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The Crisis in Darfur: An Opportunity for the United Nations to Reclaim its Status as Standard Bearer for Peace and Security for the International Community

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

SJD DISSERTATION:

THE CRISIS IN DARFUR:

AN OPPORTUNITY FOR THE UNITED NATIONS
TO RECLAIM ITS STATUS AS STANDARD BEARER
FOR PEACE AND SECURITY
FOR THE INTERNATIONAL COMMUNITY

LEILANI F. BATTISTE

SUBMITTED TO THE GOLDEN GATE UNIVERSITY SCHOOL
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- I. Overview of Recent Developments

“With all the defects, with all the failures that we can check up against it, the U.N. still represents man’s best organized hope to substitute the conference table for the battlefield.”

-- President Dwight D. Eisenhower¹

Overview

The United Nations, created after World War II, has as its basic *raison d’etre*, “to rid the world and successive generations of the scourge of war.” However, since its inception in 1945, the United Nations (“UN”) and the world have witnessed a number of large-scale human rights violations and atrocities, most of which have ended with little or no intervention of any kind from the UN. Although preserving the peace and protecting human rights were two major goals contemplated in the framework of the UN Charter, it also appears that a third, the notion of the protection of the sovereignty of independent states, has for most of the sixty plus years of the UN’s existence, taken precedence over the other two.

The problem that the Charter did not contemplate all those years ago, (although arguably, it should have) was the question, does a state cease to act within the purview of its sovereignty when it either causes harm to or fails to protect the citizens of its state? This raises an interesting problem, as the vast majority of armed conflicts are not those that occur between states; instead, they are internal conflicts that for the most part, claim innocent civilians rather than soldiers, as casualties and victims. This also raises yet another question that many scholars and jurists would have to tussle with for the next six decades – that is, what takes precedence – sovereignty or human rights?

The question of sovereignty vs. human rights is a classic “chicken and egg” dilemma. One the one hand, Article 2 (4) of the Charter constitutes a basic proscription on the use and even the threat of use of force that in some manner violates the territorial integrity or political

independence of state, or that in some way transgresses the purposes of the United Nations.²

However, on the other hand, Articles 55 and 56 of the Charter obligate each UN member to take “joint and separate action to ensure the universal respect for, and observance of, human rights and fundamental freedoms.”³

Unfortunately, this creates a conflict within the Charter itself as between the core objectives of maintenance of human rights for all peoples and preservation of state sovereignty, when a situation such as the ongoing crisis in the Darfur region of Sudan arises,⁴ that is, when a state actually deprives its citizenry of fundamental human rights.⁵ This conflict in turn raises a number of difficult questions: Do certain acts, even if they are the most heinous crimes imaginable, remain within the sovereign prerogatives and jurisdiction of the state? Do they pose any actual military threat to world peace? If not, is the United Nations still empowered to act? What if the Security Council opts not to act – should tens of thousands or even millions of people die from violence, starvation and disease for the sake of sovereignty?⁶ Furthermore, if the Security Council did not act and other states decided to act under the doctrine of humanitarian intervention, was this to be deemed an illegal assault on sovereignty?

All of these excellent questions were raised, in essence, time and time again by former UN Secretary-General Kofi Annan, who posited that the sovereignty *did not* include a right of a state to deprive its citizens of the basic human rights to which each person is entitled. As

¹ Paul Kennedy, *THE PARLIAMENT OF MAN: THE PAST, PRESENT AND FUTURE OF THE UNITED NATIONS* 47, (Random House Pubs., 2006).

² Christopher C. Joyner, “*The Responsibility to Protect*”: *Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 Va. J. Int’l L. 693, 702 (2007).

³ *Id.* at 702-703, citing U.N. Charter, Arts. 55 and 56. Article 55 (c) provides in part, that “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” Article 56 provides that “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”

⁴ The humanitarian crisis in the Darfur region of Sudan began in 2003, and has been ongoing ever since.

⁵ *Id.* at 703.

⁶ *Id.*

indicated herein, former Secretary-General Annan could be deemed as a “reformer,” as he constantly strived to redefine and recreate the role of the UN, as well as have the UN itself look at its role in the international community. The former Secretary-General became quite outspoken after the massacre in Rwanda in 1994 as well as after the ethnic cleansing atrocities that occurred in Bosnia and Kosovo from 1997-1999.

The former Secretary-General made a number of addresses to the UN body at large, authored a number of reports and commissioned a number of panels which will be discussed herein, that prompts the UN and the international community to review and address the rights and responsibilities inherent in sovereignty, in light of the number of humanitarian crises and atrocities taking place in the modern world. Not only was he looking for an answer as to whether sovereignty allowed a government to commit such human rights abuses against its own people, but he was also looking to proactive measures the UN could take to bring such abuses to an end, and how the UN could reform itself to prevent such abuses from ever happening again.

Also, as a backdrop to these questions raised by the former Secretary-General, was the notion that armed intervention outside of the UN’s authorization was an illegal assault on sovereignty. Scholars since the beginning of the concept of the state that originated with the Treaty of Westphalia, have questioned what limits were placed upon sovereignty, and whether sovereignty permitted a government to commit serious crimes against its own people.

Grotius, as well as many others who have followed, have argued that sovereignty does not permit such gross abuses of human rights to be perpetrated with impunity. However, few have actually spoken of the consequences for such abuses of power. Although in the early years of the UN the Genocide Convention was drafted and ratified, others, such as non-interventionists took the view even if the government was committing serious crimes and other human rights

abuses against its own people, nevertheless, Article 2 (4) provided a basic proscription against the use or the threat of use of force that in some way violates either the territorial integrity or the political independence of states.⁷ What the international system needed was the legal basis to intervene to stop such serious crimes and human rights abuses that a state perpetrated against its own people.

One doctrine that arose after the former Secretary-General raised hard questions of the international community was the doctrine of the “responsibility to protect.” The former Secretary-General questioned repeatedly whether the notion of sovereignty should allow a government to commit human rights abuses against its own citizens with impunity. It was clear that the former Secretary-General opined that it did not. However, the question was how to reconcile the protection of state sovereignty with the protection of human rights.

In 2001, as a result of these and other hard questions raised by the former Secretary-General, the International Commission on Intervention and State Sovereignty (“ICISS”) issued a report entitled, “The Responsibility to Protect.” The Report was an astounding breakthrough which finally reconciled the two seemingly opposing goals of the UN Charter, protection of sovereignty and the promotion of human rights, in that it conceptualizes sovereignty in terms of *governmental responsibility*. In other words, the Report promoted rethinking sovereignty as responsibility that fosters serious implications as to a state’s responsibility to its people. For one, the Report indicated that the responsibility to protect suggests that state officials are responsible for policies that ensure the protection of their citizens and the promotion of their welfare.⁸ Second, the Report implies that governments are responsible not only to their own nationals, but

⁷ See Joyner, *supra* note 1 at 702.

⁸ *Id.* at 706.

to the international community.⁹ Third, “sovereignty as responsibility” means that government officials are responsible for their own policy decisions and are accountable for their own actions.¹⁰

A series of reports by the Secretary-General himself and by appointed panels lent credibility to the doctrine of the responsibility to protect. Until 2005, it was uncertain whether the responsibility to protect would in fact be adopted by the international community. At the 2005 World Summit, the adoption of the World Summit Outcome Document by the General Assembly seemed at last, to indicate universal acceptance that the Security Council could act under the various provisions of the UN Charter to protect innocent people from genocide, war crimes, ethnic cleansing and crimes against humanity, whether such crimes were perpetrated by other governments, or even their own. The General Assembly accepted the position adopted by the Secretary-General’s High Level Panel on Threats, Challenges and Change in its 2004 Report, that the responsibility to protect was in fact an “emerging norm.” The Security Council agreed and a year later in April 2006, adopted this position as well.

While the doctrine of the responsibility to protect has evolved from its humble beginnings as an aspiration voiced by former Secretary-General Annan to the status of a norm in the process of becoming a viable legal principle,¹¹ in its first test thus far – the crisis in Darfur, it has not met expectations. The reason is not so much for failures in the doctrine, for the ICISS crafted a very detailed report which the UN could easily utilize as a roadmap for authorizing armed intervention. However, the failure lies with the unwillingness of the UN to utilize the Report in the way it was intended, or to take any other drastic action, to end the crisis. Although the Security Council referred the humanitarian crisis in Darfur to the ICC prosecutor, currently

⁹ *Id.*

¹⁰ *Id.*

there is great international pressure for him not to go forward with prosecution of Sudan's president, Omar al-Bashir.¹²

The other unknown is that Kofi Annan is no longer Secretary-General of the United Nations, and thus, no longer is there the level of activism to push for the UN to undertake needed reforms to prevent, prosecute and ameliorate such humanitarian crises. Thus far, Secretary-General Ban-ki Moon has made some statements of dismay about recent attacks and has called for all parties to commit to a cessation of hostilities. However, the few statements Secretary-General Ban has made do not rise to the level of reformist activism of Kofi Annan that the UN has had in the previous ten years prior to his term. Nevertheless, it is still early in Secretary-General Ban's tenure. It is hoped that Secretary-General Ban will continue the hard work started by former Secretary-General Kofi Annan, and push for the needed reforms of the UN to authorize intervention under strict guidelines mentioned herein where necessary, either unilaterally or multilaterally, not only put an end to the current on-going humanitarian crisis in Darfur, but to also prevent another crisis from starting.

It is said that "in the midst of chaos, is opportunity." With the humanitarian crisis in Darfur, the United Nations has been presented with a golden opportunity, to reevaluate how the international community views human rights, how it fits in with sovereignty, and how the UN can and should join an evolving international system and make human rights once again, the primary consideration of the international community and international relations. With that will come a return to the *raison d'etre* for which the United Nations was created, and a return to its intended role as the beacon of the international community that stands for all that we hoped it

¹¹ *Id.* at 704.

¹² One World US, "Don't Arrest Sudan President, Say African Leaders," Jan. 30 2009, <http://us.oneworld.net/article/359831-dont-arrest-sudan-president-say-african-leaders>, (last visited Feb. 13, 2009);

would, the protector of human rights, the arbiter of sovereign nations and the promoter of international peace and prosperity.

see also, AllAfrica.com, "*Sudan: Africa Urges Suspension of Bashir Arrest Warrant*," Feb. 12, 2009, <http://allafrica.com/stories/200902120351.html>, (last visited Feb. 13, 2009).

CHAPTER ONE:

**AN OVERVIEW OF THE GREATEST HUMANITARIAN
CRISIS OF THE TWENTY-FIRST CENTURY**

“In the midst of chaos – is opportunity.”

-- Unknown

I. Introduction

Since early 2003, the western Darfur region of the Sudan has been subjected to a massive campaign of ethnic violence that has claimed the lives of almost 400,000 civilians, and has created nearly 2 million internally-displaced refugees or refugees that have fled to camps in neighboring Chad.¹³ The humanitarian crisis in Darfur presents one of the greatest challenges to the international community since the coordinated massacre of over 800,000 people in Rwanda in one-hundred days in 1994.¹⁴ The mass murder of national, ethnic and tribal groups at the hands of the predominantly Arab Sudanese government and the pro-Arab, government-backed militias, known as the *janjaweed*,¹⁵ is deemed responsible for the deaths of tens of thousands of black Sudanese in the region.

Despite the unmistakable tragedy that has occurred and continues to occur, the international community has utterly failed to respond. The United Nations (either the Security Council or the General Assembly) has taken almost no leadership role in abating or even stopping the crisis. Debate over whether the term “genocide” should be used to describe the ethnic cleansing and displacement of nearly a half of a million people in Sudan has essentially deterred any type of humanitarian intervention from other nations that have signed or ratified the

¹³ UN News Center, *Huge Challenges Remain in Darfur and Chad UN Aid Chief Tells Security Council*, (Dec. 3, 2008), www.un.org/apps/news/story.asp?NewsID=29182&Cr=darfur&Cr1=chad, (last visited Feb. 14, 2009).

¹⁴ Jeff Fleischer, *Shake Hands With the Devil: An Interview With Romeo Dallaire*, MOTHER JONES, (Jan. 25, 2005), http://www.motherjones.com/cgi-bin/print_article.pl?url=www.motherjones.com, (last visited Dec. 2, 2006).

¹⁵ Originally referred to the nomadic Arab bandits who rode on horses and camels, enriching themselves by stealing livestock and attacking black Africans. “*Jaan*” means “evil” in Arabic, and “*jawad*” means “horse”, roughly translating “*janjaweed*” as “evil horseman.” Although there are numerous variations on the spelling of the word as it is a rough translation of Arabic, “*janjaweed*” will be used herein.

Genocide Convention.¹⁶ Although the U.S. government has referred to the crisis as “genocide,” the United Nations and the rest of the world continue to show great reluctance to do so, and have utterly failed to respond in a timely manner that could have prevented countless deaths and ended the violence.¹⁷

Despite the tragedy that has occurred over the past six years due to inaction, the United Nations, as the world’s arbiter, could reclaim the ideal of acting as the world’s “beacon” of international peace and security if it took an immediate stand to end the crisis. A number of significant events have occurred since the crisis began that in fact establish a “roadmap” in which the crisis can be abated and future crises could be avoided, which will be discussed herein. The very relevance and existence of the United Nations has been under a “full-frontal assault” from the last eight years of the Bush Administration, who viewed the United Nations as a roadblock to U.S. domination of the world’s regions, and worked to undermine its purpose and relevance, to thereby lead to its eventual demise. Under the new administration of U.S. President Barack Obama, there is hope that the U.S. will again pledge support for the United Nations, and thereby set an example as a powerful nation that not only supports its existence, but will lead the rest of the international community in strengthening its role in maintaining international peace and security.

This author posits that if the United Nations as a body followed the path laid by the previous Secretary General and took a strong stand against genocide by taking bold new action now to stop the crisis, not only could the United Nations reclaim some of its stature of the world’s organization to which nations look for leadership, but also, it would also return to its

¹⁶ Officially called, the Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force January 12, 1951) hereinafter referred to as the “Genocide Convention.”

raison d'être, that is, “to rid the world of the scourge of war,” and to meaningfully promote the protection of human rights.

It has been nearly six years since the brutal attacks began that has resulted in the deaths of hundreds of thousands civilians, and the displacement of over two and a half million more. Yet, the failure of the UN and the rest of the world to respond in that time raises both a moral and legal question: if the systematic and calculated murder of unarmed men and boys, the abduction and rape of women and girls, the destruction of villages as well as the destruction of food and water supplies, is not enough to warrant military and/or diplomatic intervention – what in the world will?

¹⁷ It should be noted that although the United States has utilized the term “genocide” to describe the crisis, and thereby giving rise to the obligations under the Genocide Convention, it too has failed to take any substantial action

II. A Brief History of the Internal Strife That Has Led to the Coordinated and Systematic Attacks Upon Civilians in the Darfur Region

A. Diverse Regions of Sudan

Sudan, the largest nation in Africa, has been mired in civil war since it won its independence from Great Britain in 1956.¹⁸ The Darfur region is Sudan's largest region, located in the western part of the country. Darfur was an independent sultanate until 1917, when it was the last region to be incorporated into the Anglo-Egyptian Sudan. Since 1994, Darfur has been divided into South, West and North regions. Much of the current crisis has taken place in West Darfur, an ethnically mixed region of Africans and Arabs, though African groups predominate.¹⁹ Since the 1980's, drought has forced the nomadic tribes of Arab cattle herders from the North to systematically attempt to seize and permanently occupy the land in the central (western) part of the Darfur region, in order to water and graze cattle. Because attempts by these nomadic tribes to relocate to more fertile lands have been met with resistance by the Fur, Masalit and Zaghawa tribes, the predominant black ethnic groups of West Darfur, they have since been subject to hostilities by the government.²⁰

The central conflict in the ongoing war has been between the Muslim government forces in the North, and rebels in the South, which began in 1955, declined in 1972, and resumed in 1983. Over the course of time, some two million people died as a result of the conflict, most of them Christians.

to abate or resolve the crisis.

¹⁸ THE COLUMBIA ENCYCLOPEDIA, (6th Ed. 2001-2004), www.bartelby.com/br/65/html (last visited April 28, 2006).

¹⁹ Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing By Government and Militia Force in Western Sudan*, Vol. 16, No. 6(A), (May 2004), available at <http://www.hrw.org/reports/2004/sudan0504/0504simple.pdf>.

²⁰ *Id.*

Because much of the current crisis has taken place in West Darfur,²¹ the Masalit, Fur and Zaghawa communities are some of the most predominant ethnic groups of West Darfur, and as such, have also been the principal victims of the government's military campaign.²² All of these tribes are largely peasant farmers, but also engage in cattle raising. Both the Masalit and Fur have united in marriage with Arabs and other Africans.²³

The conflicts in the Darfur region have continued since the early 1980's. Because Darfur is geographically isolated, it has been neglected by the central government in Khartoum. Much of the peace between the region's ethnic groups have been destroyed due to environmental degradation from the spread of the Sahara desert as a result of ongoing drought, coupled with "divide and rule" tactics of the central government and the influx of modern weaponry.²⁴

Early conflicts were predominantly clashes between nomadic groups within these farming communities, over access to pasture and water for cattle, or outright theft of animals. Since the 1980's, drought has driven these nomadic tribes to systematically attempt to permanently occupy the land in the central part of the Darfur region, known as Jebel Marra Massif. At one point, the conflict rose to the level of a civil war, with entire villages destroyed and thousands of lives lost on both sides. Despite attempts by these nomadic groups to survive as livestock herders by seizing land in the fertile central zone, the Fur, the predominant occupants, have fought back to retain what they have long-viewed as "their land."²⁵ This resulted in the start of government-initiated hostilities against the Fur for resisting the nomads' intrusion rather than seeking accommodation of them.

²¹ Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing By Government and Militia Force in Western Sudan*, *supra* note 19.

²² *Id.* at 6.

²³ *Id.* at 6.

²⁴ Sudan Update, *Reports: Peoples, Darfur*, www.sudanupdate.org/REPORTS/PEOPLES/Darf.htm, undated, (last visited Feb. 14, 2009).

²⁵ *Id.*

The Zaghawa were also among the people attempting to resettle in the central and encountered hostility from the Fur farmers. Eventually, they too would become a target of government, pro-Arab hostilities against the “zurga” (a derogatory term for “black”) and non-Arab groups of Darfur, which would eventually prompt the Fur to form their own militias. Initially these militias were utilized for self-defense, but were later folded into the Sudanese Liberation Army/Movement (“SLA/M”), that sought equality for all Sudanese. Between 1987 and 1989, the conflicts between Fur farmers and Arabs intensified so much that thousands of Fur were killed, tens of thousands more were displaced, and over 40,000 homes were destroyed.²⁶ Instead of intervening in the conflicts to defuse tensions, Khartoum ignored them, leaving them to explode some fourteen years later.

In the 1990’s, hostilities resumed in West Darfur (among other places), particularly in 1998, when Arab nomads prematurely moved their flocks into land predominantly populated by Masalit farmers. During the 1998 conflict, more than sixty Masalit villages were destroyed, an Arab village was burned, both Masalit and Arabs were killed and more than five thousand Masalit were displaced.²⁷ Despite a resolution of the conflict being reached, hostilities again broke out in 1999, with more than 125 Masalit villages partially or totally destroyed and hundreds killed, including local Arab tribal chiefs.²⁸ The government brought in military forces to stop the violence. Though an accord was reached at a reconciliation conference in that year, nevertheless many Masalit intellectuals and notables were arrested, imprisoned and tortured in towns where government-supported Arab militias were attacking Masalit villages and unarmed

²⁶ *Id.*

²⁷ Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, *supra* note 19.

²⁸ *Id.*

civilians. The violence that ensued from these attacks further polarized the pro-Arab government away from its black citizens.

B. Genesis of the Current Humanitarian Crisis

The current humanitarian crisis essentially began early in the morning on April 25, 2003, when a blast followed by six rapid detonations shook a tiny one-runway airport in El Fasher, where Sudanese soldiers were stationed. The blasts roused the sleeping soldiers out of their barracks then to be ambushed by machine-gun fire from the rebel Sudanese Liberation Army/Movement (SLA/M). The SLA/M formed as a result of the Khartoum government's disregard for the Darfur region, whereby the government refused to maintain infrastructure such as roads and other public services, and engaged in a policy of marginalizing blacks politically by awarding top government positions to local Arabs. Frustrated with being politically and economically isolated, the SLA/M sought to strike back against the government and while drawing the world's attention to their political plight. At first Khartoum did not take the SLA/M seriously; but after the attack at El Fasher, the government decided to treat the rebels as a major threat.²⁹

During conflicts with rebels in South of the country, the Sudanese military perfected a strategy to combat insurgents: air forces would attack from the sky while Arab tribesmen, armed by the government, would concurrently attack from the ground. These Arab militia, or *janjaweed* were particularly important in Darfur, since a majority of the Sudanese army who were from Darfur could not be trusted to take up arms against former neighbors and kin.³⁰ By July 2003, the government was appealing to Arabs in Darfur to protect their homeland from the

²⁹ *Id.*

³⁰ *Id.*

“rebels.” It would be the first step to laying the groundwork for the series of coordinated attacks by the Sudanese government and the *janjaweed* against its unarmed black citizens.

As a result of the history of violence, the Sudanese government, together with the *janjaweed*, began targeting the Fur, Masalit and Zaghawa through a combination of indiscriminate, deliberate and coordinated aerial and ground attacks, denial of humanitarian assistance and a campaign of terror that has resulted in the displacement of over a million and a half civilians. The Sudanese government left almost no stones unturned in attacks upon anyone “suspected” of having any allegiance to the rebel movement.

Since mid-2003, the coordinated attacks by the Sudanese army and the *janjaweed* have resulted in mass killing of mostly unarmed men and boys. In almost all of the reported attacks, the *janjaweed* have the imprimatur of the government. Witnesses and victims have described the *janjaweed* arriving and leaving with the government forces, wearing uniforms similar to government uniforms, utilizing similar arms and equipment as that utilized by government soldiers, and appearing to coordinate ground attacks with aerial bombardment by government aircraft.³¹ Eyewitnesses also reported that during attacks, the *janjaweed* have made such statements as “we are the government!”³² As to the attacks, eyewitnesses describe them as beginning with government helicopters flying at low levels to engage in reconnaissance of villages or “stake them out,” then, engage in aerial bombardments of explosives and/or other crude armaments as barrels of nails, car chassis and old appliances from planes in order to crush people and property.³³

Concurrent with the aerial attacks, government soldiers and/or *janjaweed* went into the villages ensured of a lack of security from rebel forces, and engaged in a campaign of looting,

³¹ *Id.*

³² *Id.*

abductions, grisly murders³⁴, beatings, ethnic humiliation, destruction of property and basic necessities such as food storage units and water wells.³⁵ Fleeing villagers were also targets in aerial bombings and shootings.³⁶ More often than not, these assaults were commenced in the middle of the night while villagers slept, or while villagers were worshipping at mosques or places of prayer. Ground assaults were often accompanied by attackers shouting racially derogatory terms and epithets as bullets sprayed their victims.³⁷ In addition, both government soldiers and *janjaweed* have abducted women and girls who were not killed in the assault, took them to nearby fields where they were repeatedly raped.³⁸

Often, a few days after a village has been attacked, government helicopters would return to "scoped out" villages to ensure that in fact, the villages were empty and had not been reoccupied.³⁹ If any villagers had returned, government soldiers and *janjaweed* would return to further attack the village and those who may have come back, killing and burning who and what was left, in order to ensure that a village was not reoccupied by its former inhabitants.⁴⁰ Since the coordinated attacks began, many of the destroyed villages have been reoccupied by the *janjaweed* and their families, while nearly two million black Sudanese have been displaced from their homes.

³³ *Id.*

³⁴ The most common method of killing was execution-style shooting of men and boys. Victims have also reported incidents of *janjaweed* burning families alive in their homes, as well as tossing babies and small children into burning huts as their parents fled.

³⁵ U.S. Dept. of State, *Documenting Atrocities in Darfur*, State Publication 11182, (Sept. 2004), available at <http://www.state.gov/g/drl/rls/36028.htm>.

³⁶ *Id.*

³⁷ Such statements include, "Kill the Nuba! Kill the Nuba!" a derogatory term for black Sudanese. Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, *supra* note 19; see also, U.S. Dept. of State, *Documenting Atrocities in Darfur*, *supra* note 35.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

C. The Current Situation – A Large-Scale Humanitarian Crisis With Mostly Women and Children as Victims

Currently, more than 250,000 displaced Darfur refugees are estimated to have resettled in makeshift tents in refugee camps just across the Chad border.⁴¹ Other refugees, displaced from their homes and villages, have not been able to cross the Sahara Desert into Chad, and have set up refugee camps in the western portion of Darfur. There are now approximately two million internally-displaced refugees in Darfur.⁴² The United Nations High Commission for Refugees (UNHCR) continues to set up camps, opening its twelfth camp in May 2005.⁴³ Many towns and villages in the Darfur region of Sudan, once occupied by tens of thousands of Darfurians are now essentially ghost towns numbering in the hundreds at best.

In any event, both western Darfur and eastern Chad are desolate landscapes upon which anyone can hope to survive. The land is dry and the landscape is intensely hot. Refugees have nothing more than tents to protect them from the sun and harsh elements of the Chad/Darfur landscape -- hard, arid, barren desert land subject to unrelenting heat and constant sandstorms. Food is scarce, and wood for fire in the immediate surroundings of refugee camps is even scarcer. Furthermore, the current situation has demonstrated that refugees are not out of immediate danger of further attacks, nor are they completely out of harm's way within the camps, as nearly 80% of the refugees that have fled to Chad are women and children.⁴⁴ As such,

⁴¹ *Id.* The most recent estimates as of February 2008 put the number of Darfur refugees in Chad at 250,000, which is now presumed to be higher. See, Lydia Polgreen, *Attack Pushing Darfur Refugees Into Chad*, THE NEW YORK TIMES, February 11, 2008, www.nytimes.com/2008/02/11/world/africa/11darfur.html, (last visited Feb. 15, 2009).

⁴² Although those escaping the violence from the Khartoum government and the *janjaweed* are technically not "refugees" as defined by the Convention on Refugees, as they have not left Sudan, they shall for all intents and purposes of this paper, be deemed as refugees.

⁴³ UNHCR, *UNHCR Opens 12th Camp in Eastern Chad*, May 3, 2005, www.unhcr.org/news/NEWS/4277891dc.html, (last visited Feb. 14, 2009).

⁴⁴ Amy Costello, *Chad/Sudan: A Question of Genocide*, www.pbs.org/frontlineworld/elections/chad.sudan, Sept. 16, 2004, (last visited Dec. 2, 2006).

the refugees in these camps are susceptible to continuing attacks, and the women are vulnerable to being raped by the *janjaweed* as they gather firewood.

In addition, many of the UN camps are grossly overcrowded, with camps designed for 6,000, actually holding three times that number.⁴⁵ The UN High Commissioner for Refugees (UNHCR) initially severely underestimated the scope of the tragedy in the Sudan, and thus the total number of refugees requiring assistance. Many of the camps lack clean water, sanitation, and food, though UN relief workers have been present for months. Infants and children are particularly at risk as they become severely malnourished and susceptible to disease from drinking water utilized by animals. The World Health Organization has reported that due to such unsanitary conditions, as of September 2004, between 6,000 and 10,000 people in camps in Darfur die every month due to unsafe water and living in unsanitary conditions; many of them are aged 5 and under.⁴⁶

In addition to the unsanitary conditions of the camps, the refugees have literally no protection from the harsh elements of the Chad/Darfur border landscape – hard, arid, barren desert land subject to unrelenting heat and constant sandstorms. In many of the camps in Chad, four sticks in the ground constituted “home.”⁴⁷ Some make roofs or a shelter by draping or affixing a cloth to the sticks. On sunny days with no wind, such a makeshift shelter provides some respite from the heat; however, on days with wind and sandstorms, “home” may blow across the desert.

The UNHCR mobile monitoring teams have also monitored security in West Darfur and near the Chad border. As a result of attacks in some of the camps, as of late July 2004, the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

UNHCR has had to move over 140,000 refugees to safer camps deeper inside Chad,⁴⁸ and another 65,000 as of early October 2004.⁴⁹ The UNHCR teams also monitor movements of people and have found that as the violence continues in Darfur, so have the numbers of refugees fleeing towards the border.⁵⁰

The situation with the explosion of refugees in Chad has become so dire that in early 2006, Chadian President Idriss Deby stated that his country would no longer be able to shelter refugees after June 2006 nor guarantee the security of the refugees, and hoped that the Darfur conflict would end at that time.⁵¹ The Chadian government even accused the government of Sudan of financing and arming anti-Deby rebels from Darfur, who attacked Chad's capital, N'Djamena, only days before.⁵² Despite Sudan's denials, Chad broke diplomatic relations, which were eventually renewed.⁵³ In September 2006, a little attention was garnered to the plight of refugees when then-Senator Barack Obama visited one of the camps in Eastern Chad, and called for the United Nations to send in a UN protective force.⁵⁴

Then-Senator Obama's calls for a UN protective force were quite prescient, as the violence against Darfur refugees in Chad continued to escalate. In February 2008, aerial bombing continued over the Chad/Sudan border, and armed men blocked UNHCR trucks from moving newly arrived refugees further into Chad, away from the border.⁵⁵ This prompted the

⁴⁸ UNHCHR, *UNHCHR Back in Chad's Violence-Hit Camps; Completes Transfer From Border Town*, (Jul. 27, 2004), www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=NEWS&id=410667974&page=news, (last visited Feb. 14, 2009).

⁴⁹ UNHCHR, *UNHCR Still Working to Move Refugees From Chad-Sudan Border*, (Oct. 9, 2004), www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/3cb14eceff02b1ffc1256dba0055865b, (last visited Feb. 14, 2009).

⁵⁰ *Id.*

⁵¹ Red Orbit, *Chad Warns It May Stop Sheltering Darfur Refugees*, (April 14, 2006), www.redorbit.com/news/display/id=470432, (last visited Feb. 14, 2009).

⁵² *Id.*

⁵³ See note 255, *infra*.

⁵⁴ Christopher Wills, *Obama Visits Sudanese Refugees in Chad*, (Sept. 2, 2006), www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR200609020658.html, (last visited Feb. 3, 2009).

⁵⁵ Refworld, *Sudan-Chad: Bombing Blocks Access to New Refugees*, (Feb. 20, 2008), www.unhcr.org/refworld/docid/47bea83a1de.html, (last visited Feb. 3, 2009).

Chadian Prime Minister Nouradine Delwa Kassire Coumakoye to declare that the Chadian government would be refusing to admit new refugees.⁵⁶

1. How the Sudanese Government Continues To Perpetuate and Exacerbate the Crisis

Despite the fact that over a two and a half million people have been displaced as a result of the systematic attacks upon unarmed civilians, the Sudanese government is doing little to offer anything in the way of aid to refugees. As previously noted, sanitation in the camps is poor, raising worries among those providing humanitarian assistance of the possibility of an outbreak of cholera or measles. Some observers indicate that these may be the precise conditions that the Sudanese government wanted, in order to eliminate displaced civilians naturally. As if the very real threat of disease was not enough, refugees living in the camps live under the continuing threat of attacks from the *janjaweed*.

The UN reports that despite the numbers that have already fled, the attacks continue.⁵⁷ Those who have been displaced have no real prospect of returning home to escape the threat, as the *janjaweed* continue their assault on African villages. With the crisis since garnering more prominence in the world's eyes, the government has felt pressure to alleviate the crisis, though not in a way one would expect. In August 2004, there were reports of incidents in which masked gunmen swept into camps in the middle of the night, abducting village leaders. The leaders would return the next day, apparently injured, reporting that their assailants threatened to kill them if they did not take their people home.⁵⁸ As recently as February 2008, when refugees attempted to return to their villages in Darfur, they were told by the army to go back to Chad.⁵⁹

⁵⁶ *Id.* See also, UK Mail & Guardian, *Chad Says No to More Darfur Refugees*, (Feb. 11, 2008), www.mg.co.za/article/2008-02-11-chad-says-no-to-more-darfur-refugees, (last visited Feb. 14, 2009).

⁵⁷ CNN, *Darfur Attacks Horrify UN Envoy*, (Feb. 2, 2005), www.cnn.com/2005/WORLD/africa/02/02/sudan.un.envoy.reut/index.html, (last visited Feb. 14, 2009).

⁵⁸ *Id.*

⁵⁹ See note 55, *supra*.

There have been some signs of hope in the crisis, however short-lived. In April 2004, the SLA/M and the Sudanese government signed a temporary cease-fire, and the African Union (A.U.) agreed to send a hundred and twenty unarmed monitors to Darfur.⁶⁰ These monitors were limited to investigating violations of the cease-fire and were not supposed to combat the biggest threat, namely, the continued attacks on Darfur civilians by the *janjaweed* and the military.⁶¹ In late July 2004, the UN Security Council passed a resolution imposing an arms embargo on the *janjaweed* and the SLA/M rebels, and threatening the Sudanese government with "further action," such as an asset freeze or travel ban, if it did not show substantial progress within thirty days in disarming the *janjaweed* and bringing war criminals to justice.⁶² But the Sudanese government made it clear that it had no intention of disarming Arab tribal leaders.⁶³

However, as indicated above, the violence continues. There are also reports that the Sudanese government continues to arm the *janjaweed* militias, and it continues to bomb and attack civilians.⁶⁴ Many of the refugees in Chad still face cross-border raids by the *janjaweed*, and dangerous isolation during the rainy season, when aid deliveries are almost impossible.⁶⁵ Women are under a constant threat of being raped while gathering wood for fire if forced to look for wood too far from the camps.⁶⁶

What is needed now in Darfur and along the Chad border, is an effective, international peacekeeping and protection presence, precisely what the Sudanese government wants to avoid

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Samantha Power, *Dying in Darfur*, THE NEW YORKER, (Aug. 30, 2004), http://www.newyorker.com/archive/2004/08/30/040830fa_fact1, (last visited Feb. 13, 2009).

⁶⁴ See note 55, *supra*.

⁶⁵ *Id.*

⁶⁶ World Vision, *Humanitarian Aid for Sudanese in Darfur and Chad*, (Aug. 20, 2004), www.worldvision.org/worldvision/appeals.nsf/stable/chad_homepage?Open, (last visited Feb. 14, 2009).

most.⁶⁷ Only very recently has the UN announced that a peacekeeping force will be deployed to Darfur to monitor the situation, but full deployment has been constantly delayed. It is sorely needed, as there have been numerous reports of the Sudanese government threatening to force refugees to go home, but refugees refuse, knowing full well that they face the threat of further attacks.⁶⁸ Most refuse to return home until they know that it is safe to do so, that is, when the government rids the country of the *janjaweed*.⁶⁹

III. The Sudan Genocide – Violation of Numerous Human Rights Treaties

The genocide in the Sudan violates a number of enumerated human rights as contained in a number of human rights treaties, which creates an obligation under customary international law to abate and/or bring to an end. Two of the most important treaties being violated, namely the Genocide Convention and the International Bill of Rights, justifies immediate action by the Security Council to utilize the threat of armed intervention to put an end to the crisis.⁷⁰

A. The Genocide Convention

The Genocide Convention came about largely through the efforts of one man, Ralph Lemkin, a Polish Jew who first began to warn the world about Adolf Hitler's plan to attack Jews

⁶⁷ *Id.*

⁶⁸ *Id.*; see also, Reuters, *Darfur Refugees Live Within Sight of Their Homes*, (Feb. 10, 2005), <http://www.reliefweb.int/rw/RWB.NSF/db900SID/VBOL-69GEEG?OpenDocument>, (last visited Feb. 14, 2009); see also, Associated Press, *UN Darfur Peacekeepers Deployment Delayed*, INTERNATIONAL HERALD TRIBUNE, (Feb. 18, 2009), <http://www.ihf.com/articles/ap/2009/02/18/africa/AF-Sudan-Darfur.php>, (last visited Feb. 18, 2009).

⁶⁹ *Id.*

⁷⁰ See note 16, *supra*. The "International Bill of Rights" is the collective name for the Universal Declaration of Human Rights, G.A.Res. 217, U.N. GAOR, (III 1948), adopted by the U.N. General Assembly on December 10, 1948; the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967), adopted by the U.N. General Assembly on December 16, 1966 (Annex to G.A.Res. 2200, 21 GAOR, Supp. 16, U.N. Doc A/6316 at 490), entered into force on January 3, 1976; and the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), adopted by the U.N. General Assembly on December 16, 1966 (G.A.Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316 at 52), entered into force on March 23, 1976. Other conventions being violated as a result of the crisis is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352, of which Sudan is a signatory; the Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, of which Sudan is a signatory; the Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, G.A.RES. 180 (XXXIV 1979), 19 I.L.M. 33 (1980), which seeks to end gender-based discrimination, of which Sudan is *not* a signatory; Convention on the Rights of the Child, 1577 U.N.T.S. 3, of which Sudan is a signatory.

in Europe as early as 1933. Lemkin was inspired by a speech by British Prime Minister Winston Churchill that had described what Germany was doing as “a crime without a name.”⁷¹

In 1944, Lemkin published a long, scholarly account of the Holocaust that included copies of Hitler’s anti-Jewish decrees in his book, *Axis Rule in Occupied Europe*.⁷² In *Axis Rule*, Lemkin coined a new phrase, “genocide,” to describe the crime that went beyond murder to the annihilation of a people. Within a week of its publication, the Roosevelt administration seized upon the term to describe what was happening in Europe. Not long after that, “genocide” gained widespread usage when the media began using the word in its news coverage.⁷³

In the years after World War II, the newly created United Nations declared the Nazi atrocities as “crimes against humanity”, and set out to create new standards on the laws and customs of war.⁷⁴ After the Nuremberg judgment, the UN General Assembly declared genocide an international crime.⁷⁵ Through the intense lobbying efforts of Ralph Lemkin, in 1948 the UN General Assembly drafted and unanimously adopted the convention aimed at the prevention and punishment of genocide, which was ratified on January 12, 1951.⁷⁶

For over forty years after World War II, the Genocide Convention was relegated to obscurity as human rights focused on more modern violations such as apartheid, torture and disappearances.⁷⁷ With the events in Bosnia, Kosovo and Rwanda, the Convention was brought back into the limelight once more. The humanitarian crisis in Darfur should be added to the list

⁷¹ CBC News, *Indepth: Sudan – The Genocide Convention*, (Sept. 20, 2004), www.cbc.ca/news/background/sudan/genocide-convention.html; William Schabas, *Special Report No. 41: The Genocide Convention at Fifty*, United States Institute of Peace, (Jan. 7, 1999), www.usip.org/pubs/specialreports/sr990107.html, (last visited Feb. 14, 2009).

⁷² *Id.*

⁷³ CBC News, *Indepth: Sudan – The Genocide Convention*, *supra* note 71.

⁷⁴ Schabas, *Special Report No. 41: The Genocide Convention at Fifty*, *supra* note 71.

⁷⁵ *Id.* See also, note 16, *supra*.

⁷⁶ *Id.*

⁷⁷ *Id.*

of events of worldwide significance demanding immediate interpretation and application of the Genocide Convention, and all the acts that fall under its jurisdiction.

1. The Elements of Genocide

Because genocide is a crime of intent, the crucial question is the purpose of the offender, not the result.⁷⁸ Even if the numbers of those killed are relatively low, the crime can be considered genocide if the intent is to destroy a group "in whole or in part."⁷⁹ Whereas there are large numbers of victims, the intent is relatively easy to prove, and can be easily deduced from the given facts.⁸⁰

In the case of the crisis in Darfur, there is little question that what occurred was genocide. Large numbers of victims, estimated in the tens of thousands, have been subject to a pattern of coordinated atrocities: killings, rapes and destruction of property, all due to their ethnicity. The facts indicate that the predominantly Arab government and its militias committed genocide by targeting non-Arabs⁸¹ in its campaign of mass murder of national, ethnic and tribal groups, and in forcing those groups into such adverse conditions so as to bring about their destruction naturally.

However, quite surprisingly, there has been much debate as to whether what Khartoum had in mind was in fact genocide, giving rise to the reluctance of the world and the UN to refer to the crisis in Darfur as such. In July 2004, both houses of Congress unanimously passed concurrent resolutions calling the crisis genocide.⁸² Former Secretary of State Colin Powell testified before the Senate foreign relations committee that the pattern of atrocities and

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Because the only other race of people in the Sudan are black Sudanese, though belonging to various tribes, it is presumed that the intended targets by the Government and its militias were of one race – black. See also, notes 15, 34-37 and 56, *supra*.

⁸² *Id.*

displacement of people in Darfur lead to the conclusion that genocide had in fact occurred.⁸³

Nevertheless, despite the previous Bush administration's conclusion that the crisis is in fact genocide, no intervention has been offered by the United States.

a. Appointment of the ICID

On September 18, 2004, the Security Council, acting under Chapter VII of the UN Charter, appointed a commission of inquiry, "to investigate reports of violations of international humanitarian law and human rights law regarding the situation in Darfur, and to determine whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable."⁸⁴ Unfortunately, as promising as this seemed, the five-person International Commission of Inquiry on Darfur ("ICID")⁸⁵ concluded that in its report that while the Sudanese government and the *janjaweed* militia are in fact responsible for the indiscriminate attacks on unarmed civilians that constitute war crimes, nevertheless, the commission found that the Government did not pursue a policy of genocide.⁸⁶ The Commission concluded that two elements of genocide may be deduced from the gross violations of human rights by the Government and the *janjaweed* militia.

First, the *actus reus*, consisting of the killing, or the act of causing serious bodily or mental harm, or deliberately inflicting conditions of life most likely to bring about the destruction of a group of people. Second, there is the existence of a protected group being targeted for the criminal conduct. Unfortunately, the Commission further concluded that the

⁸³ CBC News, *Indepth: Sudan – The Genocide Convention*, *supra* note 64; Scott Straus, *Darfur and the Genocide Debate*, (Jan./Feb. 2005), <http://users.polisci.wisc.edu/straus/Straus.pdf>, (last visited Feb. 14, 2009).

⁸⁴ S.C. Res. 1564, U.N. Doc. S/Res/1564, (Sept. 18, 2004).

⁸⁵ The five members of the Commission were some of the most prominent jurists and scholars in the international arena: Antonio Cassesse, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY); Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott.

⁸⁶ See note 85, *supra*; see also, United Nations, *Report of the International Commission on the Inquiry on Darfur to the United Nations Secretary General*, (Jan. 25, 2005), www.un.org/News/dh/sudan/com_inq_darfur.pdf, (last visited Feb. 14, 2009).

essential element of genocide, the intent to commit genocide, was missing, as it appeared that intent of the government and the *janjaweed* militia on perpetrating attacks upon unarmed civilians and villages was primarily for the purposes of counter-insurgency warfare.⁸⁷

This is a tragically erroneous conclusion. The overwhelming evidence indicates that the calculated and coordinated attacks were primarily targeted against unarmed civilians.⁸⁸ In addition, the manner in which attacks were carried out strongly suggests otherwise.⁸⁹ The aerial attacks focused on food, water supplies and shelters, not armory sites.⁹⁰ Ground attacks were indiscriminate and did not appear to seek out rebel insurgents, or those that were armed.⁹¹ Victims and witnesses alike assert that the Government and the *janjaweed* acted in concert to randomly kill, rape, attack and maim, without any evidence of the presence of insurgents,⁹² and with the stated intent to kill black Sudanese.⁹³ In addition, the continued attacks upon civilians while seeking refuge in camps in and outside of Darfur (over the Chad border), is also compelling evidence of the intent to commit genocide.

In addition, by not labeling the Darfur crisis for what it is – a genocide, ICID has effectively avoided having the obligations entailed under the Genocide Convention to be triggered, which would have obligated the international community – including the United Nations – to prevent, suppress and punish genocide.⁹⁴ Furthermore, the facts of the Darfur crisis are *virtually identical* to those presented in the Kosovo conflict, where there was international intervention. Neither the UN or the United States had any trouble whatsoever in referring to

⁸⁷ *Id.* at 4.

⁸⁸ See footnotes 31-37, *supra*.

⁸⁹ See footnotes 34-39, *supra*.

⁹⁰ See footnote 34-35, *supra*.

⁹¹ See footnote 37-39, *supra*.

⁹² See footnotes 37-39, *supra*.

⁹³ See footnote 37, *supra*.

⁹⁴ Nsongurua J. Udombana, *An Escape From Reason: Genocide and the International Commission of Inquiry on Darfur*, 40 Int'l Law. 41, 41-42.

Slobodan Milosevic's campaign of murder, rape, beatings, burning of villages and intentional displacement of ethnic Albanians as "ethnic cleansing," and therefore enough to warrant intervention.

While the two terms "ethnic cleansing" and "genocide" are not entirely synonymous,⁹⁵ they seek similar ends: to rid a territory of a population. While the Commission may have erroneously concluded that the Sudanese government and its militias merely intended to rid Darfur of tribes inhabiting the area, numerous victims and witnesses to the attacks have attested that the *attackers themselves* intended to kill the blacks in Darfur.⁹⁶ Furthermore, follow-up attacks of villages after initial air and ground assaults, attacks upon villagers who return to villages, attacks upon refugees in camps in both Darfur and Chad, as well as the intended disruption of relief operations, all evidence the intent to not just displace a people, but to completely annihilate it.⁹⁷ The only good news from ICID's investigations was that it did conclude that crimes against humanity were committed in Darfur thereby justifying prosecution by the International Criminal Court (ICC), on which the Security Council did follow through.⁹⁸

2. Rape

As stated above, reports of the crisis in Darfur include rape of women and girls that were not killed during an initial assault, as well as the rape of women and girls in the refugee camps in both Chad and Darfur.⁹⁹

The law of war has prohibited rape by soldiers for centuries.¹⁰⁰ During armed conflict, the role of rape has been utilized as both an attack on the individual victim and as a method of

⁹⁵ The term "ethnic cleansing" refers to the intent to "cleanse" or "purify" a territory of one ethnic group by use of terror, rape and murder in order to convince the inhabitants to leave. "Genocide" seeks to destroy the group.

⁹⁶ See footnote 26, *supra*.

⁹⁷ See footnotes 35-40, *supra*.

⁹⁸ See note 94, *supra*, and note 424, *infra*.

ethnic cleansing, intended to humiliate, shame, degrade and terrify an ethnic group.¹⁰¹ In World War II, rape was treated as an instrument of policy; the Nazi and Japanese practices of forced prostitution and rape on a large scale is an egregious example of such policies.¹⁰²

Although rape is specifically prohibited in the fourth Geneva Convention¹⁰³ and the Additional Protocols,¹⁰⁴ these instruments do not treat rape as a grave breach subject to universal jurisdiction.¹⁰⁵ Both the Nuremberg and Tokyo Tribunals largely ignored gender-based crimes.¹⁰⁶ It was only in recent years that the International Criminal Tribunal in The Hague, in its indictment of Bosnian Serb military and police officers in connection with rapes of Muslim women in the Bosnian war, declared that rape is a war crime.¹⁰⁷ More recently, both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have overcome reluctance by those governments and other obstacles to address and prosecute individuals committing this crime.¹⁰⁸

Furthermore, Pierre-Richard Prosper, former U.S. ambassador-at-large for war crimes, helped to expand the definition of genocide to include organized violence against women as

⁹⁹ UN News Centre, *Darfur's Displaced Remain Traumatized and at Risk of Rape, Harassment*, (Aug. 30, 2004), www.un.org/apps/news/story.asp?NewsID=11777&Cr=sudan&Cr1, (last visited Feb. 13, 2009); see also, footnotes 35-37, *supra*.

¹⁰⁰ Theodore Meron, *Rape As A Crime Under International Humanitarian Law*, 87 AM. J. INT'L. L. 424, 430 (Jul. 1993).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Convention Relative to the Protection of Civilian Persons in Time of War, (Aug. 12, 1949), 6 U.S.T. 3516, 75 U.N.T.S. 287 [Geneva Convention No. IV].

¹⁰⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, Arts. 76(1) and 85, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) [Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, Art. 4(2)(e), 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977) [Protocol II].

¹⁰⁵ Meron, *Rape As A Crime Under International Humanitarian Law*, *supra* note 100 at 430.

¹⁰⁶ K. D. Askin, *Sexual Violence In Decisions And Indictments Of The Yugoslav And Rwandan Tribunals: Current Status*, 93 AM. J. INT'L. L. 97, (Jan. 1999); Marlise Simons, *For First Time, Court Defines Rape as War Crime*, NEW YORK TIMES, (Jun. 28, 1996), see www.nytimes.com/specials/bosnia/context/0628warcrimes-tribunal.html.

¹⁰⁷ Simons, *For First Time, Court Defines Rape as War Crime*, *supra* note 106.

¹⁰⁸ Askin, *Sexual Violence In Decisions And Indictments Of The Yugoslav And Rwandan Tribunals*, *supra* note 106 at 101.

rape. After spending significant time as a prosecutor at the International Criminal Tribunal for Rwanda (ICTR), Ambassador Prosper concluded that rape and mutilation had to be considered crimes so traumatizing to its victims that it made them, for all practical purposes, no longer able to contribute to humanity.¹⁰⁹ While in Arusha, Tanzania, Ambassador Prosper looked at the Genocide Convention and argued to the court that the Convention envisioned acts which fall short of death, but also caused "serious bodily harm." Ambassador Prosper further argued that the systematic rape of Tutsi women fell into that category. In the end, the court found that rape was a part of the act of genocide.¹¹⁰

There is no question that systematic rapes of women and girls occurred during the initial attacks in Darfur, and continue to occur against women and girls in refugee camps in and outside of Darfur. In the totality of the circumstances, it appears that rape, which was sometimes accompanied by murder, was intended to destroy the ethnic tribes that inhabited Darfur. This is only further evidence that genocide in fact occurred in Darfur, and that the UN Commission was incorrect in its assessment as to the intent of the Sudanese government and its militia. As the crisis in Darfur in fact amounts to genocide, it is now time for the UN to mete out punishment for these blatant criminal acts.

It is obvious that the actions of the Sudanese government violate the Genocide Convention.¹¹¹ The Genocide Convention defines genocide as "acts committed with intent to

¹⁰⁹ U.S. Dept. of State, *Genocide Convention Now Extends to Systematic Rape*, press release of the Embassy of the United States for Japan, undated.

¹¹⁰ *Id.*

¹¹¹ Also known as the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277. Although Sudan is not a signatory to this convention, given that the UN was founded out of principles to prevent war and other atrocities that occurred during World War II, arguably, Sudan has little standing to state that since it is not a signatory to the Genocide Convention, it is not beholden to its proscriptions, given that these principles have the force of customary law.

destroy, in whole or in part, a national, ethnical, racial or religious group” by various means,¹¹² that seek as its end, the annihilation of a people. The Genocide Convention states that not only is the act of genocide a punishable act, but it also includes as punishable offense conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide as well as complicity in genocide.¹¹³ The Convention further provides that punishment for the crime of genocide not only applies to government rulers and officials, but also to private individuals.¹¹⁴ The atrocities that have occurred include executions, rapes, destruction of property, food and water supplies, all due to the ethnicity of the people to whom these crimes are directed towards. In addition, there is continued violence by the *janjaweed* against refugees in camps, mostly women and children, arguably to the end of destroying the population.

B. The International Bill of Rights

The three principle instruments of human rights, the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) have collectively, acquired the designation “the International Bill of Rights.”¹¹⁵ Since its adoption in 1948, no state or government that has come into existence has questioned or expressed reservation to the Universal Declaration, and it continues to be cited with unanimous approval in resolutions of

¹¹² The full text of Article II of the Convention reads as follows: “In the present Convention, genocide means 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; (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.”

¹¹³ The full text of Article III of the Convention reads as follows: “The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”

¹¹⁴ The full text of Article IV of the Convention reads as follows: “Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

¹¹⁵ See note 70, *supra*.

international bodies,¹¹⁶ leading many experts and scholars to argue that the provisions of the Universal Declaration in fact, have the force of customary law.¹¹⁷ Some applicable rights included are rights to life, liberty, security of person, entitlement to rights without discrimination, right to nationality, and freedom from arbitrary deprivation of property.¹¹⁸

The international law of human rights includes numerous international agreements and other instruments, as well as an extensive body of principles of customary law that seeks to establish minimum international standards for national human rights as international norms that states are required to respect and ensure.¹¹⁹ Of course, the international law of human rights begins with the United Nations Charter, which has at its core the recognition of and respect for the principle of equal rights and self-determination of peoples.¹²⁰ The three principle instruments of human rights, the Universal Declaration of Human Rights (Declaration), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have collectively, acquired the designation "the International Bill of Rights."¹²¹

The Universal Declaration was adopted on December 10, 1948. Like the United Nations itself, it was drafted as a result of Hitler and other atrocities that occurred during World War II. Since its adoption, no state or government that has come into existence has questioned or

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Universal Declaration of Human Rights, Articles 1, 2, 3, 5, 7, 12, 13, 14, 17.

¹¹⁹ Lori Damrosch, et al., *INTERNATIONAL LAW: CASES AND MATERIALS*, 675-676, (4th ed. 2001).

¹²⁰ Article 55 of the United Nations Charter reads as follows: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 of the Charter reads as follows: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

¹²¹ Damrosch, et al., *supra* note 119 at 591. See also note 70, *supra*.

expressed reservations to the Universal Declaration, and it continues to be cited with unanimous approval or acquiescence in resolutions of international bodies.¹²² Though the Universal Declaration was not originally intended to be law, there has been an increased propensity to attribute a legal character to many of its provisions, given its universal acceptance.¹²³ This has led many experts and scholars to argue that the provisions of the Universal Declaration in fact, have the force of customary law.¹²⁴

1. The ICCPR and the ICESCR

In 1966, the Universal Declaration was bifurcated into the two distinct covenants, the ICCPR and the ICESCR. Both covenants begin with the recognition of the inherent dignity of the human person, and that all members of the human family are entitled to the equal and inalienable rights of freedom, justice and peace in the world.¹²⁵ But the two covenants then diverge. The ICCPR obligates states to respect and ensure the rights recognized by the Covenant for all persons subject to their jurisdiction, and to enact laws and adopt any other measures necessary to that end.¹²⁶ The ICESCR obligates states to recognize and achieve progressively a number of rights,¹²⁷ most notably, the right to adequate food, clothing and housing (Article 11), the right to protection and assistance to the family, mothers and children (Article 10).

However, as worldwide events indicate, many nations have not strictly and faithfully adhered to the principles of the International Bill of Rights. Unlike the Universal Declaration,

¹²² *Id.* at 593.

¹²³ *Id.* at 594.

¹²⁴ *Id.*

¹²⁵ UN Office of the High Commissioner on Human Rights, www.unhchr.ch.

¹²⁶ Damrosch, et al., *supra* note 119 at 595-97.

¹²⁷ Other rights include the right to work (Article 6); the right to just and favorable working conditions (Article 7); to social security (Article 9); to the highest attainable standard of physical and mental health (Article 12); to education (Article 13); and to the right take part in cultural life, to enjoy the benefits of scientific progress and its application, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which a person is the author (Article 15). See, UN Office of the High Commissioner on Human Rights, www.unhchr.ch.

both of the Covenants were designed to transform the provisions of the Universal Declaration into binding treaties, both Covenants have measures of enforcement by the establishment of Committees,¹²⁸ which required states to periodically report to the Committees on measures they have taken to adhere to the Covenants. In addition, member states may submit complaints lodged against them by or on behalf of private individuals claiming to be victims of violation.¹²⁹

Sudan is a member state to both Covenants, and the Universal Declaration. As well documented herein, the Sudanese government has committed innumerable gross violations of human rights. Under the enforcement mechanisms of both Covenants, the government of Sudan could be held accountable for its violations, and subject to the obligations of adherence of the Covenants if either individuals or other states file complaints. However, because the number of complaints against the Sudanese government for violations of both the ICCPR and the ICESCR (and other human rights conventions) could number well into the thousands, the most practical vehicle for handling such claims of violations could be the referral of the crisis in Darfur to the International Criminal Court, as discussed herein.

C. Other Relevant (and Applicable) Human Rights Treaties

While the Genocide Convention and the International Bill of Rights are two of the most important treaties that are being violated, nevertheless, a number of other less prominent but equally important treaties are also being violated which should give rise to United Nations action to abate or end the Darfur humanitarian crisis. And, while the following conventions do not have the same enforcement requirements as the Genocide Convention, nevertheless, these conventions are important instruments in the international law of human rights. These documents also lend credibility to the argument that the situation in Darfur has given rise to a number of human rights

¹²⁸ The ICCPR has a Human Rights Committee, and the ICESCR has a Committee on Economic, Cultural and Social Rights.

violations, and that intervention is required to stop the killings, rapes and displacements, as well as to prevent further human rights violations.

1. The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) was adopted by the UN General Assembly in December 1965. Its basic tenet is that all UN members should take steps to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.¹³⁰ It further recognizes that every nation shall fully and faithfully observe the provisions of the UDHR.¹³¹ Despite these provisions, numerous human rights violations based on race, sex, language and religion by signatory states have occurred since the Convention’s entry into force. Numerous human rights violations based on race, sex, language and religion have occurred since the Convention’s entry into force in 1969: the Vietnam war, Bosnia, Kosovo, Rwanda, the apartheid in South Africa, torture and kidnappings in South America, and now the Darfur humanitarian crisis. The actions of the Sudanese government, a signatory to CERD, and the government-sponsored militia against its black minority population, are in direct violation of the Convention.

2. The Convention Against All Forms of Discrimination Against Women

The Convention Against All Forms of Discrimination Against Women (“Women’s Convention”) is a special treaty dealing specifically with gender-based discrimination. It was adopted in 1979, and entered into force two years later. The aim of the Convention is to eliminate all forms of discrimination against women, which Article 1 of the Convention defines

¹²⁹ UN Office of the High Commissioner on Human Rights, www.unhchr.ch.

¹³⁰ UN Office of the High Commissioner on Human Rights, www.unhchr.ch.

¹³¹ Damrosch, et al., *supra* note 119 at 593.

as “any distinction, exclusion or restriction made on the basis of sex.”¹³² Unfortunately, the Convention is textually silent about violence against women, except as to trafficking of women. To remedy this, in 1992, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted General Recommendation No. 19, on violence against women, which applies to violence against women perpetrated by public officials, although discrimination is not limited to acts by or on behalf of governments.¹³³

Though there have been numerous reports of mass rape and other crimes committed against women in Darfur, it is unlikely the Sudanese government will be brought to justice for violations of this Convention. As of 2000, only 165 nations have fully ratified the Women’s Convention, and Sudan is not one of them. The grisly accounts of mass rape and mutilation of women in war and conflicts such as Bosnia, Kosovo, Rwanda and now Darfur cry out for a universal ratification and adoption of the Women’s Convention. However, having attracted the greatest number of reservations with the potential to exclude most, if not all the terms of the treaty,¹³⁴ the Convention has almost no power to prevent such atrocities from continuing in the future. And given the number of reservations, it is not likely to be applied seriously any time soon.

3. The Convention on the Rights of the Child

The Convention on the Rights of the Child was adopted in November 1989 and entered into force in 1990. The Convention recognizes that in order to achieve a full and harmonious development of a child, it is in the best interests of children to grow up in a family environment.

¹³² The full text of Article I of the Convention reads as follows: “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction mad on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

¹³³ Damrosch, et al., *supra* note 119 at 675-677.

It also recognizes that in order for the child to be fully prepared to live an individual life in society, a child should be brought up within their jurisdiction without discrimination of any kind as to the child or his or her parent or legal guardian on the basis of race, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Like many other human rights conventions drafted in the spirit of the International Bill of Rights, the Convention on the Rights of the Child has been egregiously violated over time. As with other conventions and the International Bill of Rights discussed herein, the government of Sudan, a signatory, is in gross violation in of this Convention by creating the crisis in Darfur, and in continuing to perpetuate the crisis by forcing thousands of displaced women and children to live in fear for their safety in deplorable conditions in refugee camps, as well as conscripting children into the Sudanese army.

4. The Convention on Refugees and Stateless Persons

The Convention on Refugees was adopted 1951, in response to the large number of Jewish people who had to leave Germany during World War II. This Convention defines “refugee” as a person who has crossed an international border due to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. So far, it is the only international agreement to specifically guarantee protection to refugees. Sudan is a signatory to this Convention, as is Chad.

As noted above, the continued attacks against displaced Sudanese refugees in Chad is in clear violation of the Convention. By the fact that displaced persons are now in a protected status, the Sudanese government, along with the Chad government, is under an obligation to

¹³⁴ J. Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 A.J.I.L. 281, 317 (1991).

protect refugees. While those displaced persons still trapped in Darfur do not technically meet the definition of "refugee," nevertheless, it is arguable that spirit of the Convention would create an obligation for the Sudan government not to engage in acts that purposefully causes harm or allows harm to come to such displaced persons.

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CHAPTER TWO:

THE CRISIS IN DARFUR:

**A "CIVIL WAR" UPON WHICH HUMANITARIAN
INTERVENTION WOULD INTERFERE IN STATE SOVEREIGNTY?**

“If the collective conscience of humanity . . . cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and justice.”

-- Former Secretary-General Kofi Annan

I. Introduction

The Sudanese government has continually justified its armed attacks upon innocent unarmed civilians as the legitimate use of the police power by a sovereign state in a purely domestic matter, characterizing such actions as “attacks against rebel groups.”¹³⁵ Others, such as the United Nations, consider the plight of the inhabitants of the Darfur region to be an issue of customary humanitarian law, as well in violation of a number of treaties.

While the Sudanese government would have the world believe that the grossly exaggerated number of deaths and/or refugees are the result of a civil war against “armed rebels,” to all the rest of the world, it is clear that these senseless atrocities that have been committed on a large scale are the result of a pro-Arab government seeking to eradicate its Black population.

II. International Law and Policy on Armed Conflicts – Humanitarian Considerations

A. Is the Darfur Crisis an Armed Conflict?

1. Overview

What is occurring today is a full-scale attack on unarmed civilians, creating over two million refugees, mostly due to an armed militia backed by the Sudanese government, and we must now ask: Is this really an armed conflict? And what type of conflict is it exactly?

Under international law, an armed conflict is (normally) defined as the “resort to the use of force to resolve a political issue where diplomatic solutions have failed.”¹³⁶ Green in his text

¹³⁵ *Id.*

¹³⁶ As noted by Warren E. Small, Adjunct Professor, Lecture, “Law of International Armed Conflict,” Golden Gate University, (Jan. 22, 2007).

notes, citing Grotius who, in his *De Jure Belli ac Pacis*,¹³⁷ states that war is the “state or situation of those who dispute by force of arms,”¹³⁸ usually requiring two or more parties to a dispute.

While the situation in the Darfur region of the Sudan represents many of the elements articulated in this definition, it appears that it is enough to classify this scenario as an armed conflict.

There is clearly a use of force – the Sudanese military with the assistance of the *Janjaweed* utilize arms and other crude weapons to attack villages and farmers in the Darfur region to either drive out villagers and take over the land, or kill villagers outright. Clearly there is a history of a dispute, or the basis of a dispute, though it is rather questionable whether the original dispute between the Sudanese government and the Sudan Liberation Army/Movement (“SLA/M”), one of the so-called “rebel forces,” really has anything to do with the Darfur region of Sudan. The government has repeatedly utilized the “presence” of the SLA/M and other “rebel” groups in the region as a pretext for its attacks on villages and unarmed civilians, despite the fact that much of the armed strife between the SLA/M and the government has taken place in the southern region of Sudan.

2. Systematic Attacks on Civilians by the *Janjaweed* – Do They Make the Situation an Armed Conflict?

As stated above, the problem created by the presence of the *Janjaweed* is not only the attacks upon unarmed civilians with little or no security to protect them, but also the fact that the *Janjaweed* has acted in the past, and continues to act, with the full assistance, financing and imprimatur of the Sudanese government. Given these facts, it would be fair to say that attacks by the *Janjaweed* do indeed allow the characterization of the Darfur situation as an armed

¹³⁷ L.C. Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, pg. 1, (1993), citing Grotius, *DE JURE BELLI AC PACIS*, (published 1625.)

¹³⁸ *Id.*

conflict. As many reports indicate it is the *janjaweed* that are primarily responsible for the ongoing attacks of villages and refugees in camps, a closer look at the *janjaweed* is warranted.

a. Who are the *Janjaweed* and What is their Status?

Janjaweed militiamen are primarily members of nomadic Darfurian and Chadian Arab-speaking tribes who have long been at odds with the Masalit, Fur and Zaghawa farming communities, over access to pasture and water for cattle, or outright theft of animals. The *janjaweed* first emerged in 1988 after then-Chadian President Hissene Habre defeated the Libyan government's territorial designs on Chad. Libya's Chadian protégé, Acheickh Ibn Omer Saeed retreated with his Arab militia forces to Darfur, where they were hosted by the newly-elevated chief of the Mahamid Rizeigat Arabs of north Darfur, who had earlier smuggled weapons to Ibn Omer's forces. Ibn Omer had also brought with him to Darfur an Arab supremacist ideology.

As a result, in the early 1990's, the *janjaweed* became the combination of Chadian and Darfurian forces, tolerated by the Sudanese government, who became notorious for racist rhetoric, massacre, rape and forced displacement.¹³⁹ The conflicts between the then-insurgents and the *janjaweed* were primarily over the increasingly scarce water and land resources in Darfur, given the problem of increasing desertification of arable lands, due to ongoing drought.¹⁴⁰ Such scarcity resulted in *janjaweed* resorting to such tactics as "swooping in" on non-Arab farms to steal cattle or force farmers off their land altogether.¹⁴¹

In 1999-2000, faced with threats of insurgencies in Western and Northern Darfur, Khartoum armed the *janjaweed*. The *janjaweed* became much more aggressive in 2003 after two non-Arab groups, the SLA/M and the Justice and Equality Movement (hereinafter, "JEM") took

¹³⁹ *Id.*

¹⁴⁰ B. Koemer, *Who Are the Janjaweed? A Guide to the Sudanese Militiamen*, Slate Magazine, (Jul. 19, 2005), www.slate.com/toolbar.aspx/actio=print&id=2104210, (last visited April 15, 2007).

¹⁴¹ *Id.*

up arms against the Sudanese government alleging mistreatment of non-Arab Sudanese by the predominantly Arab government in Khartoum. In response to the uprising, the *janjaweed* began pillaging towns and villages inhabited by members of the Masalit, Fur and Zaghawa tribes – from whom many members of the SLA/M and JEM drew their forces.¹⁴²

Since 2003, the *janjaweed*, with the assistance and backing of the government, are no longer the “scrappy” militias of yesterday, but are now instead well-equipped fighting forces that receive and enjoy the covert assistance of the Sudanese government.¹⁴³ It has been reported by field observers from Human Rights Watch that the Sudanese government openly recruited horse-owning Arab men, promising them a gun and a monthly salary in exchange for their services with the *janjaweed*.¹⁴⁴ Another group, International Crisis Group indicated that the money paid to the *janjaweed* is derived directly from the booty captured in raids on towns and villages, giving them an additional financial incentive to act with extreme brutality.

b. Should the *Janjaweed* Be Entitled to the Protected Status Given to Members of the Armed Forces?

Mercenaries have long been viewed as non-combatants outside of the protection of the Geneva Conventions afforded to members of the armed forces (combatants), and are not entitled to be treated as prisoners of war. As a matter of fact, it has only been since World War II that mercenaries have been condemned, with the UN concluding that the use of mercenaries in national liberation movements is a criminal act. Both the Security Council and the General Assembly have passed a number of resolutions (though, General Assembly resolutions are non-binding), indicating that the recruitment and use of mercenaries against national liberation

¹⁴² *Id.* It should also be stated that the conflict in Darfur is entirely separate from the 22-year civil war in the southern region of Sudan that has continued between the Muslim government and Christian and animist rebels. Amazingly, the *janjaweed* have nothing to do with that war. *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

movements constitutes a criminal act.¹⁴⁵ Given all that is known about the *janjaweed* thus far, it can be said that the *janjaweed* may fall under the definition of a *mercenary*.

In 1977, Protocol I to the Geneva Conventions was adopted,¹⁴⁶ and entered into force on December 7, 1978. Under Article 47 of Protocol I, a mercenary is defined as any person who: (a) is specifically recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact, is promised, by or on behalf of party to a conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (e) is not a member of the armed forces of a party to the conflict; and (f) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.¹⁴⁷

Interestingly, although under Protocol I, although a mercenary would not have the right of a combatant or a prisoner of war, nevertheless, he or she would not be devoid of all protection. Presumably since he or she is not deemed a combatant, he or she is presumably a civilian and would be treated as such under the Civilians Convention (the Fourth Geneva Convention.) Under Protocol I, a mercenary would be entitled to such minimum prerequisites such as a fair trial, as well as the fundamental guarantees under Article 75 of Protocol I.¹⁴⁸

It appears that the *janjaweed* falls under all categories indicated above, and may be deemed mercenaries. It also appears that the *janjaweed* have been recruited as mercenaries by

¹⁴⁵ Green, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 131 at pg. 112; see also note 31, *supra*.

¹⁴⁶ See note 43, *supra*.

¹⁴⁷ See, Article 47, Protocol I Additional to the Geneva Conventions of 1949, 1125 U.N.T.S. 3, adopted June 8, 1977, at Geneva, Switzerland.

¹⁴⁸ See note 38, *supra*.

the Sudanese government to oppose any force real or perceived, that is actively seeking to stop the government from further marginalizing Black Sudanese in the Darfur region.

c. The Problem of Mercenary Status – The Imprimatur of the Sudanese Government

Members of the *janjaweed* militia have also been reported to have the imprimatur of the government. Numerous witnesses and victims have described the *janjaweed* arriving at the same time as and leaving with the government forces, wearing uniforms similar to government uniforms, utilizing similar arms and equipment as that utilized by government soldiers, and seeming to coordinate ground attacks with aerial bombardment by government aircraft.¹⁴⁹ Members of the *janjaweed* even reside in government garrison towns.¹⁵⁰ It has also been reported that during attacks, the *janjaweed* have made such statements as “we are the government!” leaving no doubt as to the relationship between the government and the *janjaweed*.¹⁵¹

Despite the rather obvious imprimatur of the government, nevertheless, it cannot be said that the *janjaweed* is in fact a part of the armed forces of the government of Sudan. Numerous reports of the ongoing violence in the Darfur region refer to the *janjaweed* as militiamen, acting in concert with, (though outside of) the government. The Khartoum government itself has offered various conflicting reports of its logistical and financial support of the *janjaweed*, denying any involvement with the *janjaweed* coupled with claims of the *janjaweed* acting alone,¹⁵² then flatly refusing calls from the international community for the government to

¹⁴⁹ Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, *supra* note 19.

¹⁵⁰ B. Koemer, *Who Are the Janjaweed?*, *supra* note 134.

¹⁵¹ See note 32, *supra*.

¹⁵² *Id.*

disarm them.¹⁵³ Nevertheless, it is likely that despite reported ties to the government, the *janjaweed* should be considered as having a “mercenary”-type status.

3. The Activities of the SLA/M and the JEM – Do They Make it an Armed Conflict?

a. The Beginning of the Sudanese Liberation Army/Movement

The SLA/M was originally made up of an armed self-defense militia formed by western Sudanese tribesmen – primarily the Fur, Masalit and Zaghawa tribes who utilized the land for farming, as a defense to those Arab tribesmen who wish to utilize the same land for grazing their cattle.¹⁵⁴ Currently, many of those in the SLA/M are non-Muslim Black Sudanese who have survived the attacks of the *janjaweed* who have taken up arms to stop the marginalization of Black Sudanese by the pro-Arab government.¹⁵⁵

Formerly known as the Darfur Liberation Front, the SLA/M issued a political declaration on March 14, 2003, stating that it had taken up arms against the Khartoum government to change the political system in Sudan. The SLA/M demanded, among other things for Black Sudanese, equality, the separation of religion and the state, complete restructuring and redistribution of political power, equitable development as well as cultural and political pluralism.¹⁵⁶

b. The Beginning of the Justice and Equality Movement

The JEM began as a result of a 1989 coup by the National Islamic Front leader Hassan al-Turabi who overthrew former President Sadeq al-Mahdi, clearing the way for Omar Hassan al-Bashir to take the presidency.¹⁵⁷ Al-Turabi then incorporated non-Arab African Muslims into the political system of Sudan. Al-Bashir saw this incorporation as an attempt to reduce his

¹⁵³ *Id.*

¹⁵⁴ PBS, In Depth Coverage, *The Darfur Crisis: Rebel Groups in Darfur*, www.pbs.org/newshour/indepth_coverage/africa/darfur/rebel-groups, undated, (last visited April 14, 2007).

¹⁵⁵ Sudan Update, *Reports: Peoples, Darfur*, *supra* note 24.

¹⁵⁶ See note 154, *supra*.

¹⁵⁷ *Id.*

power, dissolved the government and purged it of the non-Arab Muslims who went on to form the JEM.¹⁵⁸

The pro-Arab, Muslim government is accused by the JEM of being discriminatory and oppressive to non-Arabs, accusing the government of such offenses as taking lands from African tribes, systematic rapes, destruction of basic infrastructure such as water and electrical systems, bombing of civilians.¹⁵⁹ The JEM along with the SLA/M has also accused the government of attacks on camps of internally displaced persons, mostly non-Arab, Muslim and non-Muslim Africans. It is in defending these camps that both rebel groups have encountered the *janjaweed*, who have sometimes plundered the camps taking livestock, water and other resources, and sometimes women in the camps.¹⁶⁰

c. Joining of Forces of the Two Rebel Groups

In January 2006, the SLA/M and the JEM issued a joint statement, indicating that they agreed to join in all political, military and social forces, their international relations and to double their combat capacity in a collective body under the name Alliance of Revolutionary Forces of West Sudan. This statement presumably means that the two groups are operating under a joint command. Even though the groups have acted jointly since the statement was issued, recent events have suggested that there may be somewhat of a splinter between the two groups. For example, some factions of the SLA/M still loyal to a SLA/M former leader Abdul Wahed Mohammed el Nur, may not be party to peace agreements signed by the current leaders of the joint forces, namely Minni Arcua Minnawi (SLA/M) and Ibrahim Khalil Mohammed (JEM).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

B. The Conflict in Southern Sudan

Southern Sudan has been beset more than one civil war. The first civil war between Northern and Southern Sudan began in 1955, one year before Sudan was declared an independent nation. It essentially sought to limit the movement of Southern Sudanese in order to prevent the spread of malaria and other tropical diseases to British troops that previously occupied Sudan.¹⁶¹ The conflict lasted from 1955 to 1972, when a cessation of the north-south conflict was terminated under the terms of the Addis Ababa Agreement, which granted autonomy to Southern Sudan.¹⁶²

The Second Sudanese Civil War began in 1983, after a ten-year hiatus of conflict, when President Gaafar Nimery decided to abrogate the Addis Ababa Agreement by creating a Federated Sudan which included states in Southern Sudan, previously declared autonomous.¹⁶³ President Nimeiry also imposed Islamic law on the southern states.¹⁶⁴ The Sudan People's Liberation Army (SPLA) was formed as a result.¹⁶⁵ The war continued after Nimeiry was ousted and a democratic government was elected, although the Umma party (an Islamic party) had a majority in Parliament.

The leader of the SPLA, John Garang, refused to recognize the Umma party as the government but agreed to negotiate as a representative of their parties. A bloodless coup installed current President Omar al-Bashir and Islamic Front leader Hassan al-Turabi, and a government of Islamic orientation that began to use religious propaganda to recruit people for the regular army. This caused the conflict with SPLA to intensify, as many people in the south were

¹⁶⁰ *Id.*

¹⁶¹ Wikipedia, *The Second Sudanese Civil Wars*, http://en.wikipedia.org/wiki/Second_Sudanese_Civil_War, (undated), (last visited April 21, 2007.)

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Christian.¹⁶⁶ The SPLA sought the support of the West (after previously having the support of the Soviet Union and Ethiopia) to portray the war as campaign of the Arab Islamic government to impose Islam and the Arabic language on the Christian south.¹⁶⁷

The second civil war went on for twenty years, which left a devastating effect on villages and tribal rebels alike. It also bitterly divided the country on racial, religious and regional grounds, displaced more than four million people, and resulted in the death of two million more. It also severely damaged the Sudan economy, resulting in starvation of many people, as well as a demise of infrastructure and funding for basic health services, education and jobs. In 2003, significant progress towards a peace agreement was made, and a Comprehensive Peace Agreement was reached on January 9, 2005, granting Southern Sudan autonomy for six years, to be followed by a referendum on independence. It also created a co-vice president position and allowed the north and south to split oil (and their proceeds) equally, but left both the North and South's armies in place.

The United Nations Mission in Sudan (UNMIS) was established under UN Security Council Resolution 1590 of March 24, 2005, whose mandate was to support implementation of the Comprehensive Peace Agreement and to perform functions related to humanitarian assistance, as well as to promote the protection of human rights.¹⁶⁸ UNMIS' mandate was quickly tested when John Garang, the south's elected co-vice president died in a helicopter crash on August 1, 2005, three weeks after he was sworn into office. This resulted in riots, but eventually, peace was restored to the region.¹⁶⁹

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

Despite the 2005 Peace Agreement, southern Sudan still faces a number of problems. Widespread sexual violence against children continues, as well as a lack of adequate infrastructure designed to bring adequate healthcare, education and jobs is still prevalent.¹⁷⁰ The imposition of Sharia (Islamic) law makes it difficult to prosecute many sexual assault cases, and in addition, the lack of attention of the pro-Arab Islamic government has allowed thousands to continue to face the on-going threat of sexual abuse, armed attacks, abductions, torture and forced displacement.¹⁷¹

C. Is the Darfur Conflict a Fight for Self-Determination?

The attack at El Fasher in 2003 that triggered the current crisis was borne out of a long struggle of Black Darfurians for equality and political equality in the Darfur region. As indicated above, the pro-Arab government has over time engaged in the systematic political and economic marginalization of Blacks, while favoring Arabs. It has been reported that both the SLA/M and the JEM have taken up arms to oppose such marginalization of Blacks, to seek infrastructure, jobs, political equality in the Darfur region. As indicated in Chapter II (A) (2), it appears that under the current facts, the conflict in Darfur can be characterized as a conflict for self-determination, which is not clearly defined under Protocol I of the 1949 Geneva Conventions, discussed below.

1. The Activities of the Sudanese Army – Do They Make it an Armed Conflict?

Although many reports indicate it is the *janjaweed* that are primarily responsible for the ongoing attacks of villages and refugees in camps, it should be remembered that the *janjaweed* has acted and continues to act with the full assistance, logistical support and financing of the

¹⁷⁰ Reuters, Africa, *South Sudan Children Still Suffering Despite Peace*, (Apr. 19, 2007), <http://africa.reuters.com/top/news/usnBAN926642.html>, (last visited April 21, 2007).

¹⁷¹ *Id.*

Sudan government. Furthermore, it should be noted the *janjaweed* has not acted alone in its attacks on villages. As reported by Human Rights Watch, many of the aerial bombardments, surveillance, heavy equipment and reconnaissance of villages before, during and after attacks have been committed by the Sudanese Army and government planes and helicopters.¹⁷²

During conflicts with rebels in South of the country, the Sudanese military perfected a strategy to combat insurgents: air forces would attack from the sky while Arab tribesmen, armed by the government, would concurrently attack from the ground.¹⁷³ These Arab militia, or *janjaweed* became particularly important in Darfur, since a majority of the Sudanese army who were from Darfur could not be trusted to take up arms against former neighbors and kin.¹⁷⁴ Nevertheless, although it can be said that the *janjaweed* is responsible for much of the killing, in all these attacks, government forces have played a more than a supporting role to the *janjaweed* – “softening up” villages with heavier weapons than those carried by the *janjaweed*, providing logistical support, or giving the *janjaweed* protection as they leave.¹⁷⁵

As previously noted above eyewitnesses report that attacks were coordinated and brutal, starting with government helicopters, flying at low levels to engage in reconnaissance of villages prior to a full-scale attack. Then, aerial bombardments consisting of hurling explosives and/or other crude armaments ensued.¹⁷⁶ Fleeing villagers were targeted in aerial bombings and shootings.¹⁷⁷ Both the government soldiers and *janjaweed* abducted women and girls who were not killed in the assaults, took them to nearby fields where they were repeatedly raped.¹⁷⁸ A few

¹⁷² Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, *supra* note 19.

¹⁷³ Power, *Dying in Darfur*, *supra* note 63.

¹⁷⁴ *Id.*

¹⁷⁵ Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, *supra* note 19.

¹⁷⁶ Save Darfur, *Violence and Suffering in Sudan's Darfur*, www.savedarfur.org, (last visited April 21, 2007).

¹⁷⁷ U.S. Dept. of State, *Documenting Atrocities in Darfur*, *supra* note 35.

¹⁷⁸ See note 35 *supra*.

days after a village has been attacked, government helicopters would return to “scope out” villages to ensure that the previously attacked villages were empty and had not been reoccupied. If any villagers had returned, government soldiers and *janjaweed* would return to further attack the village, killing and burning who and what was left to ensure that a village was not reoccupied.¹⁷⁹

a. Was there a “Declaration of War”?

Although it can be said that ongoing political strife is primarily responsible for the full-scale crisis/conflict that is taking place today, it would be accurate to say that no official declaration of war has been made by either the Sudanese government or the “rebel” forces seeking political and socio-economical equality. Nevertheless, the attack at El Fasher on government soldiers by the SLA/M in 2003 can be said to have been interpreted by the Sudanese government as a “declaration of war” by rebel forces against the Sudanese government’s pro-Arab rule, since it is after this point that the attacks against civilians, villages and internally and externally displaced refugees began.

b. Are Combatants an Instrument of the Government?

The simple answer to this question is yes and no. As indicated above, although it is the *janjaweed* that has been primarily responsible for much of the killing on the ground, nevertheless, government army soldiers have played a role in the destruction of villages, the killing, rape, torture and displacement of civilians. Certainly Sudanese government soldiers may be deemed as lawful combatants. Combatants are defined under the *Oxford Manual on the Laws of War* as members of the armed forces of a Party to a conflict, actively engaged in conflict, protected or bound by the laws and customs of war,¹⁸⁰ and includes,

¹⁷⁹ *Id.*

¹⁸⁰ Green, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 131, at pgs. 84-85.

“the army, properly so called, including the militia . . . and other bodies which fulfil [sic] the three following conditions: (a) That they are under the direction of a responsible chief; (b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps; (c) that they carry their arms openly.”¹⁸¹

It appears that members of the Sudanese army meet all three criteria. Although much that is written about the Darfur conflict mostly describes the actions of the *janjaweed*, many eyewitness reports of attacks on villages compare the *janjaweed* to government soldiers, as wearing similar uniforms as the soldiers, under the direction of a responsible authority and carrying arms openly, much like government soldiers, *having the imprimatur of the government*. As soldiers are in fact instruments of the government, acting on behalf of the government, and carrying out the government’s policies, it can be said they are lawful combatants in the conflict. As to the *janjaweed* however, the answer is not so clear. They too appear to act at the behest of the government, are under the direction of the Sudanese military, and carry weapons openly. Nevertheless, for the reasons stated above and below, the *janjaweed* cannot be said to be lawful combatants that are instruments of the government of Sudan.

c. Is there a “Belligerent” or Adverse Party?

Those who would be considered “belligerents” are in fact the rebel forces, namely the SLA/M and the JEM, who are seeking socioeconomic and political equality in the Khartoum government. Although the reported attacks in the conflict are against civilians, nevertheless, under the laws of armed conflict, unarmed civilians who have not taken up arms in the fight (as many of those killed, injured or displaced are) not considered a party to the conflict.

¹⁸¹ *Id.* at 104.

d. Are Members of the Sudanese Army Subject to the Laws of Armed Conflict?

As members of the Sudanese army are considered members of the armed forces of a party to a conflict, that being the Sudanese government, and are considered bound by the laws of war, indeed, members of the Sudanese Army are, deemed to be “combatants” and are as such, subject to *jus in bello*, or the laws of armed conflict.¹⁸²

D. An Armed Conflict

Given all that is known about the situation in Darfur, it can be concluded that what is going on is in fact, an armed conflict. Clearly, the Government is utilizing its armed forces to resolve what it sees as a political dispute – “rebel” forces that seek political and socio-economical equality for non-Arab Sudanese, and evacuation of those non-Arabs that stand in the way of a pro-Arab mandate, and the “rebel” forces have resorted to armed warfare in achieving their ends. Although the status of some of the participants remains questionable, namely that of the *janjaweed*, there is little doubt that the situation would qualify as an armed conflict.

There are combatants, the Sudanese army, there are “belligerents”, namely the SLA/M and the JEM (as well as other off-shoot organizations, not discussed here), and there is armed warfare – attacks against both the government troops and the rebel factions, although no “war” was officially “declared.” The next question that needs to be addressed is what type of conflict is the Darfur conflict, and what law applies?

¹⁸² *Id.* at pg. 85; see also, note 141 *supra*, citing Protocol I (to the 1949 Geneva Conventions), Art. 43(2).

III. Does the Darfur Crisis Meet the Definition of International Conflict?

A. What Law Applies?

1. Origins of an International Armed Conflict

Normally, an international armed conflict is defined as the resort to the use of force by two or more states to resolve a political issue where diplomatic solutions have failed.¹⁸³ In the case of the conflict in Darfur, it is clear that the origin of the conflict is not a “state vs. state” type of conflict. While it may yet morph into a full-scale international conflict, as there have been reports in recent years of armed conflict with between Sudan and its neighboring states, Chad and the Central African Republic, nevertheless, all of the evidence presented indicates that the current crisis is borne out of a historical struggle in a country plagued by internal conflicts.

2. Acts Suggesting that the Armed Conflict May Be Deemed as an International Armed Conflict

There is no question that the conflict in Darfur has spread to eastern Chad, just across the Sudan border. Recently, reports have estimated that over 250,000 displaced Darfur refugees have resettled in makeshift tents in refugee camps just across the Chad border.¹⁸⁴ In addition, several thousand people have been killed, thousands of women and girls have been raped, entire villages pillaged and destroyed, causing the mass exodus of villagers to eastern Chad and away from their homes.¹⁸⁵ It is currently estimated that there are approximately 2.5 million displaced people within Darfur and Chad.¹⁸⁶ Another 46,000 refugees from the Central African Republic have also fled to Chad.¹⁸⁷

¹⁸³ See note 130, *supra*.

¹⁸⁴ Amnesty International, *Chad: Civilians Under Attack Darfur Conflict Spreads to Eastern Chad*, (Mar. 1, 2007), www.amnesty.org/en/library/info/AFR20/005/2007.html, (last visited Feb. 14, 2009).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

The *janjaweed* militia from both Sudan and Chad has been deemed primarily responsible for many of these attacks against Chad civilians, as well Chadian armed groups.¹⁸⁸ There are also reports that the Sudanese government continues to arm the *janjaweed* militias, and it continues to bomb and attack civilians. Many of the refugees in Chad still face cross-border raids by the *janjaweed*, and dangerous isolation during the rainy season, when aid deliveries are almost impossible. Women are under a constant threat of being raped while gathering wood for fire if forced to look for wood too far from the camps.¹⁸⁹

Ironically, these attacks on unarmed civilians have prompted both the Sudan and Chad governments to accuse each other of “sponsoring, harboring and arming opposition armed groups.”¹⁹⁰ As a result, such mutual accusations have resulted in the relations between the two governments to deteriorate to the point where, in November 2006, the government of Chad declared that it was “in a state of war” with Sudan.¹⁹¹ As such, it appears that both international humanitarian law and international law of armed conflict applies.

B. Applicability of the Hague Convention

The intention of the twenty-six countries that met at The Hague in 1899, and then in 1907, was to memorialize in writing the agreed upon *jus in bello*, or the conduct of armed conflict. The intent of the wording of what is now the preamble to Hague Convention IV, was “inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relation and in their relation with inhabitants [*of enemy territory*.]”¹⁹² (Emphasis added.)

¹⁸⁸ *Id.*

¹⁸⁹ World Vision, *Humanitarian Aid for Sudanese in Darfur and Chad*, *supra* note 57.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, *supra* note 131 at pgs. 16 & 31.

During that time, it is evident that the Law of the Hague, as well as the resulting Declarations and Conventions, were intended to pertain to international conflicts, or conflicts between states only. While the Hague Conventions are one of the cornerstones of international humanitarian law with regard to armed conflict, nevertheless, it is the intent of the Hague Conventions that they apply to *inter-state* armed conflict, that is, conduct of armed conflict between states.

While it may be said that the conflict in Darfur has recently taken on an international dimension with the “declaration of war” by Chad against Sudan,¹⁹³ the Hague Convention would only apply to any conflict between Sudan and Chad or any other state, and would not apply to the internal conflict that has taken place between government forces, the *janjaweed* and the “rebel” SLA/M and JEM since 2003.

C. Applicability of Geneva Conventions I-IV

Like the Hague Conventions, the 1949 Geneva Conventions is also a cornerstone of international humanitarian law and is also international law on the conduct of armed conflict. However, the Conventions I through IV do not apply to non-international conflict, although it stated that Common Article 3 sought to impose some minimal humanitarian considerations in non-international conflicts.¹⁹⁴ Like the Hague Conventions, applicability of the Geneva Conventions would only occur in the case of any conflict taking place between Sudan and another state; it would not apply to events already having taken place *intrastate* since 2003. It appears that since neither the Hague Conventions or Geneva Conventions would apply to the internal conflict, a review of the law of armed conflict as applied to internal conflicts is in order.

¹⁹³ See Part I, Section A, subsection (2) *supra*.

¹⁹⁴ Green, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 131 at pgs. 53-54.

1. Is the Conflict an Internal Conflict – Origins?

Prior to 1977, much of the international law of armed conflict did not apply to non-international conflicts, except for Common Article 3 of all four of the 1949 Geneva Conventions. Common Article 3 sought to impose minimal humanitarian considerations even to non-international conflicts. However, Common Article 3 has some drawbacks in terms of the Darfur conflict in that it does not go far enough to protect those who have been affected by or killed in the crisis, as discussed below. Thus, a review of other (possible) applicable treaties is warranted.

a. Applicability of Protocol I – Self Determination

In 1977, Protocol I to the 1949 Geneva Conventions on the Laws of Warfare was adopted. Protocol I pertains to internal conflicts directed towards the achievement of self-determination and national liberation, and views these conflicts as *international* conflicts,¹⁹⁵ despite their purely intrastate nature. Article 1, paragraph 4 provides that “international armed conflicts” shall include:

“armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”¹⁹⁶

Protocol I however has some drawbacks. It does not make any determination within its terms as to when a movement is seeking self-determination, or what is in fact a national movement for liberation,¹⁹⁷ nor are the terms “self-determination” and/or “national movement” defined any better in the Declaration on Friendly Relations.¹⁹⁸ The decision as to whether the

¹⁹⁵ *Id.* at pgs. 60-61.

¹⁹⁶ *Id.* at pg. 107; see also, 16 I.L.M. 1391 (1977).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

conditions specified in Article 1 (4) of Protocol I are purely subjective, and depends upon the facts of each conflict.¹⁹⁹

For those states that have ratified Protocol I,²⁰⁰ including Sudan, the decision to recognize a national movement's campaign for self-determination brings that conflict under the auspices of an international armed conflict. Protocol I provides that members of the national liberation movement concerned become entitled to all of the privileges of a legally recognized combatant.²⁰¹

Members of national liberation movements are also endowed with a number of privileges that are normally not afforded to other regular forces engaged in an international conflict. For example, members are not permitted to wear uniforms, do not have to carry their arms openly at all times, do not have to wear marks identifiable at a distance, unlike other requirements for lawful combatants.²⁰² Also, and most notably, under Article 1 (4), the members of the national liberation movement involved acquire the status of combatants and cannot be regarded as committing any criminal offense against the entity against which they are conducting their operations. Also of interest is that under Protocol I, mercenaries, which appear to be the classification of *janjaweed* militia, are not protected as combatants and may be tried for criminal conduct for actions committed during the conflict.²⁰³

One more interesting aspect regarding Protocol I should be noted. While Protocol I does not replace the Geneva Conventions of 1949, it seeks to reaffirm and develop them. For example, where Protocol I merely restates or rephrases the obligations enumerated in the Geneva

¹⁹⁹ *Id.*

²⁰⁰ Amnesty International, *Chad: Civilians Under Attack Darfur Conflict Spreads to Eastern Chad*, (Mar. 1, 2007), www.amnesty.org/en/library/info/AFR20/005/2007.html, (last visited April 22, 2007). Sudan had previously ratified all four of the 1949 Geneva Conventions, and in December 2006, ratified Protocols I and II of the Geneva Conventions, which took effect February 2007.

²⁰¹ Green, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, *supra* note 131 at pg. 61.

²⁰² *Id.* at pg. 61.

Conventions, it would be binding on a state *even if it had not ratified or acceded to Protocol I* but which is a party to the four Geneva Conventions.²⁰⁴ As to the Darfur conflict, Sudan, which is a party to all four Geneva Conventions, would have been bound by those terms of Protocol I that restate or rephrase the terms of the four Conventions. Fortunately, as of March 7, 2006, Sudan acceded to Additional Protocol I, and on July 13, 2006, acceded to Additional Protocol II. Both instruments came into force six months after Sudan's accession.

As indicated above, there is ample evidence that what is going on in Darfur would accurately be characterized as a struggle for self-determination. In taking up arms against the government, the SLA/M and the JEM are seeking to achieve political and socio-economic equality systematically denied to non-Arab Sudanese since the pro-Arab movement took over the Khartoum government. Since neither "self-determination" nor "national movement for liberation," are precisely defined under either Protocol I or the Declaration for Friendly Relations, it appears that the efforts of both the SLA/M and the JEM may fall under the definition of self-determination, and as such, should be deemed an international conflict under Protocol I.

b. Applicability of Protocol II

Protocol II to the Geneva Conventions of 1949, also adopted in 1977, is the first and only international agreement exclusively regulating the conduct of parties to a non-international conflict.²⁰⁵ Non-international conflicts are defined in Article I of Protocol II as:

"all armed conflicts which are not covered by Article I of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised [sic] armed groups, which [1] [are] under responsible command, [2] exercise control over part of its territory as to

²⁰³ *Id.*

²⁰⁴ Green, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 131 at pg. 49.

²⁰⁵ *Id.* at p. 58-60.

enable them to carry out sustained and concerted military operations and [3] [are able] to implement this Protocol.”²⁰⁶

Protocol II is a difficult threshold to meet, as it requires that all three elements be met before a conflict can be deemed to be a conflict falling under Protocol II. As a matter of fact, with the provision that a dissident movement be in control of part of the national territory, almost no national liberation movement has met this requirement, as almost no national liberation movement has been in such control of any part of the national territory.²⁰⁷

As to the conflict in Darfur, the national liberation movement, namely, the SLA/M and the JEM, is not in control of any part of the national territory in Sudan enough to carry out sustained and concerted military operations. As many of the reports indicate, most of the attacks are against unarmed civilian in villages scattered throughout Darfur, which it is reported, the government claims may contain the “rebel forces.”²⁰⁸ This does not suggest that the rebel forces control any part of the Darfur territory, if in fact the government attacks villages where they “suspect” the rebels may be. As a matter of fact the evidence suggests quite the opposite – the attacks have been effective to drive out and displace over two and a half million people from their homes and villages in Darfur.

Furthermore, it is also arguable that the SLA/M and the JEM are not under a central command, or able to accede to Protocol II. As indicated above, although the two groups made a statement regarding the combination of forces and resources, however, recent reports have suggested a philosophical “split” between the SLA/M and the JEM.²⁰⁹ Despite the announcement in January 2006 of the two groups forming a joint group, the Alliance of Revolutionary Forces of West Sudan, there is little evidence to suggest that there is an organized,

²⁰⁶ *Id.* at pg. 63; see also 16 I.L.M. 1442 (1977).

²⁰⁷ *Id.*

²⁰⁸ See note 19, *supra*.

centralized military command. As a matter of fact, recent reports seem to indicate that attacks by the "rebel groups" against government forces are anything but organized, but are in fact random and sporadic. Furthermore, if indeed philosophical differences may exist among some former members of the SLA/M and the JEM under the joint Alliance, this would seem to undermine any ability of the Alliance to accede to Protocol II. As such, it appears that Protocol II would not be applicable to the Darfur conflict.

D. Applicability of Common Article 3 of the Geneva Conventions

Assuming that neither Protocol I nor Protocol II apply to the Darfur conflict, and the conflict can be deemed a truly internal conflict not entitled to the application of international law, common Article 3 to all four Geneva Conventions of 1949 would apply.²¹⁰ Common Article 3 to the Conventions was the first attempt to extend international recognition to non-international conflicts in order to impose obligations upon the parties thereto to observe legal regulations during the conflict.²¹¹

Under common Article 3, protection is stipulated on a basis of complete non-discrimination for all persons including *hors de combat*, civilian and non-combatants in a non-international conflict located in a territory of a party to the four Conventions.²¹² The purpose of common Article 3 is to ensure that such persons are treated humanely, and forbids such acts as cruelty, murder, torture, unfair trial, etc.²¹³ The provisions of common Article 3 bind each party

²⁰⁹ See Chapter II, Section A (3)(b)(i), *supra*.

²¹⁰ See, Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, (signed at the Hague on Oct. 18, 1907, entered into force Jan. 26, 1910).

²¹¹ Green, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 131 at pg. 57.

²¹² *Id.*

²¹³ *Id.*

to a conflict, and would appear to apply even in a state of insurgency.²¹⁴ Furthermore, common Article 3 does not affect the legal status of any party.²¹⁵

However, one problem of Article 3 common is that it entitles only the national government of the territory in which a non-international conflict is located to retain power to try insurgents for treason or administer justice under the national criminal law after the conflict has ceased.²¹⁶ Such a rule would be wholly inappropriate in a state such as Sudan. As reports indicate, the Khartoum government cannot be trusted to carry out justice after the conflict is over, given that it has denied the numbers of people killed by its own troops, despite conflicting reports to the contrary by respected human rights organizations such as the United Nations or Human Rights Watch.

Furthermore, it is a long held maxim in international law that where a government is unable or unwilling to try those parties that commit atrocities during an armed conflict, such war criminals should be brought to justice in an international tribunal. Given everything that is known about the Darfur conflict, it appears that the Khartoum government would be more than unwilling to try those members of its own forces or member of the *janjaweed* militia that have committed inhumane acts and/or war crimes against civilians and other non-combatants to the conflict, since it has voluntarily recruited, financed, supported and rewarded those individuals that served the government to clear the Darfur region of non-Arab settlers, and has continued to provide no protection whatsoever to those civilians and non-combatants who have survived attacks during the conflict.

²¹⁴ *Id.* at 57-58.

²¹⁵ *Id.* at 43.

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IV. Conclusion

The purpose of armed conflict is “to defeat the adverse party.”²¹⁷ The law of armed conflict only permits such actions that are necessary for this purpose, and forbids acts which go beyond this and cause injury to persons or damage to property not essential to achieving this end.²¹⁸ One of the most basic rules of the law of armed conflict is that civilians and civilian objects must not be made the object of direct attack.²¹⁹ Yet, as we have seen almost everyday for the past six years, this is exactly what is happening in the conflict taking place in the Darfur region of Sudan. Most of the armed attacks of villages have been directed towards the very citizens that the Khartoum government has marginalized, systematically denied equal political, socio-economic and infrastructure rights to, and isolated. The struggle by the two main rebel forces with the Khartoum government for self-determination, or achievement of equal rights in a pro-Arab government for non-Arab citizens, has led to the deaths of over 300,000 people and the displacement of another two and a half million people.

It is not enough to recognize that a great atrocity of genocide is occurring in the Darfur region; at the root of it all is an internal armed conflict, subject to the laws of international armed

²¹⁶ *Id.* at 58.

²¹⁷ Green, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 131 at pg. 118.

²¹⁸ *Id.*

²¹⁹ *Id.* at 120.

conflict taking place, to which the parties to the conflict must abide, which has now spilled over into a neighboring country making it, in effect, a conflict between two states. Unfortunately, the main parties to the conflict, the Sudanese army and its armed militia the *janjaweed*, are not abiding by these laws of armed conflict. The international community has called for resolution and amelioration of the effects of the conflict under the terms of international treaties pertaining to human rights. However, there is ample opportunity to also bring those who violate the laws of armed conflict to justice based upon the various conventions that govern it.

CHAPTER THREE:
LAW AND POLICY ON
ARMED INTERVENTION IN ETHNIC CONFLICTS
AND THE CONFLICT IN DARFUR

“... [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?”

-- Former Secretary-General Kofi Annan

I. International Intervention – A Very Unsettled Proposition

A. The Power of the U.N. to Engage in/Authorize Intervention

The U.N. Charter is the legal authority that allows the United Nations to engage in intervention.²²⁰ Article 2(4) of the UN Charter expressly prohibits one member nation from using military force against another.²²¹ This is so because the U.N. Security Council is primarily responsible for maintaining international peace and security, with its primary powers as set forth in Chapters VI, VII, VIII and XII of the U.N. Charter.²²² Chapters VI and VII authorize the Security Council to utilize various methods to maintain international peace and security.²²³ The following indicates that while the Security Council may be, and has been, unwilling to do much to put an end to the crisis in Darfur, nevertheless, it is vested with great power to do so.

1. Peaceful Measures Under Chapter VI

Chapter VI of the Charter authorizes the Security Council to investigate disputes that may disrupt or even threaten international peace and security, and to recommend appropriate procedures to mitigate or resolve them.²²⁴ Such procedures usually involve formulating diplomacy strategies such as hortatory actions, negotiation and peace agreements as incentives to settle disputes peacefully.²²⁵ Hortatory actions may include declarations issued through resolutions, and/or presidential statements; negotiations involve engaging conflicting parties in

²²⁰ David J. Scheffer, U.N. Engagements in Ethnic Conflicts, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 147, 157 (David Wippman ed., 1998), as cited by Nadia Deans, *Tragedy of Humanity: The Issue of Intervention in the Darfur Crisis*, 19 *Emory Int'l L. Rev.* 1653, 1671 (2005).

²²¹ U.N. Charter, Article 2(4).

²²² U.N. Charter Art. 24, para. 2.

²²³ *Id.*

²²⁴ See Scheffer and Deans, *supra*, note 220.

discussions in an attempt to address underlying conflicts, which can be an effective means of preventing such conflicts from recurring.²²⁶ However, where a situation has reached the level where it may be deemed a crisis or even a humanitarian crisis such as that in Darfur, the U.N. should not rely solely on such peaceful means of conflict resolution to end such a crisis.²²⁷

2. More Coercive Measures Under Chapter VII

In those cases such as the Darfur humanitarian crisis where peaceful measures are not feasible, (nor would they necessarily be effective), Chapter VII authorizes the United Nations to take more coercive measures of intervention.²²⁸ Article 39 authorizes the Security Council to determine if there is any “threat to the peace, breach of the peace or act of aggression” and to decide if measures to be taken under Articles 41 and 42 are necessary “to maintain or restore international peace and security.”²²⁹ In other words, the U.N. Charter allows the United Nations to intervene in those situations constituting a breach of the peace by either imposing sanctions or by taking military action. Article 42 authorizes the Security Council to engage in military intervention if nine members of the Security Council vote (with the concurrence of all five permanent members) to engage in military intervention where measures under Article 41 are deemed inadequate to address the threat or breach of international peace or an act of aggression.²³⁰

a. Article 41 Sanctions

The types of measures employed under Article 41 are not likely to help ameliorate the humanitarian crisis in Darfur. Article 41 allows for such non-military measures to ensure that States comply with U.N. mandates. These measures may consist of “complete or partial

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

interruption of economic relations” such as sanctions, or “the severance of diplomatic relations.”²³¹ The usual sanction for states involved in ethnic conflict and/or human rights violations is an arms embargo, since it is easier to impose than other broader sanction regimes, and usually more effective.²³² Economic sanctions are also effective to exert pressure to comply with international law, and may function to help establish individual accountability.²³³

1. Economic Sanctions

Normally, sanctions can be very effective in coercing the violating state to comply with a U.N. mandate.²³⁴ However, in situations such as that presented in the crisis in Darfur, where non-state actors are the violators, there are a number of reasons that it would be difficult indeed for economic sanctions to induce compliance.²³⁵ First, although numerous reports have described the *janjaweed* attacks as acting with the imprimatur of the Sudanese government,²³⁶ the government adamantly denies having any ties to the *janjaweed*, and instead, would have the international community believe that they are “armed bandits, neither organized nor funded.”²³⁷ Second, assuming the government’s highly improbable claim that the *janjaweed* is not acting with government authority is true, there appears to be no plausible evidence that such sanctions would be effective to prevent further attacks on civilians, since an economic sanction would not reach a non-state actor.

²²⁹ U.N. Charter Article 39.

²³⁰ *Id.*

²³¹ See Deans, *supra* note 220, 1674.

²³² *Id.*

²³³ An example is the Security Council’s imposition of economic sanctions against Serbia, Montenegro and the Bosnia Serbs, which prompted all parties to cooperate with their ethnic counterparts, and even coerced the Serb leaders to cooperate with the ICTY. See, Deans, *supra*, note 219, 1675

²³⁴ *Id.*

²³⁵ *Id.* In the case of the crisis in Darfur, the non-state actors are the *janjaweed*, who are alleged to act with the authority of the Sudan government.

²³⁶ See notes 31-40, *supra*.

²³⁷ Eye on the UN, *The UN Human Rights Council Self-Destructs: Geneva Updates*, Dec. 5, 2006, www.eyeontheun.org/geneva-updates.asp?p=290, (last visited Feb. 1, 2009.)

Third, there is also the problem that the imposition of any sanctions such as an economic sanctions or an arms embargo from the Security Council is not likely to materialize, given that two of its permanent members China and Russia have their own economic interests in Sudan (oil and weapon sales to Sudan). On July 30, 2004, the Security Council passed Resolution 1556 which imposed an arms embargo upon Sudan, prohibiting the sale of weapons and related material to all non-governmental entities and individuals operating in Darfur. Security Council Resolution 1591 on March 29, 2005, expanded the embargo to all parties to the N'Djamena Ceasefire agreement and other belligerents in Darfur.²³⁸ Although the embargo did ultimately include the Sudanese army with the passage of SC Resolution 1591 (under SC Resolution 1556, it did not), this did not deter other nations from selling arms to Sudan, which is now awash with arms.²³⁹ Two nations who have continued to sell arms to Sudan are two of the Security Council's permanent members, China and Russia.²⁴⁰ Although there is a movement by UN experts to urge a wider arms embargo to extend to all of Sudan and Chad,²⁴¹ it is unlikely that either China or Russia will agree to such an expanded sanction.

2. Diplomatic Sanctions

The Security Council may also impose diplomatic sanctions as a reprimand to those parties engaging in conflicts that breach international peace. Articles 4, 5 and 6 of the U.N. Charter give the Security Council the authority to either "deny membership in the United Nations, for suspending the rights and privileges of membership and for expelling from the

²³⁸ Human Rights First, *Stop Arms to Sudan*, Dec. 2008, <http://www.stoparmstosudan.org/pages.asp?id=32>, (last visited Feb. 1, 2009.) The ceasefire agreement, which has since collapsed, was signed on April 8, 2004, by the Government of Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement, two of the largest rebel groups operating in Darfur at the time. *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* See also Reuters, *UN Experts Urge Wider Arms Embargo on Sudan, Chad*, Nov. 18, 2008, http://www.reuters.com/article/homepageCrisis/idUSN18283497.CH_2400, (last visited Feb. 1, 2009.)

organization respectively.”²⁴² The harshness of severing diplomatic relations is such that it is considered “a measure [just] short of using force to enforce Security Council decisions.”²⁴³

Diplomatic sanctions under Articles 4, 5, and 6 of the Charter may prove somewhat effective in the case of the crisis in Darfur, may be more effective against the Government than economic sanctions. One reason is that for many months after the crisis began, the Government denied that such atrocities as those that have occurred in Darfur have in fact occurred,²⁴⁴ and the exacerbation of the conflict has precluded any attempts of the United Nations or other non-governmental organizations to investigate the gravity and extent of the situation with refugees, as well as to acquire an accurate account of how many civilians have lost their lives.²⁴⁵ Second, despite its protestations of non-involvement with the *janjaweed* or even its more incredible claim of lack of knowledge of the movements of the *janjaweed*, the Government of Sudan might respond to diplomatic sanctions if instituted coercively enough.

The Security Council should take the position that the Government’s claims of non-involvement or even lack of knowledge of the *janjaweed* are too incredible to be believed, and force the Government to “crack down” on the *janjaweed* or face potential diplomatic exile. Why would this be effective? Because despite media reports of the ongoing crisis in Darfur, which the Government deems as “exaggerated,”²⁴⁶ the Government has attempted to present itself in a positive light in the international community and within the United Nations. The Government’s

²⁴² U.N. Charter arts. 4-6; see also Deans, *supra* note 220, at 1675.

²⁴³ *Id.*

²⁴⁴ Amnesty International, *Beyond Any Doubt: Sudan Uses and Supports the Janjawid in Darfur*, Apr. 2006, www.amnestyusa.org/document.php?id=ENGIOR410282006&rss=darfur, (last visited Feb. 1, 2009.)

²⁴⁵ *Id.* See also Press Release, *Security Council Told Darfur Situation Deteriorating, Tension at Highest Level, Fighting More Widespread*, Apr. 11, 2004, U.N. Doc. SC/8236 (2004).

²⁴⁶ *Id.* See also CNN.com, *Sudan President: Media ‘Exaggerating’ Darfur Conflict*, (Mar. 11, 2008), <http://www.cnn.com/2008/WORLD/africa/03/11/sudan.darfur/index.html>.

membership on the former Human Rights Commission,²⁴⁷ is an example of the Government's brazen attempts to elevate Sudan's profile on the international stage, despite its human rights record. Such diplomatic sanctions could also keep the Sudanese Government from hiding its crimes behind the mask of a high international profile.

b. Article 42 Military Intervention

Under Chapter VII of the UN Charter, if the State does not comply after Article 41 sanctions are employed, the United Nations may also use military action under Article 42 to restore international peace and security.²⁴⁸ Where the Security Council determines that a conflict constitute a threat to or breach of international peace and security, or an act of aggression, then Chapter VII effectively overrides the sovereignty limitation on armed intervention.²⁴⁹

There certainly is precedent for the successful employment of UN instituted military intervention. The 1990 military action to expel Iraq from Kuwait is an example of a Security Council authorized military intervention under Chapter VII, in which the Security Council determined that Iraq's invasion of Kuwait was a breach of international peace and security that warranted military intervention.²⁵⁰ In addition, the UN issued Resolution 688 to justify the 1990 invasion of northern Iraq on the grounds that Iraq's repression of civilian Kurds led to the displacement of the Kurds and created a refugee crisis in Turkey and Iran.²⁵¹ The UN determined that the refugee crisis was a breach of international peace and security.²⁵²

Much in the way that the UN determined a military invasion by Iraq resulting in a large scale refugee situation was a breach of international peace and security, the Security Council

²⁴⁷ BBC News, *UN Elects New Human Rights Body*, May 9, 2006, <http://news.bbc.co.uk/2/hi/americas/4754169.stm>, (last visited Feb. 1, 2009).

²⁴⁸ U.N. Charter art. 42; see also, Deans, *supra* note 220, at 1676.

²⁴⁹ See Deans, *supra* note 220, at 1677.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

should also determine that the situation in Darfur, which has also resulted in a large-scale refugee situation, should also be deemed to be a breach of international peace and security. Although no other state invaded Darfur, nevertheless, the crisis has not only presented the potential to affect other states, but the sheer numbers of refugees (over 250,000 since 2004)²⁵³ that have flooded over the border into neighboring Chad to escape the violence in Darfur, could affect the stability of Chad. As previously indicated, there have been numerous attacks on civilian refugees in refugee camps by the *janjaweed*,²⁵⁴ within the Chad border to the point where a large number of refugees in camps had to be moved deeper within Chad away from the border.²⁵⁵

Such attacks as aerial bombings within the Chad border has had a multi-dimensional effect of (1) endangering refugees and Chadian civilians, (2) angering the Chad government and thereby raising the potential for relations between Chad and Sudan to further escalate,²⁵⁶ and (3) endangering efforts of the UNHCR from getting food supplies to camps in order to provide assistance to tens of thousands of refugees. Such attacks have furthered tensions between Sudan and Chad, with each government accusing the other of supporting rebel groups hostile to their

²⁵³ See, U.S. Department of State, "Fact Sheet: Sudanese Refugees in Chad," Dec. 2004, www.state.gov/document/organization/39325.pdf. See also notes 48-49, 51, 54-55, *supra*.

²⁵⁴ See Refworld, "Sudan-Chad: Bombing Blocks Access to New Refugees," Feb. 20, 2008, www.unhcr.org/refworld/topic.4565c225/1.4565c25f17f47bea83alde.0.html, (last visited Feb. 3, 2009).

²⁵⁵ See, UNHCR, *UNHCR To Move Refugees Further Away From Chad/Sudan Border*, (Mar. 10, 2008), www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=44117d424, (last visited Feb. 14, 2009).

²⁵⁶ See, U.S. Department of State, "Chad", Nov. 2008, www.state.gov/r/pa/ei/bgn/37992.htm. In 2006, a border dispute broke out between Chad and Sudan as a result of the massive numbers of refugees that have fled to Chad, in which both governments accused the other aiding rebel groups in each country in armed conflict with their respective governments. The conflict caused such a humanitarian crisis that the UN authorized deployment of an European Union peacekeeping force. In 2008, Chad and Sudan entered a cease-fire agreement at N'Djamena, Chad, after Chadian rebels infiltrated N'Djamena and surrounded the Presidential Palace, which Chad believed Sudan was involved with. The two governments signed a peace accord in March 2008 agreeing to stop backing rebels hostile to each other. The peace accord quickly deteriorated, resulting in a breakdown in diplomatic relations that were eventually restored in October and November 2008.

respective governments.²⁵⁷ This has resulted in a breakdown of diplomatic relations between the two governments,²⁵⁸ which could destabilize the region.

Because the Darfur crisis has affected Darfurian civilians in Chad, has created a burden for the Chadian government, and has the potential to affect innocent civilians of Chad, the Security Council can and should exercise its Chapter VII powers because there is a breach of international peace and security. The Darfur crisis has caused diplomatic relations to break down (and revive) between Sudan and Chad, but it is a matter of time before the situation explodes and causes conditions to deteriorate completely.

B. Humanitarian Intervention by States

If the Security Council is not willing to intervene, despite the attacks on refugee camps in Darfur and in Chad, as well as escalating tensions between the two governments, then it should authorize a multilateral armed intervention and/or peacekeeping forces in the crisis. As to individual states, the Charter provides two accepted legal bases for the use of force: the right of individual or collective self-defense in response to an armed attack, or force authorized by the UN Security Council.²⁵⁹

However, as the 1999 NATO air strikes in Bosnia demonstrate,²⁶⁰ customary norms have allowed for a third -- the use of force for humanitarian purposes. Humanitarian intervention is an armed intervention by a State or group of States, without the consent of the violating country or the United Nations to handle situations of human rights violations and protect the nationals of

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶⁰ In March 1999, NATO forces intervened militarily in Kosovo to stop Slobodan Milosevic's "ethnic cleansing" campaign waged against ethnic Albanians, which faced severe international criticism until NATO's bombing campaign proved successful. Madeleine Albright (with Bill Woodward), *MADAM SECRETARY*, 381, (Miramax Books, Eds. & Pubs., 2003).

that country.²⁶¹ Humanitarian intervention is designed to prevent atrocities (or further atrocities) by State governments against their own civilians and to preserve regional and global stability.²⁶² The widely accepted view is that such interventions are intended to be a short-term initiative, aimed at stopping massive and ongoing human rights violations and atrocities, which are no longer justified once violations cease.²⁶³ Furthermore, the text of the Charter itself, under Article 1(3), arguably is consistent with the purposes of humanitarian intervention, by stating that one of the main purposes of the United Nations is “[t]o achieve international cooperation in solving international problems of an economic, social and cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction.”²⁶⁴

Although humanitarian intervention pre-exists the creation of the UN and the Charter, it was not until after World War II that humanitarian intervention was actually discussed by scholars as a legal norm.²⁶⁵ The International Law Commission (ILC), in commentaries to the Draft Articles on Responsibility for Internationally Wrongful Acts,²⁶⁶ though not referring to humanitarian intervention by name, did however note that a “legal regime of serious breaches [of peremptory norms] is itself in a state of development.”²⁶⁷

Humanitarian intervention as a concept is dependent upon the existence of the obligations *erga omnes partes*, i.e., “the obligations of a state towards the international community as a

²⁶¹ See, Deans, *supra* note 220, at 1677.

²⁶² *Id.* at 1678.

²⁶³ Petr Valek, *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?*, 26 Mich. J. Int'l. L. 1223, 1227 (2005).

²⁶⁴ U.N. Charter, art. 1, para. 3; see also, J.J. Welling, *Non-Governmental Organizations, Prevention, and Intervention in Internal Conflict: Through the Lens of Darfur*, 14 Ind. J. Global Legal Stud. 147, 167.

²⁶⁵ Valek, *supra* note 263 at 1226.

²⁶⁶ *Id.* at 1226, citing Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

²⁶⁷ *Id.*, citing the Int'l. L. Comm'n, Commentaries to the Draft Articles on Responsibility of States for Intentionally Wrongful Acts, 53rd Sess., art. 19 (2001), reprinted in Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR Supp. (No. 10) at 292, U.N. Doc. A/56/10 (2001).

whole.”²⁶⁸ The International Court of Justice (ICJ) has held that “such obligations derive . . . from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery racial discrimination.”²⁶⁹ One scholar noted that “in the event of material breaches of such obligations, every other state may lawfully consider itself legally injured and is thus entitled to resort to countermeasures against the perpetrator.”²⁷⁰

Even though the ILC and the ICJ have posited general rationale for humanitarian intervention, the Genocide Convention limits intervention, stating “[a]ny 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.”²⁷¹ Because the Genocide Convention itself does not give individual states a right to intervene even in the event of genocide, humanitarian intervention has been hotly debated by international lawyers and scholars, as an assault on sovereignty.²⁷² While most member nations may recognize a need for some type of humanitarian intervention, the use of force as part of such an intervention has been a dubious proposition at best.

1. Humanitarian Intervention as an Assault on State Sovereignty

In the case of civil war, many nations will not intervene, even if a humanitarian crisis is afoot, for fear that it will infringe upon a state’s sovereignty. This raises a question with the crisis in Darfur, as to whether part of the reluctance on the part of the Security Council or any other party to intervene militarily to stop the crisis in Darfur, is because the conflict there is viewed as a “civil war.”

²⁶⁸ *Id.* at 1226.

²⁶⁹ *Id.*, citing *Barcelona Traction, Light and Power Co., (Belgium v. Spain)*, 1970 I.C.J. 33, PP 33-34 (Feb. 5).

²⁷⁰ *Id.*, citing Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *Eur. J. Int’l L.* 1, 2 (1999).

²⁷¹ Valek, *supra* note 263 at 1226.

In other cases, humanitarian intervention has been used as a pretext for political and military intervention in another *nation's* sovereign affairs,²⁷³ and has even been deemed an "assault on a state's sovereignty," when the humanitarian intervention occurs without Security Council VII authorization. In any event, recent history indicates that the criteria for deciding when an intervention is appropriate has been applied unevenly, such as the intervention in Kosovo and the non-intervention in Rwanda.

Grotius, referred to as the "father of international law," stated that "any ruler or government loses the protection of international law when he starts to commit serious crimes against his own people."²⁷⁴ Grotius' legacy also includes the theory of "just war," which is lawful only when fought for a just purpose by just means.²⁷⁵ The problem with this doctrine is that it was impossible to determine in any particular case whose case was just and whose case was not.²⁷⁶ Over time, the rule of *bellum justum* which was understood as a legal restraint on war, turned into the opposite, and the end result is that both domestic and international law were rebuilt on a basis that left little room for "moral absolutes."²⁷⁷

Critics of humanitarian intervention have held onto the traditional view of sovereignty, and have used Grotius' own words as the basis of their arguments against humanitarian intervention, and have also had to look no further than Article 2(4) of the UN Charter, which rules out any use of force other than that permitted by way of self defense under Article 51 of the Charter, or that permitted or required by way of collective action under Chapters VII and VIII.²⁷⁸ The rationale is that force, or the threat of it, other than that used in self-defense, is axiomatically

²⁷³ See, Deans, *supra* note 220, at 1677.

²⁷⁴ *Id.*

²⁷⁵ Valek, *supra* note 263 at 1224, citing Hugo Grotius, DE JURE BELLI AC PACIS, 1625.

²⁷⁶ *Id.* at 1224.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

a violation of a state's sovereignty, which in the Westphalian-state model describes as the notion of territorial integrity and political independence.²⁷⁹

The post-Westphalian international system is dominated by the notion of sovereignty as its defining characteristic.²⁸⁰ This unfortunately has created a one-dimensional view of the global community, that any conflict would only involve the interaction of one sovereign state with another.²⁸¹ Of course, this does not contemplate a situation of an internal crisis within a state, with the state itself as the perpetrator of the conflict. This binary, state/non-state view of global relations is problematic for two reasons: first, activities falling outside of this model are ignored, and two, it is presumed that any activity occurring entirely within a state borders do not, and should not, draw international attention.²⁸² Sovereignty will act to prevent the international community from prosecuting genocidal atrocities, thus rendering intrastate murders beyond the scope of international concern.²⁸³

Critics have also argued that humanitarian intervention is in fact, a "pretextual" basis for starting a war to implement a regime change in an independent, sovereign state.²⁸⁴ Although the "pretext" argument is one rationale as to why modern international law precludes unilateral humanitarian intervention, the real question is, should it, if it is compatible with the purposes of UN Charter to restore peace and security?²⁸⁵

²⁷⁸ Nigel Rodley & Basak Cali, *Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law*, 7 Hum. Rts. L. Rev. 275, 279 (2007).

²⁷⁹ *Id.* at 279.

²⁸⁰ Michael Pulos, *Hiding Corpses Within Sovereign Borders: Why the World Fails to Prosecute Genocide*, 11 UCLA J. Int'l L. & Foreign Aff. 161, 170 (2006).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ Ryan Goodman, *Humanitarian Intervention and the Pretexts for War*, 100 Am. J. Int'l L. 107, 108 (2006), which lists a number of international scholars who object to legalizing unilateral humanitarian intervention based on the "pretext" argument, including Oscar Schachter, Louis Henkin, Ian Brownlie, Bruno Simma, Richard Bilder, Thomas Franck, and Jane Stromseth.

²⁸⁵ *Id.* at 112-113.

Another argument against humanitarian intervention lies in the notion of state practice. In particular, it has been argued that some of the most “noble” incidents of intervention in the twentieth-century, could not withstand scrutiny.²⁸⁶ In other words, they were not justifiable, and therefore could not amount to customary law.²⁸⁷ Their relevance is disputed because such interventions were not justified based on a legal right of humanitarian intervention by the interveners themselves, nor could it be viewed that the interveners were placing humanitarian needs above their own state interests.²⁸⁸

However, in recent years, the international community has changed its view on humanitarian intervention. Many theologians, ethicists, political scientists and international legal scholars are taking another look at sovereignty, recognizing that sovereignty is in fact a malleable power that as a principle of international law *has never been absolute*, but relative in the sense that the sovereignty of one state found its legal limits in the sovereignty of other states.²⁸⁹ They are moving toward reviving the “just war” doctrine in that humanitarian intervention is a “just cause” for war.²⁹⁰ Some legal scholars have moved back to the Grotian concept of a universal moral order involving human rights, in that gross violations of human rights present a *prima facie* just cause for action.²⁹¹

²⁸⁶ See Rodley & Cali, *supra* note 278 at p. 279.

²⁸⁷ *Id.*

²⁸⁸ *Id.* Examples of interventions that have been questioned by some scholars who believe humanitarian intervention is illegal, or was a pretext for promotion of the interveners' own state interests include, India's intervention in Bangladesh (1971), Vietnam's intervention in Cambodia, France's intervention in Central Africa (1979), Tanzania's intervention in Uganda (1979) and the US' interventions in Grenada (1983) and Panama (1989-1990).

²⁸⁹ John A. Cohan, *Sovereignty in a Postsovereign World*, 18 Fla. J. Int'l L. 907, 936 (2006).

²⁹⁰ *Id.*

²⁹¹ Valek, *supra* note 263 at 1224-25, citing Yoram Dinstein, *Comment on War*, 27 Harv. J.L. & Pub. Pol'y 877, 878 (2004); Nigel Dower, *Violent Humanitarianism – An Oxymoron?*, HUMAN RIGHTS AND MILITARY INTERVENTION 73, 82 (Alexander Moseley & Richard Norman eds., 2002); Fernando Teson, HUMANITARIAN

Teson, a proponent of this concept, states:

“Wars should be avoided, even sometimes at a considerable cost. But some wars are just. The United Nations itself is the child of a victory in a just war. Just wars are those that are waged in defense of the only currency we all have: our basic rights and the individual autonomy from which they derive.”²⁹²

The Security Council cannot authorize military intervention under Chapter VII unless there is a threat of international peace or an act of aggression.²⁹³ In the case of the crisis in Darfur, surely the Security Council could justify a military intervention because the 1990 invasion of northern Iraq which led to influx of refugees from northern Iraq into Iran and Turkey, is strikingly similar to the displacement of Darfur civilians into Chad which has led to a refugee crisis for Chad. The similar circumstance of refugee displacement could be considered a breach of international peace and security, which gives the Security Council legal basis to authorize military intervention under its Chapter VII powers.²⁹⁴ Far from being an action that is at variance with the purposes of the United Nations, intervention is consistent with a key purpose of the organization as embodied in the Charter, which is the achievement of human rights and fundamental freedoms.²⁹⁵

As Teson describes, an intervention in the Darfur crisis would be, a “just” war.²⁹⁶ The *erga omnes* obligation the United Nations owes to the international community to prevent such gross violations of human rights vests it with the moral authority to address and (hopefully) abate

INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 317 (Transnational Publishers, 3rd edition, updated and revised, 2005).

²⁹² *Id.* at 1225, citing Teson, *supra* note 263, at 317.

²⁹³ See Deans, *supra* note 220, at 1677.

²⁹⁴ *Id.* at 1680.

²⁹⁵ See, Rodley & Cali, *supra* note 278, at 281.

²⁹⁶ *Id.*

incidents of genocide.²⁹⁷ Hopefully, starting with the Darfur crisis, it can be applied more consistently in the future, than it has been applied in the past.

C. Inconsistencies in the Application of Humanitarian Intervention

1. The Intervention in Kosovo

When NATO forces intervened militarily in Kosovo to stop Slobodan Milosevic's "ethnic cleansing" campaign waged against ethnic Albanians, such intervention faced severe international criticism until NATO's bombing campaign proved successful. NATO's use of force in Kosovo presented a legal dilemma in that its military action did not fit either of the two accepted legal bases for using force under the UN Charter. NATO's chief justification for military intervention was that the Kosovo crisis had implications for stability in the entire region.²⁹⁸

The killings in Kosovo began in late February/early March 1998, in a small town of Prekaz, when Serb paramilitary units stormed through ethnic Albanian villages, killing scores of people. Whole families were burned alive in their homes; women, children and elderly were among the victims.²⁹⁹ In the months to come, more innocent Albanians would die and more refugees would flee as a result of the Serb offensives launched against rebellious Kosovar Albanians.

After the initial February/March attack, then-Secretary of State Madeleine Albright determined that Slobodan Milosevic had to be stopped immediately before more violence and deaths ensued.³⁰⁰ Unfortunately, it took a year and a half, with numerous conferences and negotiations and the eventual NATO air strikes before Russia and China would agree to a

²⁹⁷ Stephen Toope, *Does International Law Impose a Duty Upon the United Nations to Prevent Genocide?*, 46 McGill L. J. 187, 188 (2000).

²⁹⁸ Albright, MADAM SECRETARY, *supra* note 260, at 381.

²⁹⁹ Deans, *supra* note 220 at p. 1678.

Security Council resolution that would provide a framework for a military agreement between NATO and Yugoslavia, and allow a peacekeeping force in Kosovo.

On March 23, 1999, NATO initiated air operations. Before the bombing campaign began, the Serb offensive had already driven 100,000 Kosovars from their homes. Milosevic's apparent goal, not unlike that of the Sudanese government,³⁰¹ was to quash the opposition and reestablish an ethnic balance on a permanent basis.³⁰² Despite the fact there was no agreement from the Russians for the strikes or a Security Council authorization for NATO's use of force, UN Secretary General Kofi Annan was supportive of the strikes. The Secretary General recalled the atrocities that had taken place in Bosnia only a couple of years before, stating "[there] are times when the use of force may be legitimate in the pursuit of peace."³⁰³ Moreover, in a speech in Geneva to the UN Commission on Human Rights, the Secretary General also stated that "ethnic cleansers' and those guilty of gross and shocking violations of human rights will find no justification or refuge in the UN Charter."³⁰⁴

a. Could the Kosovo Intervention Serve as a Roadmap for Humanitarian Intervention in Darfur?

The NATO air strikes lasted for eleven weeks,³⁰⁵ and during that time, Milosevic continued his murderous assault against Kosovar Albanians, and sending another million more fleeing from their homes.³⁰⁶ The strikes inflicted a great deal of damage on the infrastructure of Milosevic's government and forces. As such, on June 3, Milosevic accepted a deal that even the

³⁰⁰ *Id.*

³⁰¹ See, UN News Centre, *UN Commission Finds Sudanese Government Responsible for Crimes in Darfur*, www.un.org, (Feb. 1, 2005).

³⁰² Albright, MADAM SECRETARY, *supra* note 260 at 408-409.

³⁰³ Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, GEORGETOWN LAW MAGAZINE, Spring 2002, www.law.georgetown.edu/alumni/publications/2002/magazine/spring02.html, (last visited Feb. 14, 2009).

³⁰⁴ Albright, MADAM SECRETARY, *supra* note 260 at 408-409.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

Russians could agree to, which would allow Milosevic to withdraw his troops and end the conflict.³⁰⁷ Shortly thereafter, a Security Council resolution was drafted that provided the framework for a military agreement between NATO and Yugoslavia, and determined the timing of the withdrawal of Serb forces.³⁰⁸ On June 9, Yugoslav forces began to withdraw. Once withdrawal was verified, NATO halted its military operations the next day.³⁰⁹ Once NATO halted its operations, Russia agreed to vote on the Security Council resolution³¹⁰ authorizing a peacekeeping force. Afterward, the peacekeeping forces deployed. Not long after that, refugees returned to their homes.

While the road to disarmament and peace was long, arduous and by no means perfect, because of the intervention by NATO forces the numbers of those killed and/or displaced were greatly reduced. While NATO forces may not have a direct interest in the affairs in African countries, nevertheless, similar diplomatic negotiation among G8 nations could have taken place long ago to curb the violence and reduce the sheer numbers of refugees from Darfur. While the road to peace was difficult, it does highlight two problems with humanitarian intervention: the political will coupled with the national interests of the individual permanent members of the Security Council, (i.e., Russia's reluctance to authorize force against a Slavic nation), and the potentiality that humanitarian intervention may be used by more powerful nations to bring about regime change. In any event, the process to peace in Kosovo is an admirable effort that could have been duplicated in achieving peace in the Sudan, to avoid needless deaths and the displacement of over a million refugees.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

2. The Lack of Intervention in the Rwandan Crisis

Only five years before the NATO intervention in Kosovo, ethnic Hutus in Rwanda began murdering the minority Tutsi population (along with moderate Hutus). Not only was intervention non-existent, but a little more than two weeks after the killings began, the UN Security Council voted to cut the UN force in Rwanda from 2,500 to 800.³¹¹ Over 800,000 Rwandans were killed in 100 days.³¹² To add insult to injury, like the current situation in Darfur, the UN as well as the U.S. administration, were either reluctant or flatly refused to refer to it as a “genocide.”

a. The Genesis of the Rwandan Massacre

Rwanda is a small state, roughly half the size of Maryland that was a German colonial possession from 1899 until 1916. Belgium then became Rwanda’s colonial ruler until 1962.³¹³ Two ethnic groups, the Hutu and the Tutsi dominate the population of Rwanda. Hutus make up a numerically larger group, although European colonialists treated the Tutsis as being more superior.³¹⁴ In the late 1950’s, the Belgians realized that Hutus outnumbered Tutsis, and Hutus would eventually rise to power. As such, Belgium abandoned its affinity for the Tutsis.³¹⁵

Civil unrest between the Tutsis and the Hutus ensued over the next forty years. Attacks against the Tutsis over the years resulted in approximately 200,000 Tutsi refugees fleeing to Uganda.³¹⁶ However, life in Uganda under two successive dictators (Obote and Amin) gave coming-of-age Tutsis a chance to gain military experience, and a renewed determination to

³¹⁰ The resolution was drafted and negotiated by G8 foreign ministers in 12 hours time, on June 7 and 8, 1999. See, Albright, MADAM SECRETARY, *supra* note 260, at 420-21.

³¹¹ Fleischer, *Shake Hands With the Devil: An Interview With Romeo Dallaire*, *supra* note 14.

³¹² CBC News, *Indepth: Sudan – The Genocide Convention*, *supra* note 71.

³¹³ Richard J. Norton, *Rwanda* (Jul. 11, 2000), www.au.af.mil/au/awc/awcgate/navy/pmi/rwanda.pdf.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

return to and liberate Rwanda.³¹⁷ These same fighters formed the core of the Rwandan Patriotic Front (RPF).³¹⁸

During this time, the one-party state in Rwanda was becoming increasingly corrupt and the Hutu government sought to blame the Tutsis for domestic problems in order to deflect blame from itself.³¹⁹ Meanwhile, in the early 1990's the RPF began offensives into Rwanda in order to achieve political equality for Tutsis.³²⁰ The government seized the opportunity to denounce the Tutsis and blame them for any and all government setbacks.³²¹ This resulted in one of the most virulent, anti-Tutsi hatred campaigns in Rwandan history.

By 1994, tensions between the government and the RPF were at an all-time high. Violence was continuing to escalate. By late March, there were reports of weapons being distributed to Hutu civilians.³²² The situation boiled over on April 6, 1994 when Rwandan President Juvenal Habyarimana's plane was shot down by two surface-to-air missiles.³²³ Rwandan authorities seized on the tragedy as an opportunity to immediately blame the RPF.³²⁴ Militia and army units were immediately deployed, and roadblocks were set.³²⁵ For the next 100 days, a genocidal fury ensued that would result in over 800,000 people being hacked,³²⁶ shot, strangled, clubbed and burned to death. A majority of these were unarmed civilians, predominately Tutsis, though some moderate Hutus also perished. A new civil war, far more bloodier than those in Rwanda's past had begun.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* See also, Gerard Prunier, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (Columbia Univ. Press, 1997).

b. The U.S. Failure to Intervene in the Massacre

Despite the extreme circumstances presented in the massacre, the U.S. response was immediate but eventually, utterly lacking. Though the Clinton administration followed the situation closely, it failed to use the word “genocide.” The Defense Department established a task force that collected and forwarded information on the situation, including the numbers killed. Although U.S. Marines were deployed to assist with the evacuation of U.S. citizens, that was the extent of U.S. military intervention.

Nevertheless, the U.S. did not intervene or engage in peacekeeping in Rwanda. The question of sending US troops as part of either a unilateral or multilateral force was raised but there was no call for Congress to send troops, as the tragedy in Somalia was fresh in the minds of many members of Congress, as well as in the mind of the American public.³²⁷ The Clinton administration surmised that it was highly unlikely an intervention in another internal crisis in an African nation would not have the support of the American public.³²⁸ At one point, the Organization of African Unity (OAU) volunteered to contribute forces, but funding for those forces would have to be provided. No funding was forthcoming, as there was little public support for involvement in Rwanda. Interestingly, the Congressional Black Caucus (CBC) did not call for intervention. Although UN troops were present when the massacre began, eventually they were withdrawn for safety reasons, and reinforcements were denied.³²⁹

While at the time there was no urgent need to intervene, there has been quite a bit of hand wringing since. Almost fifteen years have passed, and Rwanda is still considered one of the worst massacres in history. In 1999, President Clinton stopped in Rwanda to apologize for his

³²⁶ The weapons of choice for many civilian killers were machetes.

³²⁷ President William J. Clinton, *MY LIFE*, (Alfred A. Knopf, Pubs., 2004), at p. 593.

³²⁸ *Id.*; See also, Fleischer, *Shake Hands With the Devil: An Interview With Romeo Dallaire*, *supra* note 14.

³²⁹ Fleischer, *Shake Hands With the Devil: An Interview With Romeo Dallaire*, *supra* note 14.

“hands-off” policy and pledged that never again should the U.S. fail to act in the face of such compelling evidence.³³⁰

Many have criticized the Clinton administration for its failure to act, and rightly so. While an apology was well-intentioned, nevertheless, it came five years too late, and after almost one million people perished in one hundred days. The compelling evidence of genocide required that other nations as well as the UN take action. The former head of the UN peacekeeping mission in Rwanda, Retired General Romeo Dallaire has written and spoken extensively on the subject,³³¹ and opines that action was not taken in Rwanda due to the self-interests of nations, that the gain was not there and the risks were too high.³³²

c. Racism and Intervention: Are the Standards for Intervention Applied Consistently?

While the massacres in Kosovo were certainly enough to grab the world’s attention, the number of total deaths is not anywhere near the estimated total of those that have perished in either Darfur, or in the Rwandan massacre of 1994. Hundreds of thousands have been killed in Darfur, while it is well known that over 800,000 Rwandans were killed in that government-orchestrated massacre. As of November 1999, the estimated number of total dead in Kosovo was between 10,000 and 20,000.³³³ This raises yet another ethical and moral question: whether intervention in government-sponsored genocide is in fact based on race. In the midst of criticism leveled at the lack of intervention in both the crises in Rwanda and Darfur, it is questionable what is the difference between the Bosnia and Kosovo conflicts in which U.S. and NATO forces

³³⁰ President William J. Clinton, *supra* note 327 at p. 781-82.

³³¹ See, Romeo Dallaire (with Brent Beardsley), *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA*, (Carroll & Graf Pubs., 2003), at p. 512-520.

³³² Fleischer, *Shake Hands With the Devil: An Interview With Romeo Dallaire*, *supra* note 14.

³³³ CNN, *UN Investigators Expect Death Toll to Climb*, www.cnn.com, (Nov. 10, 1999), estimated at 11,324; IDEA, *Kosovo: Orders of Magnitude*, www.ideajournal.com, (Vol. 5, No. 1, July 25, 2000).

intervened, and the Rwanda and Darfur crises, where the U.S. and other nations refuse to use the "genocide" label, let alone intervene to stop it.

One point should be noted, is that while the NATO intervention in Bosnia was later accepted, it was at first blush deemed illegal. NATO forces went in without the approval of the Security Council (acquired later), and by traditional standards, was in fact an illegal intervention. Under Article 2(4), NATO did not intervene as a result of an act of aggression that caused it to act in self-defense under Article 51, nor did it act by way of Chapter VII authority (enforcement action) or under Chapter VIII (regional action).³³⁴ Ironically, one reason the intervention may have ultimately been "blessed" by the international community is that the NATO intervention is consistent with the main object and purpose of the Charter that is, the maintenance of international peace and security.³³⁵

Many critics have placed the difference in opinion on these two interventions squarely upon the issue of race. The former head of UN security forces for Rwanda attributes the intervention in Kosovo to the residual influence of the colonial era; Yugoslavia is white, located in Europe and is closer to home. Whereas in Africa, there is a tendency to trivialize Africans as always engaging in "tribalism," leaving an impression that some count whereas others do not.³³⁶ Unfortunately, this also raises an ethical and moral dilemma, as genocide is neither race nor gender specific.

During the Rwandan massacre, the Congressional Black Caucus was surprisingly silent on whether the U.S. should intervene to stop the massacre. President Clinton specifically sought out the Congressional Black Caucus' level of interest in the issue, but it had not called for intervention. Again, it is believed that the political and military dimensions that presented

³³⁴ See Rodley & Cali, *supra* note 278, at 279.

³³⁵ *Id.*

themselves in Somalia would not be repeated, thus making even the CBC wary of intervention in another African civil war. Most interesting is the fact that the CBC has not made any allegations that the failure to intervene in Rwanda was due to racism. Press conferences that took place at the time indicate that while the CBC makes only passing references to Rwanda, it never made any comparisons with response of the U.S. and NATO forces in the massacres in Kosovo.³³⁷

On the other hand, as to the crisis in Darfur the Congressional Black Caucus was quite vocal. In June 2004, ranking members of the CBC took part in a joint press conference in which they brought attention to the crisis by seeking 10,000 signatures to deliver to then-Secretary of State Colin Powell, to compel the U.S. to intervene militarily to stop the genocide.³³⁸ Since that time, members of the CBC had continually called for the Bush administration to take action on the crisis in Darfur, so as to avoid another crisis as that which occurred in Rwanda.³³⁹ Although pronouncements were made, no action was ever taken by the Bush administration. It remains to be seen what actions or policy positions will be taken by the new administration of U.S. President Barack Obama, or whether Congress will actually have to "pressure" President Obama to take a position on the Darfur crisis.

Although the Khartoum government has claimed that interfering in the genocide in Darfur is a matter of interfering in its "sovereign matters" and relies upon Article 2(7) of the Charter,³⁴⁰ the short answer to such a claim is thus: the United Nations was created out of the

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ Africa Action, *Congressional Black Caucus Joins Africa Action in Call for US Intervention to Stop Genocide in Darfur*, (Jun. 23, 2004).

³³⁹ See, Press Release, *Rep. Payne Urges Action at Congressional Black Caucus Press Conference on the Crisis in Darfur, Sudan*, (Jun. 23, 2004), www.house.gov/list/press/nj10_payne/pr_040623.shtml; Edward Epstein, *Oakland Lawmaker Calls on World to Aid Darfur*, SAN FRANCISCO CHRONICLE, (Jan. 28, 2005).

³⁴⁰ UN Charter Article 2(7) states as follows: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

principle that a state (case in point, Nazi Germany) should not be allowed to kill its own people. To say that a full-scale genocide is a “sovereign matter” is ludicrous – the Secretary-General himself has stated that genocide and other crimes against humanity simply do not fall within the purview of sovereignty, when he noted that world leaders at the 2005 World Summit agreed that “all states have the ‘responsibility to protect’ their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”³⁴¹ As discussed further herein, such a pronouncement turns the traditional Westphalian-state notions of sovereignty on its head: sovereignty is not absolute (in that a sovereign nation may abrogate international law), and with sovereignty comes responsibility.

Further, it should also be noted that Article 54 of the Charter circumvents any possibility that a single-actor nation could use military intervention in another nation’s sovereign affairs. Article 54 requires that the Security Council be kept informed of any regional activities engaged in for the purpose of the maintenance of international peace and security.³⁴² Thus, the threat that one nation will “interfere” in another nation’s “sovereign affairs” when it offers humanitarian intervention is reduced to a minimum.

In any event, it is the Security Council that is really charged with the duty to maintain international peace and security. Genocide is a *norm de jus cogens* – one of the most widely accepted fundamental norms of international law that are non-derogable, and constitute the most despicable crimes against humanity.³⁴³ It has been argued that a violation of a *jus cogens* norm gives rise to universal jurisdiction, punishable by any state, because the violator becomes a

³⁴¹ K. Annan, *Darfur: A Responsibility We All Share*, THE GUARDIAN, NIGERIA, (Sept. 29, 2006), http://www.nguardiannews.com/editorial_opinion/article03.

³⁴² UN Charter Article 54 states as follows: “The Security Council shall at all times be kept full informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.”

³⁴³ William Reisinger, *Beyond “De-Nile” The United Nations Genocide Problem in Darfur*, 23 *Touro L. Rev.* 685, 713, (2007). The other crimes against humanity also defined as *jus cogens* norms are torture and slavery.

hostes humani generis, a common enemy to all.³⁴⁴ If the Security Council believes any state acting under universal jurisdiction to intervene and stop a genocide is an improper use of force, then it should use its power to create an exception to the prohibition on the use of force – namely, to investigate and take military action if necessary to stop genocide and other crimes against humanity -- before they become large-scale humanitarian crises, which the international community decided is never an issue of interference in a state’s “sovereignty” when it created the United Nations.

³⁴⁴ *Id.*

CHAPTER FOUR:

FROM MERE ASPIRATION TO EMERGING LEGAL PRINCIPLE:

THE BIRTH OF “THE RESPONSIBILITY TO PROTECT”

“What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.”

-- The International Commission on
State Sovereignty

I. Overview on Humanitarian Intervention

For years while the world watched the atrocities and severe violations of human rights in such places as Cambodia, Somalia, Haiti, Ivory Coast, Sierra Leone, Liberia, Congo, Bosnia, Kosovo, Rwanda, Darfur and now Zimbabwe, the international community struggled to find a way to institute mechanisms to prevent, deter and remedy such tragedies of humanity. It was clear when the United Nations was founded that all peoples, no matter who they were or where they lived, regardless of race, sex, ethnicity, religion, language, social status or political preferences and affiliations were entitled to the enjoyment of basic human rights and fundamental freedoms that are now embodied in such documents as the UN Charter, the Universal Declaration of Human Rights, the International Bill of Rights, as well as number of treaties. However, the problem has been one of enforcement. How does the international community assure the world's peoples who have been stated to be entitled to live free and enjoy these rights when the traditional notions of sovereignty, and that sovereignty should not be interfered with, that such rights to human security will be protected?

Many scholars have also struggled with the same question as to how to prevent such tragedies and get back to the basic reason the UN was founded. Two such scholars, Sean Murphy and Michael Scharf, both struggled to establish overall frameworks for the legality of humanitarian intervention in the aftermath of the massacres and subsequent interventions in

Bosnia and Kosovo.³⁴⁵ After Bosnia, Professor Murphy attempted to make a case for a customary international law that allows for humanitarian intervention in cases of widespread deprivations of human rights.³⁴⁶ Unfortunately, while this theory was influential, it was not widely adopted by states.³⁴⁷

The problem was also one of a basic dilemma: humanitarian intervention versus state sovereignty. The international community was mired in the framework that sovereignty was paramount to all other considerations, and that no state had a right to interfere in the internal affairs of another. Such “interference” was an illegal assault upon another state’s sovereignty, even if the intervention was to save a state’s people from human rights violations at the hands of their own government. This conjured up the notion that sovereignty was somehow, “absolute sovereignty.” Not only was it outdated thinking about the notions of sovereignty, it was wholly incorrect. One needs to look no further than the reasons the United Nations was founded: and the basic reasons were not to protect “absolute” state sovereignty.

Although the Charter framework does contemplate protection of the sovereignty of the state, as we have learned from the reasons the United Nations was founded, one reason was not to protect sovereignty “at all costs.” Nazi Germany attempted to “grow” its state not only to achieve European and eventually world domination, but also to deprive many of its own “citizens” of their inherent human rights, including the right to live, through genocide and ethnic cleansing. The successful nations of World War II and the founders of the United Nations had in mind when they wrote the Charter of the new organization, that a state should not be allowed to kill its own people. As Grotius even recognized, killing one’s own people is not an attribute of,

³⁴⁵ Paul R. Williams and Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?* 40 Case W. Res. J. Int’l L. 97, 102 (2007-2008).

³⁴⁶ *Id.* at 105.

³⁴⁷ *Id.*

nor an absolute right of sovereignty.³⁴⁸ Such historic pronouncements and precedent lead to one simple conclusion: there is no such thing as absolute sovereignty, nor is sovereignty “absolute.”

A. Appeals of the Secretary-General for Consensus on Intervention

In response to the many tragic events that had taken place in the 1990's, then Secretary-General Kofi Annan addressed the dilemma of humanitarian intervention in his addresses to the General Assembly in September 1999, and again in April 2000. The former Secretary-General had generated a great deal of discussion in response to his remarks, when he called upon member states to “unite in the pursuit of more effective policies to stop organized mass murder and egregious violations of human rights.”³⁴⁹ The former Secretary-General recognized at the time that in the nearly six decades since the UN was founded, the character of the international system has changed. No longer were disputes primarily between two or more states; in modern times, for the most part, disputes were primarily *intrastate*, mostly civil wars or “uncivil wars” as one scholar refers to them³⁵⁰ – that claim mostly innocent civilians as opposed to soldiers or other military personnel, as its primary victims.

On September 20, 1999, in reflecting upon the prospects for human security and intervention in the 21st century, the former Secretary-General addressed the General Assembly of the UN and declared:

“In the case of Kosovo . . . the inability of the international community to reconcile the question of the legitimacy of an action taken by a regional organization without a United Nations mandate, and the universally accepted imperative of effectively halting gross and systematic violations of human rights, could only be viewed as a tragedy. It had revealed the core challenge to the Security Council and the United Nations as a whole in the next century: to forge

³⁴⁸ See note 274, *supra*.

³⁴⁹ Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the UN Human Rights Council and the Emerging Norm of “Responsibility to Protect” Make a Difference?*, 35 *Denv. J. Int’l L. & Pol’y* 353, 366, *in* The Secretary-General’s Millennium Report, *We the Peoples: The Role of the United Nations in the Twenty-first Century*, 47-48, U.N. Doc. A/54/2000 (Apr. 3, 2000), www.un.org/millennium/sg/report/ch3.pdf.

³⁵⁰ See Joyner, *supra* note 2, at 704.

unity behind the principle that massive, systematic violations of human rights—wherever they might take place—should not be allowed to stand.”³⁵¹

Such a declaration challenged on its face, the concept of “absolute” sovereignty (or sovereignty that was not to be undermined in any manner), that the UN and the international community had clung to for over five decades.

The former Secretary-General again reissued the challenge and made a compelling appeal to the international community to find consensus to resolve the dilemma of humanitarian intervention, when he gave his address in 2000 before the Millennium Summit.³⁵² In posing one poignant question to abhorrent critics of humanitarian intervention, the Secretary-General stated:

“[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 that offend every precept of our common humanity?”³⁵³

Such a compelling question essentially summed up the core of the debate on humanitarian intervention since the UN was founded. Was the UN created to protect sovereignty – or to protect human rights? If those critics of humanitarian intervention took a closer look at the reason the UN was founded, they would have realized that the creation of the UN was a testament to the principle that gross and systematic violations of human rights (i.e. the Holocaust) was not tolerable, and that intervention to stop such violations (i.e., nations becoming engaged in World War II to stop Hitler’s march across Europe, who killed millions of innocents along the way) was entirely permissible.

³⁵¹ Press Release, General Assembly, *Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General, in Address to General Assembly*, U.N. Doc. GA/9595 (Sept. 20, 1999), available at <http://www.un.org/News/Press/docs/1999/19990920.ga9595.html> (last visited Feb. 6, 2009).

³⁵² See Joyner, *supra* note 2, at 705.

³⁵³ Secretary General Kofi Annan, “*We the Peoples: The Role of the United Nations in the 21st Century*,” hereinafter, “*We the Peoples*”), p. 48, (2001), <http://www.un.org/millennium/sg/report/full.htm>, (last visited Feb. 6, 2009).

B. The International Commission on Intervention and State Sovereignty and the 2001 Report

In response to the Secretary-General's challenge, in September 2000, the Government of Canada, together with a group of major foundations, undertook the call to find consensus on the question of humanitarian intervention, and announced at the General Assembly the establishment of the International Commission on Intervention and State Sovereignty ("ICISS"). Although many governments had attempted to answer the Secretary-General's call,³⁵⁴ the ICISS ultimately proved to be the most influential in shaping the concept of "the responsibility to protect."³⁵⁵

The mandate of the Commission was to build a broader understanding of the problem of reconciling intervention for humanitarian purposes and sovereignty.³⁵⁶ More specifically, the mandate was to develop a global political consensus on how best to move from polemics – and often paralysis—towards action within the international system, particularly through the United Nations,³⁵⁷ to resolve matters involving mass human rights abuses and/or atrocities.

The Commission met for the first time in November 2000 in Ottawa, Canada, then proceeded to take its research around the world, where it met with various individuals in the international community in order to consult with the widest possible range of opinion around the world. Discussions were conducted in Beijing, Cairo, Geneva, London, Maputo, New Delhi, New York, Ottawa, Paris, St. Petersburg, Santiago and Washington, D.C.³⁵⁸ The meetings

³⁵⁴ Other nations include Denmark, the Netherlands, Sweden and the United States. See Nanda, *supra* note 323, at 368.

³⁵⁵ *Id.*

³⁵⁶ The International Commission on Intervention and State Sovereignty (ICISS), "The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty, Dec. 2001, <http://www.iciss.ca/report-en.asp>, (last visited Feb. 10, 2009).

³⁵⁷ *Id.*

³⁵⁸ *Id.*

involved representatives from governments, inter-governmental organizations, non-governmental organizations, universities, research institutes, and civil society.³⁵⁹

In 2001 ICISS produced a report, "The Responsibility to Protect," an astounding breakthrough which finally reconciled the two seemingly opposing goals of the UN Charter, protection of sovereignty and the promotion of human rights, in that it conceptualized sovereignty in terms of *governmental responsibility*. The Report veered away from the traditional language of the sovereignty-humanitarian intervention debate,³⁶⁰ which tended to focus on either the "right of intervention" or "a right to intervene," versus "interference with sovereignty." The Report instead clarified that "responsibility to protect" focused on, not the government wanting to intervene or on the government to be intervened in, but instead on those *the concept is seeking to protect* – the victims of mass humanitarian crises, the citizens of the state that has failed to protect them.

1. Overview of the Report

The Commission essentially divided the Report into eight major parts, with the most important sections focusing on the meaning of "the responsibility to protect," namely, the three distinct responsibilities that are: (1) the *responsibility to prevent*, (2) the *responsibility to react* and (3) the *responsibility to rebuild*, all of which will be discussed in greater detail herein. The Report also addresses some other ancillary but valid concerns, such as the "question of authority" which looks at the very crucial role of the Security Council to maintain international peace and security, and what is to happen when the Security Council fails to act. The Commission acknowledged that there is no doubt whatsoever that there is no better or more appropriate body than the Security Council to deal with military intervention issues for

³⁵⁹ *Id.*
³⁶⁰ *Id.*

humanitarian purposes, for it is the Security Council that should be making the hard decisions in difficult cases about the possibility of overriding state sovereignty.³⁶¹

Although the Commission acknowledges that the Security Council is at the heart of international consensus on military intervention,³⁶² it did point out that while the Security Council does have the primary responsibility for maintenance of international peace and security matters, it does not have sole or exclusive responsibility. For example, Article 10 of the Charter grants to the General Assembly general responsibility to deal with any matter within the scope of UN authority.³⁶³ In addition, Article 11 of the Charter gives the General Assembly a "fallback" responsibility specifically with regard to the maintenance of international peace and security, although it is to make recommendations only and not binding decisions.³⁶⁴ The Commission also pointed out that any action taken by the General Assembly must be done under the "Uniting for Peace" resolution of 1950, which creates an Emergency Special Session procedure, which was previously used in Korea in 1950, in Egypt in 1956 and in the Congo in 1960.³⁶⁵

As the Commission further pointed out, all of the above indicates that even in the absence of a Security Council endorsement, and with the General Assembly's only recommendatory in nature, an intervention that had two-thirds vote in the General Assembly would clearly have

³⁶¹ *Id.* at p. 49.

³⁶² *Id.*

³⁶³ *Id.* at p. 48; see also, U.N. Charter, art. 10, which provides: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or both on any such questions or matters." Article 12, which limits the power of the General Assembly, provides in part: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

³⁶⁴ *Id.*; see also, U.N. Charter art. 11, which provides in part: "2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

³⁶⁵ *Id.* at 48.

powerful moral and political support for action.³⁶⁶ Nevertheless, the Commission made clear that the task of the Report and the Commission's good work was not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has,³⁶⁷ which would be a welcome change.

One example is where the Commission in the Report calls upon the five permanent members of the Security Council to agree to a "code of conduct" for the use of the veto power. The Commission calls upon the permanent five members to avoid using the veto in those instances where actions are needed to stop or avert a significant humanitarian crisis, and where its vital national interests are not involved, to avoid obstructing the passage of what would otherwise be a resolution with a majority of support for such action.³⁶⁸

The Report also includes a section on "Operational Dimension" to be discussed in further detail herein, which discusses the military interventions, namely (1) preventative operations, (2) planning for, carrying out and following up military interventions, as well as (3) a doctrine for human protection operations. Within the discussion of "Operational Dimension," the Commission spelled out four essential principles for military intervention which are to be considered before any action is taken: (1) the "just cause threshold"; (2) the "precautionary principles" for military interventions, that are: (a) right intention, (b) last resort, (c) proportional means and (d) reasonable prospects for success; (3) right authority (i.e., Security Council) and (4) operational principles with clear objectives and a clear military approach during the military engagement.³⁶⁹

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 49.

³⁶⁸ *Id.* at 51.

³⁶⁹ *Id.* at p. xii and xiii.

2. A New Approach: Shifting the Debate

There is little question that in the last sixty years disparities have widened between the presumed lawful conduct of sovereign states as defined in the UN Charter and actual state behavior in international relations, as justified under the pretext of sovereign rights.³⁷⁰ For example, in the case of the crisis in Darfur, the government of Sudan has vigilantly tried to keep the UN High Commissioner for Refugees, the ICC investigators, non-governmental organizations and UN-sanctioned peace-keeping forces out of Darfur, claiming (despite appearances to the contrary), that the number of deaths and displaced are “grossly exaggerated,” and that any such outside “interference” is an infringement upon Sudan’s sovereignty.³⁷¹

It is apparent that Sudan’s claims of sovereignty are not what the original framers of the Charter had in mind when they drafted it: that disreputable governments like Sudan could use its power to do whatever it wished to its own citizens.³⁷² As previously posited, the United Nations was founded because the world believed that a state should not be allowed to kill its own people. The Charter and UN practice indicate that sovereignty entails a dual responsibility: one, the duty to respect the sovereignty of other states and to refrain from interfering in their internal affairs, and two, the duty of the government to respect the fundamental rights of all peoples within the state and to take action to protect them.³⁷³ Yet the debate about humanitarian intervention has placed the two duties of government diametrically opposed to one another: how to reconcile the principle of state sovereignty with the human rights necessity that a population should not be endangered by its own government.³⁷⁴

Joyner, *supra* note 2, at 707.

The Epoch Times, “U.N. Says Darfur Death Toll May Be 300,000; Sudan Denies,” THE EPOCH TIMES, (Apr. 22, 2008), <http://en.epochtimes.com/news/8-4-22/69640.html>, (last visited Feb. 13, 2009).

Joyner, *supra* note 2, at 707.

Id. at 707.

Id.

The doctrine of “the responsibility to protect” is the key to rethinking the meaning of sovereignty, that instead of being something sacrosanct, that sovereignty implies the need for governments to exercise responsibility. A government’s responsibility is not only to other states as indicated above, but to its own citizens.

“The responsibility to protect” also redirects the discussion from whether or not there is a “right to intervene.” While both “the responsibility to protect” and “the right to intervene” have as their ultimate goals the protection of the endangered citizens of a state, nevertheless, the responsibility places the onus on a government to protect its people. If it fails in that duty to protect, then it is imperative upon the international community to do what a government is either unable or unwilling to do – especially in a case such as the crisis in Darfur, where a state is itself the perpetrator of massive human rights abuses and/or atrocities. As the Commission said:

“What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.”³⁷⁵

The Commission noted that the traditional language in the “sovereignty-intervention” debate in terms of “the right to humanitarian intervention” or “the right to intervene” is unhelpful for three reasons. First, the “right to intervene” focuses on the claims, rights and prerogatives of the intervening states rather than on the urgent needs of the potential beneficiaries of the action.³⁷⁶ Second, “the right to intervene” focuses narrowly on the intervention itself, and does not take into account any prior preventative efforts or subsequent follow-up assistance, both of which have been in the past, neglected in practice.³⁷⁷ Third, the language itself, “the right to intervene” effectively “trumps” sovereignty with intervention at the outset of the debate, by

³⁷⁵ See ICISS Report, *supra* note 356, at 11.

³⁷⁶ *Id.* at 16.

³⁷⁷ *Id.*

making any debate or dissent as to whether intervention should be undertaken at all, "anti-humanitarian."³⁷⁸

The Commission also indicated that in order for intervention for humanitarian protection purposes to be accepted, including military action, then it is imperative that the international community develop consistent, credible and enforceable standards to guide state and governmental practice.³⁷⁹ The Commission indicated that any new approach to humanitarian intervention needs to meet at least four basic objectives: (1) establish clear rules, procedures and criteria (clearer than those previously existing) for determining whether, when and how to intervene; (2) establish the legitimacy of military intervention when necessary and after all other approaches have failed; (3) ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimize the human costs and institutional damage likely to result, and (4) help eliminate, wherever possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.³⁸⁰

Such clearly stated objectives are promising for future interventions for a number of reasons. One, the objectives could better ensure that intervening states are not intervening on the pretext of humanitarian purposes, only to effect regime change or any other improper purpose. Two, if executed according to the Commission's objectives, even the most ardent critics of intervention can be assured that intervention is not taken as a first resort, but as a last resort, after all other measures have failed. Three, if objective rules are established for determining whether, when and how to intervene, it may reduce the likelihood of permanent members of the Security Council to veto an intervention, even if their pecuniary interests are involved, because a

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 11.

³⁸⁰ *Id.*

humanitarian crisis and a proposed intervention would have met the threshold criteria established, no matter where the intervention was planned to take place.

The Commission also pointed out that the inconsistency with interventions and non-interventions in Srebrenica, Kosovo, Somalia, Rwanda and now Darfur, have made it abundantly clear that the thinking of international relations and all that goes with it must be comprehensively reassessed, in order to meet the challenges presented in the 21st century.³⁸¹ With clearer guidelines as set out herein, it is hoped that military intervention will be applied more consistently based on objective criteria regarding those who are suffering, as opposed to whether a state is connected to a super-power (such as Europe or the U.S.), or whether the crisis is taking place in Africa or not. Although the Commission itself does not advocate it, it appears that if such clear guidelines are followed, it could affirmatively answer the question as to whether humanitarian intervention absent Security Council authorization could be permissible.³⁸²

3. The Specific Responsibilities of "The Responsibility to Protect"

The Report of the Commission indicates that the doctrine of "the responsibility to protect" is multidimensional, as not only does it entail the responsibility to react, but also the responsibility to prevent as well as the responsibility to rebuild.

a. The Responsibility to React

The responsibility to react is the most critical aspect of the responsibility to protect, and as such, is the most difficult to implement both politically and conceptually, in response to those extreme situations of compelling human need.³⁸³ When preventative or other corrective measures have been unable to contain internal violence and the government is unwilling or unable to remedy the situation, then more extreme measures to curtail the violence may have to

³⁸¹ *Id.*

³⁸² Nicole Duller, *Jus Ad Bellum: Law Regulating Resort to Force*, 30 WTR Hum. Rts. 8, 11 (2003).

be undertaken by the international community.³⁸⁴ However, a number of excellent questions are raised such as, what constitutes an “extreme” case?³⁸⁵ What threshold must be reached for violations of human rights to trigger military action? Who makes the determination that intervention is necessary?

The answers to these critical questions lies in the six threshold criteria or “precautionary principles” that the Commission laid out in the Report, which must be weighed in deciding whether there should be military intervention. The six criteria are (1) just cause, (2) legitimate intention, (3) last resort, (4) proportionality, (5) reasonable prospects and (6) legitimate authority.³⁸⁶

(1) The Threshold of Just Cause

Military intervention for human protection purposes must be taken when the cause is just and when there is serious and irreparable harm occurring to human beings or imminently likely to occur.³⁸⁷ In the Commission’s view, intervention is justified in two broad set of circumstances: to either halt or avert (1) large scale loss of life, actual or apprehended, with genocidal intent *or not*, which is the product of deliberate state action, state neglect or inability to act, or a failed state situation, or (2) large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.³⁸⁸ If either of these two criteria are satisfied, then the “just cause” component of the decision to intervene is satisfied.³⁸⁹ It should also be noted that the Commission determined that if there are human rights violations

³⁸³ See Joyner, *supra* note 2 at 709.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ See ICISS Report, *supra* note 356, p. 32-37.

³⁸⁷ *Id.* at 32.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

falling short of outright killing or ethnic cleansing (i.e., systematic racial discrimination), then the just cause threshold is not met, nor is military intervention warranted.³⁹⁰

(2) Right Intention

Because the primary purpose of a military intervention is to halt or avert mass humanitarian atrocities, any use of military force designed to achieve other purposes such as alterations of borders, advancement of political causes, overthrow of a government or occupation of territory should be avoided³⁹¹. What the Commission sought to achieve was intervention for the purposes of protecting human life, the ultimate human right. An intervention based on the four examples above, would arguably be an illegal assault on a state's sovereignty, unless the reason for an occupation of territory or overthrow of a government is in furtherance of the protection of a state's people. In such an event, it is recommended that there be a clear intention from the outset to return the territory (in the case of occupation) to its sovereign owner at the conclusion of the hostilities, or have such territory administered on an interim basis by the UN.³⁹²

The Commission recommended that one way to ensure that an intervention is being undertaken for the "right intention" is to make certain that a military intervention is always a *collective or multilateral* intervention, as opposed to being operated by one state.³⁹³ In addition, other ways to ensure that an intervention has the "right intention" is to look to whether it is supported by the citizens of the state for whom the intervention is being taken, or is supported by the other countries in the region.³⁹⁴ If there is support for a multilateral intervention by the people of the state where such abuses are being committed, and/or support in the region for

³⁹⁰ *Id.* at 34.

³⁹¹ *Id.* at 35.

³⁹² *Id.*

³⁹³ *Id.*

military intervention, then theoretically, the Security Council would have no cause to question the legitimacy of such an intervention.

(3) Last Resort

Before any intervention is undertaken, every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must be explored.³⁹⁵ The responsibility to react with military force can only be justified when the responsibility to prevent has been fully exhausted.³⁹⁶ This may include diplomatic solutions, appeals to the UN, or even economic sanctions. However, the Report does not require that every single available alternative be exhausted before resorting to force; the Commission acknowledged that in some cases, there can be reasonable grounds to believe that, in light of all circumstances, the measure if attempted would not have succeeded.³⁹⁷

Where there is a conflict between a state party and a rebel group, as in Darfur (although, not the origin of the genocide), the Commission stressed the importance of negotiations between the two parties before any type of military action is taken.³⁹⁸ This is because, at the heart of any conflict between a state party and a rebel group, is the issue of the rebel group achieving its political and cultural autonomy. Any long-term solution cannot be achieved without some type of negotiations, either before or afterward.

In the case of Darfur, there have been ongoing negotiations between the Sudan government and rebel groups, and even some peace agreements. However, peace agreements have not always lasted very long.³⁹⁹ In any event, although a peace agreement between the Sudan government and rebel groups can only help the situation in Darfur, nevertheless, it should

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 36.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

be remembered that it is not the source of the crisis – although the government has used so-called attacks by rebel groups as a pretext to attack unarmed and innocent civilians.

(4) Proportional Means

The threshold of proportional means refers to the scale, duration and intensity of any planned military intervention necessary to achieve the humanitarian objective in question.⁴⁰⁰

The level of force used should be commensurate with the scale of the original provocation, and should be strictly limited to what is necessary to accomplish the purpose of the intervention.⁴⁰¹

Further, the Report stressed that international law must be strictly observed in such situations.⁴⁰²

The Commission was wary against an intervention making matters worse or engaging in military action for an improper purpose, such as overthrowing the existing government, or engaging in “all out war”⁴⁰³ when perhaps a few targeted strikes may be necessary to halt the loss of life. Any military action undertaken for humanitarian purposes must also be limited in duration to the time absolutely necessary to stop the atrocities from taking place, or to halt their execution.⁴⁰⁴

In the case of the crisis in Darfur, a military intervention would only need to target the Sudanese government and the army – as well as the *janjaweed*. What would make the most sense is intervention directed towards those thresholds where the government and the *janjaweed* are likely to be, such as the northern part of Darfur where many refugees have been driven out.

³⁹⁸ *Id.* at 36.

³⁹⁹ See notes 155, 164 and 177 *supra*, and notes 558-564, *infra*.

⁴⁰⁰ ICISS Report, *supra* note 356 at 37.

⁴⁰¹ *Id.* at 37.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ Joyner, *supra* note 2 at 714.

The point is that international law has evolved such that the rights of people merit protection.⁴⁰⁵

It is clear that any military intervention should be only to the extent that it saves lives.

(5) Reasonable Prospects for Success

The Report also makes clear that military action can be justified only if it stands a chance of success, that is, to halt or avert the atrocities or suffering that triggered the intervention in the first place.⁴⁰⁶ The Commission's rationale is that military action is not justifiable if actual protection cannot be achieved, if embarking upon the intervention would make matters worse than if there were no intervention at all, or if a military action would trigger a larger conflict.⁴⁰⁷

The Commission pointed out that given these guidelines, it is unlikely that an intervention would be successful against a major power, such as one of the five permanent members of the Security Council.⁴⁰⁸ However, in the Commission's view, simply because military intervention cannot be mounted (successfully) in every corner of the world, is no reason not to mount military interventions at all.⁴⁰⁹

In the case of the Darfur humanitarian crisis, given the lack of sophistication of most of the armaments used to attack civilians, it would be fairly easy for a multilateral force with more sophisticated weaponry to successfully take on the Sudanese army and the *janjaweed* and end the atrocities fairly quickly. There would need to be no regime change; however, such an intervention could serve the purpose of sending a powerful message to the international community – that such human rights abuses and atrocities are no longer tolerable, and steps will be taken to end them.

Id.

ICISS Report, *supra* note 356 at 37.

Id.

Id.

(6) Legitimate Authority

The Commission makes abundantly clear throughout the Report that when authorization is needed for humanitarian purposes, the first stop must be the UN Security Council, especially since Article 2(4) makes clear that the Charter includes the basic non-intervention principle.⁴¹⁰ However, where intervention is to take place, Article 2(4) makes it clear that “to ensure prompt and effective action by the United Nations,” it confers upon the Security Council the “primary responsibility for the maintenance of international peace and security.”⁴¹¹

Chapter VII of the Charter sets out what that responsibility entails, which sets out in Article 39 the action the Security Council may take when it “determine[s] the existence of any threat to the peace, breach of the peace or act of aggression.”⁴¹² Such measures may include those short of the use of force such as embargoes, sanctions and the severance of diplomatic relations as described herein, as stated in Article 41.⁴¹³ However, where the Security Council determines that such non-military measures are likely to be inadequate, under Article 42, “it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security,” therein resorting to or permitting the use of military force.⁴¹⁴

A couple other important provisions should be noted, although they may or may not have applicability in the case where a military intervention for humanitarian purposes is contemplated. Article 51 allows for military force as “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN,” and requires that any action taken as a

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 47, citing Art. 2(4), which provides in part: “all Members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The Report also cites Art. 2(7), which prohibits the United Nations from intervening “in matters which are essentially within the domestic jurisdiction of any state.” *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

result be immediately reported to the Security Council.⁴¹⁵ Chapter VIII also acknowledges the existence and security role of those regional and sub-regional organizations that may become involved, but expressly limits the power of such organizations in that, “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”⁴¹⁶

The Report also acknowledges that while the Charter vests with the Security Council the “primary” responsibility of peace and security matters, nevertheless it is not vested with the sole authority to do so. Article 10 of the Charter gives general responsibility to the UN General Assembly with regard to any matter within the scope of UN authority, and Article 11 gives the General Assembly a “fallback” responsibility with regard to the maintenance of international peace and security, however, only to make recommendations – not binding decisions, under the “Uniting for Peace” provision.⁴¹⁷ It should also be noted that in order to prevent a “split” among the major organs of the UN, the Charter prohibits the Security Council from discussing the matter at the same time, if it is being considered by the General Assembly.⁴¹⁸

The Commission recognized that the UN is the principle institution for building, consolidating and utilizing the authority of the international community, as it was set up to be the “linchpin” of order and stability, the framework within which the members of the international system negotiated agreements of the rules of behavior as well as legal norms of proper conduct in order to preserve the society of states.⁴¹⁹ The authority of the UN is not founded upon the

Id., citing Art. 51.

Id. at 48, citing Chapter VIII.

Id.

Id.

Id.

notion of coercive power, but by its role as the “arbiter of legitimacy.”⁴²⁰ It is the concept of legitimacy that is the key link between the exercise of authority and the recourse to power.⁴²¹

The Commission also noted that any attempt to enforce authority can only be made by the legitimate agents of that authority – namely, the UN.⁴²² Any collective intervention authorized by the UN would be regarded as legitimate because it is duly authorized by a representative international body.⁴²³ No doubt, such decisions to resort to force are not made lightly, and the request for UN authority would be made in the context of serious consideration of any such decision. Once upon a time, the great powers altogether transferred the authority to settle issues of international peace and security. It is then up to the UN to use that authority to maintain international peace and security.

The Commission found in consultations around the world, that there was overwhelming consensus that the Security Council plays a central role in determining when, where how and by whom military intervention should be undertaken, as well as any other measure.⁴²⁴ The question then becomes how to make the Security Council work better in order that a military intervention can be undertaken when a situation is presented that warrants such intervention. In the case of the humanitarian crisis in Darfur, the Security Council has taken very little action to halt or avert the atrocities, although in March 2005, it did refer the role of the government perpetrators to the ICC prosecutor for further investigation and possible prosecution.⁴²⁵ However recently, leaders of other African nations have appealed to the ICC prosecutor not to prosecute Sudan President

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.* at 49.

⁴²⁵ Press Release, *Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court*, U.N. Doc. SC 8351 (March 31, 2005), referring to S.C. Res. 1593, U.N. Doc. S/RES/1593 (2005), as adopted by the UN Security Council on March 31, 2005. The prosecutor of the ICC formally requested an arrest warrant for Sudan President Omar al-Bashir in July 2008.

Omar al-Bashir.⁴²⁶ It remains to be seen what will follow from any ICC investigation of this crisis.

b. The Responsibility to Prevent

In the Report, the Commission ~~iterated~~ ^{reiterated} its strong belief that the responsibility to protect implies an accompanying responsibility to prevent.⁴²⁷ The Commission made clear that prevention of deadly conflict lies primarily with sovereign states and the institutions contained therein, and there must be a firm commitment to ensuring fair treatment and fair opportunities for all citizens, which provides a solid basis for conflict prevention.⁴²⁸ The Commission further opined that efforts to ensure accountability and good governance, protect human rights, promote social and economic development and ensure a fair distribution of resources are the necessary means to prevent conflict.⁴²⁹

However, as in the case of the crisis in Darfur, the Commission recognized that all governments may not achieve these noble, if not somewhat lofty goals. As such, the Commission also indicated that conflict prevention is not merely a national or local affair, because the failure of prevention could have potential international consequences and costs.⁴³⁰ As such, the Commission indicated that support from the international community is crucial for conflict prevention. Support can come in many forms, such as developmental assistance, ~~efforts to provide support for local initiative~~, efforts to help address root causes of potential conflict,

⁴²⁶ One World US, "Don't Arrest Sudan President, Say African Leaders," *supra* note 12 ; see also, AllAfrica.com, "Sudan: Africa Urges Suspension of Bashir Arrest Warrant," *supra* note 12.

⁴²⁷ ICISS Report, *supra* note 356 at 19.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

and support for local initiatives that promote good government, human rights, mediation and reconciliation in the event conflict arises.⁴³¹

Showing a commitment to conflict prevention on an international scale has two notable benefits: one, international support for prevention efforts could allow for inducements as punitive measures if a state is not willing keep tensions from erupting into a full-scale conflict.⁴³² Second, the credibility that international actors gain by trying to help a state avoid conflicts is especially important in the event that reaction to a conflict necessarily involves coercive measures as armed force.⁴³³ The Commission noted that although the point of preventative measures is to reduce and hopefully eliminate the need for intervention, but where a situation has gone beyond successfully preventing conflict or a full-scale catastrophe, such efforts can be a necessary precondition for responding effectively to conflict.⁴³⁴

The Commission also noted that in 2000, both the Security Council and the General Assembly adopted resolutions recognizing the vital role of the United Nations system in conflict prevention, and pledging to enhance their effectiveness. A "Report of the Panel on United Nations Peace Operations"⁴³⁵ indicated that punitive measures or armed force may be avoided by utilizing more effective prevention, with the United Nations as the "clearinghouse" for collection and assessment of such early warning information that could detect whether a genocide or other deadly conflict is about to take place.⁴³⁶

For effective prevention of conflict, the Commission indicated that three essential conditions have to be met. First, there has to be knowledge of the fragility of the situation and

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ Report of Panel on UN Peace Operations, U.N. Doc. A/55/305-S/200/809, (Aug. 21, 2000),

www.un.org/peace/reports/peace_operations.

⁴³⁶ *Id.*

the risks associated with it, an “early warning.” Second, there must be an understanding of any policy measures that may effectively ameliorate the situation – the “preventative toolbox.” Third, there must be a willingness to apply those measures – the issue of “political will.”

(1) Early Warning

The Commission indicated that for early warning to be effective there must be more official resources devoted to early warning and analysis, which requires reliable and accurate information. Although many *ad hoc* resources have been available, (including UN peacekeepers), they have not always been effective.⁴³⁷ This has given rise to a new breed of non-governmental organizations, namely, those groups dedicated exclusively to conflict prediction.⁴³⁸ Such groups as Human Rights Watch, who have in the past dedicated most of their resources and efforts to monitoring human rights violations, have now expanded their efforts to include early warning about conflicts that could potentially result in massive violations of human rights or genocide.⁴³⁹ While these groups have at times provided effective information, nevertheless, the problem is that these organizations still need time to coordinate among themselves to effectively mobilize their constituents globally to work with the media and more governments.⁴⁴⁰

(2) Root Cause Prevention Efforts

The Security Council – the UN body charged with the maintenance of international peace and security – has stressed the importance of responding to the root causes of conflict and the need to pursue long-term preventative strategies. The Charter itself provides guidance for such long-term strategies. Article 55 of the Charter recognizes that addressing problems related to

⁴³⁷ ICISS Report, *supra* note 356 at 21.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

international economic, social, cultural, educational, human rights, health and related problems, is essential to creating conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.⁴⁴¹ There is a growing consensus that armed conflicts cannot be understood unless the “root causes” of conflict, such as poverty, political oppression and uneven distribution of resources are considered. As the Secretary-General stated in his 2001 report, “Prevention of Armed Conflict: Report of the Secretary-General,” “[e]very step taken towards reducing poverty and achieving broad-based economic growth is a step toward conflict prevention.”⁴⁴²

The Commission suggested that achieving the Secretary-General’s goals may mean measures such as addressing those political needs not met, tackling economic deprivation and the lack of economic opportunities, strengthening legal protections and the rule of law, or embarking upon needed reforms to the military or other state service institutions.⁴⁴³ Had the UN taken a close look at the root causes of the conflict that has led to the atrocities in Darfur, it would have found that the source of the conflict includes all of the above-suggested roots of conflict, especially political oppression and economic deprivation/lack of economic opportunities. The aims of the Sudan government to oppress one group of people in order to create a pro-Arab government can be said to be one of the main root causes of the conflict that has led to the genocide in Darfur.

(3) Direct Prevention Efforts

The direct prevention “toolbox” speaks of essentially the same issues as root cause prevention efforts – namely political/diplomatic, economic, legal and military, but different means to achieve resolution of these issues. To achieve resolution of these issues may involve

⁴⁴¹ *Id.* at 22.

⁴⁴² See note 479, *infra*.

either (1) straightforward assistance, (2) positive inducements or where necessary, (3) threatened “punishments” in order to get a state to address these concerns and keep local tensions from becoming a national conflict.⁴⁴⁴ This may include political or diplomatic solutions with the assistance of the UN, direct economic prevention measures may include incentives such a future funding or investment if a state can resolve its internal problems.⁴⁴⁵ Also, direct legal measures such as mediation or arbitration may be utilized to resolve a domestic dispute. In the past, tribunals have been utilized to focus the world’s attention on state perpetrators of human rights abuses, with an eye towards sending a signal to other potential state human rights abusers. The ICC has also an effective measure as a threatened prosecution for genocide and other crimes against humanity, may prevent future conflicts. However it remains to be seen what will happen once the ICC issues arrest warrants for Sudan president Omar al-Bashir, and whether it will have any impact on the Darfur humanitarian crisis.

Finally, one measure that has gained international support in recent years is economic sanctions.⁴⁴⁶ Such economic sanctions as the threatened removal of funding or divestment or investment avoidance can effect change, as it helped South Africa change from a system of apartheid to a democratically controlled government.

While all of these suggested measures have been effective in the past and are certainly worth trying, the Commission notes there may be problems. One problem as that expressed by the Sudan government is that governments are reluctant to accept “international preventative strategies,” as that could lead to ever-increasing outside “interference.” There are two answers to this. The first is that international policy makers must remain sensitive to the particularities of

⁴⁴³ ICISS Report, *supra* note 356 at 23.

⁴⁴⁴ *Id.* at 23.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

the state in question, and not seek to apply measures that do not fit the situation or state at hand.⁴⁴⁷ The second is, if a state took every effort with early preventative measures, there would be no need to escalate such measures to such a punitive extreme such that sanctions or military action is instituted.⁴⁴⁸ A state should make every effort at the outset to ameliorate the situation in order to avoid the conflict from erupting into a situation with international implications, where the whole world may get involved.

c. The Responsibility to Rebuild

The responsibility to protect also implies that there is a responsibility to rebuild. As previously stated, any military action should only last as long as needed to contain the conflict.⁴⁴⁹ This means that when military action is taken no matter how long it lasts, because a state's capacity to discharge its duties may be compromised, there should be a genuine commitment to helping to build a durable peace, promoting good governance and sustainable development.⁴⁵⁰ This involves many facets, starting with a post-intervention plan, because many issues need to be considered before any military action is ever commenced. They are (1) post-intervention obligations, (2) administration under UN authority and (3) local ownership and the limits to occupation.

(1) Post-Intervention Obligations

The post-intervention obligations that need to be considered *before* military action is instituted are multi-faceted and complex. Overall, ensuring sustainable reconstruction and rehabilitation will involve the commitment of sufficient funds, resources and as well as close cooperation with the local people, may mean the intervening authority staying in the country for

Id.

Id.

See Section II, subsection B (3), (a)(4) herein, *supra*.

ICISS Report, *supra* note 356 at 39.

some time after military operations cease.⁴⁵¹ One facet of consideration is post-conflict peace-building, which refers to those actions undertaken at the end of a conflict to consolidate peace and prevent a recurrence of armed confrontation.

Former Secretary-General Kofi Annan suggested in his 1998 report, "The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa," that "peace building may involve the creation or strengthening of national institutions, monitoring elections, promoting human rights, providing for reintegration and rehabilitation programmes, as well as creating conditions for resumed development."⁴⁵² The Secretary-General also indicated that to avoid a return to conflict "while laying a solid foundation for development," emphasis should be placed on critical priorities such as, encouraging reconciliation; demonstrating respect for human rights; fostering political inclusiveness; promoting national unity; ensuring the safe, smooth and early repatriation and resettlement of refugees and displaced persons; reintegrating ex-combatants; curtailing the availability of small arms and mobilizing domestic and international resources for economic recovery and construction, and noted that "every priority is linked to every other, and success will require a concerted effort on all fronts."⁴⁵³

The Commission noted that a few key institutional structures should be in place *before* armed intervention begins in order for the above-suggested priorities to be instituted effectively. One is the provision of basic security by the intervening force for *all* members of a population, regardless of ethnic origin or relation to previous source of power in the territory, protection of lives and property.⁴⁵⁴ It also means the successful disarmament, demobilization and reintegration of members of military and security forces, and the phasing in of civilian police

⁴⁵¹ *Id.*

⁴⁵² The Secretary-General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, at ¶ 63, (April 16, 1998), www.un.org/ecosocdev/geninfo/afrec/sgreport/index.html.

⁴⁵³ *Id.* at ¶ 66.

forces to maintain security as the intervening force withdraws.⁴⁵⁵ As has been seen since 2003, this was the primary problem of U.S. operations in Iraq, namely, the failure to plan for post-intervention reconstruction.

An effective judicial system for successful justice and reconciliation is also needed to maintain order after an intervening force has stopped human rights violations. If an intervening force's mandate to guard against further violations is to be successful, it must be enhanced by a system that will bring any ongoing violators of human rights to justice, otherwise the intervention operation loses credibility.⁴⁵⁶

Also important to post-intervention operations is the means to encourage economic growth, the recreation of markets and sustainable development, which means that the intervening authorities should find a basis as soon as possible for ending any coercive economic measures applied to the country before or during intervention. Intervening authorities also have the responsibility to manage as swiftly and smoothly as possible the transfer of development responsibility and project implementation to the local leaders, as quickly as possible. This will ensure that it is in fact the local population that is primarily responsible for rebuilding infrastructure that an intervening force or authority has no specific knowledge or experience to successfully rebuild.

(2) Administration Under UN Authority

This section of the responsibility to rebuild specifies that guidelines for the behavior of intervening authorities can be found under Chapter XII of the UN Charter and should be followed, in order to enable reconstruction and rehabilitation to take place in an orderly

⁴⁵⁴ ICISS Report, *supra* note 356 at 40-41.

⁴⁵⁵ *Id.* at p. 41.

⁴⁵⁶ *Id.*

fashion.⁴⁵⁷ The most relevant provision is Article 76, which indicates that the aim of the system is to promote the “political, economic, social and educational advancement of a people of a territory, to encourage human rights, to ensure the equal treatment of all peoples in the UN in social, economic and commercial matter; and also to ensure equal treatment in the administration of justice.”⁴⁵⁸ Chapter XII is also particularly relevant to those interventions where the root of the conflict is self-determination (i.e., Sudan). Acting under the authority of the UN also creates an oversight function of sorts. Given that the primary goal of the responsibility to protect is to respond to threats to human life, and is not a tool for achieving political goals of the local groups involved,⁴⁵⁹ adhering to the authority created under Chapter XII will ensure that the intervention and post-intervention operations do not themselves become a basis for separatist claims, and instead carry out the purposes for which the responsibility to protect and rebuild were created.

(3) Local Ownership and the Limits to Occupation

The responsibility to rebuild recognizes that the requirement for the intervening force to stay on in the country long enough to ensure sustainable reconstruction and rehabilitation has both positive and negative implications.⁴⁶⁰ One of the obvious positive effects is that an intervention can help restore the rule of law by protecting the territory’s constitutional arrangements that have presumably been violated, and allow the sovereign to regain authority over operations of the territory. However, if an occupation or UN authority over a territory that has been subject to an intervention is unnecessarily prolonged, then the effect is that the

⁵⁷ *Id.* at p. 43.

⁵⁸ *Id.* at p. 43, citing Art. 76 of the U.N. Charter.

⁵⁹ *Id.*

⁶⁰ *Id.* at 44.

sovereignty is seriously compromised, and in some cases may suggest a "trusteeship" type situation, which the UN wishes to avoid.⁴⁶¹

Another pitfall of a prolonged occupation is that if poorly administered, could result in the occupying force or authorities being viewed at the "enemy," inimical to the success of long-term rehabilitation efforts. Equally, a reconstruction and rehabilitation program that does not involve local personnel or excludes local priorities could create an unhealthy dependency on the intervening authority, or become a financial drain on the intervening authority.⁴⁶² As such, the Commission recommended that a balance be struck between the authority of the intervenors, and the long-term interests of the local population and country where the intervention took place.⁴⁶³

As in the case of the intervention in Kosovo, it is essential to strike a balance between the responsibilities of international and local actors.⁴⁶⁴ International actors usually have the resources to help provide a secure environment while the rebuilding process takes place, but must be careful as to not confiscate or monopolize political responsibility on the ground.⁴⁶⁵ They must take steps to set up political processes between conflicting parties that develops a competent system within a framework that promotes and encourages cooperation among former antagonists.⁴⁶⁶ A competent system will also facilitate the transfer of responsibility from international agents to local agents, while minimizing the risk of former adversaries falling back into old patterns of hatred and eventually conflict, or of the international authority having to mediate local tensions.⁴⁶⁷ All of the above, if executed successfully, is consistent with the long-

⁴⁶¹ *Id.*
⁴⁶² *Id.*
⁴⁶³ *Id.*
⁴⁶⁴ *Id.*
⁴⁶⁵ *Id.*
⁴⁶⁶ *Id.*
⁴⁶⁷ *Id.*

term aim of international actors in a post-conflict situation, that is, “to do themselves out of a job.”⁴⁶⁸

C. What “The Responsibility to Protect” Means to the International Community

“The responsibility to protect” is an emerging legal doctrine in the international community that elevates human rights to the level to which it was originally intended – paramount to almost all other considerations, including sovereignty. While state sovereignty remains a cardinal principle of contemporary international law,⁴⁶⁹ and this has created a tension between the concept of state sovereignty and human rights, nevertheless, the law cannot allow a state to commit human rights abuses against its people with impunity. With the rise of human rights as an issue taking greater precedence in international relations, human rights conditions within a state now transcend national boundaries and have become a common salient concern among nations in the international community, and under international law.⁴⁷⁰

“The responsibility to protect” codifies this growing consensus. It states that human rights conditions of peoples of a state are no longer unquestionably accepted as the internal affairs of that state, insulated from the reach of international law. It also states that while every state has not only territorial and governmental sovereignty, that is not the end of it; it also has the responsibility to its people to protect its people from harm and other human rights abuses, and certainly, not to perpetrate them. Arguably, “the responsibility to protect” is why the UN was founded in the first place – to say to the world that a state is not permitted to kill its own people.

The responsibility to protect also reminds each state that even though they retain sovereignty over their internal affairs and their territorial integrity, nevertheless when voluntarily participating in the international community, they have also effectively forfeited some of that so-

⁴⁶⁸ *Id.*

⁴⁶⁹ See Joyner, *supra* note 2 at 717.

called "absolute" authority through signing onto the international agreements that protect human rights. That means the protection of human rights extends *within their own territories*. Any conditions or limitations placed on a state's sovereignty by signing onto such international agreements are relative, conditional and self-imposed. "The responsibility to protect" merely "codifies" this concept.

The responsibility to protect starts before the carnage begins.⁴⁷¹ If it is to be fulfilled, a government must strive to prevent and conditions that imperils its people through the mechanisms of its sovereignty. If the government fails in its duties to exercise its fundamental duty to protect its people, either through an inability to act or through malicious intentions, then that government *forfeits* any entitlement to sovereignty that might prohibit any other state from intervening into its internal affairs in order to stop the bloodshed.⁴⁷²

The effect of the responsibility to protect is to remind states that by joining the international community, they have effectively removed human rights conditions from being a matter exclusively within the domestic jurisdiction of a state, and converts such conditions to a matter of concern to the international community. The responsibility to protect provides the rules as to how states should behave in avoiding those acts that constitute human rights abuses or atrocities in the first place; but if they do not, the international community must respond if a state is unable or unwilling to abate or stop such conditions. It is not a license to intervene recklessly; instead, it is a roadmap for new world order in the emerging precedence of human rights above all else. Hopefully, it is a roadmap that will be followed particularly with regard to the crisis in Darfur, to lead the UN and the international community "out of the wilderness" as to what the international community should stand for, what it should not tolerate, and what it should do

⁴⁷⁰ *Id.*
⁴⁷¹ *Id.*
⁴⁷² *Id.* at 720.

when faced with situations that not only (potentially) threaten international peace and security, but also threaten (or kill) a large number of innocent people who have the right to participate in the common humanity in peace.

D. The Way Forward

Finally, the last Chapter of the Report “The Responsibility to Protect: The Way Forward,” discusses mobilizing the political will needed both domestically and internationally in order to carry out the recommendations in the Commission’s Report. The Commission’s objective with the Report was to have a concrete and political impact. With that, the Commission made a number of written, specific recommendations on how each major organ of the United Nations (the Security Council, the General Assembly and the Secretary-General) can best utilize the Report going forward,⁴⁷³ to prevent humanitarian crises from becoming ongoing tragedies.

To the General Assembly, the Commission recommended that the General Assembly adopt a declaratory resolution embodying the basic principles of the responsibility to protect, and to contain four other basic elements: (1) an affirmation of the ideal of sovereignty as responsibility; (2) an assertion of the threefold responsibility of the international community of states – to prevent, react and to rebuild – when faced with human protection claims in states that are either unable or unwilling to discharge their responsibility to protect; (3) a definition of the threshold (large scale loss of life or ethnic cleansing, actual or apprehended) which human protection claims must meet if they are to justify military intervention, and (4) an articulation of

⁴⁷² *Id.*
⁴⁷³ *Id.* at 74-75.

the precautionary principles (right intention, last resort, proportional means and reasonable prospects) that must be observed when military force is used for human protection purposes.⁴⁷⁴

To the Security Council, the Commission recommended: (1) that the members of the Security Council should consider and seek to reach agreement on a set of guidelines, embracing the "Principles for Military Intervention" summarized in the Synopsis (of the Report), to govern their responses to claims for military intervention for human protection purposes, and (2) that the Permanent Five members of the Security Council should consider and seek to reach agreement not to apply their veto power, in matters where their vital state interest are not involved, to obstruct passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.⁴⁷⁵

To the Secretary-General, the Commission recommended that the Secretary-General give consideration and consult as appropriate with the President of the Security Council and the President of the General Assembly, as to how the substance and action recommendations of the Report can best be advanced in those two bodies, and by his (or her) own further action.⁴⁷⁶

The Commission noted that with the Report, it has met its goals of reconciling two objectives, namely, strengthening not weakening the sovereignty of states, and improving the capacity of the international community to react decisively when states are either unable or unwilling to protect their own people.⁴⁷⁷ The Commission also expressed optimism that with the "road map" as set out in the Report, that the international community will improve its overall willingness and ability to protect those in mortal danger.⁴⁷⁸ The Commission also entreated upon the international community to "step up" and meet the challenges that a large scale humanitarian

⁴⁷⁴ *Id.* at 74.

⁴⁷⁵ *Id.* at 74-75.

⁴⁷⁶ *Id.* at 75.

⁴⁷⁷ *Id.* at 75.

crisis presents, or else the international community as protector of our common humanity, could fail.

⁴⁷⁸ *Id.*

CHAPTER FIVE:

**REEVALUATION AND REASSESSMENT OF THE ROLE OF
THE UNITED NATIONS
TO PROMOTE AND MAINTAIN INTERNATIONAL PEACE AND
SECURITY**

“We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom . . . have resolved to combine our efforts to accomplish these aims.”

-- United Nations Charter

I. Overview of Efforts Towards Reassessment and Re-evaluation of the Role of the UN

While the UN did little or nothing during the one hundred days of the Rwandan massacre in 1994, it has been remiss ever since. After all, the cardinal mission of the United Nations is “to save succeeding generations from the scourge of war.”⁴⁷⁹ Since then, there has been quite a bit of focus on the cause and effect of armed conflict that leads to humanitarian crises such as genocide and ethnic cleansing, in addition to looking at future prevention.

After the Rwandan massacre occurred, the UN held a number of meetings, generated a number of reports on the subject of security in the modern era, and how the lack of security can lead to such humanitarian crises. This chapter will look at the impact of the 2000 Millennium Summit of the United Nations, which created a “blueprint” in which Member States made a commitment “to take effective measures for the prevention and removal of threats to the peace.”⁴⁸⁰ The 2000 Millennium Summit was one of the most important actions taken by the UN after the Rwandan massacre of 1994, not only for its recognition of the continuing threat of genocide, ethnic cleaning and other crimes against humanity some fifty-plus years after the UN

⁴⁷⁹ The Secretary-General, “*Prevention of Armed Conflict: Report of the Secretary-General*” (hereinafter, “*Prevention of Armed Conflict*”), United Nations General Assembly/Security Council, p. 9, U.N. Doc. A/55/985-S/2001/574, (2001).

⁴⁸⁰ *Id.*

was established, but also for its critical analysis of the root causes of genocide, ethnic cleansing and other crimes against humanity that result from internal wars and conflict.

In addition, there have been five reports which have been generated since the 2000 Millennium Summit which not only examines how genocide, ethnic cleansing and other crimes against humanity have redefined “security”, but also the respective roles of the UN, other non-governmental organizations, governments and private actors play in seeking an end of the proliferation of such humanitarian crises. These reports include (1) “We The Peoples: The Role of the UN in the 21st Century, Report of the Secretary-General”; (2) “Prevention of Armed Conflict: Report of the Secretary-General,” (2001); (3) “Progress Report on the Prevention of Armed Conflict: Report of the Secretary-General,” (2006); (4) “In Larger Freedom,” also prepared by the Secretary-General, and (5) the Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change, “A More Secure World: Our Shared Responsibility.”

In addition, the 2005 World Summit held at UN Headquarters in September 2005 also reassessed and reprioritized the goals as set out in the 2000 UN Millennium Development Goals. Two of the stated priorities to come out of the World Summit were the “promotion of peace and security,” and the “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” Altogether, if the goals and recommendations of the 2000 Millennium Summit, the 2005 World Summit as well as the four documents discussed herein are achieved, the UN could be well on its way to achieving the goal of ending genocide and other crimes of humanity in the modern era.

II. The UN Millennium Summit and the Millennium Development Goals

In September 6-8, 2000, conflict prevention was one of the many prominent topics of focus during the 2000 Millennium Summit of the United Nations, at which leaders from all over the world reached a consensus of determination to establish just and lasting peace all over the world in accordance with the principles of the UN Charter.⁴⁸¹ What is truly interesting is that the focus was not only on conflicts as between two or more states, but more importantly, recognized the potential for internal conflict within a state as a threat to international security.

Overall, it was agreed that conflict prevention lies at the heart of the mandate of the United Nations in maintaining international peace and security, and conflict prevention is preferable to curing the results of conflict.⁴⁸² It was also agreed that the most effective means of conflict prevention was to develop long-range strategies incorporating political, economic, social and other measures focused on reducing or eradicating the underlying causes of armed conflict.⁴⁸³ The results are embodied in the eight goals developed at the 2000 Millennium Development Summit.⁴⁸⁴

The eight Millennium Development Goals,⁴⁸⁵ to be achieved by the target date of 2015, include: (1) halving extreme poverty and hunger; (2) achieving universal primary education; (3) empowering women and promoting equality between women and men; (4) reducing the under-five mortality by two-thirds; (5) reducing maternal mortality by three-quarters; (6) reversing the spread of diseases, especially HIV/AIDS and malaria; (7) ensuring environmental sustainability,

⁴⁸¹ See, GA Res. 55/2, "United Nations Millennium Declaration," U.N. Doc. A/RES/55/2, as adopted by the UN General Assembly on Sept. 18, 2000.

⁴⁸² Secretary-General Kofi Annan, "*We the Peoples*," *supra* note 353, at p. 44.

⁴⁸³ The Secretary-General, "*Prevention of Armed Conflict*," *supra* note 479 at p. 10.

⁴⁸⁴ See note 481, *supra*, and note 486, *infra*.

⁴⁸⁵ Also abbreviated as "MDG's".

and (8) creation of a global partnership for development with targets for aid, trade and debt relief.⁴⁸⁶

The basic premise of the Millennium Development Goals is that world leaders recognize their responsibilities to not only promote sovereignty of States, respect for human rights and fundamental freedoms, but also *to become more effective in maintaining international peace and security* by devoting resources and tools towards conflict prevention (hence issues that sow the seeds of conflict), peaceful resolution of disputes and peacekeeping, all through international cooperation. What is also interesting to note, is that at the 2000 Millennium Summit world leaders came to the realization that security in the modern era has taken on a new meaning – one that understands that in some cases, the root causes of conflict are not necessarily focused on the weapons of warfare.

A. The Meaning of “Security” in the Modern Era

While the Millennium Development Goals speak of alleviating societal ills that over time can cause internal conflicts that lead to genocide, ethnic cleansing and other crimes against humanity, nevertheless, the key focus of the goals remained on security in the modern era. The concept of security and conflict prevention is an evolving one.⁴⁸⁷ In the traditional view of security, security pertained preeminently to states, their borders and their ability to protect themselves from external aggression.⁴⁸⁸ During the Cold War, the focus in security and conflict prevention was on the weapons race, mostly between two super powers and their allies.

⁴⁸⁶ Fact Sheet, “*The Millennium Development Goals and the United Nations Role*,” www.un.org/millenniumgoals, (last visited Feb. 13, 2009).

⁴⁸⁷ The Secretary-General, “*Prevention of Armed Conflict*,” *supra* note 437 at p. 3.

⁴⁸⁸ Joyner, *supra* note 2, at 706-707.

It has been over sixty years since any of the world's major powers have been engaged in a world war.⁴⁸⁹ Nowadays, the concepts of security and conflict prevention has taken on a new meaning. Security and conflict prevention are no longer solely focused on international wars and physical defense of state borders, but are now focused on protection of welfare of the citizens of states and the root causes of internal conflicts and strife that lead to large-scale humanitarian crises such as genocide and ethnic cleansing, not simply their violent symptoms.⁴⁹⁰

Some of the root causes include poverty; lack of respect for human, civil and political rights; lack of inclusion in governmental institutions and processes which disallows participation by all citizens; increasingly scarce resources; deprivation of fundamental freedoms, and deprivation of the right to development.⁴⁹¹ If indeed the international community is successful in achieving most if not all of the Millennium Development Goals by 2015, then it is possible that the most common causes of conflict and hence, the devastating results thereof, would be (theoretically) rendered obsolete.

B. "We the Peoples:" Security in the Post-Cold War Era

In a 2000 report written in anticipation of the Millennium Summit, "We the Peoples: The Role of the United Nations in the 21st Century," the Secretary-General drew on the words of the UN Charter to point out that the United Nations, "while it is an organization of sovereign States, exists for and must ultimately serve . . . the needs and hopes of peoples everywhere."⁴⁹² The Secretary- General also noted that to do so, "we must aim . . . to perfect the triangle of

Secretary-General Kofi Annan, "We the Peoples," *supra* note 353, at p. 45.

Id.

Id. at p. 45-46.

The Secretary-General, "In Larger Freedom: Towards Security, Development and Human Rights For All, Report of the Secretary-General of the United Nations for Decision by Heads of State and Government in September 2005," *supra* note 353, at ¶ 12, U.N. Doc. A/59/2005 (March 21, 2005).

development, freedom and peace.”⁴⁹³ To that end, the Secretary-General enumerated the components of what would best assure security in the post-Cold War modern era.

In the chapter entitled “Freedom from Fear,” the Secretary-General points out that since the 1990’s, wars have been mainly internal and extremely brutal, claiming the lives of more than 5 million people.⁴⁹⁴ At one time security meant defense of a territory from external attack; now, it is synonymous with the protection of communities and individuals from internal violence. The Secretary-General recommended that the best way to achieve security is through a “human-centered” approach.

This “human-centered” approach not only looks at the threats created by weapons of mass destruction as well as small arms and weapons, but also the threats created by poverty, resource depletion, water scarcities and environmental degradation, all of which may result in social and political tensions that eventually lead to conflict or strife. The Secretary-General then outlines six preventative strategies to meet the security needs of the modern era.

1. Preventative Strategy One: Prevention as a Means of Maintaining Security

First and foremost, security begins with prevention. The Secretary-General noted that prevention not only addresses the violence of conflicts, but also their root causes, the most obvious of which are noted above. In order to prevent deadly conflicts, there must be a better understanding of their root causes, since no two conflicts are the same and therefore, no single strategy will be universally effective.⁴⁹⁵ The Secretary-General noted that for poor countries at war, poverty is often coupled with sharp ethnic or religious divisions, the rights of the minority population being subordinated by the government, government being insufficiently inclusive, or allocation of available resources favors the dominant population. In some cases, as noted below,

⁴⁹³ *Id.*

⁴⁹⁴ Secretary-General Annan, “*We the Peoples*,” *supra* note 353 at p. 43.

internal conflict is also driven by economics. Globalization and the presence of multinational corporations in such places as Nigeria,⁴⁹⁶ the Sudan and other African countries in order to fully exploit available resources have also lead to egregious human rights abuses, including murder. Whereas war and other internal conflicts may be exceedingly devastating for some, it has been profitable for private actors and other opportunists who have been complicit in an ongoing conflict.⁴⁹⁷ Drugs, weapons, oil and other commodities of trade have contributed more than their fair share to the internal strife that has claimed the lives of more than five million people since 1990. A current example, of course, is the crisis in the Darfur region of the Sudan. A review of two of the most recent crises highlights how the above-indicated factors have created and continue to perpetuate a humanitarian crisis.

a. Deprivation of Rights and the Right to Development

While poverty and denial of human rights cannot be said to “cause” a civil war, internal conflict, terrorism or organized crime, they all greatly increase the risk of instability and violence.⁴⁹⁸ Similarly, war, conflict and humanitarian crises are not the only reasons that countries are trapped in poverty, but they do undoubtedly set back development.⁴⁹⁹ For example, in the lead up to the Rwandan massacre, because members of the Tutsi tribe were preferred by the former Belgian colonists, when the non-preferred Hutu tribe finally seized power, they systematically deprived the Tutsis of political participation and blamed them for the

⁴⁹⁵ *Id.* at p. 45.

⁴⁹⁶ See, Case No. 155/96, The Social and Economic Rights Action Center and Center for Economic and Social Rights v. The Federal Republic of Nigeria, (2001), in which the African Commission for Human & Peoples' Rights found that Nigeria was in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights when the government of Nigeria, involved in oil exploration and production, caused environmental degradation and health problems resulting from the contamination of the environment of the Ogoni People, and lead to the deaths of many Ogoni, including the execution of Ogoni activist Ken Saro Wiwa.

⁴⁹⁷ Secretary-General Annan, “*We the Peoples: The Role of the United Nations in the 21st Century*,” *supra* note 353 at p. 45.

⁴⁹⁸ The Secretary-General, “*In Larger Freedom*,” *supra* note 492 at ¶ 15.

⁴⁹⁹ *Id.*

country's ills, up to the time they coerced civilian Hutus to attack and kill 800,000 of their fellow Tutsi citizens.

In the case of the current crisis in the Sudan, as a result of the Arab government's favoritism of Arabs, the indigenous (black) peoples of Darfur have been subjected to years of political marginalization. As such, the cycle of poverty for black Darfurians occurs due to a number of factors: lack of economic opportunities for large numbers of the population due to privatization, leading to job losses for many workers; lack of services particularly in the areas of education and health; the deterioration of existing hospitals and schools, including extreme conditions of no pay for teachers and health care professionals for work; and lack of reliable means of transport and infrastructure, which results in high prices for fuel and other necessities.

In addition, as the ever-expanding Sahara Desert has forced Arab cattle herders to populate Darfur, and drive out black farmers who have traditionally occupied such lands. Khartoum has responded by granting political power and good jobs to Arabs at the expense of the black population, in addition to depriving black farmers of their livelihood. The government has continued to foster a policy of suppression of a "minority" culture by the "majority" or self-proclaimed "national" culture, all toward the end of political marginalization and lack of representation of blacks in government functions.⁵⁰⁰

None of these factors can possibly lead to realization of the right to development for all Darfurians or even sustainable development, as black Darfurians are deprived of any and all of the tools needed to develop economically, or to sustain themselves. This is in addition to the fact that black Darfurians are given practically no political or economic opportunity whatsoever to achieve even sustainable development, thus leaving many to scrape for their next meal. It goes

⁵⁰⁰ Environment & Development Challenges News, *Resource and Environmental Aspects of the Ongoing Genocide in Darfur*, Environment & Development Challenges News, (March 2005).

without saying that a policy of chasing black Darfurians off of their land simply does not lend itself to the creation of renewable resources such as food, water or basic necessities supplies.

b. How Oil Drives Genocide

Although the Sudanese government has objected to any investigation into the genocide, preferring to explain the slaughter as an ancient rivalry between nomadic herding tribes in the north and black African farmers in the south, all while denying responsibility for acts of the *janjaweed*, nothing could be farther from the truth. The fact is that the genocide in the Sudan is also being driven and funded by revenue derived from oil exploration and production.

In 1978, Chevron discovered oil in southern Sudan. The government redrew jurisdictional boundaries to exclude the oil reserves from the southern jurisdiction, which began the 21-year war between the government and rebels in the south. In January 2005, a peace accord was reached with the government and the SPL/M, allowing the south to operate under its own civil law, and oil revenues were to be divided between Khartoum and the SPL/M territory.

Unfortunately, Darfur – an oil rich, predominantly black area of the Sudan, was left out of the accord. So another reason for attacks on villages and civilians in Darfur was justified -- to clear the way for drilling and pipelines. Some of the land seized from black Darfurians has been reportedly given to Arabs from Chad.⁵⁰¹ In April 2005, seismic studies indicated that Sudan had a sizable oil reserve, though not as large as the six Persian Gulf countries.⁵⁰² Nevertheless, the discovery of oil reserves has clearly wreaked havoc on the Sudan and its people. The revenues to Khartoum have been approximately one million dollars a day, most of which has been

⁵⁰¹ D. Morse, *Oil Drives the Genocide in Darfur*, Counter Currents, (Aug. 20, 2005), www.countercurrents.org.

⁵⁰² *Id.*

funneled into arms, in order to rid Sudan of its non-Arab population and reap the benefits for itself.⁵⁰³

Not surprisingly, revenues derived from oil production have resulted in a concentration of wealth for the elites, kickbacks and bribery, and has led to destruction of regional economies. In some cases the oil companies themselves contribute to the destruction of local villages. Roads and bridges built by oil firms have been used to attack remote villages, and have even contributed to the murders of locals in order to clear lands for drilling and pipelines.⁵⁰⁴

c. The Impact of Humanitarian Crises on the Environment

As indicated, a number of factors contribute to humanitarian crises, and in each instance, there is an adverse impact on the environment. In the crisis in Darfur, the ongoing drought creating an arid, non-arable land has led to the years-long fight between Arab cattle herders and black farmers. It is this fight over scarce resources that has laid the foundation for Darfur to erupt into the full-scale humanitarian crisis that it is. The attacks themselves, designed to kill or drive out a population by destroying agricultural lands and water supplies will have an untold long-term impact on the environment.

As previously noted, Sudan is now in the business of oil exploration. Drilling, laying pipelines, and the residual effects of running such oil explorations operations can also devastate an already-devastated environment suffering from a severe drought. If the little available water is being utilized for oil exploration operations, it can be said that oil exploration itself is also contributing to the increasing desertification of the Sudan. Deforestation in order to make way for oil exploration and production is also a contributing factor to the devastation of the

⁵⁰³ *Id.*
⁵⁰⁴ See note 501, *supra*.

environment. It is also surely to deprive indigenous people of the ability to maintain renewable resources.

2. Preventative Strategy Two: Protection of the Vulnerable

The Secretary-General also noted that another preventative strategy for security is protection of the vulnerable. Despite the existence of a number of international conventions and covenants designed to protect the most vulnerable citizens, particularly women, children and refugees, women are vulnerable to violence and sexual exploitation, children are forced into slave labor or being conscripted into the armies that cause bloodshed, if in fact they are not themselves killed. As to refugees, as recently seen in Darfur and along the Chad border, refugees are attacked in the camps that are designed to assist them and provide refuge from the violence.

International conventions have traditionally looked to states to protect their civilian populations, but this tradition has been threatened in three significant ways.⁵⁰⁵ First, as in the case of the Sudan and Rwanda, states or state actors are often the perpetrators of violence against a civilian population, the very population they are obligated to protect.⁵⁰⁶ Second, non-state combatants, especially in a state whose government has collapsed, are either ignorant or wholly contemptuous of humanitarian law or human rights.⁵⁰⁷ Third, international conventions such as the Women's Convention or the Children's Convention do not adequately address the specific needs of vulnerable groups such as internally displaced persons, women and children in complex emergencies such as that presented in Bosnia, Rwanda, and now the Darfur region of the Sudan.⁵⁰⁸

⁵⁰⁵ Secretary-General Annan, "*We the Peoples*," *supra* note 353 at p. 46.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

To combat this problem, the Secretary-General suggests that stronger legal standards are needed to centralize humanitarian and human rights law, to protect humanitarian workers, and now a third very important purpose – to regulate the actions of private and corporate actors, who are involved in internal wars and conflicts in increasing numbers.⁵⁰⁹ In the wake of globalization, given the alarming rate at which private and corporate actors are discovered to have contributed to the root causes of conflict or are complicit in the violence, an international convention regulating such private actors having such key roles in ongoing conflicts may be an idea whose time has come.

3. Preventative Strategy Three: Humanitarian Intervention

A third preventative strategy as suggested by the Secretary-General pertains to addressing the dilemma presented by humanitarian intervention to stop atrocities such as genocide and ethnic cleansing. Critics of humanitarian intervention indicate that it could become a cover for gratuitous interference in the internal affairs of sovereign states or that it could result in movements that provoke governments into committing gross violations of human rights or external interventions to aid their cause.⁵¹⁰ However, the Secretary-General raises an excellent point: if humanitarian intervention is an “unacceptable assault on sovereignty,”⁵¹¹ then how is the world to respond to systematic humanitarian crises that occurred in Rwanda in 1994 or the ongoing crisis in the Sudan?

As the Secretary-General notes, such a question presents quite a dilemma for those who do not believe that humanitarian intervention is the best means to stop genocide and other crises. However, the Secretary-General also correctly points out that no legal principle – not even sovereignty – should ever shield crimes against humanity such as genocide or ethnic

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.* at 47-48.

cleansing.⁵¹² Where peaceful attempts to stop such crimes have been exhausted, it is imperative that the Security Council take action on behalf of the international community. In fact, it appears that what the Secretary-General stated, is that *humanitarian intervention could be a form of maintaining security*.

Despite protestations from nations opposing humanitarian intervention that it is an unwarranted interference into sovereignty, nevertheless, it must remain an option to stop mass murder where all other peaceful attempts have failed.⁵¹³ Fortunately, humanitarian intervention may become an emerging norm, given that the costs of such humanitarian crises are so much greater than if the conflict had been prevented or stopped before becoming a full-scale international crisis.

4. Preventative Strategy Four: Strengthening Peace Operations

A fourth preventative strategy includes strengthening peace operations. Of course, this assumes that they are ever started. The objective of peace operations and peace building is to assist the parties engaged in conflict to pursue their interests through political channels.⁵¹⁴ This includes providing emergency relief, demobilizing former fighters, reintegrating former fighters into society, clearing armaments such as landmines, stabilizing government, rebuilding economies and promoting equitable and sustainable development practices.⁵¹⁵ Furthermore, post-conflict peace building has helped to prevent the breakdown of peace agreements and to build the foundations for sustainable peace.⁵¹⁶

Although peace operations have had some successes such in Namibia, Mozambique, the former Yugoslav Republic of Macedonia, there have been some tragic failures such as that in

⁵¹¹ *Id.* at 48.

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ *Id.*

Rwanda, Srebrenica⁵¹⁷ and now, the Darfur region of the Sudan. Due to the lack of commitment of military forces from Member States, and the usual last minute ad hoc manner in which peace-building operations are put together, they have not been as successful as they could. Because of this, the Secretary-General put together a high-level panel to review all aspects of peace operations, and to suggest ways that peace operations may be improved politically and operationally, as well as reviewing the option of force where peaceful prevention fails.⁵¹⁸

5. Preventative Strategy Five: Targeted Sanctions

A fifth suggested preventive strategy for security is targeted sanctions. However, sanctions have had an uneven track record. Although there has been success in states such as South Africa where sanctions brought an end to the oppressive Apartheid regime, there are many instances where sanctions have not induced compliance with Security Council resolutions.⁵¹⁹ In some cases, little effort has gone into monitoring or enforcing sanctions, or there has been little or no assistance from the international community with enforcement. This has rendered the notion of sanctions in the case of the most egregious human rights abuses – meaningless. The other problem that sanctions presents is that it is those that suffer the most, not the political powers that inflict suffering – that truly benefit from the effects of sanctions. Those in power can exploit sanctions by profiting from black market activity, and exploit sanctions as a pretext for eliminating domestic sources of political opposition.⁵²⁰

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* at 49.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* See also, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, "A More Secure World: Report of the High-Level Panel on Threats, Challenges and Change," (hereinafter, "A More Secure World"), 2004, <http://www.un.org/secureworld/report.pdf>. The Report explored the possibility that the use of force (or the threat thereof) can be used in the instance where peaceful prevention fails.

⁵¹⁹ A prime example is the Security Council's March 2005 resolution calling for sanctions of asset freezes and travel restrictions against individuals in the Sudan unless it ceases its activity of human rights abuses against its own civilian population. The Security Council was supposed to appoint panel members to identify persons responsible, but failed to do so.

⁵²⁰ Secretary-General Annan, "We the Peoples," *supra* note 353 at p. 50.

Fortunately, a few nations such as Switzerland, Germany, Canada and the United Kingdom have been working on plans for more effective sanctions such as arms embargoes or targeted boycotts, as well as plans for better implementation.⁵²¹ It remains to be seen if the UN Security Council will take cues from these forward-thinking countries and put in place effective sanctions that could end current and future crises.

6. Preventative Strategy Six: Pursuit of Arms Reduction

The sixth suggested preventative strategy for security is the pursuit of arms reductions. In the years since the end of the Cold War, there have been both gains and setbacks in achieving the goal of total disarmament. Among the gains are the Ottawa Convention banning landmines and the Chemical Weapons Convention both being entered into force, and the conclusion of the Comprehensive Nuclear-Test-Ban Treaty has resulted in the strengthening of nuclear safeguards and the reduction of the number of nuclear weapons by half.⁵²² However, attempts at arms reduction have also had some setbacks. This includes proliferation of covert nuclear weapons programs, nuclear testing in South Asia, the unwillingness of some key states to ratify the Comprehensive Nuclear-Test-Ban Treaty, as well as the newest threats of chemical and biological weapons.⁵²³

The key problem, as the Secretary-General points out, is the increase in the availability of small arms and light weapons. Currently, it is these weapons that kill the most people in modern wars and conflicts, and have killed more people and caused more carnage than the atomic bombs dropped on both Hiroshima and Nagasaki combined.⁵²⁴ These arms are heavily traded and accessible on the global market. They are responsible for the human rights abuses currently

⁵²¹ *Id.*
⁵²² *Id.*
⁵²³ *Id.*
⁵²⁴ *Id.*

taking place in the Sudan and previously in other humanitarian crises, and their availability on the market has exacerbated armed conflicts that have sometimes lead to large-scale humanitarian crises. After the cold war, many of the small arms surpluses wound up in some of the most dangerous conflict zones, including many of the states experiencing conflict and humanitarian crises in Africa.

The other problem is that although the majority of the world's trade in small arms is legal (some 50-60%), a large portion of the sales are not.⁵²⁵ The task of controlling the circulation and availability of these arms is made more difficult due to the lack of security in some countries, and the lack of responsibility in some others.⁵²⁶ The Secretary-General aptly points out that in order to gain control of the illicit small arms, governments need to take a more proactive approach. Two ways to accomplish this is to for governments to make the sale and transfer of such arms more transparent, or to utilize buy-back programs that have been successful in countries such as Albania, El Salvador, Mozambique and Panama.⁵²⁷ Buy-back programs have allowed individuals to exchange weapons for such life essentials as farming tools and other implements, sewing machines, construction materials, and whole communities to be provided with schools, health-care services and road repairs.⁵²⁸

Nuclear weapons also remain a threat to security. While many of the world's nuclear weapons are in the hands of the major powers as the United States and Russia, many of them are not (i.e., South Korea, Iran). Currently, the Strategic Arms Reduction talks are stalled and there are no negotiations at all concerning the thousands of weapons of nuclear power that are

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

presumed to be in the possession of smaller dangerous states.⁵²⁹ The Secretary-General proposed convening a major international conference to discuss and propose ways to eliminate nuclear dangers. It is a noble idea, but in light of the current developments in the world, (the so-called “standoff” between the United States and Iran), it is highly unlikely that such a convention will take place anytime soon.

III. Reports: Armed Conflict and Threats to Security in the Modern Era

A. “Prevention of Armed Conflict” (2001): A Report of the Secretary-General of the United Nations on the State of Security in the Post-Rwandan Massacre Era

In a report by UN Secretary-General Kofi Annan as presented to both the UN General Assembly and the Security Council, the Secretary-General noted that when elected, he “pledged to move the United Nations from a culture of reaction to a culture of prevention.” The 2001 report, “Prevention of Armed Conflict: Report of the Secretary General” points out as one of its basic premises that “conflict prevention is one of the primary obligations of Member States as set forth in the Charter of the United Nations.” The Secretary-General also asserts that the United Nations⁵³⁰ has a moral responsibility to ensure that genocides such as that perpetrated in Rwanda are prevented from ever happening again,⁵³¹ but also points out that all organs of the UN⁵³² as well as governments, other non-governmental organizations and private actors must act in concert bring about the necessary changes so that such crises do not arise again.

⁵²⁹ *Id.* at 53.

⁵³⁰ While much of the focus of this paper is on (possible) necessary military action as authorized by the Security Council to stop humanitarian crises, it is important to understand that the General Assembly also plays an important role in the prevention of armed conflict. The General Assembly has a broad authority to (1) consider conflict prevention in all its aspects; (2) develop recommendations for peaceful resolution of conflict, as appropriate; (3) call the attention of the Security Council to situations which are likely to endanger international peace and security. See also, the Secretary-General, “*Prevention of Armed Conflict: Report of the Secretary-General*”, *supra* note 479, p. 3.

⁵³¹ The Secretary-General, “*Prevention of Armed Conflict: Report of the Secretary-General*”, *supra* note 479, p. 10.

⁵³² *Id.* In addition to the General Assembly and the Security Council, the Secretary-General also indicates that other UN organs such as the Economic and Social Council, the International Court of Justice as well as other internal departments of the UN can play a vital role in the achievement of conflict prevention.

The Secretary-General points out that in his view the Charter identifies two defining elements of the philosophy underlying the collective security system. First, prevention of armed conflict is far more desirable and cost-effective strategy to ensure lasting peace and security than trying to stop or alleviate its symptoms after conflict has begun; and second, as provided in Article 2, paragraph 3, "armed 'international' conflicts are best prevented by 'peaceful means in such a manner that international peace and security are not endangered.'"⁵³³

The report also points out the necessary evolution regarding the concept of 'collective security' currently taking place in the twenty-first century. The former Secretary-General noted that in the last part of the twentieth century, collective security was pursued through *reactive* means, and almost always defined in military terms; whereas in the twenty-first century, 'collective security' should imply a *preventative* obligation for the international community to address tensions, grievances, inequality, injustice, intolerance and hostilities at the earliest stages possible, before peace and security are endangered.⁵³⁴ The former Secretary-General suggested that in order for the UN to move from a culture of "reacting" to crises, it must create an effective preventative strategy which requires a comprehensive approach that encompasses both short-term and long-term political, diplomatic, humanitarian, human rights, developmental, institutional and other measures taken by the international community, and makes a number of recommendations toward that end.⁵³⁵

Although the report discusses how the UN can better serve the international community in becoming more effective in preventing crises, nevertheless it should be reiterated that the primary responsibility for conflict prevention rests with the national Governments, with civil

⁵³³ *Id.* at p. 9. It should also be noted that while the Article 2, paragraph 3 specifically refers to international conflicts among states, it is clear from the context of the report that the Secretary-General contemplates that *internal* conflicts may also endanger international peace and security.

⁵³⁴ *Id.*

society playing a key role.⁵³⁶ The Secretary-General made a number of recommendations on how efforts of the United Nations system could be enhanced with the cooperation and active involvement of the Member States. Three such recommendations include (1) more cooperation between governments and the key organs of the UN (namely the General Assembly and Security Council), (2) more cooperative action as between the General Assembly and the Security Council and (3) a more proactive role of the Security Council.⁵³⁷ Again, a plan of prevention can only be effective where the multidimensional root causes of conflict are identified and addressed. This may be easier said than done, since often with long-term conflicts that erupt into humanitarian crises the government has not ventured either to identify or alleviate the root cause of conflict, and in some instances such as the crisis in the Darfur region of the Sudan, is actually the perpetrator of conflict.

The rationale of the former Secretary-General in highlighting the concerted efforts of the UN, governments, non-governmental organizations and private actors in preventing conflict is to demonstrate that all of these actors play a role in overcoming the root causes of conflict. One of the major culprits responsible for conflict is, as indicated above, the lack of sustainable development. Obviously, sustainable development cannot take place in the midst of actual or potential conflict,⁵³⁸ and an actual conflict can and will destroy the achievements of national development.⁵³⁹ As the former Secretary-General points out, "effective conflict prevention is a *prerequisite* for achieving and maintaining sustainable peace, which in turn is a prerequisite for sustainable development."⁵⁴⁰ As noted above, where a society is successful in its civil

⁵³⁵ The Report is divided into many sections, at the end of which the Secretary-General makes a number of recommendations which are too numerous to repeat here.

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ *Id.* at p. 7.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

institutions, and is achieving sustainable development for its entire people, the likelihood of conflict is greatly reduced.

It appears the key point the former Secretary-General makes in this report is that by assisting national Governments and local counterparts in finding solutions to problems by offering support for the development of national and regional capacities for early warning, conflict prevention and peace-building, the UN is in fact helping itself to achieve its overall goals of prevention of conflict and maintenance of international peace and security. In other words, by preventing from conflict and genocide from ever taking place, the UN and the international community can avoid the human and societal costs of restoring the peace after the damage is done.

B. “Progress Report on the Prevention of Armed Conflict” (2006): A Follow-up Report of the Secretary-General

In 2006, the Secretary-General prepared a follow-up to his 2001 report on the Prevention of Armed Conflict.⁵⁴¹ The Secretary-General’s report found that in a number of areas, significant progress had not been made.

For example, the former Secretary-General noted that in Resolution 57/337, “Prevention of Armed Conflict” as issued by the General Assembly,⁵⁴² called upon Member States and the international community to abide by the resolve of the Millennium Assembly to make the United Nations more effective in maintaining peace and security by providing the resources and tools needed for conflict prevention,⁵⁴³ and noted the need to strengthen the capacity of the UN for early warning, collection of information and analysis of potential conflict.⁵⁴⁴ The Secretary-General reported that unfortunately, no significant progress had been made, and that the UN still

⁵⁴¹ See U.N. Doc. A/60/891, 18 July 2006, as presented to the General Assembly on July 18, 2006.

⁵⁴² See U.N. Doc. A/RES/57/337, 18 July 2003, as adopted by the General Assembly on July 18, 2003.

⁵⁴³ *Id.* at p.4.

lacked the capability to analyze and integrate data from different parts of the international system into comprehensive (and usable) early warning reports and strategies on conflict prevention.⁵⁴⁵

The Secretary-General also found that a further review of progress indicated that the UN's capacity to use its leverage to prevent armed conflict in conjunction with other actors is not fully being harnessed.⁵⁴⁶ He also noted that conflict prevention did not yet have a permanent forum for regular discussions with the intergovernmental system, and stressed the importance of the system to act together in a more deliberate manner, to make the most of "comparative advantages" and consider a system of incentives that make preventative action a more compelling choice.⁵⁴⁷

The Secretary-General made a number of recommendations to ameliorate the lack of progress and commitment to the prevention of conflict, and called upon Member States to more comprehensively address the primary sources of tension for conflict-vulnerable regions and countries.⁵⁴⁸ Such recommended measures include (1) the regulation of trade in natural resources that fuel conflict (such as oil), (2) reduction in the sale and illicit flow of small arms and light weapons, (3) finding common ground on the use of nuclear, chemical and biological weapons, (4) addressing such ongoing problems as environmental degradation, migration, and the abuses of human rights, as well as (5) attainment of the Millennium Development Goals.⁵⁴⁹ The Secretary-General called upon Member States to accede to, ratify and comply with international human rights, humanitarian and other legal instruments relevant to the prevention of armed conflict,⁵⁵⁰ He also invited the international community as a whole to more explicitly

⁵⁴⁴ See note 541, *supra*, at p. 27, in which the Secretary-General references Resolution 57/337, annex paragraph 35.

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.* at 28.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

(and effectively) embrace the “responsibility to prevent” by exploring and making effective use of peaceful means to assist States in living up to their obligations regarding the protection of their populations.⁵⁵¹

C. Making Good on the Millennium Development Goals’ Future Promise to End Genocide and Promote International Security: Two Reports

In the last two years, the UN has issued two very crucial reports in anticipation of the 2005 World Summit which made a number of bold policy statements regarding the ability to stop genocide such as the current crisis in the Sudan. The first report from the Secretary-General, “In Larger Freedom: Towards Security, Development and Human Rights for All,”⁵⁵² was specifically addressed to leaders attending the September 2005 World Summit. It raised a number of concerns regarding genocide and other crimes against humanity and whether they should also be viewed as threats to international peace and security, as well as the precise role of the Security Council in taking steps to stop such crimes. “In Larger Freedom” is also laudable for its reference to the 2004 report from the Secretary-General’s commissioned High-level Panel on Threats, Challenges and Change, “A [M]ore [S]ecure [W]orld: Our [S]hared [R]esponsibility,”⁵⁵³ which explicitly states that the UN Charter is not as clear as it could be when it comes to saving lives within countries in situations of mass atrocity. A summary of the most important findings of both of these reports is discussed in further detail below.

⁵⁵¹ *Id.* See also, Chapter Four *supra*, herein.

⁵⁵² The Secretary-General, “*In Larger Freedom*,” *supra* note 353.

1. “In Larger Freedom”: Analysis of the Responsibility of the Security Council to Prevent and Stop Genocide and Crimes Against Humanity

Then Secretary-General Kofi Annan referred to his report “In Larger Freedom” to stress the enduring relevance of the Charter of the United Nations, and to emphasize that its purposes must be advanced in the lives of individuals, and encapsulates the idea that development, security and human rights are interdependent.⁵⁵⁴ The Secretary-General indicates that “larger freedom” implies that men and women have the right to be governed by their own consent, under law, in a society where all individuals can freely speak, worship, live and associate, free from fear and want.⁵⁵⁵ The Secretary-General also makes the point that as the world’s only universal body with a mandate to address security, development and human rights issues, the United Nations has a special burden to ensure these basic fundamentals are not violated or completely obliterated.

One of the most notable points of focus in the report, “In Larger Freedom,” is the Secretary-General’s excellent question:

“Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?”⁵⁵⁶

The Secretary-General also made bold statements about the role of the Security Council in stopping genocide and other crimes against humanity, by first noting that in today’s world, no State no matter how powerful can protect itself on its own, nor can any State, weak or strong, realize prosperity in a vacuum, and that all States *must act together* in effecting global change and facing imminent threats to peace and security. The Secretary-General *included* genocide and

⁵⁵⁴ The Secretary-General, “*In Larger Freedom*,” *supra* note 353 at ¶ 14.

⁵⁵⁵ *Id.* at ¶ 15.

⁵⁵⁶ *Id.* at ¶. 125.

and facing imminent threats to peace and security. The Secretary-General *included* genocide and other crimes of humanity as such threats in "In Larger Freedom," when he states that he embraces a broader vision of a more comprehensive concept of collective security, one that tackles new threats and old and that addresses security concerns of all States.⁵⁵⁷

The Secretary-General also noted that such threats to peace and security in the twenty-first century include not only international war, terrorism and weapons of mass destruction, but also civil violence, organized crime, poverty, infectious diseases and environmental degradation, since all of these can have equally catastrophic effect of causing death or lessening life chances on a large scale, as well as undermining States as the basic unit of the international system.⁵⁵⁸

The Secretary-General also noted, echoing that of the International Commission on Intervention and State Sovereignty (ICISS), that the task is not to circumvent the Security Council in considering collective force for humanitarian purposes, but to find ways to make the authority of the Security Council work better. The Secretary-General recommended that the Security Council adopt a resolution establishing a four-part set of standards to be utilized when considering authorizing use of military force in a humanitarian crisis,⁵⁵⁹ in answer to the lack of consensus as to whether States have the right *or the obligation* to use force protectively to rescue the citizens of other States from genocide or other comparable crimes against humanity.⁵⁶⁰

⁵⁵⁷ *Id.* at ¶ 73.

⁵⁵⁸ *Id.* at ¶ 78.

⁵⁵⁹ The Secretary-General also suggested a four-part set of standards indicate that the Security Council should come to a common view on (1) how to weigh the seriousness of the threat; (2) the proper purpose of the proposed military action; (3) whether means short of the use of force might plausibly succeed in stopping the threat and (4) whether there is a reasonable chance for success. *Id.* at ¶ 126.

⁵⁶⁰ *Id.* at ¶ 122.

2. “A More Secure World”: How the UN Charter Alone is Insufficient to Protect Against Human Rights Abuses

The 2004 report from the Secretary-General’s commissioned High-level Panel on Threats, Challenges and Change, “A [M]ore [S]ecure [W]orld: Our [S]hared [R]esponsibility,”⁵⁶¹ articulates a need for a more comprehensive concept of security, one that looks at new threats and old and that addresses the security concerns of all States. The report is quite explicit in its statements that the UN Charter is not as clear as it could be when it comes to saving lives within countries in situations of mass atrocity. The report accurately points out that the Charter “reaffirms faith in fundamental human rights, but does not do much to protect them,” and cites as an example Article 2.7, which prohibits intervention “in matters which are essentially within the jurisdiction of any state.”⁵⁶²

The report reiterates that Chapter VII of the Charter grants power to the Security Council to maintain or restore international security.”⁵⁶³ However, the report also accurately notes that the Security Council has not been very consistent or effective in situations like that in Darfur or Rwanda in 1994, and that in the past the principle of non-intervention in so-called “internal affairs” as genocide and ethnic cleansing have been used to protect genocidal acts or other large-scale violations of international humanitarian law. Much of the Security Council’s inaction is due to a divide in the international community as to whether the Security Council’s Chapter VII powers authorizes a “right to intervene” in acts of sovereign states that occur within their borders.

Some adamantly believe that the Security should intervene in humanitarian crises; others believe that the Security Council should not meddle in the affairs of sovereign states. However,

⁵⁶¹ High-Level Panel on Threats, Challenges and Change, “*A More Secure World*,” *supra* note 518, Section 3, “*Chapter VII of the Charter of the United Nations, Internal Threats and the Responsibility to Protect*.”

⁵⁶² *Id.*

the Panel counters this argument by correctly pointing out that through ratification of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), States have agreed that genocide, whether committed in a time of war or a time of peace, is a crime under international law.⁵⁶⁴ Since its adoption, the world has come to recognize that genocide is a threat to security to all and should not be tolerated.⁵⁶⁵ The Panel hammers this point home by pointing out that “the principle of non-intervention internal affairs cannot be used to protect genocidal acts or large-scale violations of international humanitarian law or large-scale ethnic cleansing.”⁵⁶⁶

Fortunately, the Report also points out that the tragedies in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, have focused the international community not on the sovereignty of these nations, but on their respective responsibilities to their own citizens and to the larger international community.⁵⁶⁷ As a result, the Report discusses that state sovereignty carries with it an obligation of a state to protect the welfare of its own citizens and meet its obligation to the wider international community.⁵⁶⁸

The Report also discussed the emerging norm of a collective international “responsibility to protect” via military intervention as a last resort, and authorized by the Security Council, for every state against genocide or other large-scale crimes against humanity where, as in the Sudan, the government is unwilling or unable to prevent or contain it.⁵⁶⁹ The Report also notes a growing recognition and acceptance among States that where governments are vested with the primary responsibility of protecting its people from such catastrophes and they are either

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*

⁵⁶⁹ Nanda, *supra* note 349, at 5.

unwilling or unable to stop it, it is up to the larger international community to shoulder the responsibility to engage in order to prevent and respond to such violence, and where necessary, get involved in rebuilding lives shattered by such violence.⁵⁷⁰ Thus, it is not so much “the right to intervene,” but the responsibility of every state to protect people suffering from unavoidable catastrophe such as mass murder, rape, ethnic cleansing by forcible expulsion and terror, and/or deliberate starvation and exposure to disease.⁵⁷¹

The Panel emphatically endorsed this emerging norm, as brought to the international community’s attention through the International Commission on Intervention and State Sovereignty (ICISS),⁵⁷² reiterating that the Security Council has been consistent or effective in dealing with tragedies such as those in Somalia, Rwanda and now Darfur as example, often acting too late, too hesitantly or not at all.⁵⁷³ But that can change. Both the Security Council and the larger international community have now come to accept that under its powers under Chapter VII, and in pursuit of the emerging norm of collective international responsibility to protect from mass atrocities, that the Security Council can, and should, authorize military intervention to stop humanitarian crises if it is prepared to declare that the situation is one that is a threat to international peace and security and involves breaches of international law.⁵⁷⁴

Of course, such a decision must be based on not only the legality of the decision, but also the common perception of its legitimacy – that such a decision is well-founded and for the right reasons, morally as well as legally.⁵⁷⁵ The Panel noted that if the Security Council is to win the respect it must have in the collective security system, it should follow a suggested set of

⁵⁶⁹ High-Level Panel on Threats, Challenges and Change, “*A More Secure World*,” *supra* note 518, Section 3,

“*Chapter VII of the Charter of the United Nations, Internal Threats and the Responsibility to Protect.*”

⁵⁷⁰ *Id.*

⁵⁷¹ Nanda, *supra* note 349, at 5.

⁵⁷² See Chapter Four, *supra*.

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*

guidelines that address not whether force can *legally* be used, but whether, as a matter of good conscience, it *should* be used.⁵⁷⁶ The Panel proposed a list of five guidelines that the Security Council should always address or take into consideration, when deciding to authorize or endorse the use of military force. Many of these guidelines mirror those set out by ICISS in its 2001 report.

The first is the seriousness of the threat, whether the threat is a threatened harm to a State or human security and is clearly and sufficiently serious. In the case of internal conflicts, the Panel suggests that the Security Council should determine if the threat involves genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law. The second guideline is proper purpose, whether the primary purpose of the proposed military action is to halt or avert the threat in question. The third guideline is last resort; whether every non-military option for meeting the threat in question has been explored, with reasonable grounds for belief that other measures will not succeed.

The fourth guideline explores whether the scale, duration and intensity of the proposed military action is the minimum necessary to meet the threat in question. The Panel seemed to also suggest that the action should not exceed the necessity of response to the threat. The fifth guideline is balance of consequences, whether there is a reasonable chance that the military action would be successful in meeting the threat in question. The Panel raised the concern as to whether the consequences of action are likely to be worse than the consequences of inaction. The Panel further suggested that these guidelines for authorizing the use of force should be embodied in resolutions of the Security Council and the General Assembly.⁵⁷⁷

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

If the Security Council followed the above-stated guidelines, then not only would it rise in the esteem of the international community for taking decisive action in the face of large-scale humanitarian crises, but many lives would be saved. It has its chance now; it could finally take action to stop the killings in Darfur and set the standard for action that could possibly prevent and stop future humanitarian crises. It would finally show the world that human rights, security and the lives on innocent people – are once again paramount to the concerns of government sovereignty and profiteering.

IV. The 2005 UN General Assembly World Summit and the Humanitarian Crisis in the Darfur Region of Sudan

Although the U.S. government long ago utilized the term “genocide” to describe the Sudan crisis,⁵⁷⁸ the United Nations has taken very few pro-active steps to stop it or to prevent future humanitarian crises.

However, the UN took one significant step toward dealing with such humanitarian crises. In September 2005, the United Nations (“UN”) General Assembly held a World Summit at the UN Headquarters in New York in order report, assess and re-prioritize the goals as established in the 2000 Millennium Conference, also known as the 2000 Millennium Development Goals.⁵⁷⁹ Although one of the stated priorities to come out of the World Summit was the “promotion of peace and security,”⁵⁸⁰ the UN has failed to ameliorate the Sudan crisis through diplomatic negotiations that could have ended the violence and prevented countless deaths. The question

⁵⁷⁸ H.R. Res. 467, 108th Cong. (2004); S. Res. 133 108th Cong. (2004).

⁵⁷⁹ See Chapter Five, Section II herein. The eight Millennium Development Goals, to be achieved by the target date of 2015, include: (1) halving extreme poverty and hunger; (2) achieving universal primary education; (3) empowering women and promoting equality between women and men; (4) reducing the under-five mortality by two-thirds; (5) reducing maternal mortality by three-quarters; (6) reversing the spread of diseases, especially HIV/AIDS and malaria; (7) ensuring environmental sustainability, and (8) creation of a global partnership for development with targets for aid, trade and debt relief. See, www.un.org/millenniumgoals/documents.html, (last visited Oct. 22, 2006).

⁵⁸⁰ 2005 World Summit High-Level Meeting of the 60th Session of the General Assembly, Sept. 14-16, 2005, World Summit Outcome Document, ¶¶ 69-72, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

now, as the crisis continues on, is whether the UN can and should salvage the situation by military or other intervention in order to stay true to its goal of the promotion of peace and security.

A. The 2005 World Summit Outcome Document

The most important product of the 2005 World Summit is the Outcome Document, which provides that one of the obligations of States is to settle their disputes by peaceful means in accordance with Chapter VI of the UN Charter.⁵⁸¹ Theoretically this includes States that have internal civil war and other disputes within their borders. But what of the instance where the government is engaging in armed attack against an unarmed civilian population? Where there appears to be no clear, armed enemy attacking the government, or in the case of the Sudan, where there is a civil war in one part of the country and genocide in another, pacific settlement may not always be effective. Although the UN intervened in the conflict between the SLA/M and the government in the southern part of the Sudan,⁵⁸² it has not been very effective to encourage the government to cease its authorized attacks upon unarmed civilians and now, refugees.⁵⁸³

1. The 2005 World Summit Outcome Document – Two Key Goals

As discussed in greater detail below, the September 15, 2005 Outcome Document from the 2005 UN World Summit, a high-level plenary meeting of the 60th Session of the General Assembly,⁵⁸⁴ indicates that all participating Members resolved to establish “a just and lasting

⁵⁸¹ 2005 World Summit Outcome Document, *supra* note 580 at ¶¶ 73-76.

⁵⁸² UN News Centre, *Darfur's Displaced Remain Traumatized and at Risk of Rape, Harassment*, *supra* note 86; see also, Reuters, *Darfur Refugees Live Within Sight of Their Homes*, *supra* note 99.

⁵⁸³ *Id.*

⁵⁸⁴ 2005 World Summit Outcome Document, *supra* note 580.

peace all over the world in accordance with the purposes and principles of the Charter of the United Nations.⁵⁸⁵

The Outcome Document also indicates Members' rededication to support all efforts to uphold the sovereign equality of all States, to respect the territorial integrity and political independence of Member States and to refrain in international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations.⁵⁸⁶ Summit participants also resolved to create a more peaceful, prosperous and democratic world,⁵⁸⁷ and further resolved to undertake concrete measures to find ways to implement such findings as the outcome of the 2000 Millennium Summit⁵⁸⁸ as well as other major United Nations conferences and summits so as to provide multilateral solutions to problems in the four following areas: (1) development, (2) peace and collective security, (3) human rights and the rule of law and (4) strengthening of the United Nations.⁵⁸⁹ However, for the purposes of this paper, only two of these goals will be discussed: the commitment to peace and collective security, as well as human rights and the rule of law.

a. The Goal of Promoting Peace and Collective Security

The Outcome Document, a powerful document in its own right, not only reiterates the obligation of all Member States to refrain in their *international relations* from the use of threat of force or the use of force, in any manner inconsistent with the UN Charter,⁵⁹⁰ but also reiterates that it is the Security Council which is most responsible for the maintenance of international

⁵⁸⁵ *Id.* at ¶ 5.

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.* at ¶ 16.

⁵⁸⁸ The basic premise of the Millennium Development Goals is that world leaders recognize their responsibilities to not only promote sovereignty of States as well as respect for human rights and fundamental freedoms, but also to become more effective in maintaining peace and security by devoting resources and tools towards conflict prevention (hence issues that sow the seeds of conflict), peaceful resolution of disputes and peacekeeping, all through international cooperation.

⁵⁸⁹ *Id.*

peace and security, as well as dealing with threats to the peace.⁵⁹¹ As discussed in further detail below, the Outcome Document makes it quite clear that not only do Member-States have an obligation to protect civilian populations from such crimes as genocide, war crimes, ethnic cleansing and other crimes against humanity, but, where all peaceful means of doing so have failed, Member-States must be prepared to take timely, decisive and collective action, *through the Security Council*, to ameliorate the situation. However, no matter how promising humanitarian intervention may sound as means to end a humanitarian crisis, application of the policy over the years has been somewhat problematic.

b. The Goal of Committing to Human Rights and the Rule of Law

The goals as stated in the section “Use of Force Under the Charter of the United Nations” of the Outcome Document, reiterated the obligation of all Member States to refrain in their *international relations* from the use of threat of force or the use of force, in any manner inconsistent with the UN Charter.⁵⁹² Surprisingly, the Outcome Document is also quite direct in describing the responsibilities of Member-States to protect its civilian population.

As to Member-States’ responsibilities to its own people, first of all, the Outcome Document seems to presume that the issue of how a Member-State treats its own people has been covered in the various human rights documents such as the Charter itself, the Universal Declaration of Human Rights (and the additional International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – the “International Bill of Rights” – see below), as well as the Convention on the Prevention and Punishment of the Crime of Genocide, passed by the United Nations General Assembly in

⁵⁹⁰ *Id.* at ¶ 77.

⁵⁹¹ *Id.* at ¶¶ 77-80.

⁵⁹² *Id.*

December 1948,⁵⁹³ and that all Member-States should continue to honor their obligations under those treaties as to the protections of basic human rights of their people. In addition, the Outcome Document specifically states that each Member-State has the responsibility to protect its populations from such crimes as genocide, war crimes, ethnic cleansing and crimes against humanity, and points out that the *international community, through the United Nations*, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to protect civilian populations from such crimes, and where necessary, be prepared to *take collective action, in a timely and decisive manner, through the Security Council, should peaceful means be inadequate.*⁵⁹⁴

Although former UN Secretary-General Kofi Annan made clear that the goals of the World Summit was for the UN to “fully adapt[] to the needs and circumstances of the twenty-first century,”⁵⁹⁵ the goals pertaining to the use of force not only reaffirm the primary responsibility of the Security Council in the maintenance of international peace and security, but also reaffirms the authority of the Security Council “to *mandate coercive action to maintain and restore international peace and security,*”⁵⁹⁶ (emphasis added), to protect vulnerable populations subject to massive human rights abuses and atrocities. The time is now for the Security Council to revisit the reason for its existence, and exercise this authority. As stated in the Outcome document, the Security Council can and should exercise its authority including military action where necessary, to stop genocide at once, as the resulting humanitarian crisis in the Sudan has had far-reaching consequences that affect many facets of life for the Sudanese and other Africans in the regions that get caught in its deadly trap.

⁵⁹³ Known in short as the “Genocide Convention.”

⁵⁹⁴ 2005 World Summit Outcome Document, *supra* note 580 at ¶ 137.

⁵⁹⁵ The Secretary-General, “*In Larger Freedom*,” *supra* note 492 at ¶ 153.

⁵⁹⁶ 2005 World Summit Outcome Document, *supra* note 580 at ¶ 79.

V. The United Nations: Designed To Promote International Peace and Security

The UN was borne out of World War II, mostly as a result of the absolute collapse of the League of Nations. It is, by design an organization whose purpose is not only to promote peaceful international relations among sovereign states, but also to protect the population of peoples within those states.

The UN Charter is made up of many parts, but perhaps the most critical sections of the Charter come in the middle of it: Chapter IV on the General Assembly, and Chapter V which deals with the composition, functions, powers (and voting procedures) of the Security Council.⁵⁹⁷

It should be noted that while resolutions of the General Assembly have the effect of being nothing more than “recommendations,” on the other hand resolutions of the Security Council are binding upon all Member-States of the UN.⁵⁹⁸ The Charter also vests with the Security Council the most important function of the UN, and therefore the reason for its creation: the maintenance of international peace and security.⁵⁹⁹ Member-States of the UN grant the Security Council the right to act on their behalf in carrying out such duties associated with the maintenance of international peace and security, and Member-States are obligated to follow such decisions.⁶⁰⁰

Thus, it is no accident that the Security Council is the most powerful organ of the United Nations; it is the one which is best able to address issues that threaten the “global geopolitical equilibrium.”⁶⁰¹

What the above indicates is that the United Nations was not necessarily created to establish or reaffirm the rights of sovereignty, but to protect human rights and maintain international peace and security; in other words, to maintain world order. It is no accident that

⁵⁹⁷ *Id.* at 35.

⁵⁹⁸ UN Charter, Chapter V, Article 24.

⁵⁹⁹ *Id.*

the United Nations was designed to act as the main arbiter of disputes among independent nations. Events of the recent past, namely, the 2000 Millennium Development Goals, the creation and report of the International Commission on Intervention and State Sovereignty, the 2005 World Summit as well as a number of reports redefining the role of the United Nations, the Security Council and the General Assembly, all demonstrate that the United Nations did pause to reflect and reconsider the very important role it plays in the international community.

⁶⁰⁰ J. Kagan, *The Obligation to Use Force to Stop Acts of Genocide: An Overview of Legal Precedents, Customary Norms and State Responsibility*, 7 San Diego Int'l. L.J. 461, 469 (Spring 2006).

⁶⁰¹ *Id.*

CHAPTER SIX:
THE NEW UN HUMAN RIGHTS COUNCIL:
“THE WAY FORWARD” IN REMEDYING AND
PREVENTING HUMAN RIGHTS VIOLATIONS?

“The creation of the Council would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations.”

-- Former Secretary General Kofi Annan

I. The Report of the Secretary-General: Proposal of a New Human Rights Council

The idea for the creation of an improved human rights body in the UN was first proposed in then Secretary-General Kofi Annan’s Addendum to his report, “In Larger Freedom,” in which the Secretary General proposed as part of the overall reform of the United Nations, a change in the structure of the United Nations human rights machinery by upgrading the Commission on Human Rights into a full-fledged Council that would raise human rights to the priority accorded to it in the UN Charter.⁶⁰² Over the years, many statements had been made about the declining international credibility of the Commission, with politicization, selectivity and double standard being the common complaints about its waning effectiveness.⁶⁰³ In order to strengthen the UN human rights machinery, the Secretary-General stated quite eloquently, as follows:

“If the United Nation is to meet the expectations of men and women everywhere – and indeed, if the Organization is to take the cause of human rights as seriously as those of security and development, the Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council The creation of the Council would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations Those elected to the Council should undertake to abide by the highest human rights standards.”⁶⁰⁴

This view was also taken by many Member-States and non-governmental organizations, that it was vitally important to strengthen, improve and reform the existing human rights

⁶⁰² The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, Addendum*, ¶ 1, U.N. Doc. A/RES/59/2005/Add.1 (May 23, 2005) (hereinafter “*In Larger Freedom – Addendum*”).

⁶⁰³ UN General Assembly and Economic and Social Council, *Summary of Open-Ended Informal Consultations Held by the Commission on Human Rights Pursuant to Economic and Social Council Decision 2005/217, Prepared by the Chairperson of the Sixty-First Session of the Commission, (Follow up to the Outcome of the Millennium Summit)*, ¶¶ 11-12, U.N. Doc. A/59/847, E/2005/73 (June 21, 2005), (hereinafter “*Summary of Open-Ended Informal Consultations*”).

mechanism, in particular that relating to the work of the Commission on Human Rights, its procedures, the human rights treaties bodies as well as the Office of the High Commissioner on Human Rights.⁶⁰⁵ The Secretary-General's proposal to elevate the Commission on Human Rights to a standing Human Rights Council (as a subsidiary of the General Assembly) and to increase its authority as well as accord human rights a higher priority was supported by many States and delegations. Reference was also made to the interrelatedness of human rights, development and security, as highlighted in the Addendum to the Secretary-General's report.⁶⁰⁶

In the Addendum to his report, the Secretary-General proposed that the new Human Rights Council be a standing body, elected by the entire membership of the General Assembly, able to meet regularly and at any time to deal with imminent crises, as well as allow for timely and in-depth consideration of human rights issues.⁶⁰⁷ The Secretary-General noted that being elected directly by the General Assembly, a major organ of the UN, would make the Council more accountable, as well as representative, and would have greater authority than the Commission on Human Rights, a subsidiary body of the Economic and Social Council.⁶⁰⁸

The Secretary-General also proposed as a key function of the new Council, a "peer review" function, in which the members of the Council evaluate the fulfillment of all member States of their respective human rights obligations, giving equal attention to civil, political, economic, social and cultural rights, including the right to development.⁶⁰⁹ The peer review mechanism is designed to complement but not replace existing reporting procedures under human rights treaties. Under reporting procedures of human rights treaties, such procedures arise from legal commitments and involve close scrutiny of the law, regulations and practice

⁶⁰⁴ *Id.* at ¶ 3.

⁶⁰⁵ See *supra* note 603, *Summary of Open-Ended Informal Consultations*, ¶ 9.

⁶⁰⁶ *Id.* at ¶ 8.

⁶⁰⁷ See *supra* note 602, *In Larger Freedom – Addendum*, ¶ 4.

with regard to specific provisions of applicable treaties by independent expert panels.⁶¹⁰ Peer review, on the other hand, is a process where States would voluntarily enter into discussions regarding human rights in their respective countries, based upon the obligations to provide and protect those rights arising under the UN Charter and as expressed in the Universal Declaration.⁶¹¹ As the Secretary-General aptly states about the new Human Rights Council's function:

“It should have an explicitly defined function as a chamber of peer review. Its main task would be to evaluate the fulfillment by all States of all their human rights obligations. This would give concrete expression to the principle that human rights are universal and indivisible. Under such a system, *every Member State* could come up for review on a periodic basis. *Any such rotation should not, however, impede the Council from dealing with any massive and gross violations that might occur.* Indeed, the Council will have to be able to bring urgent crises to the attention of the world community.”⁶¹² (Emphasis added.)

Crucial to this system of peer review is the notion of universal scrutiny, whereas the performance of all Member States in regard to all human rights commitments *is subject to assessment by other States.*⁶¹³ Such a system would also help avoid the politicization and selectivity for which the Commission on Human Rights has been criticized in the past, and will touch upon the entire spectrum of human rights – namely, civil, political, economic, social and cultural rights.⁶¹⁴ In addition, the finding of the peer reviews would allow greater international assistance and policy advice on human rights situations, and would hold all elected members accountable for their human rights commitments.⁶¹⁵

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* at ¶ 6.

⁶¹⁰ *Id.* at ¶ 7.

⁶¹¹ *Id.*

⁶¹² *Id.* at ¶ 6.

⁶¹³ *Id.* at ¶ 8.

⁶¹⁴ *Id.*

⁶¹⁵ *Id.*

In addition to the peer review system, the Secretary-General also proposed that the Human Rights Council fulfill the additional functions of Member States coming together to take action when and where serious human rights situations develop (such as Sudan), by adopting country-specific resolutions.⁶¹⁶ In addition, the Secretary-General suggested that the Human Rights Council should, like the Commission, have the capability to meet in extraordinary session should a majority of members agree. Such authority of the new Council would also allow the High Commissioner for Human Rights to call for action and support from a United Nations standing body.⁶¹⁷

The Secretary-General also proposed that the new Human Rights Council play a more pivotal role in overseeing and contributing to the interpretation and development of international law on human rights, a critical part in the development of standards central to the United Nations system for the protection of human rights.⁶¹⁸ Furthermore, such a function of the new Council would reinforce the work of the treaty body system, which has also made significant contributions to the development of international law.⁶¹⁹ Overall, as concluded by the Secretary-General, a new Human Rights Council could strengthen the human rights work of other UN organs, agencies and programs such as the Security Council, ECOSOC and the new Peacebuilding Commission.⁶²⁰ It was also hoped that the new Council could analyze and draw attention to those gaps in implementation and mainstreaming of human rights issues throughout

⁶¹⁶ *Id.* at ¶ 11.

⁶¹⁷ *Id.* It should also be noted the UN High Commissioner for Human Rights will continue in the role of acting as a high-level “point person” for the human rights agenda, someone whose office is tasked with bringing all of the human rights “pieces” together, and who is charged with producing reports on human rights situations. See Kennedy, *supra* note 1, at 197.

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

⁶²⁰ *Id.* at ¶ 17.

the United Nations system, as well as assist in the support and generation of contributions for developing countries in order to avoid human rights abuses and violations.⁶²¹

II. The Creation of the Human Rights Council

A. The 2005 World Summit: A New Human Rights Council Is Established

In the September 15, 2005 [Final] Outcome Document of the 2005 World Summit, the participants of the World Summit established that a Human Rights Council be established as a subsidiary organ of the General Assembly, elected by the entire membership of the General Assembly, the composition of which is to be made up of regional representatives.⁶²² While the Outcome Document is not as detailed as to the methodology that the new Human Rights Council is to utilize as the Secretary-General's Addendum to his report, the Outcome Document does indicate that the new Council, (1) shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, and (2) the Council should address situations of violations of human rights, including gross and systematic violations (such as genocide), and make recommendations thereon.⁶²³ Much of the details of the functions of the Human Rights Council was left to the General Assembly to decide in a later resolution, as indicated below.

In addition, the new Council is responsible for, in addition to those duties as enumerated in the Outcome Document, promoting the full implementation of human rights obligations undertaken by States, and undertake a universal and periodic review of each State's fulfillment of its human rights obligations and commitments, as well as assuming the role and

⁶²¹ *Id.* at ¶ 17.

⁶²² The regional representative membership of the Human Rights Council shall be made up as follows: Africa, thirteen members; Asia, thirteen members; Latin America and the Caribbean, eight members; Eastern European states, six members; Western European states and all other states (including the U.S.), seven members. Members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms.

⁶²³ 2005 World Summit Outcome Document, *supra* note 580 at ¶¶ 157-160.

responsibilities of the Commission on Human Rights relating to the work of the UN High Commissioner for Human Rights, as previously designated by the UN Economic and Social Council.⁶²⁴

B. Mandates and Functions of the New Council

On April 3, 2006, General Assembly Resolution 60/251 resolved that all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission on the Promotion and Protection of Human Rights and other special procedures of the former Commission on Human Rights, were to be assumed by the new Human Rights Council, as of June 19, 2006.⁶²⁵ The former Commission on Human Rights concluded its sixty-second and final session on March 27, 2006.⁶²⁶

According to Resolution 60/251, the new Council will (and currently does) consist of forty-seven Member States, based in Geneva, Switzerland, elected by secret ballot by the majority of the members of the General Assembly, and based upon equitable geographical distribution.⁶²⁷ The Resolution also calls upon each Member State to make pledges and commitments to the protection of human rights which they are expected to live up to. Further, as noted above, each Member, by accepting membership in the Human Rights Council, agrees to

⁶²⁴ See, *supra* note 580.

⁶²⁵ See, UN General Assembly, G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

⁶²⁶ Office of UN High Commissioner for Human Rights, www.ohchr.org/english/bodies/chr/index.htm, (last visited October 22, 2006).

⁶²⁷ See, *supra* note 580, ¶ 7. The forty-seven Member Council elected on May 9, 2006, includes as follows: from the African States, Algeria, Cameroon, Djibouti, Gabon, Ghana, Mali, Mauritius, Morocco, Nigeria, Senegal, South Africa, Tunisia and Zambia; from the Asian States, Bahrain, Bangladesh, China, India, Indonesia, Japan, Jordan, Malaysia, Pakistan, Philippines, Republic of Korea, Saudi Arabia and Sri Lanka; from the Eastern European States, Russia, Poland, the Czech Republic, Ukraine, Azerbaijan and Romania; from the Latin American and Caribbean States, Argentina, Brazil, Cuba, Ecuador, Guatemala, Mexico, Peru and Uruguay; and from Western Europe and other States, Germany, France, United Kingdom, Canada, Finland, the Netherlands, and Switzerland. See, Press Release, *General Assembly [E]lects [F]irst [M]embers to [N]ew Human Rights Council*, UN News Service, May 9, 2006, www.un.org/apps/news/printnewsAr.asp?nid=18411 (last visited Dec. 26, 2006).

have its human rights record reviewed⁶²⁸ under the “peer review” system as proposed by the Secretary-General in the Addendum to his report “In Larger Freedom.”⁶²⁹

In addition to those duties as indicated in the Outcome Document, the new Council will be responsible for (1) promoting the full implementation of human rights obligations undertaken by States; (2) undertaking a universal and periodic review of each UN Member State’s fulfillment of its human rights obligations and commitments; (3) addressing situations of violations of human rights, as well as gross and systematic violations and making recommendations thereon; (4) promoting human rights education, learning and advisory services, technical assistance and capacity-building; (5) serving as a forum for dialogue for human rights issues; (6) making recommendations and reports to the General Assembly on the accomplishments of the Council, the development of international law in the field of human rights, and the promotion and protection of human rights, and (7) assuming the role and responsibilities of the Commission on Human Rights as it relates to the work of the UN High Commissioner for Human Rights, as previously designated to the Commission by the United Nations Economic and Social Council (ECOSOC).⁶³⁰

The Council also assumes, (and where necessary) is resolved to improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission of Human Rights in order to maintain a system of Special Procedures, previously utilized by the Commission.⁶³¹ Such Special Procedures refer to a diverse range of procedures established to promote human rights in relation to specific themes or issues, or to examine situations in specific countries.⁶³²

⁶²⁸ *Id.*

⁶²⁹ See *supra* note 580, ¶¶ 1-6.

⁶³⁰ See, *supra* note 580, ¶ 5.

⁶³¹ *Id.*

⁶³² *Id.*

The Outcome Document also required that an overall review of the Council's first year of work take place within one year of the Council's first session, which took place on June 19, 2006.⁶³³

During the First Session, the Council issued a number of resolutions on a variety of human rights issues (including establishing working groups of the Commission on Human Rights, and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights), elected officers, made decisions on such procedures as periodic review and dialogue on human rights, as well as reporting procedures to the General Assembly on the First Session of the Human Rights Council.⁶³⁴

C. Protection and Promotion of Human Rights and the Rule of Law

In the 2005 Outcome Document, Member States also reiterated their commitment to "the protection and promotion of all human rights, the rule of law and democracy, as well as the obligation of all States to fulfill their obligations to promote universal respect for, and the observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter, the Universal Declaration of Human Rights as well as all other instruments relating to human rights and international law."⁶³⁵ More specifically, the Outcome Document reiterated that States, in conformity with the Charter, shall respect human rights and fundamental freedoms *without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property birth or other status.*⁶³⁶ (Emphasis added.) As to Member-States' responsibilities to its own people, first of all, the Outcome Document presumes that the issue of how a Member-State treats its own people has been covered in the various human rights documents such as the Charter itself, the Universal Declaration of Human

⁶³³ See, UN General Assembly, *Report of the Human Rights Council*, U.N. Doc. Supplement No. 53 (A/61/53).

⁶³⁴ *Id.* at p. 18, 29, 31, 41-46, 48-49, 65.

⁶³⁵ See *supra* note 580 at ¶ 119.

⁶³⁶ *Id.* at ¶ 122.

Rights (and the additional International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – the “International Bill of Rights” – see Chapter Five, herein), as well as the Convention on the Prevention and Punishment of the Crime of Genocide, passed by the United Nations General Assembly in December 1948,⁶³⁷ and, that all Member-States should continue to honor their obligations under those treaties as to the protections of basic human rights of their people.

Furthermore, as previously noted, the Outcome Document specifically states that each Member-State has the *responsibility* to protect its populations from human rights abuses and crimes such as genocide, war crimes, ethnic cleansing and crimes against humanity, and points out that the *international community, through the United Nations*, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to protect civilian populations from such crimes, and where necessary, be prepared to *take collective action, in a timely and decisive manner, through the Security Council, should peaceful means be inadequate.*⁶³⁸ (Emphasis added.)

The Outcome Document also provides that one of the obligations of States is to settle their disputes by peaceful means in accordance with Chapter VI of the UN Charter.⁶³⁹ Theoretically this includes States that have internal civil war and other disputes within their borders. But what of the instance where the government is engaging in armed attack against an unarmed civilian population? Where there appears to be no clear, armed enemy attacking the government, or in the case of the Sudan, where there is a civil war in one part of the country and genocide in another, pacific settlement may not always be effective. Although the UN intervened in the conflict between the SLA/M and the government in the southern part of the

⁶³⁷ Known in short as the “Genocide Convention.”

⁶³⁸ 2005 World Summit Outcome Document, *supra* note 580 at ¶ 137.

Sudan,⁶⁴⁰ it has not been very effective to encourage the government to cease its authorized attacks upon unarmed civilians and now, refugees.⁶⁴¹ Besides the use of force, can the rule of law itself be an effective tool to stop genocide and other instances of mass human rights violations? Thus far, the answer is not always, as genocide continues to occur despite the existence of the Genocide Convention, but the final answer remains to be seen. However, with the creation of a new Human Rights Council, at long last there is promise that the UN can and will better monitor those states that commit egregious human rights violations, such as Sudan, and hold them accountable.

III. The Human Rights Council: Efforts to Date

It has been nearly three years since establishment of the new Council, and the results regarding the Council's attention to the crisis in Sudan have been mixed, but nevertheless promising. In June 2006, the new Council took up the issue of the Peace Agreement between the government and rebel forces in the Sudan, indicating that Sudan must continue its commitment to the Peace Agreement in order to rebuild infrastructure needed for lasting peace.⁶⁴²

A. The New Council: A Promising Start on the Issue of Human Rights Violations and Genocide in Sudan

After its establishment, the attention by the new Council to the human rights situation in Darfur has been interesting and promising. At its first regular session held on June 26, 2006, the new Council held discussion on issues as identified by the President of the Council, based on consultations with Member States of the Council as well as observer States. One of the issues discussed was the Darfur Peace Agreement between the government and rebel forces in Sudan.

⁶³⁹ 2005 World Summit Outcome Document, *supra* note 538 at ¶¶ 73-76.

⁶⁴⁰ UN News Centre, *Darfur's Displaced Remain Traumatized and at Risk of Rape, Harassment*, *supra* note 86; see also, Reuters, *Darfur Refugees Live Within Sight of Their Homes*, *supra* note 99.

⁶⁴¹ *Id.*

⁶⁴² Darfur Peace Agreement signed May 5, 2006, Abuja, Nigeria, <http://allafrica.com/peaceafrica/resources/view/00010926.pdf>, (last visited Oct. 22, 2006).

The Council indicated that Sudan must continue its commitment to the Peace Agreement in order to rebuild infrastructure needed for lasting peace.⁶⁴³ The reports as summarized below indicate that not only is the crisis in Darfur worsening, but that the crisis continues to stay at the forefront of the Human Rights Council's dialogue of those most egregious human rights violations taking place in the world today.

1. Second (Regular) Session of the Human Rights Council – First Part

In September 2006, (the first part of the second regular session), the Council addressed the human rights abuses in Sudan, when the Special Rapporteur presented a report following her first mission to the Sudan in October 2005.⁶⁴⁴ First of all, the Special Rapporteur concluded that in Darfur, innocent civilians were continuing to suffer a number of human rights abuses including arbitrary arrests, being held *incommunicado* by security forces, torture, ill-treatment and mass killings.⁶⁴⁵

In addition, the Special Rapporteur also noted that discrimination and marginalization based upon ethnicity continued, depriving certain groups of basic needs as access to food, shelter, health care and education, as well as rape and sexual violence against women, all by the hands of government forces and militia.⁶⁴⁶ Interestingly, the representative of Sudan, appearing as a concerned country,⁶⁴⁷ disputed many of the claims made by the Special Rapporteur and tried

⁶⁴³ *Id.*

⁶⁴⁴ The Special Rapporteur on the situation of human rights in the Sudan, Sima Samar, presented her report to the Human Rights Council on September 27, 2006.

⁶⁴⁵ *Id.*

⁶⁴⁶ Press Release, Human Rights Council, "Human Rights Council Discusses Report on Situation of Human Rights in Sudan and Belarus,"

[www.unor.ch/unog/80256EDD006B9C2E/\(httpNewsByYear_en\)/585236C1A3977DFCC12571F6004FF0AE?OpenDocument](http://www.unor.ch/unog/80256EDD006B9C2E/(httpNewsByYear_en)/585236C1A3977DFCC12571F6004FF0AE?OpenDocument), (last visited Oct. 22, 2006).

⁶⁴⁷ Sudan is not one of the Member States elected to the Human Rights Council.

to put forward “its best face” by indicating that it fully supported and was in the process of implementing the Darfur Peace Agreement.⁶⁴⁸

However, despite mixed comments from members states as to Sudan’s commitments to both Peace Agreements,⁶⁴⁹ the Special Rapporteur suggested that Khartoum was not taking a proactive stance in aiding in ending human rights abuses, and as a matter of fact, humanitarian organizations were being denied access to deliver aid to those groups most in need.⁶⁵⁰ The Sudanese representative replied by blaming many of the problems as cited by the Special Rapporteur on armed rebel groups.⁶⁵¹

Despite the mixed reaction to the Special Rapporteur’s report on recent human rights abuses, what is important is that the new Human Rights Council shows promise of the crisis in Sudan being discussed in the open, on the world stage. It is still too early to determine if these discussions will yield the key objective – to shame the Sudanese government to stop the killing of its unarmed citizens, and to cease the above-noted human rights abuses. What is also promising is that there is a more organized observation and reporting mechanism that will allow a special mission to visit a state where human rights violations are taking place, and such observations are regularly reported to a larger body for discussion and follow up. It remains to be seen whether discussion at the Human Rights Council level will lead to action. Nevertheless, it is encouraging to see that the UN has dedicated a new subsidiary organ to review, monitor and (hopefully) take action against such abuses. The notion that human rights are being elevated to the level of importance it garners in the UN Charter is reason to have hope for the end of such humanitarian crises as that in Sudan.

⁶⁴⁸ See *supra* note 644.

⁶⁴⁹ See *supra* note 644.

⁶⁵⁰ *Id.*

⁶⁵¹ *Id.*

2. Second (Regular) Session of the Human Rights Council: Resumed

In November 27-29, 2006, the second session (resumed) of the Human Rights Council was held, in which the Council held an interactive dialogue with the Special Adviser to the Secretary-General on the prevention of genocide. Many crises in the world were discussed, including the situation regarding the occupation of Palestine by Israel, as well as the ongoing humanitarian crisis in Sudan. During this interactive session, many Member States made comments in support of the Darfur Peace Agreement, and two states, Poland and Norway, both expressed grave concern over the “dramatic human rights situation and atrocities committed in Darfur,” and backed a call by the Secretary-General to hold a special session of the Human Rights Council on Darfur.⁶⁵² Australia expressed disappointment that more of the gravity of the situation in Darfur was not addressed, and that the Council failed to discuss more about the situation in the final document in which the Council pledged its support for the Darfur Peace Agreement.⁶⁵³ There were also many comments made by special observers from non-governmental agencies such as United Nations Watch, Human Rights Watch, Amnesty International that insisted that the situation in Darfur had worsened in the recent past, and urged the Council to take more proactive steps to closely monitor the situation as well as to protect the civilian population.⁶⁵⁴

No surprise to anyone, Sudan took the position that there was an intentional campaign to offer false information and inaccurate data to the Council about Sudan, and denied that hundreds of thousands of people had been killed.⁶⁵⁵ Sudan also offered (likely to much skepticism) that the Peace Agreement had lead to very positive changes, and that statements regarding the

⁶⁵² See, *supra* note 646.

⁶⁵³ *Id.*

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.*

worsening security situation since the signing of the Peace Agreement were highly exaggerated.⁶⁵⁶

However, Louise Arbour, United Nations High Commissioner for Human Rights confirmed that the source of information upon which the assessment of the situation in Darfur was based came from the Council's own Rapporteur on Sudan, as well as the reports of the United Nations Mission in Sudan (UNMIS). According to Ms. Arbour, the reports released were based on first-hand experiences of those on the ground as part of UNMIS, given on a systematic basis, and based on first-hand verified information gathered from testimonies as well as on-site visits. Information was also cross-checked with local authorities for veracity and accuracy. In addition, the High Commissioner added that she herself made a number of short visits to the region, and was given the opportunity to speak to victims of human rights violations. Although the High Commissioner did not rely on her short visits as a definitive evaluation of the facts, nevertheless, they were supported by the presence of other humanitarian experts present and providing assistance in the region.⁶⁵⁷

At the close of the second session, the Human Rights Council resolved that, as to the situation in Darfur, it call upon all parties that had not yet done so to sign the Darfur Peace Agreement, and called for all parties to put an end to ongoing human rights violations and violations of humanitarian law, as well as calling for all parties to allow the unhindered return of displaced persons to their homes.⁶⁵⁸

⁶⁵⁶ *Id.*

⁶⁵⁷ *Id.*

3. The 4th Special Session of the Human Rights Council

In July, August and November 2006, the Human Rights Council held three special sessions, in which the situation of Israeli military incursion into occupied Palestine territory was specifically addressed.⁶⁵⁹ However, in answer to previous calls of the Secretary-General for a special session on the situation in Darfur, on December 12-13, 2006, the Human Rights Council held a fourth special session on Darfur, in which it resolved a number of items. Before it made its final resolutions, the Council received an oral statement from Louise Arbour, UN High Commissioner for Human Rights, on the state of the current situation in Darfur.

Ms. Arbour first noted that the ongoing “unrelenting” tragedy in Darfur demanded the “commensurate engagement and vigilance of the Human Rights Council.”⁶⁶⁰ Ms. Arbour pointed out that the May 2006 Darfur Peace Agreement was not being honored, and pointed to a number of instances indicated that the violence has exacerbated since late 2005.⁶⁶¹ Ms. Arbour noted that as of December 12, 2006, 80,000 people had been forced to flee their homes within the previous six-weeks time period, and that several hundred civilians, including women and children had been killed.⁶⁶² Ms. Arbour further reported that mass rapes and other egregious human rights abuses were continuing unabated, and that as a matter of fact, a lack of accountability had caused the perpetrators of such massive human rights abuses to “hold sway”

⁶⁵⁸ See, *supra* note 646.

⁶⁵⁹ General Assembly, Human Rights Council, *Report on the First Special Session of the Human Rights Council*, U.N. Doc. No. A/HRC/S-1/3, (Jul. 18, 2006); General Assembly, Human Rights Council, *Report of the Human Rights Council on its Second Special Session*, U.N. Doc. No. A/HRC/S-2/2, (Aug. 17, 2006); General Assembly, Human Rights Council, *3rd Special Session on Israeli Military Incursions in Occupied Palestine Territory*, U.N. Doc. No. A/HRC/S-3/L.1, (Nov. 14, 2006).

⁶⁶⁰ Press Release, “Address by Ms. Louise Arbour, UN High Commissioner for Human Rights on the Occasion of the 4th Special Session of the Human Rights Council,” (Dec. 12, 2006), www.unhchr.ch/hurricane/hurricane.nsf/view01/16F8C7CEC3F97D72C12572420034FBE3?opendocument, (last visited Jan 7, 2007).

⁶⁶¹ *Id.*

⁶⁶² *Id.*

over the Darfur region.⁶⁶³ Ms. Arbour further reported that the conflict has now spilled over and has engulfed parts of Chad and the Central African Republic, suggesting that the crisis is slowly becoming a regional crisis.⁶⁶⁴

Ms. Arbour was careful to also point out that the previously reported patterns of abuse⁶⁶⁵ had only exacerbated since 2005, and cautioned the Human Rights Council (as well as the rest of the UN) to refrain from looking upon the escalation in the crisis as merely an escalation of “tribal rivalries.”⁶⁶⁶ Ms. Arbour further noted that in spite of investigations and recommendations from the International Commission of Inquiry on Darfur, despite the UN Security Council’s referral of the situation in Darfur to the International Criminal Court and targeted sanctions that the Security Council imposed against Sudan, the crisis continues still. Ms. Arbour concluded her oral address with an urgent plea that the Council pay serious attention to the crisis in Darfur, and that the Council take affirmative action at the conclusion of its fourth special session to put an end to the crisis.⁶⁶⁷

In its final resolution at the conclusion of the fourth special session, first the Council expressed its concern for the seriousness of the human rights situation in Darfur, and repeated its call for any parties who have not signed the Darfur Peace Agreement to sign on.⁶⁶⁸ The Council also welcomed the cooperation of the government of Sudan with the Special Rapporteur, and called on the government of Sudan’s continued cooperation with the Human Rights Council and

⁶⁶³ *Id.*

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.* Examples of continued patterns of abuse as reported by the High Commissioner include: (1) coordinated ground attacks on civilians by the Sudanese Armed Forces and the militia, or *janjaweed*; (2) indiscriminate bombardments; (3) civilian casualties and displacement; (4) pillaging of civilian property by the Government forces and/or militia; (5) intentional hindrance of humanitarian access to those in need; (6) threats of murder, sexual violence and other physical violence towards internally displaced persons in refugee camps; (7) arbitrary arrests and detention and (8) torture and other cruel, inhuman and degrading treatment by Government forces.

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

⁶⁶⁸ General Assembly, Human Rights Council, *Decision S-4/101, Situation of Human Rights in Darfur*, U.N. Doc. No. S-4/101, (Dec. 13, 2006).

the Office of the High Commissioner for Human Rights.⁶⁶⁹ To that end, the Council decided to dispatch a High-Level Mission to Darfur in order to assess the human rights situation and the needs of Sudan to resolve it, requested the Secretary-General and the High Commissioner for Human Rights to provide logistic, technical and administrative support to the High-Level Mission.⁶⁷⁰ Further, the Council requested that the High-Level Mission report to the Council at the Council's fourth (regular) session on its findings.⁶⁷¹ Although the fourth regular session has not yet taken place, it remains to be seen what the High-Level Mission will find and recommend.

B. Recent Developments at the Human Rights Council

On March 30, 2007, the Human Rights Council adopted without a vote at its Fourth Regular Session, Resolution 4/8 on the follow-up to decision S-4/101 of December 13, 2006, as adopted by the Council at its Fourth Special Session.

1. Commission of the Group of Experts

In Resolution 4/8,⁶⁷² the Council convened a group of seven mandate holders to ensure the effective follow-up and to foster the implementation of resolutions and recommendations on Darfur as adopted by the Council, the Commission on Human Rights and other UN institutions, as well as to promote the implementation of relevant human rights mechanisms.⁶⁷³ The Group of Experts made a number of short and medium-term recommendations that were identified in their first report.⁶⁷⁴ The Group of Experts was presided over by Ms. Sima Samar, the Special

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.*

⁶⁷¹ *Id.*

⁶⁷² See U.N. Doc. A/HRC/9/13/Add.1, *Report Prepared by the Special Rapporteur on the Situation of Human Rights in the Sudan on the Status of Implementation of the Recommendations Compiled by the Group of Expert Mandated by the Human Rights Council in Resolution 4/8 to the Government of the Sudan for the Implementation of Human Rights Council Resolution 4/8 Pursuant to Human Rights Council Resolution 6/34*, 2 Sept. 2008, as presented by the Special Rapporteur to the Ninth Session of the Human Rights Council on September 2, 2008.

⁶⁷³ *Id.* at p. 4.

⁶⁷⁴ See U.N. Doc. A/HRC/5/6, *Report on the Situation of Human Rights in Darfur Prepared by the Group of Experts Mandated by Human Rights Council Resolution 4/8*, presented to the Human Rights Council on June 8, 2007.

Rapporteur on the human rights situation in Sudan as designated by the Council, and was composed of a number of individuals charged to review specific human rights issues such as violence against women, the human rights of internally displaced persons, as well as experts on the question of torture and other cruel, inhumane or degrading treatment or punishment.⁶⁷⁵

On June 20, 2007, the Council extended the Group of Experts' mandate to review the human rights situation in Darfur for another six months, requesting an update to the Council in September 2007.⁶⁷⁶ In its interim report of September 22, 2007,⁶⁷⁷ the Group of Experts indicated that at that time, it was not in a position to provide an interim report based on the information received to date from the Government of Sudan. The Group of Experts instead recommended allowing additional time to the Government of Sudan to implement recommendations, and to allow the Group of Experts to gather additional information from all reliable sources concerning the status of implementation of recommendations.⁶⁷⁸

In resolution 6/34,⁶⁷⁹ the Council requested the Special Rapporteur ensure effective follow-up and to foster the implementation of the remaining short-term and medium-term recommendations identified in the first report of the Group of Experts, through an open and constructive dialogue with the Government of the Sudan, also taking into account the final report

⁶⁷⁵ The Group of Experts consisted of Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions; Radhika Coomaraswamy, Special Representative of the Secretary-General for children and armed conflict; Yakin Erturk, Special Rapporteur on violence against women, its causes and consequences; Hina Jilani, Special Representative of the Secretary-General on the situation of human rights defenders; Walter Kalin, representative of the Secretary-General on the human rights of internally displaced persons; and Manfred Nowak, Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment. Mr. Kalin served as Rapporteur for the Group of Experts. See Report of the Ninth Session of the Human Rights Council, *supra* note 672 at p. 4.

⁶⁷⁶ See, *Statement of Sima Samar to the Human Rights Council Introducing the Darfur Experts Group Final Report on 11 December 2007*, December 11, 2007.

⁶⁷⁷ See U.N. Doc. A/HRC/6/7, *Interim Report on the Situation of Human Rights in Darfur Prepared by the Group of Experts Mandated by the Human Rights Council at its Resolution 4/8*, Sept. 22, 2007, as presented to the Sixth Session of the Human Rights Council on September 22, 2007.

⁶⁷⁸ *Id.* See also note 674, *supra*.

⁶⁷⁹ Human Rights Council Resolution 6/34, *Mandate of the Special Rapporteur on the Situation of Human Rights in the Sudan*, adopted without vote on December 14, 2007.

of the Group of Experts,⁶⁸⁰ the replies of the Government thereon, and also include information regarding the same in her report to the Council at its Ninth Session.⁶⁸¹ The Special Rapporteur prepared a report on the situation of human rights in Sudan on the status of the implementation of the short and medium term recommended actions, and presented it at the Ninth Session of the Human Rights Council.⁶⁸²

2. Status of Implementation of Recommendations by the Group of Experts

Overall, the Special Rapporteur concluded that effective implementation of recommendations by the Government of Sudan has been slow. The Special Rapporteur opined that the Government needed to engage fully in an open and constructive dialogue on such concerns, and take more concrete steps to improve the human rights situation in Darfur. As to those activities the Government had undertaken to implement the recommendations, the Special Rapporteur noted that in only a few areas were necessary steps taken to fully or to a significant degree in order to have a tangible impact.⁶⁸³

In other instances, activities were undertaken, but little or no tangible impact has been noted or reported or only initial steps were taken toward implementation, with little follow-up. The Special Rapporteur also noted that information on the human rights situation provided by UNAMID and other UN agencies, bodies and programs with operational competence in Darfur as well as other relevant sources reflected an extremely critical situation that requires immediate

⁶⁸⁰ See U.N. Doc. A/HRC/6/19, *Final Report on the Situation of Human Rights in Darfur Prepared by the United Nations Experts Group on Darfur*, as presented to the Resumed Sixth Session of the Human Rights Council on November 28, 2007. The Group of Experts concluded, in summary, that a number of recommendations had first steps towards implementation taken by the Sudan Government but not fully implemented, or were not implemented at all.

⁶⁸¹ See U.N. Doc. A/HRC/9/13/Add.1, *Report Prepared by the Special Rapporteur* (in short), *supra* note 672.

⁶⁸² *Id.*

⁶⁸³ *Id.* at 15.

action, as the available information is not consistent with the Government's assessment of the impact on the ground of activities undertaken to date.⁶⁸⁴

a. Protection of the Civilian Population

As to the status of implementation of recommendations on the protection of the civilian population, including those internally displaced persons, the Group of Experts proposed that the Government of Sudan issue and enforce clear orders to the armed forces or any militias under the Government's control that it was prohibited from making any civilians or civilian objects (including cultivated land, livestock) the target of attacks or to launch indiscriminate attacks (including, aerial bombardments and burning of villages).⁶⁸⁵ The Government indicated that it had taken a number of measures including, (1) approval of a new Armed Forces Act, which included a chapter on the protection of civilians under international humanitarian law, (2) undertaking a national study on humanitarian law, (3) held workshops with members of armed forces and police forces, prosecutors and judges on international humanitarian law principles, (4) issuance of rules to enforce discipline in the armed forces.⁶⁸⁶

Unfortunately, the information received on implementation of such measures indicated that the orders and strengthened legal framework has not had any impact as far as attacks on civilians and civilian objects by either government forces or the government aided militia, and that such attacks continued.⁶⁸⁷ The civilian population in Darfur was reported to remain largely unprotected against such attacks. As of September 2008, there was an estimated 2.5 million internally displaced persons, with an additional 250,000 seeking refuge in Chad. Approximately

⁶⁸⁴ *Id.* at 15.

⁶⁸⁵ *Id.* at p. 7.

⁶⁸⁶ *Id.* at p.7.

⁶⁸⁷ *Id.* at p. 8.

150,000 persons were displaced in the early part of 2008, in addition to the 780,000 since the signing of the Darfur Peace Agreement in May 2006.⁶⁸⁸

In addition to ongoing attacks, the Darfur population is also at risk related to sudden displacement, the lack of services and the lack of protection from armed forces and militias, with women still being subject to harassment, intimidation and sexual and physical assaults within the camps.⁶⁸⁹ There have been a number of reports of attacks by militia groups as well as the SLA/MM and other armed persons on refugee camps. In addition, the proliferation of weapons in addition to the presence of armed forces around the camps have greatly endangered internally displaced persons within the camps, with some internally displaced persons caught in the middle of fighting between two warring factions.⁶⁹⁰

b. Protection of Women Against Violence

The Special Rapporteur also reported on the status of the Government's efforts to ameliorate other human rights abuses in the Report, a few of which are highlighted herein. As to protection of women against violence, the Government reported a small number of cases of sexual and physical violence by members of the armed forces or police and that of 12 cases reported, only eight had been prosecuted.⁶⁹¹ The Special Rapporteur suggested that a more effective definition of "rape" needs to be added to the law, as under application of law, rape was amended to include adultery.⁶⁹² The Special Rapporteur also suggested that increased efforts are needed to seriously address these crimes as women and girls especially those in internally displaced camps, are particularly vulnerable to attack.⁶⁹³ The Special Rapporteur noted that

⁶⁸⁸ *Id.*

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.* at p. 10.

⁶⁹² *Id.*

⁶⁹³ *Id.*

there have only been a few cases where the perpetrators of rape have been prosecuted, and the government authorities are not responding appropriately to reports of attacks.⁶⁹⁴

However, there was some good news. The Special Rapporteur did report that steps were taken to give those women and girls who were raped access to medical care whether they chose to report their case or not.⁶⁹⁵ This has been fully implemented, with government authorities disseminating information, having state committees monitor compliance and providing ongoing training.⁶⁹⁶ In addition, gender and family protection units in Northern and Southern Darfur have received women police officers who will investigate gender-based crimes.⁶⁹⁷

While all of this appears to be a good start to ameliorate future cases, nevertheless these measures unfortunately do not begin to touch “the tip of the iceberg” as to the thousands of unreported cases of systematic and ongoing rape that have occurred since the Darfur violence began almost six years ago. It is hoped that the Government will continue to honor its commitment to these recommendations, and protect a very vulnerable population.

c. Other Humanitarian Issues Addressed

The Special Rapporteur also noted in the Report that as to the issue of children being conscripted into the armed forces, the Government has sponsored a bill, The Child Act 2008, which clearly defined a child as a person not reaching the age of 18, and revoked signs of maturity as a criterion for defining a child.⁶⁹⁸

As to protection against summary executions, arbitrary detention, disappearance and torture, the Special Rapporteur has found that Government security apparatus continued to commit these human rights violations, and that such abuses were targeted towards community

⁶⁹⁴ *Id.*

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.*

⁶⁹⁷ *Id.*

leaders and persons *perceived* to be tied to rebel groups.⁶⁹⁹ There have also been reports that detainees have been tortured or ill-treated, despite Government claims that no detainees have been tortured and all detainees have been given access to lawyers.⁷⁰⁰ Unfortunately, no information was provided the Special Rapporteur on concrete measures taken by the Government, nor has UNMIS (UN Mission in Sudan) granted access to detention centers. Although human rights monitors have been granted limited access to Government detention facilities, violations of detainees continue.⁷⁰¹

While there are a number of other compelling human rights issues raised in the Report, one other issue needs to be noted. The Special Rapporteur reported that protection of human rights workers from harassment and attack has become a growing problem, in that a number of workers have been killed, hundreds of workers abducted, hundreds of humanitarian vehicles have been hijacked, and humanitarian premises have been assaulted by armed persons.⁷⁰² In addition, access to victims of attacks and internally displaced persons in camps has become increasingly difficult and dangerous for humanitarian workers.⁷⁰³ However, the Government did finalize in September 2007 the General Directory of Procedures for non-governmental organizations operating in Northern Sudan, including special provisions for Darfur, as to gaining access to civilians and refugees.⁷⁰⁴

Finally, as to accountability and justice, the Government failed to provide any information to the Special Rapporteur as to actions taken to combat impunity for attacks on civilians and other crimes. Legal immunities for armed state agents continue to be enshrined in

⁶⁹⁸ *Id.* at p. 11.

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.*

⁷⁰² *Id.* at p. 12.

⁷⁰³ *Id.*

⁷⁰⁴ *Id.*

law, and as a matter of fact, the new Police Act grants immunity to police and other armed persons against crimes, which is purportedly lifted upon the request of the aggrieved party.⁷⁰⁵

Unfortunately, there is much skepticism that the law will be applied as the Government claims, given the Government of Sudan also informed the Special Rapporteur of its refusal to accept the competence of the International Criminal Court to investigate cases in Sudan.⁷⁰⁶

IV. Conclusion

What is promising about the Human Rights Council is that there is a more organized observation and reporting mechanism that will allow a special mission to visit a state where human rights violations are taking place, and then such observations are regularly reported to a larger body for discussion and follow up. It remains to be seen whether discussion at the Human Rights Council level will lead to action. The High-Level Mission to Sudan may or may not have encouraging news, or make substantial enough recommendations that will lead to the end of the crisis once and for all. Nevertheless, it is encouraging to see that the UN has dedicated a new subsidiary organ to review, monitor and (hopefully) take action against such abuses. The notion that human rights are being elevated to the level of importance it garners in the UN Charter is reason to have hope for the end of such humanitarian crises as that in Sudan. After all, it is difficult to hide, let alone deny, an egregious, ongoing humanitarian crisis when it is presented for all to see on the world stage.

As Paul Kennedy notes, despite all of the setbacks and “ghastly actions” against human rights in the twentieth and now twenty-first centuries, nevertheless there has been a bigger advance in the idea and practice on national and international human rights in the last sixty-plus

⁷⁰⁵ *Id.*

⁷⁰⁶ *Id.*

years than in any comparable period in all of history.⁷⁰⁷ Yet, although the gap between those rights enjoyed by a citizen of Sweden as compared to those granted to a citizen of Sudan is still quite wide, nevertheless, what is encouraging is that there is now a collective world effort to close the gap.⁷⁰⁸

⁷⁰⁷ Kennedy, *supra* note 1 at 204.
⁷⁰⁸ *Id.*

CONCLUSION

“To sum up, Ladies and Gentlemen, as an international community we have a clear obligation to prevent genocide. I believe that collectively we also have the power to prevent it. The question is, do we have the will?”⁷⁰⁹

-- Former Secretary-General Kofi Annan

If the United Nations is to avoid becoming the *Grand Guinol* of the twenty-first century and restore the organization to the stature it held when it was created, then the Security Council, the General Assembly or both, must be willing to use every tool at its disposal, include armed intervention, to stop the human rights atrocities that have been ongoing in the Darfur region of Sudan immediately.

The genocide in Sudan violates a number of protected rights under the Universal Declaration, as well as other international human rights treaties. Such egregious violations should prompt the Security Council to stop debating whether “genocide” has occurred, whether UN troops are really needed, whether the prosecution of Sudan President Omar al-Bashir somehow magically put an end to the Darfur crisis, and take immediate action to intervene and stop it once and for all. It is the role of the Security Council to maintain, and where necessary, *restore* peace and security; to date, the Security Council has not fully realized this role. It has not taken aggressive enough action to stop the genocide in Darfur – the proof is that it still continues.

The fact that the humanitarian crisis in Darfur is the tangential result of a previously existing armed conflict is no reason not to intervene. Although a civil war (of sorts) is occurring in Sudan, it is clear from all accounts that the government is using the ongoing conflict with

⁷⁰⁹ The Secretary-General, *Genocide is a Threat to Peace, Requiring Strong unite Action, Address to the Stockholm International Forum, Stockholm, Sweden* (Jan. 26, 2004), in U.N. Chronicle Online Edition, <http://www.un.org/Pubs/chronicle/2004/issue1/0104p4.asp>, (last visited Feb. 16, 2008), as cited by Erin Doherty, *The United Nations' Toolbox to Fix Genocide in the Twenty-First Century*, 30 Suffolk Transnat'l L. Rev. 485 (2007).

“rebel” forces as a pretext to attack innocent, unarmed civilians and drive them out of the Darfur region in favor of establishing a pro-Arab Sudan, committing mass murders, rapes and other atrocities along the way.

Although a number of interventions have taken place since World War II, the legal basis for humanitarian intervention has not been clear, which has led to uneven results in Kosovo and Rwanda. Such disparate treatment of two of the greatest tragedies of the twentieth century has led scholars to try to establish a potential legal framework to respond to such tragedies, despite the fact that the international community has been so uncomfortable with the notion of humanitarian intervention, that it had not, until recently, been able to adopt a coherent framework for interventions.⁷¹⁰

The concept of humanitarian intervention and whether it is a viable option in the face of genocide and other human rights atrocities has made a dramatic shift in the last sixty-plus years. Grotius recognized that a state’s sovereignty is not absolute. However, sovereignty became a vexing issue in that many scholars viewed humanitarian intervention as an assault on sovereignty, or as a pretext of one state to wage war with another to effect regime change. The rationale is that legal recognition of (unilateral) humanitarian intervention would undermine the United Nations’ authority under the Charter, to curtail aggression.⁷¹¹ Taken to an illogical extreme, under this theory the Sudan government would have a credible legal case for defending Sudanese national sovereignty to allow the Darfur genocide and other ethnic cleansing.⁷¹²

⁷¹⁰ Williams and Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?* *Supra* note 345, at p. 102.

⁷¹¹ Samuel Jones, *Darfur, The Authority of Law, and Unilateral Humanitarian Intervention*, 39 U. Tol. L. Rev. 97, 107 (2007).

⁷¹² David Aronofsky, *The International Legal Responsibility to Protect Against Genocide, War Crimes and Crimes Against Humanity: Why National Sovereignty Does Not Preclude Its Exercise*, 13 ILSA J. Int’l & Comp. L 317, 318 (2006).

Such an assertion becomes unsustainable when examined in relation to the aims of the UN Charter, under Articles 1(3), 55, 56, which speak of the obligation to protect and preserve human rights, as well as maintaining international peace and security.⁷¹³ International legal scholars have even recognized that the member states' pledge to preserve human rights is not entirely devoid of legal obligation.⁷¹⁴

After Kosovo, Bosnia and two genocidal campaigns in the Balkans, at the urging of then Secretary-General Kofi Annan, the international community developed the concept of "the responsibility to protect," which turned the traditional notion of sovereignty on its head. "The responsibility to protect" not only recognizes a state's sovereignty, but with sovereignty comes responsibility – to the people of the state. Where the state is unable or unwilling to undertake this responsibility and protect its people from crimes against humanity and other human rights abuses, the international community – including the United Nations – may intervene to protect a state's people.

With the rise of human rights as an issue taking greater precedence in international relations, there is growing consensus human rights conditions within a state are no longer merely an "intrastate issue." Such issues now transcend national boundaries and have become a concern among nations in the international community, and under international law.⁷¹⁵ The responsibility to protect" codifies this growing consensus, stating that human rights conditions of peoples of a state are no longer unquestionably accepted as the internal affairs of that state, and out of the reach of international law. It also states that while every state has not only territorial and

⁷¹³ *Id.* at 107.

⁷¹⁴ *Id.*

⁷¹⁵ *Id.*

governmental sovereignty, with sovereignty comes the responsibility to its people to protect its people from harm and other human rights abuses, and certainly, not to perpetrate them.

The 2005 World Summit Outcome Document, as well as many of the reports that preceded it, speaks to goals of peace and security through pacific means, multilateralism, as well as understanding the root causes of poverty. While these are indeed noble goals to aspire to, nevertheless, they may not always be effective to stop a full-scale humanitarian crisis. The international community should also take note that the Outcome Document speaks to the use of collective force (if necessary) as authorized by the Security Council in the goal to eradicate genocide and other crimes against humanity. The Security Council can and must take the lead in the emerging collective security system to prevent and stop genocide, ethnic cleansing and other such crimes against humanity.

With the new Human Rights Council, it is encouraging to see that the UN (at the urging of former Secretary-General Kofi Annan) has dedicated a new subsidiary organ to review, monitor and (hopefully) take action against such abuses. The notion that human rights are being elevated to the level of importance it garners in the UN Charter is reason to have hope for the end of such humanitarian crises as that in Darfur, or the prevention of a new crisis from erupting. The effectiveness of the Council is that such egregious, ongoing humanitarian crises are presented for all to see on the world stage, which gives governments such as Sudan little credibility to deny the existence of such atrocities. Furthermore, the monitoring function of the ongoing crisis by the Special Rapporteur and the Group of Experts as to the human rights situation in Darfur allows the Council, the Security Council, the General Assembly, other UN organs and the international community to see that the Government of Sudan has not made all

the efforts it should have to ameliorate the crisis, thus giving rise to the justification that more aggressive means may be justifiable and necessary to halt human suffering.

The best way to deal with the crisis is for the Security Council to authorize (or the General Assembly to recommend) an integrated form of intervention that integrates peacekeeping, peaceful measures (such as monitoring by the Human Rights Council) and military measures against both the Sudanese army and its *janjaweed* militia.⁷¹⁶ The mandate of such an integrated form of intervention should include protecting those civilians, internally displaced persons and those refugees in Chad from further attacks by both the army and the *janjaweed*. However, with such strict guidelines in existence as those discussed in this paper herein, a unilateral force if willing, should also be granted the authority to intervene militarily to stop the killing.

After 1 million people were butchered in Rwanda, many promises were made, but nothing was done. Yet again, we are witnessing another full-scale humanitarian crisis, and little action is being taken. While pacific means of resolving such large-scale crisis is noble, it has been for the most part, ineffective. It is apparent that not only does such a large-scale crisis affect life and fundamental human rights, but it also has an impact on the economy, sustainable development, and the environment. It is the role of the Security Council to maintain, and where necessary, *restore* peace and security; to date, the Security Council has not fully realized this role. It has not taken aggressive enough action to stop the genocide in Darfur – the proof is that it still continues. The Security Council would be well within its World Summit goals – and the dictates of the UN Charter, if it took more aggressive steps to stop genocide *before* it becomes a full-scale humanitarian crisis that the world would be hand-wringing over later. Not only would

⁷¹⁶ See Deans, *supra* note 220, at p. 1667.

a threat of use of force where necessary and subject to Security Council discretion avert a crisis before it starts, but it can save lives.

Further, taking action to stop an internal crisis such as genocide can prevent it from destabilizing an entire region, or leading to an internal conflict that could have unforeseen catastrophic consequences. Had the Security Council – or anyone else for that matter – taken as aggressive a stand in Rwanda and now the Sudan, as NATO did in Bosnia, nearly one million Rwandans, and nearly half a million Sudanese would still be alive today. The reason why the humanitarian crisis in Darfur is the greatest crisis of the 21st Century (arguably Rwanda is greatest crisis of 20th Century, with almost 1 million people being killed in 100 days) is not so much due to the numbers of those killed, raped, maimed or displaced (although those numbers are quite compelling), but because of *how long* the crisis has gone on, *without the United Nations – either the Security Council or the General Assembly – taking action to intervene and stop it.*

The atrocities that occurred in World War II answered the question as to whether a sovereign state can kill its own people; whether it is in the name of an armed conflict or not. The answer is a clear and unequivocal, no. It is time for the United Nations to once again, become the standard bearer for the international community, and lead by example. The United Nations should stop the pronouncement of outrage, “throw down the gauntlet” and end the crisis in Darfur now by either sending in a peacekeeping force with a military action mandate, or authorize a multilateral force. By ending the crisis immediately, the message can be sent that such human rights atrocities and abuses will no longer be tolerated.

We have put our faith in an international organization to set the standard of conduct among states. It is why the United Nations, its resulting organizations and its Charter and related documents were created – it is why we adhere to those standards today.

EPILOGUE

I. Overview of Recent Developments

With the exit of former Secretary-General Kofi Annan in 2007 and the election of Barack Obama as President of the United States in November 2008, there is a mixed result with regard to the future of the United Nations continuing on the reformist path that Kofi Annan started almost twelve years ago.

There is good news and bad news with regards to recent developments. The good news is that U.S. President Barack Obama has nominated Dr. Susan E. Rice as an ambassador of the United States to the United Nations. Ambassador Rice is a welcome change from the ambassadors under the previous administration of George Bush, including John Bolton, who sought to marginalize and perhaps eventually replace the United Nations.

On January 29, 2009, Ambassador Rice signaled a shift from the Bush administration's approach to the International Criminal Court in her first appearance before the Security Council, when she aptly described the Bush administration's policy on Darfur as "bluster and retreat." "Bluster," for the lip service paid to the issue, and "retreat" for never following up its tough rhetoric with any meaningful political, diplomatic or military action.⁷¹⁷ With such blistering criticism of the prior administration's policies on Darfur (or lack thereof), it appears that the U.S. could be changing its policies on the ICC. This theory is also supported by the fact that Secretary of State Hillary Clinton was a sponsor of legislation on Darfur during her tenure in the U.S. Senate.⁷¹⁸

Ambassador Rice also let the Security Council know that President Obama is committed to building strong international partnerships to tackle such global challenges such as enhancing global peace and security, combating terrorism and nuclear proliferation, preventing genocide,

⁷¹⁷ Mark Leon Goldberg, *Obama's Darfur Test*, THE AMERICAN PROSPECT, (Jan. 29, 2009), http://www.prospect.org/cs/articles?article=obamas_darfur_test, (last visited Feb. 12, 2009).

alleviating poverty and promoting sustainable development, and supporting respect for human rights, democracy and human dignity.⁷¹⁹ Ambassador Rice also signaled that the United States is “determined to prevent those conflicts that escalate into mass atrocities, acting early and decisively when they occur, and assuring that peacebuilding and post-conflict assistance consolidates peace durably once conflict ends.”⁷²⁰ Ambassador Rice also indicated that, “as agreed to by member states in 2005 and by the Security Council in 2006, the international community has a responsibility to protect civilian populations from violations of international humanitarian law when states are unwilling or unable to do so. But this commitment is only as effective as the willingness of all nations, large and small, to take concrete action.”⁷²¹

However, it is questionable how the Obama administration will react when and if the ICC has arrest warrants for President Omar al-Bashir. Secretary of State Clinton indicated in her answers to written questions by the Senate Foreign Relations Committee during her confirmation process, that the Obama administration “will end hostility towards the ICC and will look for opportunities to encourage effective ICC action in ways that will promote US interests by bringing criminals to justice.”⁷²² While this is certainly encouraging, it does leave open the question as to whether the U.S. will fully participate in and support the ICC. The Clinton administration originally signed onto the Rome Statute in 2000, but in May 2002, the Bush administration suspended the U.S.’s signature to the Rome Statute.⁷²³ Thus far, it appears that

⁷¹⁸ *Id.*

⁷¹⁹ Press Release, *Statement by Ambassador Susan E. Rice, US Permanent Representative, on Respect for International Humanitarian Law, in the Security Council, January 29, 2009*, (Jan. 29, 2009), http://www.usunewyork.usmission.gov/press_releases/20090129_020.html, (last visited Feb. 12, 2009).

⁷²⁰ *Id.*

⁷²¹ *Id.*

⁷²² See, The American Non-governmental Organization Coalition for the International Criminal Court, (“AMICC”), *Questions for the Record, Senator John Kerry Nomination of Hillary Rodham Clinton, Department of State, Secretary of State*, January 2009, <http://www.amicc.org/docs/KerryClintonQFRs.pdf>.

⁷²³ AMICC, *Administration Update*, (undated), <http://www.amicc.org/usinfo/administration.html>, (last visited Feb. 12, 2009).

the Obama administration will likely undertake a full policy review of U.S. policy towards the ICC before making any decision,⁷²⁴ but is likely to sign onto the ICC once again.

Recently, in a meeting with the Security Council at the ICC, the African Union urged the ICC to suspend its indictment of Sudanese President al-Bashir, indicating that an indictment of President Bashir could jeopardize the peace process in Darfur.⁷²⁵ As recently as February 9, 2009, the Sudanese Ambassador to the United Nations indicated that the Government of Sudan would move forward in the peace process even if the ICC seeks the arrest of President Bashir.⁷²⁶ Given Sudan's track record on the peace process in Darfur, it hardly seems credible that the Government is "all of a sudden" interested in seriously pursuing peace in Darfur. This appears to be another delaying tactic by the Government to deal with the human rights situation it created, in that the Government is using the UN's power to suspend an arrest warrant for a year under the pretext of trying to finally bring peace in the region. Other countries such as the U.S. and France see this nothing more than a delaying tactic, and support that the ICC move forward with an arrest warrant for President Bashir. If anything, an arrest warrant for President Bashir will signal to the Sudan government that the ICC is serious about pursuing an investigation and prosecution of the Sudan government for genocide and other crimes against humanity that have been ongoing for the past six years.

Furthermore, although the African Union has urged the ICC to suspend its indictment of President Bashir, the U.S., the United Kingdom, France, Austria and Croatia have indicated that

⁷²⁴ *Id.*

⁷²⁵ Associated Press, *AU: Suspend Indictment Against Sudan President*, (Jan. 30, 2009), <http://www.google.com/hostednews/ap/article/ALeqM5jy5ANZK3DW7Rs7wJEvnnsWJbg.html>, (last visited Feb. 1, 2009).

⁷²⁶ Associated Press, *Envoy Says Sudan Wants Peace in Darfur Even If Court Seeks Arrest for President*, (Feb. 9, 2009), www.startribune.com/templates/print_this_story?sid=39336662, (last visited Feb. 12, 2009).

they oppose a deferral under Article 16 of the ICC statute.⁷²⁷ As a matter of fact, French Deputy Ambassador Jean-Pierre Lacroix indicated after a closed-door meeting between the UN Security Council and African and Arab delegations that there is no support of an initiative to implement Article 16 procedures.⁷²⁸ Britain's Africa minister Mark Malloch Brown had earlier indicated that it was unlikely that anything could happen that could lead to an Article 16 deferral.⁷²⁹ However, to no surprise, the other two permanent members of the Security Council, Russia and China joined with the African and Arab delegations in voicing support for a deferral, in the interests of peace.⁷³⁰

Although the news of increasing efforts to bring peace to Darfur is encouraging (albeit incredible), there is good news with regard to the Human Rights Council's efforts to investigate the human rights situation on the ground. On September 24, 2008, the Human Rights Council ended its Ninth Session by deciding, (among other things), that it would extend the mandate of the Special Rapporteur on the situation of human rights in Sudan until June 2009.⁷³¹

This is a welcome development indeed. Given the Special Rapporteur's reports to the Council that the recommendations by the Group of Experts⁷³² for improvements in the human rights situation on the ground in Darfur have either been slow in implementation or not implemented at all, it would be most helpful to the human rights situation if the Human Rights Council remain engaged, to make sure that the Government of Sudan is following through with

⁷²⁷ Reuters, *U.S., France, UK Oppose Suspending Bashir Darfur Case*, Feb. 12, 2009, <http://www.reuters.com/article/worldNews/idUSTRE51C09S20090213>, (last visited Feb. 14, 2009). The text of Article 16 of the Rome Statute states as follows: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

⁷²⁸ *Id.*

⁷²⁹ *Id.*

⁷³⁰ *Id.*

⁷³¹ UN News Service, *UN Human Rights Council Renews Mandate of Sudan Investigator*, Sept. 24, 2008, <http://www.globalsecurity.org/military/library/news/2008/09/mil080924-unnews02.htm>, (last visited Feb. 13, 2009); see also, Chapter Six *supra*, herein.

those recommendations, and that the Government is sincere in its claims of wanting to bring peace to the region. Plus, the extension of the Special Rapporteur's mandate does give the Government recognition for those steps that have been taken, and some room to encourage improvement.⁷³³ As long as the Human Rights Council continues to monitor the Government's efforts to improve the human rights situation, the more likely that innocent and displaced civilians are to see an improvement in the conditions on the ground, and in their everyday lives.

The extended mandate of the Special Rapporteur is warranted, as there have been recent reports of fresh attacks upon civilians in Darfur. On January 24, 2009, Sudanese government planes bombed a rebel-held town, Muhajeria, that the JEM rebel forces seized control of in early January 2009.⁷³⁴ In the attack, government aircraft dropped two bombs on the town's western edge, setting homes on fire and killing a child in one of the blazes.⁷³⁵ The attacks sent approximately one thousand civilians fleeing their homes and taking shelter near a UNAMID camp and slept in the open fearing further attacks.⁷³⁶

The UN High Commissioner for Refugees also recently declared that an attack upon civilians in a Darfur refugee camp in August 2008 violated international law.⁷³⁷ The attack occurred on August 25, 2008, when Sudan security forces opened fire on a crowd in a displacement camp in Kalma, killing 33 people.⁷³⁸ The attack was alleged to have occurred as a result of residents in the 80,000 person camp attempting to block government forces from

⁷³² See Chapter Six *supra*, herein.

⁷³³ See note 628, *supra*.

⁷³⁴ Earthlink News, *Darfur Peacekeepers: Government Plane Bombs Town*, Jan. 25, 2009, http://my.earthlink.net/channel/news/print?guid=20090215/497bffe0_3ca6_155262009012.htm, (last visited Jan. 25, 2009). It appears that the Justice and Equality Movement (JEM) has emerged as the most powerful force against the Government's forces and the *janjaweed*, given that the JEM seized control of Muhajeria from another (now splintered) rebel group, the Sudan Liberation Movement/Army (SLM/A), who signed a peace deal with the government in 2006. The SLM/A's leader, Minni Minawi, has since been appointed as a presidential adviser. *Id.*

⁷³⁵ *Id.*

⁷³⁶ *Id.*

⁷³⁷ Reuters AlertNet, *Sudan Violated International Law in Darfur Raid – UN*, Jan. 23, 2009, <http://www.alertnet.org/thenews/newsdesk/LN640794.htm>, (last visited Feb. 14, 2009).

searching for arms or drugs.⁷³⁹ The Government claimed that it had evidence that the Kalma camp was being used to accumulate weapons, although a report issued after the attack occurred indicated that there was no credible evidence to support the Government's claim, nor that there was any evidence to support the Government's claim that the crowd posed an imminent threat to security forces, causing them to fire upon the crowd. The UNHCR declared that government troops acted unlawfully and in violation of international law when they fired upon the crowd.⁷⁴⁰ It appears that once again, the Government used the pretext of defending itself from "rebel" forces as justification for attacking innocent civilians. These new attacks in the Southern Darfur region caused great concern for the United Nations and African Union joint chief mediator for the peace process in Darfur, as the renewed attacks violates the Humanitarian Ceasefire Agreement on the Conflict in Darfur of 2004, and also constituted a violation of a number of Security Council resolutions, and called for an end to any new clashes.⁷⁴¹

Despite reports of recent attacks, there is good news. The Head of the United Nations Mission in the Sudan, Ashraf Jehangir Qazi, reported to the Security Council that he believed that 2009 could be a "make or break" year for a comprehensive peace agreement and for the prospect of peace.⁷⁴² Mr. Qazi indicated that the Comprehensive Peace Agreement signed in 2005 by the Government of Sudan and the Sudan Liberation Army/Movement (SLA/M) was quite fragile,⁷⁴³ but was optimistic of lasting peace as there was a peace referendum on the ballot for 2011, which he believed would be most attractive to people in Southern Sudan, as it could

⁷³⁸ *Id.*

⁷³⁹ *Id.*

⁷⁴⁰ *Id.*

⁷⁴¹ UN News, *Joint UN, African Union Mediator for Darfur Calls for an End to Renewed Clashes*, Jan. 29, 2009, <http://www.un.org/apps/news/printnews.asp?nid=29708>, (last visited Feb. 14, 2009).

⁷⁴² Press Release, *Without Any Exaggeration, 2009 Could be a Make or Break Year for Comprehensive Peace Agreement, Prospect of Peace in Sudan, Security Council Told*, See UN Doc. SC/9590, as presented to the UN Security Council on Feb. 5, 2009, <http://www.un.org/News/Press/docs/2009/sc9590.doc.htm>, (last visited Feb. 14, 2009).

promote unity and revenue sharing in oil profits.⁷⁴⁴ Mr. Qazi also indicated that a disarmament, demobilization and reintegration process for those serving in the army or police, which could set up a model that could be used region-wide.⁷⁴⁵ It is questionable whether all parties can come to the table to sign a peace agreement that would become a final agreement that would bring lasting peace.

All of these recent developments indicate that while there is plenty to be optimistic about, nevertheless, one has to keep in mind the plight of innocent civilians in Darfur, and that their troubles seem never-ending. As such, any claims by the Sudanese government that it is working towards a peace agreement should be taken with a healthy dose of skepticism, especially when the Government renews its attacks upon civilians in a region which is clearly the subject of the 2005 Peace Agreement.

Also, another big unknown is how the United States will lead the international community, now that the Bush administration is no longer in power. Thus far, there has been a strong indication from Obama administration officials that the U.S. is willing to participate in the international community once again to fight against human rights abuses, and work as a partner with the United Nations. It remains to be seen whether President Obama will actually commit the United States to a solution in Darfur (by the possible appointment of an envoy), or to join and participate in either the Human Rights Council or in the International Criminal Court.

Like the United Nations, the U.S. should lead by example by embracing these institutions that could finally bring an end to the humanitarian crisis in Darfur. It has been less than one month since President Obama has taken office, but thus far, the U.S. has made more progress on the international front in one month than it has in the eight years of the Bush administration. As

⁷⁴³ *Id.*

⁷⁴⁴ *Id.*

far as any further progress from the Obama administration, the world can only hope, but time will only tell.

⁷⁴⁵ *Id.*

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