intervention is one of the drawbacks for its acceptance and operationalisation. While military intervention is an aspect of the responsibility to react, it needs to be re-stated that it must be used as a last resort. Moreover, military intervention when used must clearly adhere to acceptable norms to be developed by the international community. In order, therefore, for the concept to be operational there is the need to spell out clearly, the limits of military intervention. The non adoption of the criteria proposed by the ICISS and the UN High-Level panel should not be an albatross to its implementation. The international community, represented by the UN need to spell out with exact precision as possible, the circumstances under which non consensual military force can and cannot be used in a way that is consistent with the principles of the concept. Khartoum's role in the Darfur conflict entails that it would be difficult to secure its consent and full cooperation for a peacekeeping mission in the region, especially, since it appears that it has the upper hand in the conflict.

Notwithstanding that the use of force in achieving the protection envisaged under the concept must be as a last resort, Darfur seems to suggest that force should have been

introduced earlier in the conflict, at least for the protection of civilians. The question that this raises is at what stage of the conflict should the international community call for military action? Or put differently, what are the factors that should determine the despatch of military action? Is it the number of months, or years the conflict has lasted; is it the number of diplomatic efforts that have been initiated and failed; or the number of civilians displaced and killed? If however, the criteria for endorsing an intervention based on the responsibility to protect principle as articulated by the ICISS, and the UN High Level Panel was adopted by the UN, and implemented by the Security Council, then the above questions would not arise, as the determinant factor would no longer be that of number of people dying, or time within which the conflict has matured, but the subjective application of the criteria to the particular circumstances. The wholesome adoption of the ICISS report, especially its conditions for a legitimate and effective military response need to be considered by the Security Council

With the benefit of hindsight, one can argue that it is possible that if military action was initiated in 2004, the incessant killing, pillaging, looting, and raping of civilians would have long stopped. The AU Commission Chairperson in 2004, requested that the “AU develop a plan for a full peacekeeping force, whose mandate would include the forcible disarmament of the [Janjaweed] militia, among other things.”⁹⁶⁹ While this was a good prescription to the situation, it was not followed through. It is very possible that if the suggestion was backed with political will, hundreds of thousands of civilians would have been saved from the fate of death, and displacement that eventually befell them. However, the flipside of the argument is that one is not sure of the outcome of a particular action, until it is done. A look at the US led war in Iraq would easily convince one that there is no

⁹⁶⁹ Suliman Baldo op cit.

quick war. However, the dynamics of the two situations are different. With the UN reluctance to act, the AU should have authorised a more robust intervention mission in fulfilment of its Article 4 (h). Darfur has shown that failure of the international community to intervene with its maximum resources in such a conflict is a recipe for failure.⁹⁷⁰

Secondly, the gradual strengthening of the size of the mission and mandate “are a recipe for ineffective containment of massive attacks against civilians – or the prevention of impending attacks.”⁹⁷¹ What the AU should have done after its initial assessment of the situation and assessment of the level of troops required, together with the mandate needed, was to follow it through with assistance from the international community. Quick response that is robustly contrived should be the best option, instead of the usual incremental strategy adopted by the international community. This slow incremental approach allows the perpetrators of the crime to either finalise their “project,” or to entrench themselves, making it more difficult to dislodge them.⁹⁷² Earlier intervention in Darfur could have “averted or moderated the magnitude of the [genocide].”⁹⁷³ A serious mistake the international community made at the debut of the conflict was not to include Darfur issues under the discussions for a Peace Agreement between north and south Sudan.⁹⁷⁴ International pressure is needed in whatever form in order to dislocate the conflict, and provide for political solution. This pressure should be applied on both Khartoum and the rebels, as both have been implicated in crimes targeting the civilian population. The overall

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid.

⁹⁷² Mukesh Kapila, *op cit*.

⁹⁷³ Ibid.

⁹⁷⁴ Ibid.

aim of the pressure is to protect the civilian population, while the negotiated settlement continues.⁹⁷⁵

Iraq and Afghanistan have shown that military success is different from political success. That is, in situations where a large-scale military intervention is embarked on, political intervention is equally necessary to stabilise the polity, especially post conflict. However, while mediation, negotiation, and diplomacy are tools necessary to end wide scale atrocities, and human rights abuses, there is no doubt that it might not by itself be enough to stop such killings and offer protection to the civilian population, especially, in premeditated atrocities. Military action, used with the soft power approach of mediation may at least offer that protection to civilians. However, there is the need to make the two policy options distinct from each other. This is principally because, mediators, are expected to be neutral, while the use of hard policy option does not signify neutrality. In order to maintain the neutrality expected by mediators, Mepham and Rambotham suggest that the mediating should be undertaken by NGOs, for instance, Centre for Humanitarian Dialogue.⁹⁷⁶ Furthermore, the Iraq and Afghanistan interventions though not couched as responsibility to protect situations, have cast the concept in an imperialist and agenda seeking light. That notwithstanding, the international community must continue to articulate an effective way of intervening to save civilians from harm. It must be stated that even where the intervention is championed by African states, there is always the danger that states championing the intervention could be seen as pushing a hegemonic or selfish agenda. What matters, therefore, is that the intended intervention would be able to save civilians from harm, no matter the other underlying purposes. From the UN involvement in

⁹⁷⁵ Ibid.

⁹⁷⁶ Mepham and Rambotham, op cit.

peace support operations in Sierra Leone and Democratic Republic of Congo, it is obvious that the lack of a robust mandate directed towards the protection of civilians, is the weakness in efforts at civilian protection through military protection.

While non consensual military intervention is required in Rwanda-like situations, the risks and costs associated with it is quite enormous. On the reasonable prospect test, Mepham and Rambotham are of the opinion that despite the bad situation present in Darfur, non consensual military intervention would not pass the test. They argue that the Darfurians would be put at more risk since the humanitarian relief efforts would come to an end, and there is also the danger of the collapse of the north and south Sudan peace agreement.⁹⁷⁷

While these are legitimate concerns, it must be stated that the international community would not be achieving much were it to provide humanitarian relief for the Darfurians, only for them to be killed by the *Janjaweed* militia or the Sudan Armed Forces. Moreover, the suspension of the operating licences of about 13 NGOs by Khartoum in March 2009, following the issuance of the arrest warrant against Al Bashir indicates that the ruling elite do not really care about the humanitarian needs of the civilians. Furthermore, the collapse of the Comprehensive Peace Agreement (CPA) is imminent despite the non military intervention. There are existing issues of concerns between the parties, and the warrant of arrest issued against Al Bashir will also present its own dynamics.

Failure to Act and its Consequences in Darfur

Kofi Annan captured the ineptitude of the international community to civilian protection when he stated that, “[L]ack of political will, national interest narrowly defined, and simple

⁹⁷⁷ Ibid.

indifference too often combine to ensure that nothing is done or too little too late.”⁹⁷⁸ The timeliness of response by the international community would make a difference between major humanitarian disaster and protection of civilians. For instance, most of the humanitarian actors arrived in Darfur in early 2004 after hundreds of villages had been burnt to the ground and hundreds of thousands of people either killed or displaced.⁹⁷⁹ Earlier attempts to move into Sudan, and Darfur were frustrated by Visa restrictions of the government of Sudan.⁹⁸⁰ The situation has not changed. Khartoum is not ready to allow unfettered access to Darfur. According to Usman Yacoub, “the government in Khartoum does not want outsiders to know the extent of atrocities in Darfur. They also do not want the civilians in Darfur to get access to humanitarian relief that would save their lives.”⁹⁸¹ The same sentiment was expressed by Fatima Amina Ali.⁹⁸² Mukesh Kapila suggests that the use of a rules based approach that relies on independent judgment, would be a good way of addressing the lack of political will that seems to be the bane of international organisations.⁹⁸³ The suspension of the operating licences of not less than 13 NGOs operating in Darfur by President Al Bashir indicates that Khartoum is insensitive to the suffering of the civilian population, as it blames the NGOs for collaborating with the ICC in its investigations.

The treatment of the Darfur situation in its early days as a humanitarian situation, and not a political one contributed immensely to the deterioration of the situation, this, despite

⁹⁷⁸ Kofi Annan, “Address” (Speech Given at the International Peace Academy Seminar, “Responsibility to Protect,” New York, N.Y. 15 February 2002), available at

<http://www.un.org/News/Press/docs/2002/sgson8125.doc.htm> accessed July 15 2008.

⁹⁷⁹ Al Amin Ismail, Darfur Alert Coalition, interviewed telephonically by the author on December 8 2008.

⁹⁸⁰ Ibid.

⁹⁸¹ Usman Yacoub, Darfur IDP, interviewed telephonically by the author on December 8 2008.

⁹⁸² Fatimah Amina Ali (Not Real Name), Darfur IDP, interviewed telephonically by the author on December 8 2008.

⁹⁸³ Mukesh Kapila, op cit.

Mukesh Kapila's warning to the UN that Darfur was a political issue.⁹⁸⁴ Precious time was, therefore, wasted by the international community in its concentration on humanitarian solution, for a political situation. The international community should have committed itself to an early political resolution of the conflict. This study equally reveals the gap and lack of an agreed understanding of what protection means for the purposes of achieving the responsibility thrust upon the international community. There is, therefore, the need for the international community to articulate the concept of protection as it relates to responsibility to protect. Where such a situation exists that requires military intervention, and the international community fails to act, it would no longer be enough to blame the "international community" but those directly responsible should be blamed. Since international criminal law has recognised that people, and not states commit international crimes, it, therefore, need to recognise that individuals are responsible for failing to act to protect civilians, where the situation demands for it.⁹⁸⁵ As a result of the fact that the international system does not hold individuals responsible for failing to act in such situations, Darfur was allowed to deteriorate, and no person was held responsible.⁹⁸⁶

Sanctions Regime: Another Viable Option

The imposition of sanctions on states, especially by the Security Council is one of the mechanisms the world body uses to bring states to conform to international law. However, the use of sanctions only gained prominence in post 1990, as prior to 1990 the Security Council used it only in two instances. One was against Rhodesia in 1966, and the other was

⁹⁸⁴ Ibid.

⁹⁸⁵ 1 Trial of the Major War Criminals, 223. Judgment reprinted in International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, *41 American Journal of International Law*. 172, 220-221 (1947).

⁹⁸⁶ Mukesh Kapila, Op cit.

against South Africa in 1977.⁹⁸⁷ The extent to which sanctions change states' behaviour in international relations is however, debatable. Despite the different studies carried out by the UN and other international agencies on the impact of sanctions, it remains a controversial mechanism in international law.⁹⁸⁸

Intense international pressure has been known to be effective in making a recalcitrant government change its mind. For instance, in the 1990s, the international pressure on Khartoum led to its abandoning of support for terrorists' organisations, especially, the Al Qaeda.⁹⁸⁹ Economic sanctions remain a favourable tool used by the international community to bring recalcitrant states to order. However, the effect of economic sanctions has oftentimes been felt more by the most vulnerable in the society. In this regard, therefore, the sanctions must be structured in such a way that it targets those in government contributing to massive human rights violations, and crimes against humanity, etc. It is equally important that states with business interests in Sudan should consider divesting from the country. There is a groundswell of opinion amongst Darfurians that the solution to the Darfur problem lies with political strategies, and not military. They insist that with the ICC warrant of arrest against Al Bashir, more targeted sanctions should be imposed on him, and the members of his regime, in order to end the attack on the civilian population.

⁹⁸⁷ David Mepham and Alexander Rambotham, "Introduction," in David Mepham and Alexander Rambotham (ed.) *Safeguarding Civilians: Delivering on the Responsibility to Protect in Africa* IPPR 2007.

⁹⁸⁸ Humanitarian Policy Group, Measuring the impact of humanitarian Aid: A review of current practice, available at <http://www.odi.org.uk/resources/hpg-publications/policy-briefs/15-measuring-impact-humanitarian-aid.pdf> accessed March 4 2009. See also Sanctions Assessment Handbook: Assessing the Humanitarian Implications of Sanctions, United Nations Inter-Agency Standing Committee, available at http://www.who.int/hac/network/interagency/IASC_SANCTIONS_ASSESS_HANDBOOK_FINAL.pdf accessed March 4 2009.

⁹⁸⁹ David Mepham and Alexander Ramsbotham, "Introduction," in David Mepham and Alexander Ramsbotham (ed), *Darfur: The Responsibility to Protect*, Institute for Public Policy Research, 2006.

Abu Bakr, a SLA Commander insists that Khartoum is not sincere in its negotiation efforts, “but wants to use military means to ethnically cleanse the Darfur region of blacks.”⁹⁹⁰

The use of sanctions regime has been suggested as one of the ways the responsibility to protect concept can be operationalised in Africa and Darfur in particular, especially to bring Al Bashir to submit to the ICC jurisdiction. However, the argument against sanctions, especially within the context of responsibility to protect, is that the concept is targeted at civilian protection, while sanctions have the tendency of harming civilians more.⁹⁹¹ That notwithstanding, if sanctions are designed and tailored in such a way as to target members of the regime, and put pressure on them, they might be forced to change their policies.⁹⁹² The other problem with sanctions might be its timing. The question is whether the sanctions regime could be delivered in such a timely manner as to impact positively on the suffering civilians. The application and its effectiveness are dependent on the circumstances of the case. For instance, sanctions would not have been an effective tool for civilian protection in the Rwandan genocide. It is argued that it is better to apply sanctions hoping that it would have an effect, than none at all, especially in such extended conflicts like Darfur. For instance, it is probable that if the UN and AU had issued effective sanctions against the Sudanese government elite in the early days of the conflict, the effect would long have been felt. Moreover, the delay in putting in place an effective sanctions regime against the Khartoum government allowed it to strengthen its position in Sudan, Africa, and elsewhere.

⁹⁹⁰ Abu Bakr, interviewed telephonically by the author on December 8 2008.

⁹⁹¹ Ibid.

⁹⁹² Ibid.

The African Union is empowered by its Constitutive Act to impose sanctions. Its Article 23 states that “... any member state that fails to comply with the decisions and policies of the Union may be subjected to ... sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.”⁹⁹³ Despite the legal framework for the AU to impose sanctions on erring member states, the practicality of sanctions raises a lot of challenges for the AU. The weak governance structure that is a feature of most African states is a major challenge, coupled with the porous nature of state borders in Africa.⁹⁹⁴ However, the apparent lack of political will that the AU leaders have exhibited in not suspending Al Bashir from the AU is evident that the allegiance to a Pan-African solidarity, weighs more than their “commitment to human rights principles.”⁹⁹⁵ In furtherance of this allegiance, the AU is bent on lobbying the Security Council to suspend or delay the execution of the warrant of arrest against Bashir for at least 12 months. The question that this raises is what would then happen to the civilians within the period? What is the guarantee that the suspension of the warrant of arrest will translate to better protection for the civilian population of Darfur? In fact, it could be argued that Khartoum would continue in its scorched earth policy against the civilian population of Darfur.

Notwithstanding the identification of individuals that are directly involved in the Darfur atrocities, the international community is yet impose comprehensive sanctions against them. Its weak attempt at imposing sanctions on only four of the identified implicated individuals is seen as expressing unwillingness to act for the protection of civilians. The arms embargo imposed on Darfur is not effective, since it does not apply to the whole of

⁹⁹³ AU Constitutive Act 2000, Article 23.

⁹⁹⁴ Mephram and Rambotham, *op cit.*

⁹⁹⁵ *Ibid.*

Sudan.⁹⁹⁶ The Sudanese government is, therefore, exploiting the loophole in the sanctions regime to continue supplying arms to its *Janjaweed* militia in Darfur. The earlier success of the 1990s diplomatic sanctions against Sudan for the support of terrorism indicates the possibility of success if appropriate pressure is mounted on Khartoum.⁹⁹⁷ However, one must recognise that Sudan has been emboldened by the seeming backing of its atrocities by China, Russia, the AU, and the Arab League, coupled with the realisation that the US is not in the position to launch or lead a military action against it. With the ICC issuance of arrest warrant against Al Bashir for crimes against humanity and war crimes, the international community need to pressurise the “friends” of Khartoum to give up their protectionist attitude towards him, and surrender him to the world court.

Prosecution: Another Option Tool

The suggestion by the ICISS that international legal prosecution be one of the mechanisms used in protecting civilians, is most times ignored as an option. The question however, is whether threats of international legal prosecution can alter states’ behaviour. Or have the different international criminal tribunals and the ICC contributed towards ending impunity? While it is commendable that the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) set the pace in post Cold War international criminal prosecutions, it could be argued that there was no positive impact on African leaders towards ending impunity. This argument is against the backdrop of continued acts of impunity in the continent, especially in the Democratic Republic of Congo (DRC), Uganda, Central African Republic, and Sudan despite the convictions

⁹⁹⁶ UN Security Council Resolution 1556 of 30 July 2004.

⁹⁹⁷ Ibid.

secured by the ICTR against top government figures like Jean Kambanda, a former Prime Minister in Rwanda. The indictment and warrant of arrest issued against Al Bashir by the ICC for crimes against humanity and war crimes has sparked the debate over the role of international criminal prosecutions, in civilian protection.

It is often felt that resort to criminal prosecutions during ongoing conflict could hamper efforts at civilian protection, as the party under investigation might become obstinate and intensify the targeting of civilians. For instance, the arrest and prosecution of Thomas Lubanga by the ICC, though commendable, has not added anything to the protection of civilians in the Ituri region of the DRC. Invariably, in order to have effect, the international community would have to combine international legal prosecutions, together with negotiations, as the followers of the arrested leader might continue in the atrocities if there are no mechanisms to address their restiveness. On the other hand, the threat of prosecution during peace efforts could also hamper such resolution of the conflict and realisation of peace. Persons involved in mass atrocities would be reluctant to relinquish control over their area, where they know that they might eventually be prosecuted for international crimes. The arrest and prosecution of Charles Taylor by the Special Court of Sierra Leone is one example where a former leader consented to peace deal, but ended up having the so called peace deal reversed. The other dilemma associated with the indictment of a sitting president is that of execution of the warrant of arrest issued. It must be remembered that the ICC does not have its own police, and even where there is the presence of a UN authorised peacekeeping mission like in Sudan, its mandate would not extend to the arrest of Al Bashir for instance. The ICC would, therefore, have to rely on its member states to arrest Bashir if he travels to such states. However, this obligation to arrest might not be exercised

by the state depending on its policy regarding the issuance of the warrant. For instance, following the issuance of the arrest warrant against Al Bashir, he has travelled to at least six foreign countries.⁹⁹⁸ However, of significance is that the countries are not parties to the ICC Statute. Another worrisome development is the recent declaration by the African Union calling on its member states not to respect the arrest warrant issued against Bashir. However, some countries, especially Botswana and Uganda have indicated that they will arrest Bashir in pursuance of the warrant if he enters their territory. Interestingly, Bashir who was to visit Nigeria in connection with an AU brokered peace deal in late October could not attend ostensibly because of other state engagements, but analysts suggested that it could not be unconnected with the arrest warrant issued against him.⁹⁹⁹

⁹⁹⁸ Eritrea, Ethiopia, Qatar, Saudi Arabia, Egypt, and Zimbabwe.

⁹⁹⁹ Ben Okolo Nigeria's Obligation to Arrest and Handover Al Bashir to The International Criminal Court, available at <http://nigeriaworld.com/articles/2009/oct/271.html> accessed November 26 2009

Conclusion

The debut of responsibility to protect in international relations and international law has changed the debate on civilian protection especially when viewed through the prism of intervention. Not only do scholars and analysts look at intervention from the view point of those that need help, but the debate centres on human protection. While humanitarian intervention when applied correctly advanced the case of civilian protection, its language did not advance an acceptable argument for its general acceptance. Moreover, it has often been the subject of abuse. This is not to suggest that responsibility to protect has been accepted by all states. However, the nature of progress the concept has made in its first decade of existence suggests that if the momentum of awareness and lobbying for its operationalisation are maintained, it will become an acceptable norm of international law.

Deriving from the above, it, therefore, behoves on the international community, the NGOs, and scholars to make sure that the issue of the operationalisation of the concept is kept on the front burner of the UN agenda. The concept is a welcome development in the civilian protection regime. However, more than four years after its appearance, it is still to take roots, as can be seen from the international community's inability to apply it to the test case of Darfur. This inability of the UN so far to apply the concept in Darfur despite the averred refrain of "Never Again" has exposed the lack of well articulated implementation mechanisms for translating theories into action. After the failure of the world to respond to the situation in Rwanda in 1994, the phrase "Never Again" became a collective song on the lips of the international community. However, enough efforts have not gone into transforming such rhetoric to actions.

With the emergence of the concept, fears associated with humanitarian intervention – abuse – does not seem to have dissipated notwithstanding the more refined nature of the concept and the laid down trigger mechanisms. In fact, this fear heightened with the US invasion of Iraq. This invasion, originally under the guise of searching for Weapons of Mass Destruction (WMD) floundered and the coalition's justification shifted to humanitarian intervention. However, this justification was suspect, especially since it appeared to be an afterthought advanced to ward off criticisms against the invasion. That singular act might be the bane of responsibility to protect, as small and weak states might not want to endorse the norm for fear that it could be used against them in furthering neo-imperial ambitions of some rich and powerful nations. In order to cure this defect, therefore, the Security Council should adopt a set of criteria that will be used as a benchmark to determine when to invoke the responsibility to protect concept. It would also give the CSOs and NGOs the criteria with which to determine the effectiveness and accountability of the UN Security Council in its averred responsibility to protect civilians. The criteria set out by the ICISS and the UN High Level Panel is apt.

There is a noticeable paradigmatic shift of security from state centricism to people centricism. This dynamism of the international system is reflected in the way issues of security are treated internationally. A different set of dynamics existed during the Westphalian period when the traditional concept of state or national security was ushered in. This shift in focus of security is a realisation that the state is no longer the only unit of analysis in international relations. The focus has been moved forward with the new meaning given to sovereignty – responsibility – and the emerging principle of the

“responsibility to protect.” Governments will however, continue to fall back on the traditional defence of infringement on national sovereignty even when it is so obvious that there are cases of large-scale atrocities. However, this acknowledgment of the responsibility needs to be operationalised in order to give life to the principle. Sovereignty as the bedrock of international law and international relations has been challenged over the decades and more especially, in post Cold War era. The meaning attached to sovereignty is no longer cast in stone. It has become more fluid. The obligations inherent in sovereignty have been given current pronouncement in the concept of responsibility to protect. How far this will be respected remains to be seen, especially given the political and economic undertone in most UN Security Council decisions. The absolutism of sovereignty is fast fading from international discourse as scholars and policy makers alike recognise the emergence of a parallel transition from a culture of sovereign impunity to a culture of national and international accountability. Since the ultimate existence of states is the protection and enforcement of the natural rights of its citizens, any state that engages in massive violations of human rights betrays the very essence of its being and can no longer claim domestic or international legitimacy. When decisive action is required for the protection of civilians, it appears that the UN Charter’s strong bias against intervention is not as absolute as it appears. This is based on the emerging state practice, customary international law, and norms. The principle of non-intervention in domestic matters cannot, therefore, be used as a screen by states that commit human rights violations or other atrocities of large-scale violations of international humanitarian law, which can clearly be seen to present a threat to international peace and security, and hence, require Security Council reaction.

The argument in favour of intervention notwithstanding, the position of sovereignty in international relations is still a subject of controversy. The declaration by the 60th UN Summit of 2005 recognizing the obligation to protect citizens, while it does not bear the force of law, reinforces that the balance of scale is tilting in the sovereignty and non-intervention debate. There is no doubt that there is an emergence of a change in the thinking of states and individuals on the issue of non-intervention. The adoption of a change in approach to the issue of civilian protection is advocated. This approach should focus more on prevention than on reaction.

The non operationalisation of the concept notwithstanding, since its debut, it has continued to be invoked in civilian protection discourses. For instance, the UN Security Council Resolution 1674 of April 28 2006 made reference to the concept in its unanimous adoption on Protection of Civilians in Armed conflict. Equally, the Resolution that authorised the initial peacekeeping mission in Darfur; Resolution 1706 of August 31 2006 was premised on the failure of the Sudanese government to live up to its primary responsibility to protect the Darfurians, and the international community's responsibility to protect the civilians. Notwithstanding, the "growth" of the concept and its adoption by the world body, it was, therefore, shocking that at the adoption of resolution 1769 on July 31 2007 which effectively set in place the hybrid UNAMID force, the resolution did not make any reference to the responsibility to protect. Of course, one could conjecture that the political horse-trading that would have gone into producing that resolution could have been instrumental to the absence of such reference. This would have appeared as a backsliding on the gains already made by the concept. However, it could be argued that the appointment of Dr. Edward Luck by the UN Secretary General as the Special Adviser on

Responsibility to Protect on December 11 2007 is an indication of the seriousness with which the UN views the concept.¹⁰⁰⁰ Most telling is the recent Resolution 1894 of November 11 2009 which reaffirmed “the relevant provisions of the 2005 World Summit Outcome Document regarding the protection of civilians in armed conflict, including paragraphs 138 and 139 thereof regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹⁰⁰¹ One flaw which the current wave of the concept seem to have is that there seems to be an over-emphasis on the second aspect – responsibility to react – as opposed to the first aspect which is responsibility to prevent. This narrowness in interpretation of the concept is not unconnected with the humanitarian intervention origin of the debate, and also a result of the reactive nature of the international system. This, therefore, is an area that should be focused on by researchers and policy makers to articulate ideas on how to enthrone a culture of prevention in the operationalisation of the concept.

Since regional organisations are in direct proximity to some of the conflict hotspots, it is very important that a kind of synergy be developed between them and the UN in terms of operationalising the concept. The UN need to interpret its Article 53 in a more progressive manner to allow regional organisations more latitude in taking enforcement actions in cases that satisfy the responsibility to protect threshold. However, to do this, the UN needs to adopt the guiding criteria that will determine a situation as requiring a responsibility to protect application. It is trite knowledge that it takes the UN at least six months to operationalise a peacekeeping mission. With this synergy, the regional organisations could have a first shot at protecting the civilians acting under a UN mandate. The partnership

¹⁰⁰⁰ UN News, “Appointment Confirmed of UN Special Adviser on Responsibility to Protect,” available at <http://www.un.org/apps/news/story.asp?NewsID=25010&Cr=appoint&Cr1> accessed on November 23 2009.

¹⁰⁰¹ UN Security Council resolution 1894 of November 11 2009 on Protection of Civilians.

between the UN and the AU for instance should include training, strategic issues, equipment and technical support. The UN Security Council's failure to act to protect the Darfurians will have serious consequences both for the Darfurians and for the credibility of the UN. It might also galvanize some states to continue the trend of interventions witnessed in the past sometimes tagged "coalition of the willing." When this happens, the relevance of the UN will be questioned. Failure to protect the people of Darfur could signal other despots in the world that the concept is nothing but a paper tiger, and this will not augur well for civilian protection.

The challenges of operationalisation are threefold; at the political level; economic level; and strategic level. Politically, states would need to ramp up the political will to protect the suffering masses, as the international community would not advance the cause of responsibility to protect without the will to act when necessary. Economically, the rich states need to invest more into conflict prone states, not just post facto, but as a conflict prevention mechanism. Efforts at building the capacity of states to overcome such underlying factors that lead to conflict should be the focus of prevention. At the same time, where an intervention as envisaged under the second aspect of the concept becomes necessary, the rich states need to show leadership in funding such missions. Furthermore, the rebuilding aspect of the concept needs to be considered in fund allocation. In other words, the three aspects of the concept should be treated holistically. The challenge posed by strategic interests is exemplified by the support Sudan is getting from China and Russia, especially at the UN Security Council. Strategic interests do not however, always lead to inaction. It can lead to action which then becomes an abuse of the concept. For instance, in the US invasion of Iraq, though not premised on the responsibility to protect concept, the

US' eventual claim that its intervention was of a humanitarian nature signals that states might hide under the banner of responsibility to protect when they intervene for purely strategic reasons.

Sustainable peace will remain a mirage in Sudan if the political and socio-economic marginalisation that exists in the country is not treated holistically. In doing this, the regions must be treated as a whole, as it has been evident that resolving a particular conflict through a "Comprehensive" Peace Agreement between the central government, and the particular region's rebel groups to the exclusion of other regions, signals to others that in order to get a share of the political and economic cake, they need to use the force of arms. The regional dimension of the conflict need to addressed, as without it, the region will continuously be imbued in conflict. The effective resolution of Darfur conflict, therefore, must take into consideration the conflict in Chad and Central African Republic (CAR). Furthermore, the tenuous peace that exists between the north and south of Sudan would impact on the resolution of the situation in Darfur, and sustainable peace in the region. In order to forestall the repeat of Rwanda and Darfur in other African states, the AU Panel of the Wise should be politically empowered by African states to engage in extensive mediation process where the Continental Early Warning System identifies budding conflicts. Furthermore, it could also be engaged in other ongoing conflicts to see that peaceful resolutions are reached.

The extent of humanitarian catastrophe unleashed by the government of Sudan on the Darfurians through the *Janjaweed* militia is not quantifiable. It would not be enough for the government to enter into peace agreements with the rebel groups. In resolving the conflict,

therefore, the control of the *Janjaweed* militia and other armed gangs that roam the Darfur region becomes critical. However, the question that needs to be addressed is whether Khartoum still has the authority to rein in the militias, or will the militia like the Frankenstein monster that could no longer be controlled; consume its creator, in this case, Khartoum. In a situation where it is determined that Khartoum cannot disarm the militia, the international community under the guidance of the United Nations, should carry out this function. There is also the need for Sudan to abolish the so-called “Specialised Courts,” it has established as these have proved to be very inefficient in fighting impunity in the country. The independence of the judiciary need also be ensured so as to enable it address human rights violations effectively.¹⁰⁰² The training of the Sudanese judges, prosecutors and investigators, especially in the area of international humanitarian law, human rights law, as well as international criminal law will go a long way in helping stem the acts of impunity experienced in Darfur.¹⁰⁰³ In the same vein, Sudanese laws should be brought into conformity with human rights standards. As part of post conflict reconstruction, Sudan should consider the ratification of the ICC Statute, and its domestication in its national laws. While this is a delicate issue in Sudan given the existing ICC warrant of arrest against Al Bashir, in the long term, it is worth considering in order to strengthen accountability in the country.

The paradox of the Darfur situation is such that real peace cannot be established without justice. The indictment of Al Bashir by the ICC is a confirmation of this paradigm. However, the indictment also raises the fear that in order to evade justice, Al Bashir might trade in peace for justice. Where this happens, the question would be whether peace is more

¹⁰⁰² Mohammed Al-Aagib Karim, Darfur Centre for Human Rights and Development interviewed telephonically by the author on December 8 2008.

¹⁰⁰³ Ibid.

important than justice, especially for the civilian population. There is no doubt that enduring peace and an end to violence are very essential elements for the improvement of the human rights situation in Darfur. People in violent conflict tend to suffer more than people in a relatively peaceful environment, and efforts need to be geared towards the prevention of those underlying factors that lead to conflict in the first place. It may be argued that poverty and denial of human rights may not on their own cause civil wars, terrorism or organized crime; however, they all greatly increase the risk of instability and violence.¹⁰⁰⁴

The international community's indifference to the killing fields of Darfur in the early days of the conflict is partly to blame for the elongation of the conflict. It is not enough that the ICISS established criteria for intervention, or is it enough that the necessary institutions and mechanisms are crafted by the international community. Failing to build a constituency of support for the concept, and the generation of the political will to act when faced with situations that require decisive actions will continue to haunt the operationalisation of the concept.¹⁰⁰⁵ Darfur has revealed that the difficulties involved in obtaining consent from a host state before the authorisation of a peacekeeping force contributes to humanitarian challenges. At the same time, it has also revealed that notwithstanding the new meaning attached to sovereignty – responsibility – it is still treated as sacrosanct by states, and used to perpetrate atrocities. Failure of the international community to protect the civilian population of Darfur will significantly affect the success of the responsibility to protect regime. The failure of the AU to protect the civilians has also affected the manner in which people in the continent view its avowed African solutions for African problems. The failure

¹⁰⁰⁴ Kofi Annan, UN Secretary-General, In *Larger Freedom: Towards Development, Security and Human Rights*, (New York: UN, 2005), 6.

¹⁰⁰⁵ Mepham and Rambotham, *op cit.*

of the UNAMID mission to protect the civilian population suggests that, not only is the approach faulty, but the international community is still not sure of the approach to protect civilians in danger. In apportioning responsibility for the crimes committed in Darfur, the state and the rebel groups should be held accountable. However, it must be understood that the primary responsibility for the protection of the Darfurian civilians rests with the government of Sudan.

Darfur seems to be stuck in the politics and realities of the international system. While advocates of non consensual military intervention have a case, the realities on ground seem to suggest that this will never come to fruition. Firstly, it is highly unlikely that there would be a consensus by the Security Council members, especially with China and Russia, authorising such intervention. Secondly, even where such authorisation fortuitously occurs, it is highly unlikely that the international community would be able to mobilise such troop that could dislodge the Sudanese forces and its *Janjaweed* allies. The international community would need to mobilise at least 40 – 50 000 military personnel for such operation. If the troop commitment of the US and UK in Iraq and Afghanistan is anything to go by, there might not be much hope of getting troops from the two countries, and this would affect the troop mobilisation capacity of such force, if any. Moreover, the foreign policy thrust of the United States President Barrack Obama, while having Darfur in its sights, might not be ready to engage in physical combat, especially when it is still trying to pull its forces out of Iraq. Thirdly, the paradigm of coalition of the willing seems to have been jettisoned by the US in favour of multilateralism. At the same time, the IGAD does not have articulate security mechanism akin to ECOWAS, which would have warranted it to act independent of the UN and AU. It does appear that Khartoum is aware of these

limitations, and is using them to its advantage. The ICC indictment of Al Bashir has however, offered the international community an opportunity of bringing to an end the conflict in Darfur. It is hoped that the pressure should equally translate to political solution for the conflict, thereby translating to better protection for the civilian population.

The normative development of the responsibility to protect concept and the global endorsement it has received from states pre-supposes that governments of the world should be held accountable for failing to deliver on their promises. States, especially China and Russia, should be held accountable, not just because they failed to deliver on the responsibility to protect, but they also act in ways that counter the realisation of the concept.¹⁰⁰⁶ Notwithstanding the progress the concept has made within the few years of its appearance, it should be stated that the progress has not translated to effective protection of civilians yet. As Mepham and Rambotham points out that “[T]he sombre reality is that there remains a large gap between the principles endorsed by the world’s governments at UN conferences and in UN resolutions and their willingness to take action to uphold these principles in real-life cases.”¹⁰⁰⁷

Notwithstanding the non adoption of the ICISS report in full, the World Summit 2005 adoption of responsibility to protect is a significant step by the international community in the protection of civilians. It shows that the international community is ready to jettison its culture of indifference, for a culture that puts civilian protection at the centre of international law, and international relations. The responsibility to protect concept would however, not be operational without the requisite cooperation of the states and non state

¹⁰⁰⁶ Mepham and Rambotham, op cit.

¹⁰⁰⁷ Ibid.

actors involved in the Darfur conflict and other conflicts elsewhere. The deployment of UN, peacekeepers, EU, AU, or whatever acronym they go by, cannot by itself solve the socio-political problems that are at the root of the conflict. All the international community can do is to guide the parties to realize the importance of protecting the civilian population, so as to reach a tangible and quick solution to the conflict.

Responsibility to protect will continue to be treated in the abstract, if it does not get the support of states. Even where states support the concept, it would require its domestication in order to have the desired effect. This domestication should not be left to the legislature alone, but the Civil Society Organisations (CSOs) and NGOs should sensitize not just their members, but the member states on the overall gain of applying the concept in each state's policy formulation and action.¹⁰⁰⁸ NGOs, both international and national can play a very important role in pressuring governments to adopt a positive attitude towards the concept of civilian protection, and mainstreaming its operationalisation in their policies. For instance, NGO pressure was instrumental to denying Al Bashir the Chairman of AU for two consecutive years. National efforts at championing the operationalisation of the concept can also be achieved by using every opportunity to place the concept on the national and international agenda; presenting the three aspects of the concept as a continuum; and supporting of strong systems of public and political accountability.¹⁰⁰⁹ Furthermore, the role of the General Assembly in the operationalisation and actualization of the concept need not be over-emphasised. The wide reach of the General Assembly can influence more states to adopt the concept, and push for funds to be allocated to responsibility to protect

¹⁰⁰⁸ "Actualizing the Responsibility to Protect," 43rd Conference on the UN of the Next Decade, June 20-25, 2008 Convento do Espinheiro, Evora, Portugal, available at <http://www.ipacademy.org/asset/file/369/actualizing.pdf> accessed January 25 2008.

¹⁰⁰⁹ Mephram and Rambotham, op cit.

programs at the UN.¹⁰¹⁰ Notwithstanding the above, it is advocated that the relationship between the UN Security Council and the General Assembly need to improve, as this will positively affect the issue of peace and security in the world.

¹⁰¹⁰ Ibid.

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