

**INTERVENTION TO PROTECT  
CIVILIANS IN DARFUR**

**LEGAL DILEMMAS AND POLICY IMPERATIVES**

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There are two kinds of injustice: the first is found in those who do an injury; the second in those who fail to protect another from injury when they can.

*Cicero, De Officiis I, vii*  
(trans. Michael Winterbottom, 1994)

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## ABBREVIATIONS

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ACUNS	Academic Council on the United Nations System
AMIS	African Mission in Sudan
AU	African Union
AUPSC	African Union Peace and Security Council
CCSDCA	Conference on Security, Stability, Development and Co-operation in Africa
ECOWAS	Economic Community of West African States
EU	European Union
GoS	Government of Sudan
ICC	International Criminal Court
ICISS	International Commission on Intervention and State
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
JEM	Justice and Equality Movement
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NIF	National Islamic Front
OUA	Organization of African Unity
PSC	Peace and Security Council of the African Union
SLA	Sudan Liberation Army
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States (of America)

## EXECUTIVE SUMMARY

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Darfur. This name when spoken in contemporary times evokes immediate reference to dark days gone by – the Holocaust, Rwanda and former Yugoslavia, places and events that many would like to forget. Many people have spoken and written about Darfur. The United States, early on labeled the killings and destruction of livelihoods in Darfur as genocide while doubts remained in other quarters. The United Nations Mission to Darfur stated that it was unable to reach such definitive conclusion, but added that international crimes - crimes against humanity and war crimes were certainly being committed in that conflict. Much time has elapsed since then, yet the atrocities continue. The African Mission in Sudan (AMIS) has been deployed, yet, in the face of continuing atrocities, and the regionalization of the conflict, discussions remain about what action should be taken by various players to stop these crimes.

The possibility of deploying a larger, better equipped UN force in Darfur still remains in the balance, with Khartoum refusing to consent to its deployment terming such action ‘colonization’ which it will not countenance. Many diplomats have requested Khartoum to temper its tone, and to allow deployment of UN troops. The Sudan regime has stood its ground, stating that as a sovereign nation, it will allow only a strengthened African Union force. Calls on the government to stop the atrocities have largely gone unheeded, with reports that apart from continually supplying the *Janjaweed* militia, government forces have been involved directly in attacks on civilian villages and civilians in Darfur.

No doubt, as advanced by the present author, the atrocities taking place in Darfur present serious legal challenges and policy dilemmas to the global and regional institutions. At the global level, the atrocities pose challenges and dilemmas for the United Nations (UN), especially its Security Council (SC), whose chief purposes are to maintain international peace and security by taking effective collective measures for the prevention and removal of threats to the peace, and achieving international cooperation in solving international problems of a humanitarian character. Regionally, Darfur poses legal challenges and policy dilemmas to the African Union (AU), established

by its Constitutive Act of 2000 with a mandate to “take up the multifaceted challenges that confront Africa and its peoples”, and, among others, to promote peace, security and stability on the continent. The functions of the AU Peace and Security Council (PSC), the AU standing decision-making organ for the prevention, management and resolution of conflicts in Africa are implicated.

In an attempt to figure out the best possible action(s), permissible under international law that could, and should be taken by the international community to address the atrocities in Darfur, this contribution focuses on humanitarian intervention as an option. Indeed, the way Darfur has played itself out highlights the long standing debate on the “right” or “duty” of humanitarian intervention in international law, and whether this is permissible in circumstances of mass human rights violations such as those prevailing in the Sudan. It appears that continued atrocities in Darfur of which the Khartoum regime has knowledge, and is said to actively participate in their commission would require such action from the international community.

This contribution aims at reexamining this debate within the context of Darfur by grappling with a number of questions: 1) whether there is any legal basis for forcible military intervention in cases of serious human rights violations as those taking place in Darfur; 2) whether, if justified, the form that such intervention should take; 3) who should intervene; and 4) whether such intervention would violate Sudan’s state sovereignty as claimed by the Government of Sudan (GoS).

The core argument of the study is that the human rights violations in Darfur meet the legal threshold of genocide, war crimes and crimes against humanity and, therefore, justifies forcible humanitarian intervention in the Sudan by any grouping of states whether in or outside the context of the UN or the AU. While intervention may be legitimate outside the UN or AU framework, the author suggests that it would be in the interest of the stability of the global and regional peace and security system painstakingly assembled over the last six decades that preference is given to forcible intervention within the institutional framework of the UN and AU. In order to demonstrate that forcible humanitarian intervention remains a serious policy option, the study shows that the other possible options of intervention are not appropriate in the particular circumstances of Darfur.

This study is divided into five parts. The introductory part gives a background of the Darfur crisis by examining the origins and nature of human rights violations taking place in that part of the Sudan. It also reviews initial responses to the atrocities by the international community and sets out the

conceptual parameters of the “responsibility to protect” and “humanitarian intervention”. In the second part, the author examines the possible legal and policy objections to humanitarian intervention. The author indicates that the legal objections to humanitarian intervention revolve around the concept of state sovereignty, often cited by the GoS whenever issues of foreign intervention in Darfur are raised. The part further explores the policy considerations and argues that today, the doctrine of state sovereignty must be interpreted in the context of the changing value systems of the international community, whereby sovereignty is increasingly viewed as hinging on a state’s responsibility to protect its citizens and that failure by a state to do so automatically invites intervention by the community of states in various forms, including forcible military intervention. Part three focuses on the normative framework for the responsibility to protect civilians in Darfur by responding to an array of questions in the nature: how, when and by whom. Part four discusses the roles of the international community, particularly the UN and AU by focusing on the institutional and legal apparatus relevant to humanitarian intervention. The fourth and final part sums up the main conclusions and recommendations of the study. In sum, the author concludes that in contemporary international law, humanitarian intervention is sustainable in case of serious human rights violations and that the international law principle of sovereignty has acceded to this exception. The author recommends that focus should shift from peacekeeping to rethink other options, of which humanitarian intervention is a concrete and permissible option. In the case of Darfur, which is the focus of this study, there is need for urgent forcible humanitarian intervention, preferably authorized by the UN.



## PART ONE

# INTRODUCTION

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### **Background**

The 1994 Rwandan genocide, its devastating effects and the inability of the international community to prevent, limit or halt the atrocities came at a time when many African countries were, and still are, engulfed in deadly armed conflicts, most of which are intra-state in origin.<sup>1</sup> It also came at an extraordinary time in history when many ideas, relationships and institutions, which hitherto seemed solid, had begun to 'dissolve' rapidly (Farer 1991:185). In the aftermath of the Rwandan genocide, debate has persisted on whether there are emerging norms on when and how the international community can justifiably intervene to prevent or ameliorate internal conflicts and widespread human rights abuses (Reed & Kaysen 1993:5; Harris 1995; Reisman 1997; Kritsiotis 1998; Abiew 1999).

Ten years after the Rwandan genocide and despite years of soul-searching, the response of the international community to the events in the Darfur region of Western Sudan starting in 2003 at best point at history repeating itself. Since then, the world has watched with both shock and apathy as Sudan's Arab-dominated government ethnically cleanses the vast Darfur region by giving air support to mainly Arab militias who kill, maim, rape and rob black Africans. Udombana (2005:1149–1150) has summed up the situation and implication of the situation in Darfur as follows: 'The Darfur crisis combines the worst of everything: armed conflict, extreme violence, sexual assault, great tides of desperate refugees ... Evidence from numerous sources – governmental, intergovernmental and non-governmental – suggests a tragedy that, in nature and scale, follows the example of the Holocaust.'

The atrocities taking place in Darfur present serious legal challenges and policy dilemmas to the global and regional institutions that have been set-up to promote human security. At the global level, the atrocities pose challenges and dilemmas for the United Nations (UN), especially its Security Council, whose chief purposes are to maintain international peace and security by taking effective collective measures for the prevention and removal of threats to the peace, and achieving international co-operation in solving

international problems of a humanitarian character (see UN Charter articles 1 and 24). Regionally, Darfur poses legal challenges and policy dilemmas to the African Union (AU), established by its Constitutive Act of 2000 not only to 'take up the multifaceted challenges that confront Africa and its peoples', but also to promote peace, security and stability on the continent.<sup>2</sup> Particularly, it is a challenge to the AU Peace and Security Council (PSC), which is the AU standing decision-making organ for the prevention, management and resolution of conflicts in Africa.

Darfur brings to the fore the long-standing debate on the 'right' or 'duty' of humanitarian intervention in international law.<sup>3</sup> This paper is aimed at re-examining this debate within the context of Darfur by grappling with a number of questions: is there any legal basis for forcible military intervention in cases of serious human rights violations as those taking place in Darfur? If justified, what form should such intervention take? Who should intervene? Would such intervention violate Sudanese state sovereignty as claimed by the Government of Sudan (GoS)?

This study argues that the human rights violations in Darfur meet the legal threshold of genocide, war crimes and crimes against humanity and, therefore, justifies forcible humanitarian intervention by any grouping of states whether in or outside the context of the UN or the AU. While intervention may be legitimate outside the UN or AU framework, it would be in the interest of the stability of the global and regional peace and security system painstakingly assembled over the last six decades that preference be given to forcible intervention within the institutional framework of the UN and AU. In order to demonstrate that forcible humanitarian intervention remains a serious policy option, the study shows that the other possible options of intervention are not appropriate in the particular circumstances of Darfur.

This contribution is divided into five parts. This introductory part examines the Darfur crisis, the nature of human rights violations taking place in Darfur, the international response and sets out the conceptual parameters of the 'responsibility to protect' and 'humanitarian intervention'. The second part examines the legal and policy objections to humanitarian intervention. The legal objections revolve around the concept of state sovereignty, often cited by the GoS whenever issues of foreign intervention in Darfur are raised. The policy considerations for forcible humanitarian intervention in Darfur are also explored. In respect of legal objections, the argument is that today, the doctrine of state sovereignty must be interpreted in the context of the changing value systems of the international community, whereby sovereignty is increasingly viewed as hinging on a state's responsibility to

protect its citizens. Part Three focuses on the normative framework for the responsibility to protect civilians in Darfur while Part Four discusses the roles of the international community, particularly the UN and AU, in this regard. Part Five sums up the main conclusions and recommendations of this study.

## **The Origin and Nature of the Darfur Crisis**

Darfur is Sudan's largest region, situated on its western border with Libya, Chad and the Central African Republic. It comprises an area of approximately 250 000 square kilometres with a population of approximately 6 million people. African farmers, such as the Fur, Masalit and Zaghawa tribes predominate in Darfur. The rest of the population consists of nomadic Arab tribes.

Unrest and periodic violence in Darfur are not new. On the contrary, numerous reports identify a timeline of tension and violence in the region dating back a decade or more. Two main issues have driven the violence. First is an ethnic division between the GoS and the non-Arab African communities in Darfur, which has led the GoS to support the Arab groups in the region. Second is an age-old economic competition between the nomadic Arabized herdsmen and the sedentary farmers of the African tribes over land use and water (see, e.g. Schaeffer 2006:2).

The distrust between the government-favoured Arabs and the African communities in Darfur was exacerbated when the Sadiq El Mahdi government (1986–1989) adopted a policy of arming the Arab Bagara militias known as the *muraheleen* and using them as a counterinsurgency force against the southern-based rebels. Both the El Mahdi government and its military successors have employed these militias for almost 20 years. After taking power in a coup in 1989, the then National Islamic Front (NIF), renamed the National Congress incorporated many of the *muraheleen* into the Popular Defence Forces and paramilitaries, who have been involved in attacks against African communities in Darfur.

What is relatively new is the sharp escalation of the violence in the decade from 1997 to 2007, and its explosion in 2003. During this period, the GoS has backed the *Janjaweed* militias and related predecessors engaged in steadily more vicious attacks on local villages. These attacks have spurred local militants to organize their own armed rebel groups, notably the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM).

The clash entered a new phase when the rebel groups attacked a police station in 2002 and burned government garrisons in early 2003. The SLA and the JEM accused the GoS of decades of maligning, neglecting and oppressing black Africans in favour of Arabs. They also demanded that the GoS address perceived political marginalization, socio-economic neglect and discrimination towards African Darfurians.

The GoS, heavily committed militarily in the war in the south allegedly decided to sponsor the *Janjaweed* to respond to the rebellion. With active government support the militia have attacked villages, systematically targeting civilian communities that share the same ethnicity with the rebel groups; killing, looting, displacing and polluting water supplies (Undombana 2006:1154; Report of the International Commission of Inquiry on Darfur, 2005:par 50).

The culpability of the GoS arises from the overwhelming evidence that the GoS is responsible for recruiting, arming and participating in joint attacks with militia forces that have become the main instrument for attacks on, and the displacement of, the civilian population. It is hard to know the total mortality during the two years of ethnic cleansing in Darfur. The current estimates of the number of deaths during the two years range from 200 000 to 500 000.<sup>4</sup>

Today, prospects for an imminent end to the atrocities in Darfur remain bleak. The GoS has neither improved protection for civilians nor ended the impunity for crimes against humanity enjoyed by its own officials and allied militia leaders. The international response so far has failed to stop the killings, protect civilians or ensure accountability.

Despite a ceasefire agreement and other agreements brokered and monitored by the AU between the GoS and the rebel groups, the GoS-backed militia continue in their offensive bombing civilians and rebel targets especially in South Darfur. Bombings of villages by government have also been recently reported. AU-sponsored peace talks between the parties have made little progress.

After lengthy negotiations, the GoS consented to the deployment of 1 200 AU troops in Darfur by the end of 2004 with a mandate to observe the ceasefire, report on violations only, and protect civilians whom they encounter under imminent threat and in the immediate vicinity, within their resources and capability, all predicated on the understanding that the protection of civilians is the responsibility of the GoS.

Although this number has risen to 7 000 over time, logistics and their ability to implement their mandate have been major problems associated with the AU peacekeepers, despite significant United States (US) and European Union (EU) funding. Even the contingent of 7 000 troops is inadequate for a large and remote area such as Darfur. In the face of overwhelming evidence, the GoS is unable or unwilling to protect its own citizens. At the beginning of 2007, debate on whether Khartoum would accept a joint UN/AU peacekeeping force to take over the role of the fledgling AU peacekeeping contingent still persisted. Despite Sudanese President Omar Bashir's December 2007 letter to then UN Secretary-General Kofi Annan to the effect that the GoS would accept the combined UN/AU force, analysts have warned that the letter might have been a time-buying tactic by Khartoum to use the exit of Annan as a basis of commencing fresh negotiations with his successor Ban Ki-Moon.<sup>5</sup>

### **The responsibility to protect**

Although there have been other attempts to redefine the concept of sovereignty and the place of forcible intervention in a country where gross and systematic human rights violations are taking place, it is the 2001 *Responsibility to Protect* Report of the International Commission on Intervention and State Sovereignty (ICISS, 2001) that broke new normative ground on this matter. The report proposed a reconceptualization of sovereignty – as responsibility rather than only a right. According to the report, sovereign states have the primary responsibility to protect their people from avoidable catastrophe, but when they are unable or unwilling to do so, that responsibility must be borne by the wider community of states.

ICISS (2001a:xi) suggested that the *responsibility to protect* embraced three particular responsibilities. First, the 'responsibility to prevent' entails a duty to address the root causes and direct causes of internal conflicts and other man-made catastrophes. Second, the 'responsibility to react': to respond to situations of serious humanitarian crises with appropriate measures, which may include coercive measures such as sanctions and international protection, and in extreme cases military intervention. Third, the 'responsibility to rebuild': to provide, particularly after a military intervention, full assistance with recovery, reconstruction with reconciliation, addressing the causes of the humanitarian crisis the intervention was designed to halt or avert.

The core tenet of the *Responsibility to Protect* is that sovereignty entails responsibility. Each state has the primary responsibility to protect its citizens,

but if the state is unable or unwilling to carry out that responsibility, the right and the responsibility to protect fall on the international community. The responsibility to protect framework is anchored in a comprehensive approach to humanitarian crises, framing intervention as a continuum from diplomatic to economic sanctions through to military intervention as a last resort. Furthermore, it incorporates the 'responsibility to prevent' and the 'responsibility to rebuild' as essential elements on either side of intervention.

A summation of the findings of the *Responsibility to Protect* may be in terms of the report's capturing of the core principles and the foundations of the responsibility. The core principles of the responsibility to protect, according to the ICISS, report are twofold. First, state sovereignty implies responsibility and the primary responsibility for the protection of its people's lies with the state itself. Second, when a population is suffering serious harm as a result of internal war, insurgency repression or state failure, and the state in question is unwilling or unable to halt or arrest it, the principle of non-intervention yields to the responsibility to protect (ICISS 2001a:xi).

The foundations of the responsibility to protect civilians as a guiding principle of the international community lie in the obligation inherent in the concept of state sovereignty itself; the responsibility of the UN Security Council under article 24 of the UN Charter to maintain international peace and security; specific legal obligations under human rights, human protection declarations, covenants and treaties, international humanitarian law and national law; and, developing state practice, and the practice of regional organizations and the UN Security Council itself (ICISS 2001a:xi).

The framework of the *Responsibility to Protect* is of the utmost relevance to the Darfur crisis. Darfur presents a splendid example of a government that is 'unable or unwilling' to protect its citizens, but also tragically, an international community that is equally unable or unwilling' to take on the default sovereign responsibility that the *Responsibility to Protect* envisages. More importantly, the *Responsibility to Protect* essentially endorses the legality and legitimacy of humanitarian intervention, a doctrine whose normative status has remained fraught with uncertainties over the years.

However, the *Responsibility to Protect* cautiously avoids endorsing the term *humanitarian intervention*, citing policy challenges, preferring instead to talk merely of 'intervention' or 'military intervention for human rights protection purposes' (ICISS 2001a:9). The ICISS's choice of terms is appreciable, given the controversy that has surrounded the express use of the term 'humanitarian' when referring to military use of force.

In justifying this approach, ICISS first notes and appreciates the long history as well as the wide and popular use of the term *humanitarian intervention*. It also appreciates the term's descriptive usefulness in clearly focusing attention on one particular category of intervention, namely, that undertaken for the stated purpose of protecting and assisting people at risk. However, the ICISS avoids using the term *humanitarian* (although ostensibly referring to the same doctrine), upholding the strong opposition that has always emanated from humanitarian agencies, organizations and workers to what they perceive as the militarization of the term 'humanitarian' – whatever the motives of those engaging in the intervention. (ICISS 2001a:9).

In the view of the present study, there is a significant doctrinal convergence between 'humanitarian intervention' and the 'responsibility to protect'. The ICISS's deliberate effort to explain terminology and the commission's coining of the term 'responsibility to protect' are useful in so far as conceptual clarification is always an important aspect, especially when dealing with fairly controversial subject matter.

Another point of convergence between the ICISS findings and the approach of the present study regarding the understanding of humanitarian intervention, lies in the preference of the term 'responsibility to protect' instead of the classical phrase *the right to intervene*. It is critical to see humanitarian intervention or intervention for human rights protection purposes as a duty or responsibility rather than a right. This is because human rights law creates a duty to protect, promote and fulfil fundamental rights. This duty is primarily on the state where the infraction occurs and in the event of failure by that state to guarantee the rights, the duty shifts to the international community of states acting, for example, through international human rights monitoring mechanisms, or through armed force by intergovernmental organizations in rare circumstances of serious violations of human rights, as is argued in this study. Since the intent of humanitarian intervention is to protect human rights, it is not conceivable that states have 'rights' in international human rights law. Instead, the general view is that states have duties or obligations.

The ICISS Report gives three other reasons for avoiding the 'right to intervene' approach. First, the approach focuses attention on the claims, rights and prerogatives of the potentially intervening states much more so than the on the urgent needs of the beneficiaries of the action. Two, by focusing narrowly on the act of intervention, the traditional language does not adequately take into account the need for either prior preventive effort or follow-up assistance, both of which have been neglected in practice. Seen

in this light, the responsibility to ‘react’ and the responsibility to ‘rebuild’ components are essential normative contributions of the *Responsibility to Protect* in the intervention debate. Third, the classical language effectively operates to trump sovereignty with intervention at the outset of the debate, thus ‘loading’ the dice in favour of intervention before the argument had even begun, by tending to label and de-legitimize dissent as anti-humanitarianism. (ICISS 2001a:16)

Furthermore, the ICISS justifies the responsibility to protect concept as one that provides

- (a) link between intervention and sovereignty by acknowledging that primarily, the responsibility to protect lies in the state, and only where the states defaults in this responsibility will the international community be involved.
- (b) Conceptual, normative and operational linkages between assistance, intervention and reconstruction by providing not just the responsibility to react, but to also prevent and to rebuild.

## The Doctrine of Humanitarian Intervention

### *Different definitions*

Two broad categories of the definitions of *humanitarian intervention* exist: the traditional (classical, narrow) and the liberal (wider) definitions. These approaches provide answers to two questions – who may intervene and what are the means of intervention?

With respect to the entities entitled to intervene, classical definitions ascribe the right or duty of humanitarian intervention to states only. Of this persuasion, Teson (1988:5) defines *humanitarian intervention* thus: ‘[It is] the proportionate transboundary help, including forcible help, *provided by governments* to individuals in another state who are being denied their basic human rights and who themselves would be rationally willing to revolt against their oppressive government’ (emphasis added).

The liberal definitions encompass humanitarian activities by entities other than states. A good example of activities viewed by some as constituting humanitarian intervention is the administration of relief supplies by international organizations. Understood in this sense, humanitarian intervention becomes any humanitarian action by any international agency or authority, as long as a



humanitarian impulse is the sole authoritative basis for the action in question (Kwakwa 1994:9–15; Harriss 1995; Reisman 1997:432).

In this study, the narrow definition is preferred; one that restricts humanitarian intervention to the use of force by states. Thus, activities of relief organization and other non-forcible actions that may ostensibly be carried out on humanitarian grounds are not within the purview of this study.

### ***The nature of the act of intervention***

The classical view of the nature of an act of intervention is that the intervention has to involve the use of force. Even within this school of thought, some writers such as Verwey (1986:57–59) confine the concept of humanitarian intervention to those protective activities that involve the use of military force. Others, while agreeing that humanitarian intervention involves coercive and forcible measures, argue that the intervention may be carried out not only through military action, but also through non-forcible means such as political or economic pressure. For instance, the ICISS report recognizes the controversy surrounding the potential scope of activities that may be included in humanitarian intervention, including military intervention (Verwey 1986:75; Farer 1991:185).

In contrast, liberal definitions view any form of intervention as humanitarian, as long as the purpose of the intervention is to protect human rights in the target state. Of this leaning, Kwakwa (1994:9–15) argues that humanitarian intervention may take various forms, ranging from ‘very mild and non-violent means’ such as ‘public criticisms and persuasion, direct satellite broadcasting, the financing of political parties, to forcible means [involving] the use military instruments’ (see also Kwakwa 1994:11–12; ICISS 2001:16).<sup>6</sup>

In line with the approach in this study of adopting a narrow definition, humanitarian intervention refers to the use of military force. Non-military measures, such as economic sanctions and attachment of conditions to donor funding, fall outside the scope of humanitarian intervention understood in the narrow sense.

### ***The aim of intervention***

The aim of humanitarian intervention is to forestall, limit or halt large-scale human rights violations leading or likely to lead to massive loss of

life in the target state. In their work, Franck and Rodley (1973:305), and Baxter (1973:53) have, for instance, justified humanitarian intervention by arbitrary treatment of citizens that exceeds the 'limits of reason and justice' and 'egregious violations of human rights' in the target state. Indeed, the rights violated should be the 'core' or 'fundamental' rights, those which, in terms of major human rights instruments and state constitutions, are 'non-derogable'.<sup>7</sup> Because international instruments on socio-economic rights do not contain derogation clauses,<sup>8</sup> nor do derogation clauses in national Bills of rights prohibit the suspension of socio-economic rights, many writers take the position that humanitarian intervention is a response to widespread and gross violations of 'core' or 'fundamental' civil and political rights, on a scale at which genocide, war crimes or crimes against humanity can be inferred. See for instance, Verwey (1986:58–59); Teson (1988:5); and Charney (1999: 1245–1246) as well as other commentators who agree that humanitarian intervention should respond to genocide, war crimes and crimes against humanity. However, it is arguable that violations of socio-economic rights of a magnitude that leads or is likely to lead to 'massive loss of lives' may warrant humanitarian intervention. For instance, extensive inaccessibility to food by the population in the case of famine or other natural disasters, or lack of basic health care resulting or likely to result in widespread deaths.

### ***Humanitarian intervention distinguished from related concepts***

Humanitarian intervention differs from related concepts, such as *humanitarian action*, *humanitarian operations* or *humanitarian assistance*.<sup>9</sup> As elaborated, according to the Academic Council on the United Nations System (ACUNS) (2001:par 4), humanitarian action or operations reflect a whole spectrum of humanitarian responses to conflict and crisis situations, and many of those responses may not necessarily involve the use of force. ACUNS (2001:40) regards humanitarian assistance as the act of providing aid to the government or population of a state, in order to alleviate human suffering. The assistance may be in the form of famine relief, disaster relief, sanctuary of refugees or providing for the population's needs for food, shelter and health care (Kwakwa 1994:15; ACUNS 2001:16).<sup>10</sup> Although in all the cases presented by these concepts the reason for intervening is that the lives of large groups of people are threatened, there are great differences in the manner of intervention and in the legal grounds on which such intervention is, or could be, based (see Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law (2000:6).

Humanitarian intervention also differs from intervention based on other aims such as the need to protect nationals abroad, to restore democracy or to assist an oppressed people to achieve self-determination. These aims relate to the distinct concepts of *rescuing nationals abroad*,<sup>11</sup> *self-determination*<sup>12</sup> and *pro-democratic intervention* (see Damrosch 1993:97).<sup>13</sup>

Equally, humanitarian intervention differs from *intervention with the consent* of the legitimate government of the target state given on *ad hoc* basis or by treaty. (Barrie 1999:46, 2000:89–90; and Chigara 2000:64. The only condition would be that the government that responds to such a request for assistance would have to satisfy itself that its response is proper and will have to accept that its actions will come under the close scrutiny of the international community<sup>14</sup> (Barrie 2000:94).

Individual or collective self-defence, which is lawful under the UN Charter, differs from humanitarian intervention (articles 51 and 52). The International Court of Justice (ICJ) accepted in the *Nicaragua* case that self-defence could justify action that would otherwise constitute unlawful intervention (ICJ 1986:14 par 193).

Humanitarian intervention also differs from the related concepts of *peacemaking*, *peacekeeping* and *peace enforcement*. Conceptually, peacekeeping entails the prevention, containment, moderation and termination of hostilities between or within states through the medium of a peaceful third party intervention, organized and directed internationally, using multinational forces of soldiers, police and civilians to restore and maintain peace (Dieh 1989:487; Keith 2000:5). Peacekeeping, unlike humanitarian intervention, is not intended to defeat the aggressor. Instead, it is aimed at preventing fighting, providing a buffer, keeping order and maintaining a ceasefire (Bennett 1991:140).

### ***Treaty- and customary law-based humanitarian intervention***

The source of authority for the Security Council when authorizing the use of force is the UN Charter. Considering that the UN Charter is a treaty, and that force is authorized to address a humanitarian crisis involving large-scale human rights violations, such use of force can be termed *treaty-based or institutionally authorized humanitarian intervention*. This study explores the possibility of treaty-based humanitarian intervention under the auspices of the UN Security Council. In addition, it examines if humanitarian intervention can take place on the basis of the UN Charter, but outside the Security

Council framework – in particular, the role of the UN General Assembly and of regional organizations are examined.

In terms of articles 52 and 53 of the UN Charter, the powers of the Security Council to authorize the use of force are shared with regional organizations such as the AU, and with sub-regional organizations such as the Economic Community of West African States (ECOWAS). As long as regional and sub-regional organizations authorize the use of force in compliance with article 53 of the UN Charter, that is, with the approval of the Security Council, then their action has a clear legal (treaty) basis. If the resolutions authorizing forcible interventions also consistently use terms such as ‘humanitarian crisis’, ‘humanitarian emergency’, ‘gross human rights violations’ or ‘massive loss of lives’, then such use of force amounts to UN Charter-based humanitarian intervention under the auspices of the regional or sub-regional organization, as the case may be. In addition, where forcible intervention by a regional or sub-regional organization is based not explicitly on article 53 of the UN Charter, but on a specific ‘statute’ of the intervening organization,<sup>15</sup> it is plausible to argue that such intervention amounts to statutorily based humanitarian intervention at the regional or sub-regional level.

Treaty-based humanitarian intervention is distinguishable from humanitarian intervention based on customary international law (‘unauthorized’ humanitarian intervention). In the latter case, what ought to be established is that a residual law can be found in custom, over and above law deriving from treaty or other form of statute, which allows a state or states to intervene in others where there are gross human rights violations leading to massive loss of life. In order to establish such a custom, which must exist independently of treaty provisions, two elements must be satisfied: (1) state practice (*usus*) and (2) *opinio juris*, that is, the requirement that the state practice must have arisen from the belief by those states that humanitarian intervention is a requirement of the law, and not of moral, political or ethical propriety.<sup>16</sup>

### **The scope of ‘intervention’ in the present study**

This study proceeds on the premise that on the whole, whether one talks of the ‘responsibility to protect’ or ‘humanitarian intervention’, the substantive issues, as well as the legal and policy questions arising from those issues, remain essentially the same. In this vein, the present study agrees with the ICISS’s (2001a:11) observation in the *Responsibility to Protect* that language – and the concepts that lie behind particular choices of words – does not become a barrier to dealing with the real issues.

As such, in discussing the conceptual contours and application of humanitarian intervention and the responsibility to protect in Darfur, it is important to clarify that one is essentially concerned with forcible intervention against the state or its leaders, without its or their consent for purposes of preempting or halting gross and systematic human rights violations perpetrated by the authorities of the target state or some other persons or groups. The forcible intervention may be military in nature, but it may also include other coercive interventionist measures such as the imposition of sanctions or criminal prosecutions; as well as an array of preventative and post-military intervention activities.



## PART TWO

# ADDRESSING THE LEGAL AND POLICY OBJECTIONS TO HUMANITARIAN INTERVENTION

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International lawyers and policy makers, being interested in the legality of all international state pursuits, are particularly concerned with the legal basis for humanitarian intervention. Thus, some have seen the doctrine of humanitarian intervention as illegal and unacceptable in international law. The objections to a legal endorsement of humanitarian intervention are embedded in two categories of issues, namely legal and policy. The legal objections introduced in the preceding part and discussed further in the current part (arguments indeed raised by the GoS) are that humanitarian intervention violates the cardinal principle of state sovereignty, and contravenes the ancillary norms of non-intervention and non-use of force.

As noted, the *Responsibility to Protect* concludes that state sovereignty today entails state responsibility to protect and that the default right and responsibility to protect fall on the international community. In line with this framework, this section highlights the dilemma of the competing interests of humanity *vis-à-vis* the need to adhere to traditional paradigms that constitute basic international law. Ultimately, the study attempts to answer the question of whether, if at all, the international community acting in concert may exercise this right or duty, and if such a right or duty exists, how and by whom it may be exercised. This part sets the stage for the discussion, in the subsequent parts, of the normative and institutional framework for intervention in Darfur.

In discussing these issues, the study endorses the position taken in the *Responsibility to Protect* to caution that in discussing humanitarian intervention, what is at stake is not making the world safe for big powers or trampling on the sovereign rights of small states, but it is delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to help them (ICISS 2001a:11).

### **The Legal Objections to Humanitarian Intervention: State Sovereignty and its Corollaries**

The legal objections to humanitarian intervention revolve around the question of state sovereignty (which relates to the idea of independence

and non-intervention in internal affairs)<sup>17</sup> because the defining feature of the modern international system is the division of the world into sovereign states (Abiew 1999:23). Most of the basic norms, rules and practices of international relations have thus rested on the premise of the autonomy and sovereignty of the state (Brownlie 1998:287; Chigara 2000:62; Kritsiotis 1998:1008–1013).<sup>18</sup> Also, the contemporary system of international relations is built on the assumption that the nation state is the primary actor in international life.

The right to be independent assumes the right of state autonomy in issues pertaining to its internal affairs and the carrying out of its external relations.<sup>19</sup> Judge Max Huber gave a classic definition of sovereignty in the *Island of Palmas* case in 1928, stating that '[s]overeignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.'<sup>20</sup>

State sovereignty has found expression in numerous international documents, both universal<sup>21</sup> as well as regional,<sup>22</sup> which principles have recently been reaffirmed by the 1993 Montevideo Convention on the Rights and Duties of States (165 LNTS 19, article 8), which declared that 'no state has a right to intervene in the internal and external affairs of another'.

Of most relevance, the UN Charter itself states that the organization (UN) is founded on, *inter alia*, the principle of sovereign equality of its members (article 2(1)), and affirms the principle of equal rights and self-determination of peoples (article 1(2)), both of which are a corollary of every state's right to sovereignty, territorial integrity and independence that the sovereignty and non-intervention rules seek to advance. Article 2(7) of the charter specifies that nothing in the Charter authorizes intervention in matters that are 'essentially within the jurisdiction of any state'.

Those who view humanitarian intervention as being illegal argue that military intervention is a deviation from the internationally acknowledged norm of non-intervention. Despite increasingly liberal attitudes towards intervention, state sovereignty remains a crucial underpinning of international law, as exemplified by the worldwide reaction to Iraq's forcible annexation of Kuwait (Otte and Dorman 1995:197). Those who share this view find that humanitarian intervention is an assault on state sovereignty.

Legally, humanitarian intervention has also been challenged on the ground that it violates article 2(4) of the UN Charter, which for some scholars indicates a total and complete prohibition of force in international relations, save for the exceptions expressly mentioned in the UN Charter itself. According to



Schachter (1991:65), a lawyer's view of the UN Charter and practice reveals only five legal categories for the use of force. These are:

1. Armed force as an enforcement measure taken by the Security Council under Part VII, particularly article 42
2. Individual and collective self-defence in accordance with article 51
3. Enforcement measures under regional arrangements or by regional agencies under article 53
4. Peacekeeping forces of the UN authorized by the Security Council or General Assembly and deployed with the consent of the state concerned
5. Joint action by the five permanent members of the Security Council pursuant to article 106 of the Charter.

Ian Brownlie (1989:22), who has ruled out the possibility of finding a legal basis for humanitarian intervention under the UN Charter system and wider international law, has suggested three further categories:

1. Action against former enemy states, pursuant to article 53 and 107 of the Charter.
2. Where a single state is mandated to use force on behalf of the UN.<sup>23</sup>
3. Action within the territory of a state with the express consent of the government of that state.

As outlined, support by states for adherence to a broadly formulated principle of non-use of force and non-intervention can be found in their reading of the UN Charter and other international legal documents. In other words, the legal objections to humanitarian intervention are usually invoked more often compared than those to policy objections, which are discussed in the next part. For example, Franck and Rodley (1973:285) use legal criteria to conclude that 'humanitarian intervention belongs to the realm not of law but of moral choice which nations, like individuals, must make'.

### **The Dilemma in Reconciling State Sovereignty and Humanitarian Intervention**

In his speech to mark the opening of the 54th UN General Assembly in 1999, Secretary-General Kofi Annan presented the representatives of the

UN community of nations with the following dilemma, which aptly fits the Darfur question:<sup>24</sup>

To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo, but in the context of Rwanda: if in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt [Security] Council authorization, should such a coalition have stood aside and allowed the horror to unfold? To those for whom the Kosovo action heralded a new era when states and groups of states can take military action outside the established mechanisms for enforcing international law, one may ask, is there not a danger of such interventions undermining the imperfect yet resilient security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?

After analysing the competing interests exposed in the part of speech quoted above, Annan went on to suggest that the classical legal concept of state sovereignty might, however, have to yield in some circumstances to the 'sovereignty of the individual'.<sup>25</sup> He further argued that:

[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? ... [S]urely, no legal principle – not even sovereignty – can ever shield crimes against humanity ... Armed intervention must always remain the option of last resort, but in the face of mass murder, it is an option that cannot be relinquished. (SG/SM/7136 GA/9596).

The dilemma outlined by the Secretary-General in his speech can be broadly summed up as that of competing normative values in international law. The basic question is: what deserves priority, the emphasis on preventing the use of force between states and maintaining stable relations between them or 'humanity' – the protection of citizen's fundamental rights? The relationship between these two interests, that is, of sovereignty versus humanity, is complicated and fraught with contradictions that defy easy solutions.

The one view considers any infringement of the ban on the use or threat of force, as laid down in article 2(4) of the UN Charter, as a fundamental

violation of the constitution of the international state community which results in grave implications for international peace and security. These implications may be occasioned, for instance, if intervention without a Security Council mandate results in the permanent members of the council distancing themselves from the intervention and the international order enshrined in the UN Charter, giving rise to dangerous tension and insecurity (see Advisory Council on International Affairs and Advisory Committee on Issues of Public International law (2000:8)).

The second view emphasizes the need to uphold the 'principles of humanity'. Here, universal respect for human rights is also seen as a precondition for a stable international order, as an aspect of the 'constitution of the international community'. According to this line of reasoning, international failure to take action against large-scale violations of human rights such as those in Darfur is not only wrongful – because, for example, it violates the Genocide Convention – but also encourages repressive regimes to use or continue to use, harsh methods in order to maintain their own positions of power (see Advisory Council on International Affairs and Advisory Committee on Issues of Public International law (2000:8)). According to this view, any international order that tolerates genocide or other flagrant violations of human rights is by definition unstable, as national and international order are closely connected, and both largely derive their legitimacy and stability from their ability to protect individuals or groups against violence and arbitrary treatment (see Advisory Council on International Affairs and Advisory Committee on Issues of Public International law (2000:8)).

In international law, this dilemma has been addressed by placing a premium on the principles that protect human rights and general welfare or development of the international society in the broadest sense. Ultimately, this approach has had the effect of eroding the principle of state sovereignty in a fundamental way.

### **Addressing the Legal Objections: Erosion and Changing Nature of Sovereignty**

Notwithstanding the importance attached to sovereignty in the international legal system, developments in the last five decades or so have gradually but inevitably changed the original conception of sovereignty. The changes in the legal interpretation of the norm enshrined in article 2(7) of the UN Charter and the entire concept of state sovereignty are as a result of the fact that the material conditions under which sovereignty is exercised have

dramatically changed since 1945 (Kwakwa 1994:18). The changing face of state sovereignty is attributable to at least five factors.

First, sovereignty in the classical sense has suffered from the increasing internationalization of human rights. The tremendous increase in the corpus of human rights law in the last few decades has resulted in the removal of the question of human rights from the domain of individual sovereign states, and the fundamental rights and freedoms of the individual are now the concern of the international community as a collective.

In the opinion of the ICISS in the *Responsibility to Protect*, development and enforcement of human rights norms internationally have seen the emergence of a parallel transition from a culture of sovereign impunity to a culture of national and international accountability (ICISS 2001:14). Consequently, the significance of these developments in establishing new standards of behaviour and new methods of enforcing those standards is unquestionable.

Second, the exponential increase over the last few decades of global interdependence and interconnection, as exemplified by the concept of globalization, which favours the advancement of a single view of social, economic, political, cultural and environmental issues, has played a major role (on globalization see McCorquodale & Fairbrother 1999:736; Garcia 1999:56; UNDP 1999:2). Transformations on the world scene have greatly eroded the boundaries between national economies and world economies, which have never been as closely integrated in as many ways as it is today (Kwakwa 1994:19).

As regards this interconnectedness, particularly the serious and widespread human rights violations even in internal conflicts, the *Responsibility to Protect* observes the dwindling view in the prosperous West that intrastate warfare is simply a matter arising in distant and unimportant regions. There is no longer such a thing as a 'humanitarian catastrophe occurring in a faraway country of which we know little' (ICISS 2001:5).

This interconnectedness has been captured in the *Responsibility to Protect* in several respects.

Third, the revolutionary developments in telecommunications and technology, which are also linked to the issue of human rights, have contributed to the erosion of state sovereignty. These revolutions have eliminated the controls that governments exercised over the availability and dissemination of information. As one author has noted, satellites and television have created

an unprecedented opportunity for people to see what is happening in other countries, including human rights violations (Kwakwa 1994:20).

Fourth, the increased participation by individuals, international organizations, non-governmental organizations (NGOs) and other non-state actors in the international arena means that respect for sovereignty and jurisdictional boundaries has gradually shifted from an absolute sovereignty theory to a 'sovereignty is not that crucial' attitude (Kwakwa 1994:21). There are numerous treaties, declarations of principles and other human rights instruments that define the role of the individual on the international plane. As affirmed by various commentators (Bierly 1963:1; Shaw 1991:1; Wallace 1992:3; Dugard 2000:1), although international law has traditionally been defined as the law governing the relationship between states, this definition has been modified by developments in international law that increasingly accords individuals rights and duties and, therefore, the capacity to act on the international plane. An example of such developments in human rights law that grant individuals the right to petition international oversight bodies for human rights violations as well as those in the field of international criminal law, under which individuals, irrespective of their status,<sup>26</sup> are protected, but also bear direct responsibility for international crimes committed by them.<sup>27</sup>

The fifth factor, arguably one of the main ones, relates to the changing patterns of armed conflict. The involvement of the international community in violent conflicts and humanitarian crises has substantially increased since the end of the Cold War.<sup>28</sup> At the same time, the world security system has changed. Waning strategic importance of former superpowers has resulted in a reduction in assistance (Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law, 2000:10), leading to prolonged armed conflicts with resulting disintegration or near disintegration of weak states (see Helman & Ratner 1992/1993:5). Resorting to repressive measures in an attempt to maintain national unity is not unknown (Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law 2000:10).

Armed conflicts have also, since the end of the Cold War, lost the traditional distinction between 'intrastate' and 'inter-state' conflicts to become more of a mixed pattern (Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law 2000:10) and which often spills across ill-defined national frontiers that do not coincide with ethnic, religious or cultural boundaries.<sup>29</sup> In addition, refugee flows across borders have the impact of internationalization of a hitherto intrastate-armed conflict.

These new patterns of conflict, as aptly represented by the Darfur conflict, mean that traditional diplomatic means of intervention may not apply where whole populations are threatened with extermination by their own governments. Economic sanctions, too, have a limited effect, as their impact only becomes apparent in the long term, whereas the prevention of genocide or mass slaughter of civilians calls for rapid, decisive action (Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law 2000:10–11; see also Regan 2000:101ff). Military intervention is often the only way left to contain a catastrophe (Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law 2000:10–11; see also Regan 2000:101ff).

The effect of the erosion of the doctrine of state sovereignty on the issue of foreign intervention is that the interpretation of existing norms on sovereignty should be done in the context of the changes that have taken place since the norms on sovereignty were first crafted into the UN Charter and other instruments. Such interpretation leads one to find a legal basis for humanitarian intervention in treaty and customary international law, despite the codifications of the doctrine of state principle, which entails non-intervention and the non-use of force.

As noted, today state sovereignty is increasingly viewed from the point of view of responsibility. When a state joins a universal intergovernmental organization such as the UN, the assumption is that the state commits itself to be a responsible member of the community of nations. The treatment of that state as sovereign is conditioned on responsible action and the safeguarding of safety, lives and welfare of its citizens, and where that fails, international community steps in (see ICISS 2001a:13). As other writers, Deng (1995:208–209) and Zartman (1995:1–10) affirm, the ‘transfer’ of responsibility is premised on the ground that a state that cannot protect the basic rights of its population has forfeited its sovereignty, and the international community has a duty to re-establish it. It is argued here that humanitarian intervention is one of the ways through which the international community can re-establish sovereignty in a country such as the Sudan where large-scale violations of human rights are taking place.

The *Responsibility to Protect* therefore notes the emergent normative shift in international law and relations, entailing movement from viewing sovereignty as control to sovereignty as responsibility. As ICISS (2001a:13) has noted, sovereignty as responsibility implies that

- (a) State authorities are responsible for the functions of protecting the safety and lives of citizens and the promotion of their welfare.

- (b) The national political authorities are responsible to the citizens internally and to the international community through the UN.
- (c) The agents of the state are responsible for their actions, i.e. they are accountable for their acts or omissions.

### **Policy Objections to Humanitarian Intervention**

Within the literature, criticisms against humanitarian intervention are not solely predicated on legal principles. The line of attack also comprises a series of policy objections that have been used to argue against any formal endorsement of humanitarian intervention as a matter of principle. In this regard, see Kritsiotis (1998:1014). Although these objections in and of themselves should not be regarded as a substitute *modus operandi* for determining the status of humanitarian intervention in international law,<sup>30</sup> the role that such policy considerations have in the legal process cannot be denied. What is required when according significance to these considerations, as Kritsiotis (1998:1014) has noted, is moderation: 'their application and impact require balanced judgment as well as a full appreciation of the normative context in which such considerations operate'.

The balance required in this regard calls, on the one hand, for appreciation that when state practice is not definitive on a given matter – as is the case with humanitarian intervention – that policy considerations of the nature discussed in this article cannot be brushed aside, nor can they be ignored.<sup>31</sup> On the other hand, Kritsiotis (1998:1014) notes that 'these policy objections ... are neither conclusive nor sustainable grounds of objection to intervention on humanitarian grounds'. According to him, each of these objections, outlined below have themselves become deserving targets for criticism. The objections cannot be relied upon to provide a definitive answer to the difficult question of the status of humanitarian intervention in modern international law.

The most vigorous adherents of a policy of non-intervention have been the weaker states, mostly Third World states, apprehensive of severe limitation on their sovereign rights by the more powerful states in the international system.<sup>32</sup> The concerns of the countries of the Third World are buttressed by the fact that most military interventions in the last century have been by the richer countries of the North in the poorer states of the South (Kwakwa 1994:30).

The three policy objections are discussed in turn.

### ***Humanitarian intervention is prone to abuse and is selectively applied***

Like those scholars who view humanitarian intervention as illegal in international law, Kritsiotis (1998:1020) has argued that its practice enhances 'opportunities for abusive use of force, the long-term effect of which is to bring the international normative system into disrepute'. According to Franck and Rodley (1973:284), humanitarian intervention is unacceptable, since its advocates would not be able to 'devise a means which is both conceptually and instrumentally credible to separate the few sheep of legitimate humanitarian intervention from the herds of goats which can too easily slip through'. If humanitarian intervention were accepted, states would then, to use Falk's (1959:167) words, embark on 'heroic missions' to save and protect what they deem persecuted populations, but would, in actual fact, only use the cover of altruism to use force to realize alternative and suspect ambitions.

Abuse of the process, according to Henkin (1972:96), thrives partly because 'humanitarian reasons are easy to fabricate'. Consequently, history has shown that 'every case of intervention has been justified on some kind of humanitarian ground'. Elsewhere, Henkin (1979:145 as cited in Kritsiotis, 1998:1021) has argued that should humanitarian intervention be liberally tolerated in law, there would be a flood of interventions, considering that violations of human rights are indeed all too common. In essence, it would almost be a potential situation of every state intervening in every other.

Furthermore, Kritsiotis (1998:1026) has argued that if humanitarian intervention is accorded recognition in law, it 'would introduce endless opportunities for the selective use of force in cases of humanitarian need and this in turn would endanger the crucial kinship between international law and the rule of law' (see also Brownlie (1989:25–26)). Also linked to the abuse of humanitarian argument is the proposition that states are unlikely, if ever, to engage their forces in authentic altruistic interventions. This view sees the preparedness of states to act as being, more often than not, based on self-interest, making the so-called right or duty of humanitarian intervention nothing more than a lingering, even self-contradictory, legal convenience.<sup>33</sup> Indeed, while not clearly articulated, the GoS's objection to the deployment of UN peacekeepers, arguing that there are hidden motives behind it in particular suggesting that it is a ploy by the West to colonize the Sudan, seems to fit this specific policy objection.



This objection to humanitarian intervention can be replied to by pointing out that it presupposes a 'puritan' criterion for assessing the innermost motivation of action rather than taking the legal reasoning that states advance. The problem with the approach that emphasizes the primacy of motives is, as observed by Wheeler (2000:38) that it 'takes the intervening state as the referent object for analysis rather than the victims who are rescued as a consequence of the use of force'. He is of the view that the motives of the intervener should not be given primacy, unless it can be shown that the motives for the intervention are inconsistent with a positive humanitarian outcome. Teson (1988:106–108) rightly challenges the motives-first approach, arguing that this approach is predicated on a flawed methodology. He suggests that the true test is whether the intervention has put an end to human rights deprivations. It follows that on occasions where political expediency coincides with the existence of humanitarian grounds for intervention, as was the case in the Vietnamese intervention in Cambodia, it could be taken that the ingredients of humanitarian intervention have been satisfied.

### ***Humanitarian intervention has short-term complications and lacks long-term benefits***

Opponents of humanitarian intervention such as Kwakwa (1994:31) also argue that intervention is easier said than done; it is invariably much easier to get in than it is to get out. The Somalia intervention lends credence to this argument. Kwakwa (1994:31) suggests a further opposition to humanitarian intervention: it only raises the levels of violence in the short run, and makes reconciliation of the parties more difficult in the long run. To Weiss (1994:62), the use of outside military forces for humanitarian intervention also makes the task of the affected country's own civilian authorities more difficult to manage. The debacle of the Somalia intervention aptly illustrates this point. The GoS has lamely advanced a related argument, noting that deployment UN forces will complicate ongoing peace initiatives, which it is keen to pursue.

The problem with this objection to humanitarian intervention is that it suggests that humanitarian intervention should not be endorsed simply because it may complicate the situation in the target state. However, the objection fails to recognize that the use of force, whether for the purposes of protecting nationals abroad or for self-determination would result in complications. Despite these complications, international law still recognizes these grounds for the use of force because of the utilitarian purpose that they serve.

### ***A 'humanitarian war' is a contradiction in terms***

To some (Douzinas 2000:129–141; Roberts 2000:32), an armed conflict and its consequences – bombing and maiming people – cannot be instruments of protecting human rights. Douzinas (2000:130–131) for instance, argues that a destructive war is by definition a devastating negation of human rights, and is regarded as 'humanitarian' because 'human rights have been hijacked by governments, politicians and diplomats, and entrusted in the hands of those against whom they were invented'. Citing North Atlantic Treaty Organization (NATO) intervention in Kosovo, which, although regarded as successful in so far as there were no NATO casualties, was nevertheless a huge failure because of the many civilians that were killed in the course of the bombing. (Sideropoulos 2001:xi). The Independent Commission on Kosovo (2000:97) has argued that the mission was partially successful.

The claim that 'humanitarian intervention' is a contradiction in terms views humanitarian intervention in terms of the collateral damage it may cause. While it is true that humanitarian intervention may lead to accidental casualties, the intervention is still humanitarian if one considers that it ends up saving lives; often more lives than those lost as a result of the intervention.

**PART THREE**  
**THE NORMATIVE FRAMEWORK**  
**FOR THE RESPONSIBILITY TO**  
**PROTECT CIVILIANS IN DARFUR**

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**The Framework Principles for the ‘Responsibility to Protect’**

***The Place of normative clarity***

The relevance of the *Responsibility to Protect* framework arises from the fact that interventions for the protection of civilians are likely to continue to occur in the foreseeable future, especially in Africa. This is so because instances of gross violations of human rights continue to occur, especially in the context of internal armed conflicts. (Zacklin 2001:924). One of the likely consequences of such humanitarian interventions is that the future of the post-Cold War legal order will entail a further ‘softening’ of the view of the traditional positivist and absolute view regarding the use of force under the UN Charter. The UN’s increasing involvement in peacekeeping missions worldwide bares testimony to this. Given that interventions are likely to continue occurring, guidelines aimed at limiting the potential abuse of the noble ideals of undertaking the responsibility to protect need to be developed (see *Report of the Secretary-General on the Work of the Organization* UN GA, 54th Session, 4th Plenary Meeting 1; UN Document A/54/PV4 (1999); Charney (1999:1243); Lillich (1967:357–35); Cassese (1999:21)).

Rules and criteria for intervention would serve a number of purposes, some of which are outlined by the Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law (2000:28):

- Clarify the minimum conditions to be satisfied by the intervening states
- Help to structure the deliberations within the UN Security Council and General Assembly on specific instances of intervention
- Provide the UN community of nations with a basis for assessing instances of unauthorized humanitarian intervention that have already taken place and for tolerating them in appropriate cases, provided that ‘legitimacy considerations’ sufficiently account for further development of the law relating to humanitarian intervention, as it offers a starting point for

gaining international acceptance for a separate legal ground justifying humanitarian intervention not based on statute (in which humanitarian necessity prevails over the law banning the use of force).

A set of comprehensible standards would provide for predictability, despite the *ad hoc* nature of humanitarian interventions. While identifying criteria for justifiable intervention does not resolve the problem of deciding automatically whether a particular case has satisfied these tests, it, however, establishes a common reference within which argumentation can take place (Wheeler 2000:33).

### ***The core argument in the International Commission on Intervention and State Security report and its relevance to Darfur***

This section highlights the core principles of the ICISS report, *The Responsibility to Protect*, and their relevance to the situation in Darfur. That report is arguably the most progressive attempt to reconcile the conflicting paradigms of state sovereignty and forcible intervention to protect civilians. *The Responsibility to Protect* (ICISS 2001a:xi) highlights two basic principles. First, state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies in the state itself. Second, where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unable or unwilling to halt or avert it, the principles of state sovereignty and non-intervention yields to the international community's responsibility to protect.

The first of these principles echoes (without formally acknowledging) arguments put forth by Francis M. Deng, the UN Secretary-General's Representative on Internally Displaced Persons, namely that a sovereign state's responsibility and accountability to both domestic and external constituencies must be affirmed as interconnected principles of the national and international order. At the very least that means providing for the basic needs of its people. When states fail to discharge this responsibility and refuse to call for help even under those circumstances, the international community can be expected to step in to provide remedies (ICISS 2001a:xi).

The *Responsibility to Protect* has placed the notion of sovereignty as responsibility squarely in the global debate over the efficacy of forcible humanitarian intervention. The second principle is bold and definitive. Although the report acknowledges that the primary responsibility to protect

lies with the state concerned, it recognizes the duty of the international community to protect people when the state is unable, unwilling, or is the main vehicle of oppression.

The case of Darfur, it is contended, presents a splendid case for the invocation of the *Responsibility to Protect*. The GoS has failed in its responsibility to protect civilians in Darfur in supporting and failing to disarm the *Janjaweed*, or otherwise halt the widespread human rights violations in Darfur. For that reason, the GoS may not hide under the cloak of sovereignty to forestall the deployment of UN peacekeeping forces or even a peace enforcement contingent. So as to avoid a repeat of Rwanda, and to uphold the international rule of law and the values upon which modern civilization is established, the GoS must be compelled to yield for international intervention to stop the atrocities. It is therefore important to look in more detail, into some of the substantive and procedural aspects of such international intervention.

### ***The broad criteria for intervention***

Using the normative framework in the *Responsibility to Protect Report*, this section discusses four broad criteria for humanitarian intervention, posed as four questions, and incorporating both the substantive and procedural requirements for justified humanitarian intervention. These are as follows:

- Which states should be allowed to intervene?
- When should the intervention be allowed?
- What conditions have to be met during the intervention?
- When and how must the intervention end?<sup>34</sup>

However, two overarching criteria are discussed first. The one regards the primacy of preventive measures and the other concerns the primary role of the Security Council in the use of force in international relations.

Preventative measures would fall into the category of what the ICISS report calls the *Responsibility to Prevent*. In this regard, the *Responsibility to Protect* (ICISS 2001a:xi) points out two issues related to priority in intervention. First, prevention is the single most important dimension of the responsibility to protect. Preventative options should always be exhausted before intervention is contemplated. Second, the exercise of the responsibility to prevent and react should always involve less intrusive and coercive measures before more intrusive and coercive ones are considered.

The *Responsibility to Protect* discusses an array of preventative approaches, including early warning analysis; dealing with the root causes as well as direct preventative measures. (ICISS 2001a:20–27). The direct preventative measures may take the form of express political or diplomatic interventions; economic interventions (both positive and negative inducements; offers for mediation, arbitration or adjudication; or even preventative military interventions such as deploying a preventive UN force as happened in Macedonia).

As observed in Part One the *Responsibility to Protect* entails three duties: (1) responsibility to prevent; (2) ‘responsibility to react’; and (3) the ‘responsibility to rebuild’. The situation in Darfur being far beyond the issue of prevention, only the principles relating to the *Responsibility to React* and the concomitant *Responsibility to Rebuild* are feasible at this juncture.

Under the UN Charter (in terms of articles 2(4), 24 and 25), the Security Council has the primary authority to sanction the use of force. Therefore, in order to uphold the international rule of law, the use of force should be primarily reserved for the UN Security Council. Given that states’ obligations under the UN Charter override those under any other treaty (in terms of article 103 UN Charter), the inability of the Security Council to fulfil this primary function because of disagreement among members, or because one or more of the permanent members exercises its veto, must be clearly established before humanitarian intervention is carried out outside the UN framework. (Zacklin 2001:939).

In the case of Darfur, both the UN and the AU have taken action concurrently. While the AU has deployed a peacekeeping force in Darfur since 2004, only in September 2006 did the UN pass a resolution to deploy UN peacekeepers to take over the mandate of the AU forces, though failing consent from the CoS, this is yet to go forward.

Without such consent, it follows, as is argued in this study, that the only avenue left is forcible humanitarian intervention. It is unlikely that the UN Security Council can come to a unanimous agreement to use force to save lives in Darfur, leaving the onus of such intervention squarely on the AU, subject to other considerations of a substantive and procedural nature as discussed in this section.

### **Which States Should be Allowed to Intervene?**

The protection of a broadly interpreted right to life belongs to the category of *obligationes erga omnes*, that is, obligations in whose fulfilment all states

are deemed to have a legal interest. (Charney 1999:1232) The obligations are not upon an individual state acting alone. This implies that at international law, collective, and not unilateral use of force, is envisaged, except if an individual state is acting in self-defence. Thus Falk (1968:339) has written that '[t]he renunciation of [unilateral] interventions does not substitute a policy of non-intervention, it involves the development of some form of collective intervention.'

For as long as the norm of humanitarian intervention is neither clearly articulated nor universally endorsed, collective interventions – either by the UN or by a regional organization or even a coalition of states – will remain the most legitimate form of intervention. For this reason, preference should be given to humanitarian intervention by a group of states acting under the auspices of an intergovernmental organization. The checks and balances contained in these guidelines for humanitarian intervention are more likely to be effective in an institutional context than when the humanitarian intervention is undertaken by an individual state.

According to the *Responsibility to Protect*, it is preferable for the involvement of the countries in the region in humanitarian intervention, since it is these countries that, in practice, are capable of intervening or providing essential logistical support in good time. Going by the experience of the AU peacekeeping in Darfur, it is unlikely that African states can forcibly intervene effectively, unless such intervention is funded and logistically backed by the more equipped Western countries. This could be done if the AU entered into collaboration with the UN pursuant to Part VIII of the UN Charter.

States taking part in humanitarian intervention should be party to universal and regional instruments for the protection of human rights. In addition to ratification of, or accession to, human rights treaties, states should have a record of stability and respect for the rule of law and fundamental human rights. Also, the intervening states should not themselves be in any way involved in the massive violations of human rights that the intervention is designed to combat. This will enhance the integrity of the intervening states as well as their disinterestedness.

It follows that if the AU decides to authorize a few states to intervene on its behalf in Darfur, then the selection of the states to intervene should be guided by the above criteria. Finally, the organization itself should be neutral and should not be seen to support the government of the target state or any insurgents or other group therein.

## When Should Intervention be Allowed?

The *Responsibility to Protect* also grapples with the question of defining the type of circumstances that should trigger humanitarian intervention. In defining these circumstances, this study is guided by the definition of *humanitarian intervention* adopted here. The situation must be grave, one in which fundamental human rights are being, or are likely to be, seriously violated on a large scale and there is an urgent need for intervention. This means that there should be a just cause, which to Wheeler (2000:34) is a 'supreme humanitarian emergency' or in terms of the Independent Commission on Kosovo (2000:193), 'severe violations of international human rights and humanitarian law.'

Given that this is prone to subjective interpretation, it is our view that it is not the number of people killed or tortured that defines these circumstances (see also Wheeler, 2000:34). Instead, the intervening states should be required to make a convincing case that the violations of human rights within the target state have reached such a magnitude that, according to Walzer (1978:152), they 'shock the conscience of humanity.' Wheeler (2000:34) has stated that generally, 'a supreme humanitarian emergency exists when the only hope of saving lives depends on the outsiders coming to the rescue'.

The *Responsibility to Protect* (ICISS 2001a:31) proposes two sets of circumstances in which the responsibility to protect, particularly the responsibility to react, could be invoked, namely where there is:

- (a) [L]arge-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- (b) [L]arge-scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, force expulsion, acts of terror or rape.

There must be proof of clear and publicly available evidence that international crimes of grave proportions, preferably amounting to the crimes of genocide, war crimes or crimes against humanity, are being committed or are about to be committed in the target state. (Charney 1999:1245). However, the lack of 'official' evidence should not be used as an excuse for not intervening on humanitarian grounds. Prior to the 1994 Rwanda genocide, for example, several warnings were issued to the UN of the imminent crisis, and NGOs and media reports could have attested to the escalating violence (see Prunier 1995:Part 7 generally). According to Prunier (1995:Part 7), these signals were



initially dismissed, with the assertion that there was insufficient evidence to predict or forestall the genocide.

The recommendation in the *Responsibility to Protect* (ICISS 2001a:35) is that credible evidence could come from reports of highly respected and impartial NGOs, such as the International Committee of the Red Cross (ICRC); from UN organs and agencies such as the High Commissioner for Human Rights or for Refugees; from specific independent fact-finding missions dispatched by the UN Security Council or the Secretary-General; or occasionally from the media.

The Commission of Inquiry on Darfur (see UN Security Council Resolution 1564) found that although it was legally difficult to establish that genocide was being committed in Darfur, there was overwhelming evidence of the commission of war crimes and crimes against humanity. Numerous other reports by governmental and no-governmental agencies have concurred with these findings, with some even finding evidence of genocide. It follows therefore that the commission of any of the above crimes in Darfur (i.e., war crimes, crimes against humanity or genocide) warrants forcible humanitarian intervention.

The role of the target government (in this case the GoS) is important. The legitimate government of the country may be perpetrating the violations (e.g. Iraq and Kosovo), may acquiesce in them (e.g. East Timor) or may be unable to control grave and systematic violations perpetrated by non-state actors (e.g. Somalia). What must be proved is the 'failure' or 'collapse' of the target state, which entails the complete breakdown of governance, law and order.<sup>35</sup> On the strength of evidence, the first two scenarios are applicable to Darfur. Being in control of the situation in Darfur, the GoS cannot be said to be unable to stop the atrocities, neither has it sought assistance from other states, save to permit the AU force.

It should also be established that the internationally recognized government is unable or unwilling to provide the victims with appropriate protection from the violations. The fact that authorities are willing but unable to uphold the rule of law and also prevent large-scale violations of human rights has been identified by the UN Secretary-General as one of the factors that the Security Council should consider when reaching a decision on the subject (see Report of the SG to the SC on the Protection of Civilians in Armed Conflict, S/1999/957, par 40).

Where any form of government or other authority is totally absent, the requisite consent required under international law for entry of troops

cannot be validly granted (see generally Helman & Ratner 1992–1993). Zacklin (2001:938) suggests that if violations of human rights are as a result of a breakdown in the organs of the state, it must be ascertained that the governmental authorities are incapable of ending these violations or additionally it failed or refused to appeal to third states or international organizations for assistance, and it refuses them access to its territory.

Zacklin (2001:939) adds that the military operation must be humanitarian, that is, aimed at preventing or ending the humanitarian emergency involving the gross violations of human rights referred to. The intervening state should also show that it has exhausted all the non-military means of action against the state that is violating the human rights, without success (see Independent Commission on Kosovo, 2000:194). These non-military means may include attempts to end the humanitarian crisis with the support from civil society in the target state, efforts through regional or other international organizations responsible for monitoring the upholding of human rights, negotiations and non-forcible countermeasures such as sanctions.

Certain procedural requirements regarding exhaustion of peaceful remedies and the use of force as a last resort, but which should be reconciled with the need for speedy action to address a humanitarian emergency are applicable. First, an appropriate call to the target state to end the gross and systematic violations of human rights either by itself or with the assistance of other states or intergovernmental organizations (Charney 1999:1247). Second, a final warning on a show of failure or unwillingness to comply within a reasonably short period so that an eventual military intervention is not rendered useless (Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law 2000:30). Intervention before exhausting all peaceful means may need to be conditioned upon an undertaking to be held liable for damages if it is thereafter established that the intervention was not justified. In the case of Darfur, all indications point to the absence of a desire to heed warnings or do something to stop ongoing atrocities.

### **Which Conditions Have to Be Met During the Intervention?**

A number of substantive and procedural criteria must also be met during the actual intervention. These relate to the concept of proportionality, the respect for international humanitarian law, compliance with the purposes of the UN and with those of the intervening intergovernmental organization.

## ***Proportionality***

Humanitarian intervention must be proportional to the gravity of the situation. This largely concerns purpose and means of the intervention. While the intervention is being undertaken, it must be limited in scope to actions necessary and proportionate to the objectives of halting gross and systematic violations of human rights.

According to Rodley (1992:37), the principle of proportionality requires ‘that the gravity and extent of the violations be on a level commensurate with the reasonably calculable loss of life, destruction of property [and] expenditure of resources’. Intervening states should eschew the use of force if it will lead to a worsening of the situation. It is likely that the very act of humanitarian intervention may itself constitute a threat to international peace and security where the violations of human rights or their consequences do not constitute such a threat (Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law 2000:31).

The impact of the humanitarian intervention on the national structure of the target country must be limited to what is necessary in order to attain the humanitarian objective. This may, nevertheless, mean that the intervention is designed to the structure of a state and forms of authority in order to ensure that human rights are upheld in the future (e.g. through fair elections).

As regards proportionality, the *Responsibility to Protect* (ICISS 2001a:37) observes that the ‘scale, duration and intensity of the planned military intervention should be the minimum to secure the humanitarian objective in question’. That implies that the means have to be commensurate with the ends, and in line with the magnitude of the original provocation.

## ***Respect for international humanitarian law***

The rules of international humanitarian law should apply during any instance of humanitarian intervention. In this regard, the Geneva Conventions of 1949, which enjoy near universal ratification (188 states), form part of customary international law and must be complied with whether or not a state is a party to them (Schindler 1999; Wembou 1997:685ff). If the intervention is carried out by states that are not party to the additional protocols of 1977, the rules of customary international law in the field of international humanitarian law should be adhered to.<sup>36</sup>

Violation of international humanitarian law may entitle the target state not only to invoke article 51 of the UN Charter, but also to sue for damages. If humanitarian intervention takes place without UN Security Council authorization, the states involved should agree to be subject to the jurisdiction of the ICJ. The intervening state should be ready to be sued by any directly harmed state for possible violations of international law (Charney, 1999:1247). Similarly, individual military personnel should be prepared to be subject to relevant criminal jurisdictions, including the International Criminal Court (ICC).

### ***Compliance with the purposes of the UN or intervening intergovernmental organization***

The intervention must not contravene the purposes of the UN, including preservation of the territorial integrity and political independence of the target state. The purpose of the military intervention should be limited exclusively to alleviating the widespread gross violations of human rights. It should not seek to enforce any other objectives that are not directly associated with the humanitarian purpose of the intervention. Throughout the humanitarian intervention process, the UN Security Council should supervise the intervening states at all stages. The purposes and governing principles of the intervening intergovernmental organization should be respected. The same should govern those who seek to restore the rule of law.

### **When and How Must the Humanitarian Intervention End?**

The intervening states must undertake in advance to suspend the humanitarian intervention as soon as the state concerned is willing and able to end the large-scale violations of human rights itself, or when the Security Council or a regional intergovernmental organization with the authorization of the Security Council takes enforcement measures involving the use of force for the same humanitarian purposes. (Zacklin 2001:939).

The intervening states should also end the intervention when its objective, namely the cessation of the violations of human rights, has been attained. The intervention must not be ended prematurely, and the conditions for a post-conflict peace-building process must be in place including the installation of an effective government and law and order in place (Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law 2001:32).

Once a humanitarian intervention has been undertaken, the onus is on the international community – or at least those states supportive of the intervention – to ensure the bare minimum conditions in the target state to forestall any foreseeable perpetration of gross and systematic violations of human rights. Such post-war reconstruction almost necessarily includes a funding commitment, armed or unarmed presence of neutral monitors, provision of resources to both state and non-state actors to establish necessary institutions to sustain the target state.



## PART FOUR

# RETHINKING THE ROLE OF THE UNITED NATIONS AND THE AFRICAN UNION IN DARFUR

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Although the discussion on the criteria for intervention may refer to the role of states, it should be borne in mind that it is envisaged that this role will be exercised in the context of intergovernmental organizations. As pointed out in Part One, this study argues for preference of collective over unilateral intervention. In line with the principle of 'burden sharing', it is also preferred that regional or sub-regional intergovernmental organizations engaging in intervention should do so under the overall supervision of the UN Security Council. The present section also looks at the various ways in which the existing institutional framework within intergovernmental organizations can be reformed or improved to enable these organizations to play a more effective role in humanitarian intervention.

The Darfur crisis does not represent the first time the international community and the UN, particularly the UN, have failed to respond quickly to a humanitarian crisis. In the recent past Bosnia, Cambodia and Rwanda stand out as cases of serious human rights violations. The usual approach by the UN of deliberating endlessly while atrocities continue seems to be repeating itself in Darfur. One fears that should there be an intervention, it would come after most violations have occurred with the added difficulty of tracing perpetrators and mounting trials.

### **Legal Basis and Menu for United Nations Intervention in Darfur**

The UN Charter is the legal authority that allows any intervention in Darfur-like situations. As noted already, the Security Council has the primary responsibility for the maintenance of international peace and security. Parts VI and VII of the UN Charter, which relate to coercive measures respectively, are the two important Parts of the UN Charter are relevant in this regard.

### ***Peaceful measures, including deployment of peacekeeping forces***

Under Part VI, the Charter authorizes the Security Council to investigate disputes that may disrupt international peace and security and recommend appropriate

procedures to resolve them. If the council ascertains that a conflict is a threat to international peace, it has the legal authority to do all that is possible to mitigate the conflict. In this regard, it may formulate diplomatic strategies addressing potential incentives, goals and motivations, followed by steps to mediate the conflict.

The peaceful interventions may take the form of hortatory actions (declarations issued through resolutions and statements), negotiations and peacekeeping to oversee peace agreements. There have been a number of UN Security Council resolutions on Darfur, notably resolution 1556 and resolution 1564, both of 2005. In each of these resolutions, there is, in particular, an insistence on the GoS to disarm the *Janjaweed* militia to arrest the people responsible, and to bring to justice their leaders. And in each of these resolutions, the Security Council also expresses its intention to consider other actions, including measures under article 41 of the UN Charter, namely sanctions.

Peaceful methods do not seem to be working or workable in Darfur. While hortatory actions taken on Darfur have been useful in laying out the actual situation for the international community and place a global focus on the crisis, they have not gone further than that. Rather than take effective measures, Sudan has come out defensively.

Although negotiations are usually vital in resolving various conflicts such as that in Darfur, which are rooted in economic tensions and competition over scarce resources, one cannot rely solely on these peaceful measures to end the atrocities given the elevated levels of conflict and hence the absence of a conducive environment.

The success of *peacekeeping* missions is equally in doubt. The aims of the AU peacekeeping mission of the prevention of fighting, provision of a buffer, the keeping of order and the maintenance of a ceasefire seems to have failed given the frequent outbreaks of fighting and one-sided attacks by the GoS and its agents on civilians (Bennett 1991:140). Although the government authorized the intervention by the African Mission in Sudan (AMIS), levels of tolerance have thinned. Effectiveness of civilian protection is further hampered by other logistical difficulties, including a limited number of ill-equipped troops over vast territory. Worse still, the GoS has refused to consent to the deployment of 20 000 UN peacekeeping troops authorized by a UN Security Council Resolution on 30 August 2006.

### **Forcible measures under Part VII: feasible?**

In cases where peaceful measures are not feasible, Part VII of the UN Charter authorizes the UN Security Council to apply coercive measures of intervention.



Article 39 allows the council to ascertain ‘any threat to the peace, breach to the peace, or act of aggression’, and to decide measures to be taken under article 41 and 42 ‘to maintain or restore international peace and security’.

In discharging this mandate, the council has proved willing, especially in the 1990s, to interpret its powers under Part VII of the charter broadly. As a result, it has come to view not only the use of force between states, but also large-scale violations of human rights as threats to international peace and security justifying armed intervention (see Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law 2000:34). Interventions in Iraq, the former Yugoslavia, Liberia, Somalia, Sierra Leone and other countries have been so justified.

While an international dimension is almost always important, nowadays the council sees internal conflicts with large-scale humanitarian implications as threats to international peace and security in their own right, thus giving a broad interpretation of article 39 of the UN Charter.<sup>37</sup> The operation in Somalia was the first in which the Security Council had authorized intervention in an internal conflict on the basis of Part VII of the UN Charter (Resolution S/794 of 1992). Part VII interventions in Rwanda (1994)<sup>38</sup> and in Haiti (1994)<sup>39</sup> were similarly justified.

By emphasizing the unique nature of the circumstances surrounding each of these three operations, the Security Council, perhaps, hoped to avoid creating precedents, whereby it may be obliged to intervene in every internal conflict. However, the more often the Council invokes ‘exceptional circumstances’, the less easily it can maintain that its decision is incidental.<sup>40</sup> Such justifications may not be necessary in the Sudan, where the conflict, while ‘centred’ in Darfur has assumed regional proportions through cross-border movement of refugees and ‘exportation’ of violence.

The question to be asked is whether there is sufficient interest by economically powerful states in Sudan. While the answer to the question is in the affirmative (considering Sudan’s vast oil resources), the same interest of economically powerful states is likely to be the genesis of the lack of Security Council consensus on Chapter VII dealing with forcible intervention. China has been the main problem, showing more concern for protecting its lucrative oil contracts in Sudan – China is Sudan’s largest oil investor – than for protecting hundreds of thousands of lives in Darfur.

Russia, protecting its own valuable arms sales to Khartoum, has seconded this cold-hearted unresponsiveness. These veto-carrying UN Security Council

members have opposed not only any UN intervention, but even targeted sanctions on, for example Sudan's oil industry; travel bans; seizure of the assets of the government's ringleaders in the Darfur massacres; or an arms embargo on the GoS. Other members have opposed tougher measures, arguing that too much pressure on the GoS would have threatened the pace process with Southern Sudan. This prompted the US to tone down Security Council proposals, which then predictably turned into rather weak resolutions.

## Prosecution

As regards the Darfur crisis, a viable policy option would be to pursue the international prosecution of the perpetrators of the most heinous international crimes in that region. The GoS has done nothing to bring the perpetrators to book. Sudanese presidential inquiry into human rights atrocities in Darfur in December 2005 disputed evidence of widespread and systematic abuses, and instead of prosecution, recommended the formation of a committee. Yet the UN Commission of Inquiry on Darfur confirmed that the GoS in its counterinsurgency has committed heinous human rights violations against the civilian population. It established clear links between the Sudanese state machinery and the *Janjaweed* militias, and stated that militias had received supplies distributed to the militias by the army and by senior civilian authorities at the local level.

On 5 March 2005, the UN Security Council passed Resolution 1593 empowering the Prosecutor of the ICC to investigate grave crimes allegedly committed in Western Darfur. This resolution is historic for being the first UN Security Council referral since the Rome Statute came into force in 2002.

The Darfur referral is significant in many aspects. Resolution 1593 is a tacit recognition of the ICC by the US and China – their abstentions notwithstanding; and such recognition is a vital step towards giving the ICC the legitimacy it needs to achieve true universality. The referral is also a big step towards restoring real peace in Sudan. Prosecuting the perpetrators of the Darfur mayhem and making reparations to victims are essential for victims to come to terms with their loss.

The referral also has the potential of deterring vigilante justice, at present and in the future. It will discourage those who would want to seek revenge and take justice in their own hands. Resorting to the ICC is the most reasonable and potentially effective option for ensuring justice over Darfur

as the investigation and prosecution in Sudan of persons enjoying authority and prestige in the country and wielding control over the state apparatus is difficult or even impossible.

## **The Role of the African Union**

### ***From the Organization of African Unity to the African Union: normative shift?***

The AU Act clearly departs from the regime of the Organization of African Unity (OAU) Charter in the area of human rights.<sup>41</sup> The importance of human rights was sparingly recognized under the OAU Charter by reference to the UN Charter and to the Universal Declaration of Human Rights (UDHR), but further established through the adoption of the African Charter on Human and Peoples' Rights in 1981.

The AU Act confirms growing attachment to the importance of human rights in Africa by providing that it shall be the objective of the AU to 'encourage international co-operation, taking due account of the [UN Charter] and the UDHR' (article 3(e)). The Act provides that the AU shall strive to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments' (article 3(h)). The principles of the AU include, *inter alia*, 'promotion of gender equality, respect for democratic principles, human rights the rule of law and good governance' (article 4(m)) as well as 'respect for the sanctity of human life' (article 4(o)).

In order to achieve its human rights-related objectives, the AU has incorporated the OAU human rights organs into the AU framework: the 1993 Mechanism on Conflict Prevention, Management and Resolution as an organ of the AU;<sup>42</sup> the African Commission on Human and Peoples' Rights;<sup>43</sup> and the African Committee of Experts on the Rights of the Child<sup>44</sup> both incorporated into the AU framework a year later.<sup>45</sup>

### ***Relationship between the African Union and the United Nations Security Council***

The attitude taken by the OAU regarding the requirements of article 53 of the UN Charter seems to have been adopted at the formation of the

AU. Article 4(h) of the AU Constitutive Act empowers the Assembly of Heads of State and Government to intervene in a member state to preempt or halt the commission of war crimes, genocide and crimes against humanity. Neither article 4(h), nor the rest of the provisions of the AU Constitutive Act, subject this power of the Assembly to the supervision of the Security Council (see Abass & Baderin 2000:18; Magliveras & Naldi 2002:418–419).

Rather than avoid clarifying the issue of the relationship between the AU and the UN Security Council with regard to the maintenance of international peace and security, this issue should be clearly addressed. It is especially desirable that the UN Security Council retains primacy in the any military interventions, pursuant to its charter-sanctioned powers. However, in the event that the UN Security Council defaults in discharging its mandate, it should be permissible for the AU to authorize military intervention.

The protocol requires the African Union Peace and Security Council (AUPSC) to co-operate with the UNSC and with 'other relevant organizations' in the maintenance of peace and security in Africa (article 17(1)). It is a welcome development that the Protocol Relating to the Establishment of the Peace and Security Council of the African Union calls for establishment of a co-operative working relationship between the AU, the UN and other intergovernmental organizations in matters related to peace and security in Africa (article 17).

### ***Basis for intervention under the AU Constitutive Act***

The OAU Secretary-General stated in 2001 that the AU was designed to be a new institution, completely different from the OAU.<sup>46</sup> Although only time will tell whether or not the AU will be more effective than its predecessor, it is noteworthy that the provisions of the AU Constitutive Act, especially those concerning intervention, radically depart from those of the OAU Charter. The Constitutive Act contains a number of general provisions on collective security, which envisage an interventionist organization.

The provisions state that the AU shall 'promote peace, security and stability on the continent' (article 3(f)) and function in accordance with the principles of the 'establishment of a common defence policy for the African Continent' (article 4(d)), the right of member states 'to live in peace and security' (article 4(i)), and the right of any member state of the AU 'to request intervention from the [AU] in order to restore peace and security'(article 4(j)).

A cursory evaluation of the above provisions prompts an impression that they contradict the customary international law principle of non-intervention, which also forms part of the AU Constitutive Act (see articles 4(g) and 4(f)). Article 4(g) enshrines the non-intervention principle, stating that the AU shall function according to the principle of ‘non-interference by any member state in the internal affairs of another’. One may argue that this provision completely negates those discussed in the previous paragraph.

However, a closer examination of the wording of article 4(f) reveals otherwise. The AU provision differs fundamentally from its UN Charter ‘equivalent’ contained in article 2(7) of the UN Charter, which provides, *inter alia*, that ‘[no]thing contained in the present Charter shall authori[s]e *the [UN]* to intervene in matters which are essentially within the domestic jurisdiction of any state’ (emphasis added).

The UN Charter provision above is addressed to the UN acting as such, and not to the member states. In contrast, article 4(f) of the AU Constitutive Act is directed at member states, by requiring that no member state should interfere in the ‘internal affairs of another’. Thus it is argued that article 4(f) does not have the same effect as article 2(7), because the former provision does not restrain the AU from intervening in the internal affairs of individual states.

Article 4(h) is of prime relevance to the question of humanitarian intervention. It gives the AU the ‘right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’. Being couched in terms of a ‘right’, it means that the AU Assembly will have the discretion to decide whether or not to intervene. The consent of the target state will not be required. It would have been better if the provision required the AU to intervene as a matter of ‘duty’, because a sense of obligation to intervene is more likely to move the AU into action. Nevertheless, the provision raises at least two general legal issues, which are discussed below.

First, a question might arise whether or not article 4(h) of the AU Constitutive Act is in conflict with article 2(4) of the UN Charter, which states that ‘[a]ll members [of the UN] shall refrain in their international relations 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 UN’.<sup>47</sup>

It may be argued that the above provision precludes any consent that African states have given the AU to intervene in their internal affairs. In such a situation, then article 4(h) would be void for incompatibility with article 2(4),

which is regarded as *jus cogens*. A number of writers share this view (see, e.g., Schatcher 1985; Charney 1999; Abass & Baderin 2002). Such a view would be strengthened by the fact that the UN Charter provides that obligations of member states under the UN Charter supersede their obligations under any other treaty (article 103). Furthermore, the Vienna Convention on the Law of Treaties (article 53) provides that '[a] treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law.'

A response to such a concern would be that the kind of force prohibited by article 2(4) of the UN Charter is that which is 'against the territorial integrity or political independence of states'. Intervention under article 4(h) of the AU Constitutive Act would not be against the territorial integrity or political independence of the African states that are members of the AU. Had the provision been designed to allow such interference, the member states would not have agreed to allow the provision in the Act. The provision in article 4(h) presumes prior consent by every member state of the AU to the effect that the union is allowed to intervene in their respective territories. A recent study by Abass and Baderin (2002:18) adopts this reasoning, and argues as follows:

What the AU members contracted out by giving their consent to intervention by the AU is the principle of 'non-intervention' ... By ratifying the AU Act, African states must be understood to have agreed that the AU can intervene in their affairs accordingly. In empowering the [AU] to that effect under article 4(h), the states must be taken to have conceded a quantum of their legal and political sovereignty to the [AU].

Furthermore, article 4(h) of the Constitutive Act does not clarify who determines when the AU should intervene and by what means. Of course, the article is quite clear that it is the AU Assembly of Heads of State and Government that will make a decision for intervention. The means of intervention are not stated, but considering that the intervention under this provision will be responding to 'grave circumstances', which are specified as 'war crimes, genocide and crimes against humanity,' one may plausibly presume that the intervention will be by use of armed force. War crimes, genocide and crimes against humanity are most likely to be committed in the context of armed conflicts. Therefore, only proportional use of armed force is likely to address these 'grave circumstances.'

It must be accepted that it is the AU Assembly of Heads of State and Government that is to decide when to intervene, and that the intervention is likely to involve the use of armed force. The definition of the three major

crimes will not raise problems, as the Rome Statute enacts comprehensively in this regard.<sup>48</sup> A decision to intervene will only require an endorsement of two-thirds of the member states, and no single member of the AU has the power to veto (article 11 of the AU Act). This will ensure that no single state can control the decision-making process in respect of the operation of article 4(h) and the AU Constitutive Act in general.

The second subsidiary issue arising from the above concern is that the AU Constitutive Act does not envisage the AU's supervision by the UN Security Council, yet the UN Charter (article 24) provides that the UN Security Council has 'primary responsibility' concerning the maintenance of international peace and security. Indeed, the UNSC in exercising its primary responsibility has the mandate to supervise the AU, which is a regional arrangement within the meaning of article 52 of the UN Charter. Under such supervision, the AU would be bound by article 53 of the UN Charter, which states as follows:

The Security Council shall, where appropriate, utili[s]e such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies *without the authorization of the Security Council ...* (emphasis added)

The above provision restrains all activities of regional organizations with regard to the use of force, unless the Security Council has authorized such action. Yet, the AU Constitutive Act in article 4(h) purports to authorize the AU to intervene without the authority of the UN Security Council. This may imply that the AU considers that it will not be expedient to wait for UN Security Council authorization before responding to situations of war crimes, genocide and crimes against humanity.

The omission by the AU Constitutive Act of the UN Security Council supervision requirement can only be interpreted as being deliberate. Only one year before the AU Constitutive Act was adopted, the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA) Declaration of the OAU had expressly recognized that 'the *primary* responsibility for the maintenance of international peace and security [was] with the [UN] Security Council [but] the OAU in close co-operation with the [UN] and [sub-regional intergovernmental organizations], remains the *premier* organization for promoting security, stability, development and co-operation in *Africa*' (see AHG/Decl 4 (XXXVI), principle 4(g)). In this declaration, the 'primacy' of the UN Security Council in matters of international peace and security was recognized, although even then, the

framers carefully added that the OAU remained the ‘premier’ organization for the same purpose when it comes to the OAU’s region of competence – Africa. AU forceful intervention in Darfur need not receive UN Security Council authorization and supervision.

An approach similar to that of the AU had been taken in the past. ECOWAS intervened in Liberia and in Sierra Leone in 1990, and 1997 respectively, without the authority of the Security Council. In both cases, ECOWAS authorities invoked the doctrine of humanitarian intervention, as well as the provisions of the Protocol on Mutual Assistance and Defence (see *West Africa* 4–10 February 1991:140; *West Africa* 2–8 March 1992 210; Kufuor 1993:529). ECOWAS is likely to continue with this trend under the provisions of the 1999 Mechanism for Conflict Prevention, Management and Resolution. Similarly, the UN Security Council did not authorize NATO’s use of force in Kosovo.

This tendency arises from the fact that the UN Security Council’s bureaucratic procedures and selectivity cannot guarantee a quick response in cases of gross human rights violations. Furthermore, the Security Council has either ignored some conflicts or has shown discrepant standards in those conflicts to which it has responded. The case of Liberia is cited by commentators such as Weller (1994:Foreword, ix) as an example where the UN Security Council first declined to intervene then intervened only after ECOWAS had done so. An argument may thus be made that where the UN Security Council refuses to intervene in a crisis of a UN member state, this frees the concerned regional arrangement or agency to undertake whatever actions it deems necessary (Abass & Baderin 2002:24).

It is fundamental to note that it is likely that the norm of humanitarian intervention may be espoused by further enactments by the AU in the future. This is so because of the fundamental difference between the contents of article 3 and that of article 4 of the AU Constitutive Act. The provisions of the former article are expressed, as ‘objectives’ while those of the latter are ‘principles’. Maluwa (2000:201) has stated that ‘principles’ form the main process by which the OAU embarked on lawmaking. This trend is likely to continue under the new dispensation of the AU.

### ***The Protocol Relating to the Establishment of the Peace and Security Council***

The Protocol Relating to the Establishment of the Peace and Security Council of the AU presents a bold normative and institutional framework and may be



a relevant source of authority for humanitarian intervention in Darfur. The protocol (article 22(1)) establishes the AUPSC to take over the work of the OAU Mechanism for Conflict Prevention, Management and Resolution.

The objectives of the AUPSC (article 3(b)) include the anticipating and pre-empting of armed conflicts, and the attendant massive violations of fundamental human rights. It will also aim to promote democratic practices, good governance, the rule of law, human rights, the respect for the sanctity of human life and international humanitarian law (article 3(f)).

Among the principles governing the Peace and Security Council is the principle in article 4(h) of the AU Constitutive Act, by which the AU may intervene pursuant to a decision of the Assembly of Heads of State and Government, in member state in respect of genocide, war crimes and crimes against humanity (article 4(j)). Also, the functions of the Council shall include, *inter alia*, 'intervention, pursuant to article 4(h) of the [AU Constitutive Act]' (article 6(d)).

In order to enable the AUPSC to perform this and other responsibilities, the protocol (article 13(j)) provides for the establishment of the African Standby Force, composed of standby contingents 'for rapid deployment at appropriate notice. Such standby contingents shall be established by member states of the AU, in terms of 'standard operating procedures' of the AU (article 13(j)). It appears from these provisions that the African Standby Force shall be an *ad hoc* force, constituted as needs arise. The functions of the African Standby Force shall include 'intervention in member state in respect of grave circumstances ... in order to restore peace and security, in accordance with article 4(h) [of the AU Constitutive Act]' (article 13 3(c)).

The protocol clarifies at least three issues that the AU Constitutive Act has left open for interpretation. First, as stated earlier, the Constitutive Act is silent on who determines when the 'grave circumstances' justifying intervention in a state, and by what means the intervention is to be carried out. The protocol (article 7(e)) provides that the AUPSC will have the power to recommend to the AU Assembly of Heads of State and Government, intervention pursuant to article 4(h) of the AU Constitutive Act in respect of 'war crimes, genocide and crimes against humanity as defined in relevant international conventions and instruments.

Concerning the means of intervention under article 4(h) of the AU Constitutive Act, I argued earlier that the use of force is envisaged. This position is supported by the provision of the protocol (article 13(1)) requiring

the establishment of an African Standby Force with both ‘military and civilian contingents’ for purposes of ‘rapid deployment at appropriate notice’. Second, the observation is made in the discussion of article 4(h) of the AU Constitutive Act that neither the provision nor the rest of the Constitutive Act clarifies the relationship between the AU and the UN when it comes to issues touching on international peace and security. The conclusion is drawn that the drafters of the Constitutive Act deliberately left out any definition of this relationship, in order to ensure that the AU can act in emergency cases of the ‘grave circumstances’ and the attendant massive violations of fundamental rights. The protocol appears to discount this assumption by detailing out how the AUPSC will work together with the UN Security Council.

In its preamble (par 4), the protocol recognizes the ‘provisions of the Charter of the [UN], conferring on the Security Council primary responsibility for the maintenance of international peace and security’. It also takes cognisance of the ‘provisions of the [UN] Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer co-operation and partnership between the [UN], other international organizations and the [AU], in the promotion and maintenance of international peace ... [and] ... security in Africa’ (Preamble par 4).

Also, the AUPSC shall be guided by ‘the principles of the AU Constitutive Act, those of the *UN Charter*, and the Universal Declaration of Human Rights’ (article 4 of the Protocol, emphasis added). The AUPSC also has power to ‘promote and develop a strong partnership for peace and security between the [AU] and the [UN] and its agencies ...’ (article 7). Furthermore, the AUPSC is enjoined by the protocol to ‘co-operate and work closely.

It is interesting to note that there exists an internal contradiction regarding the provisions of the protocol on the relationship between the AUPSC and the UNSC. The protocol (article 16(1)) states that the AU ‘has the *primary* responsibility for promoting peace, security and stability *in Africa*’ (emphasis added).

Despite the elaborate provisions by the protocol recognising the primacy of the UN Security Council in the promotion of international peace and security, that primacy only relates to peace and security in other parts of the world. Within Africa, the protocol adopts the position taken the AU Constitutive Act – that of according the AU the primary role in matters of international peace and security, including the use of force in the maintenance thereof. This argument is supported by the fact that the protocol does not provide anywhere that the AUPSC or the AU Assembly of Heads

of State and Government will require the authorization of the UN Security Council before engaging in humanitarian intervention under article 4(h) of the AU Constitutive Act.

The third and final issue in respect of the AU Constitutive Act, which the protocol clarifies relates to the relationship between the AUPSC and the African Commission on Human and Peoples' Rights. The protocol (article 19) provides that the AUPSC 'shall seek close co-operation' with the Commission in all matters relevant to the mandate of the Council.

The commission is obliged under the protocol to bring to the attention of the council 'any information relevant to the objectives of the [Council]' (article 19). These provisions are likely to 'give teeth' to the commission's mandate under article 58 of the African Charter on Human and Peoples' Rights, by which it may bring to the attention of the Council situations of gross and systematic violations of human rights. Information provided by the commission under the protocol may be a basis of a recommendation by the council to the AU Assembly for humanitarian intervention under article 4(h) of the AU Constitutive Act.

Finally, it is noteworthy that the role of eminent personalities who were prominent in the functioning of the AU has also been recognized in the protocol. A 'Panel of the Wise' is established with the mandate to 'advise the [AUPSC] and the Chairperson of the [AU] Commission on all issues pertaining to the promotion and maintenance of peace, security and stability in Africa' (article 11(1)). The Panel of the Wise is to be composed of 'five highly respected African personalities from various segments of society who have made outstanding contribution to the cause of peace, security and development on the continent' (article 11(2)).

The advice of the Panel of the Wise is likely to be heeded by the AU mechanism for conflict prevention, management and resolution, and the personal intervention of the panel in situations of armed conflicts where massive violations of fundamental human rights are taking place may succeed in reconciling the warring parties, given Africa's respect for elders. The provision made for the panel is an important development, as it will ensure that the use of force will only be resorted to if the panel's mediation, conciliation and other peaceful methods of intervention have failed.

The analysis of the provisions of the AU Constitutive Act led to the conclusion that it represents a major normative and institutional departure from that contained in the OAU regime. The AU Constitutive Act, unlike the OAU Charter, has an express provision mandating it to deal with human

rights issues in member states. This suggests that human rights issues will not be treated as matters within the domestic jurisdiction of AU member states.

Article 4(h) of the Constitutive Act provides for treaty-based humanitarian intervention as defined in this study. The intervention will be exercised through the recommendations of the AUPSC to the Assembly of Heads of State and Government. The AUPSC Protocol, unlike the AU Constitutive Act, provides for the relationship between the AU and the UN Security Council relating the use of force by the AU. However, the provisions of the Act, as well as those of the AU Act, fall short of expressly requiring that the AU shall have to prior or *ex post facto* obtain authorization of the UN Security Council before engaging in the use of force under article 4(h) of the AU Act.

### ***The subsidiary role of the African Union under Part VIII of the United Nations Charter***

During the 1990s, successive UN Secretaries-General Javier Perez de Cueller, Boutros Boutros-Ghali and Kofi Annan put forward proposals for a greater contribution by regional organizations with regard to issues of conflict resolution and the maintenance of international peace and security.<sup>49</sup> The proposals demonstrate the increasing willingness of the Security Council to authorize regional and sub-regional intergovernmental organizations to carry out operations relating to the maintenance of international peace and security, sometimes at the initiative of the concerned regional or sub-regional organization.

What has been missing, though, is an outright endorsement by the Security Council permitting these organizations to venture into such operations without Council authorization. (Deen-Racsmany 2000:297). Yet, a few regional or sub-regional organizations have in the last decade or so taken the liberty of undertaking enforcement action involving the use of force without prior authorization of the Security Council. Some notable examples of such undertakings are the ECOWAS intervention in Liberia and in Sierra Leone, and the NATO military attack on Kosovo in 1999.

This section focuses on the subsidiarity debate on restructuring the operational relationship for the use of force between the UN, and regional and sub-regional intergovernmental organizations in Africa. In the search for subsidiarity, two agendas appear to be competing. (Deen-Racsmany 2000:298ff).<sup>50</sup> The first of these is based on 'burden sharing', and seeks to build a new co-operative and complementary division of labour between

the UN on the one hand and regional and sub-regional organizations on the other.

The second agenda is based on 'burden shifting' and it seeks to devolve responsibility for action to the concerned regional or sub-regional organization, without due concern for whether the capacity exists for effective response. Burden shifting appeals to Western governments that are either reluctant to commit military or civilian personnel to politically volatile and physically dangerous situations, or are unwilling to underwrite the costs of assistance in regions where their rarely defined 'national interests' do not lie. (Deen-Racsmany 2000:298).

However, this self-centred approach undermines the very aspiration on which the international community of nations is founded, and is therefore undesirable in this era of shrinking time, shrinking space and shrinking borders. Instead, burden sharing should guide the normative and institutional improvements within and outside the UN framework, recognizing that the UN lacks the capacity, resources and expertise to tackle all problems related to the maintenance of international peace and security.

In particular, burden sharing should encourage recognition of an increased role of regional and sub-regional intergovernmental organizations in humanitarian intervention. These organizations should play a prominent role in humanitarian intervention because it is the countries of the region or sub-region that are the most likely to be affected by refugee flows or other consequences of gross human rights violations. In addition, these countries are as a result of their proximity better placed to undertake fact finding before a decision to intervene is made. They are also capable of a more rapid response.

Part VIII of the UN Charter governs the role of regional and sub-regional organizations in the use of force. Under this Part, the Security Council has the 'primary responsibility for the maintenance of international peace and security' (article 24). However, regional and sub-regional organizations – which the Charter refers to as 'regional arrangements or agencies'<sup>51</sup> – may exist 'for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action' (article 52). However, such regional arrangements or agencies and their activities must, according to article 52, be consistent with the objectives of the UN.

The Security Council is obliged to utilize the regional and sub-regional organizations for actions related to the council's mandate, provided that

'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the ... Council' (article 53). The above provision contains significant ambiguities concerning the use of force by regional organizations under the auspices of the UN Charter.

First, the term 'enforcement action' employed in the UN Charter is not defined. Article 53 merely obliges the Security Council to utilize regional or sub-regional organizations in carrying out 'enforcement action' where appropriate. According to the ICJ, peacekeeping operations conducted with the purpose of the maintenance of international peace and security, and based on the consent of the parties concerned or clearly not directed against the sovereignty and territorial integrity of any state, should not be considered as enforcement measures.<sup>52</sup> This means that only action contrary to the sovereignty and territorial integrity of the target state amounts to an 'enforcement action' if the action is authorized by the UN or other intergovernmental organization. Moore (Racsmany 2000:302) argues that this argument should apply not only to measures authorized by the Security Council, but also to those sanctioned by the General Assembly in the Uniting for Peace Resolution<sup>53</sup> and to those undertaken in the context of regional and sub-regional organizations. What is not clear is the question of whether or not 'enforcement action' entails humanitarian intervention.

A second ambiguity relating to the use of force by regional or sub-regional organizations in the context of the UN Charter relates to the time when the Council authorization must be obtained. From a survey of the *travaux préparatoires*<sup>54</sup> and academic commentaries, no consensus exists on the question whether the UN Charter requires express or tacit approval of enforcement action by regional organizations and whether such approval should precede intervention or could be *ex post facto*. See for instance Wolf (1993:293) and Moore (cited in Deen-Racsmany 2000:305) who insist on prior authorization while Akehurst (1967:214) argues for a permissive interpretation of UN Charter. It has been argued that lack of condemnation (i.e., acquiescence) or express commendation of an armed intervention by the Security Council implies the council's view that the action did not require authorization, and this conduct amounts to tacit approval of the intervention (see e.g., Levitt 1998:347). Logical as this argument may be, it falls short of outlining on a theoretical basis what specific action or reaction by the Security Council would underlie tacit approval, and the criteria that may be used to assess such approval.

The third ambiguity relates to the interpretation of the formulation that action by regional arrangements or agencies must only be permitted to act

in situations that are 'appropriate for regional action' (article 53). The charter provides no clear limitation of the freedom on action specific to regional organizations, as the principle of non-intervention codified in article 2(7) deals with that norm only in the relationship between states and the UN (Deen-Racsmany 2000:308). Also, this issue has not been discussed in relation to regional organizations existing before 1945.

In spite of the ambiguities outlined above, the complementary role of regional and sub-regional intergovernmental organizations in the maintenance of peace and security in their respective areas of jurisdiction has become increasingly important, especially in Africa and in the context of *burden sharing*. With the Security Council becoming more and more keen on returning the UN's role as peacemaker in Africa, and in the presence of unending armed conflicts on the continent, it may be concluded that in the future the one glimmering sign of hope will come not from New York or Geneva, but from Addis Ababa or Lagos or from elsewhere within Africa (O'Brien 2000:60).

It is submitted that regional organizations should only surpass the UN Council when the humanitarian emergency is so grave that any delay would lead mass of loss of lives in a manner that shocks the conscience of mankind. Darfur falls in this category.

### **The Way Forward for Darfur:**

#### **A Mixture of Peaceful and Forcible Measures by the UN and AU**

Effective international intervention depends on the nature of a particular conflict. Situations that display tension indicating the potential for conflict may be addressed by peaceful Part VII measures with a view to managing the tension and thereby erasing the basis for conflict. Peaceful measures are also effective at the stage of the conflict where the fighting is of low intensity and there is a desire of the parties to end the fighting. Peaceful measures (Part VI) are not suitable in situations of large-scale war, such as in Darfur, where there is opportunity to negotiate without the danger of losing lives. Forcible measures (such as Part VII measures), in contrast, are effective in situations of large-scale war, as is the case in Darfur. Forcible military measures help bring violence under control and curtail bloodshed. However, military measures are not effective in dealing with the underlying issues that triggered the violence. It follows, therefore, that the most optimal route to take for durable peace in Darfur is one that combines forcible humanitarian intervention but with the possibility of seizing any possibility to conduct diplomacy.

In this connection, the best response by both the UN and the AU with regard to the situation in Darfur falls between diplomacy and forcible humanitarian intervention, where immediate, proactive military action is accompanied by conflict resolution. The current focus on peacekeeping is insufficient. The peacekeeping option is limited in so far as there appears to be no peace in Darfur to keep. Further, chances of bolstering the fledgling AU peacekeeping force in Darfur have been thwarted by Khartoum's firm refusal to give consent to such UN presence. The only avenue left is to pursue forcible humanitarian intervention to protect civilians in Darfur, even as the diplomacy over the GoS' consent to UN Peacekeeping and other initiatives go on.



## PART FIVE

# CONCLUSION AND KEY RECOMMENDATIONS

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### Summary

The effects of abuse of power by political leadership and authority have been particularly felt in Africa, as a result of poor accountability of some governments. One of the consequences of the abuse of power in Africa has been the problem of armed conflicts that have plagued the continent since independence and the resultant massive violations of human rights. Darfur is only the latest evidence of this very sad African legacy.

According to international law, there is a basis for forcible humanitarian intervention in Darfur. Legal objections to the recognition of the doctrine of humanitarian intervention in international law relate to the relationship between humanitarian intervention, on the one hand, and the doctrine of state sovereignty and the concomitant principles of non-intervention and non-use of force, on the other. As has been pointed out, criticisms against humanitarian intervention are not solely predicated on legal principles. The line of attack also comprises policy objections. The policy objections are that humanitarian intervention is prone to abuse and is selectively applied, that humanitarian intervention complicates the situation in the target state and that 'humanitarian intervention' is a contradiction in terms.

This study has argued that on a progressive interpretation of the UN Charter, the norms on the ban of the use of force (see article 2(4)) and non-intervention (article 2(7)) should be balanced with the charter (articles 1(3), 13, 55, 56, 62, 68 76) obligations on states to promote and protect human rights. A balance between these two sets of normative values supports the view that humanitarian intervention under the UN Charter is not unlawful.

Policy objections to humanitarian intervention have been discounted or shown to be unjustified generally and in the case of Darfur. As argued, the policy objection that humanitarian intervention is prone to be abused (the motives-first approach), which attaches primary importance to the actual reasons why states engage in humanitarian intervention is not ascribed to in this study. My argument is that the motives of the intervener should not be

accorded primacy, unless it can be shown that they are inconsistent with a positive humanitarian outcome.

As regards the argument that humanitarian intervention results in short-term complications and no long-term benefits, this study has argued that the complications that come with humanitarian intervention are common to any state pursuit, and that what is needed is to develop criteria for minimizing these complications. Finally, with regard to the contention that humanitarian intervention contradicts itself by destroying or adversely affecting lives in the guise of saving others, this study advocates for a utilitarian approach. Seen from this angle, it is plausible that on the whole, humanitarian intervention may be justified from a utilitarian perspective if it serves to save more lives than those lost incidentally during the military intervention.

In contemporary times, sovereignty must be reconciled with human rights principles. It was argued that notwithstanding its importance in international law, the concept of state sovereignty, developments in the last few decades have gradually but inevitably changed its original conception. The combined effects of the internationalization of human rights, globalization, the revolutionary developments in telecommunications and technology, the individualization of international law and emergence of new actors on the international plane, and the changing nature of armed conflicts have contributed to the erosion of the concept of state sovereignty.

Breaking from restrictive normative framework, the Constitutive Act of the AU has elaborate provisions on the protection of human rights and the promotion of peace and security in Africa (see articles 4 and 4 of the Act) including provision for military intervention to forestall or halt genocide, war crimes and crimes against humanity (article 4(h)). The AU can invoke this treaty-based sanction of humanitarian intervention to intervene in Darfur.

In pursuing a clear, consistent, transparent and consistent policy and practice of forcible humanitarian intervention, the UN needs to start by reassessing its role as an organization that strives to maintain international peace and security. So far, the UN has allowed non-legal factors to inhibit it from carrying its role and helping innocent civilians in Darfur. If the organization continues to allow these factors to determine its actions, it will lose its purpose within the international community.

This study has demonstrated that each of the forcible and non-forcible methods of intervention open to the UN and AU are subject to serious difficulties, which are nevertheless not insurmountable. These difficulties

include veto powers (UN), and logistical and financial handicaps (AU). Even if the logistical and funding issues were resolved, the AU should be wary of reliance on Western powers or on external donor funds to fund its operations, as this may compromise the organization's independence.

The AU needs to develop clear and transparent policies that describe under what circumstances it will accept donor funds in respect of a military deployment. At the same time, the policies should attempt, as far as possible, to build a firewall between the need to receive donor support for such operations, on the one hand, and undue influence on the organization's ability to execute those operations as it deems fit, on the other.

If the methods for intervention open to both the UN and AU are restricted both organizations should take steps to modify these methods so that they can be applied effectively to ongoing crises, such as the one on Darfur. With significant involvement, the UN and AU can effectively work towards ending the Darfur crisis. In particular, an integrated approach to intervention involving simultaneous forcible humanitarian intervention and peaceful measures (under Parts VI and VII respectively) is recommended.

The following are the key recommendations of this study.

## **Recommendations**

### ***The international community should stop focussing only on peacekeeping***

At the moment, the focus of the international community is on pressurizing Khartoum to allow 22 000 UN peacekeepers to join the AU peacekeeping contingent already on the ground. While this is a worthy approach, there is a need for the international community to appreciate that peacekeeping is appropriate where there is peace to keep. There is no peace to keep in Darfur. In any case the long-standing effort to have Khartoum allow UN peacekeeping could be rendered unimportant by trying to achieve peace and the rule of law in Darfur through means other than peacekeeping.

### ***There is a need for urgent forcible humanitarian intervention in Darfur; preferably authorized by the United Nations***

In order to uphold the international rule of law, the primacy of the council in matters involving the use of armed force for the maintenance of international

peace and security should be recognized. In Darfur, the council should authorize and then supervise the intervention. However, the AU should keep the UN Security Council updated on all developments relating to the intervention, until the very end of the intervention. The forcible humanitarian intervention should go hand in hand with peaceful measures (e.g. peacekeeping and negotiations). All the substantive and procedural criteria discussed in Part Three of this study should be complied with.

Operationally, it is preferable that regional or sub-regional organizations are suitable for a rapid response to a humanitarian emergency due to geographical proximity to the target state. Moreover, it is the African countries that are likely to be affected most by ongoing gross human rights violations in Darfur, for instance, through trans-border refugee flows or proliferation of illegally held arms. Indeed, African states are more likely to be interested in addressing the gross human rights violations in Darfur. The involvement of the AU in humanitarian intervention promotes effectiveness of UNSC in its functions through burden sharing.

***The United Nations and African Union should provide the framework for operationalization of the responsibility to react***

The responsibility to protect entails three duties: (1) the duty to prevent, (2) react and (3) to rebuild. At present, the opportunity to prevent has been overtaken by events. However, it is not too late to affect the responsibility to react, followed by the responsibility to rebuild. The United Nations and the African Union (the latter being the responsible regional organization) should provide the institutional framework under which the responsibility to react in order to protect civilians in Darfur is operationalized as soon as possible.

**There is need for the United Nations and the African Union to seize the ‘opportunity’ offered by the Darfur crisis to give effect to the framework of the *Responsibility to Protect* report by developing guidelines on forcible humanitarian intervention**

Although this study has taken the position in the ICISS *Responsibility to Protect* report to the effect that humanitarian intervention has a legal basis in international law, the doctrine of humanitarian intervention has no universally acceptable criteria. The criteria should prioritize preventive measures before force is actually used to pre-empt or end gross human rights violations in the target state.

Evidence of gross human rights violations leading, or likely to lead to, mass loss of life should trigger humanitarian intervention. The use of force should be proportionate and should only be sufficient to address the gross human rights violations. The intervening states should not change the political conditions in the target state, although they may be involved in necessary post-conflict reconstruction. The intervening troops should be subjected to individual criminal responsibility for violations of international humanitarian law in the target state, and their states or the intervening intergovernmental organization should be subjected to suits in the ICJ for breach of the territorial integrity of the target state. As soon as the objective of the intervention is realized, the intervening states should withdraw their troops immediately or as soon as the necessary post-conflict reconstruction is complete. The criteria should also anticipate a mixture of forcible and non-forcible measures.

***The African Union should take the lead in forcible humanitarian intervention in Darfur if the United Nations continues to act indecisively, but upon serious legal advice***

This study argues that forcible humanitarian intervention is legitimate and lawful, with or without UN Security Council endorsement. Although the ideal situation would be whereby the council endorses and supports an AU-organized forcible intervention in Darfur, the AU would still be within the limits of international law to pursue such intervention without such endorsement. That is the spirit of the *Responsibility to Protect*. ECOWAS intervention in Liberia and Sierra Leone in the 1990s without prior Security Council authorization lends credence that this approach is supportable in terms of state practice. However, any intervention without express UN Security Council endorsement should be within the substantive and procedural framework discussed in Part Three of this study.

As a matter of urgency, the AU should seek further legal advice in order to give effect to the suggestion of forcible intervention in Darfur, and, in effect, reappraise the legal soundness of the normative framework of the *Responsibility to Protect*. One way in which this advice could be sought is by the AU Commission to setting up a lean team of five to seven experts in international law and politics to go through the normative corpus of the *Responsibility to Protect* with a view to recommending the legal, institutional and operational frameworks in which the principles in the *Responsibility to Protect* can be applied by the AU in Darfur, but also in other countries like Somalia and Ivory Coast where the responsibility to protect civilians is paramount.

***Forcible humanitarian intervention in Darfur should be combined with peaceful measures, such as negotiations and peacekeeping***

The UN and AU should continue with any feasible peaceful methods of intervention in Darfur simultaneous with any use of armed force. There is a need to diversify the policy options for Darfur. Diversification of the responses to the Darfur crisis involves considering peace enforcement under the UN Charter or authorizing multilateral forces under the UN or AU or both to give effect to the responsibility to protect, more particularly the responsibility to react, before the story of Darfur becomes a story of regret as was the case with Rwanda. In diversifying the response, the international community also tempers the military options with diplomatic conflict resolution initiatives. Efforts to promote or provide mediation, good offices, arbitration and even adjudication should never be underestimated or scaled down at any point during conflict situations.

## NOTES

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- 1 For a detailed account of international armed conflicts in Africa and their impact, see Mekankamp et al. (1999), generally. See also Solomon (1999: 34); 1998 *Report of the UN Secretary-General regarding the causes and effects of armed conflicts in Africa*, United Nations (1998: para 13).
- 2 See Constitutive Act of the African Union adopted in Lomé, Togo, on 11 July 2000 CAB/LEG/23.15 (entered into force on 26 May 2001).
- 3 Both the concepts of 'duty' and 'right' in respect of humanitarian intervention are subject to academic controversy. See, for instance, Kratochwil (1995: 21–35) stating that a 'right' to intervention cannot be construed from the point of view of misuse of power by a government, because 'the violation of a right does not automatically vest a third person with either a duty or the right to correct the infraction'). However, some authors make reference to the 'right' of humanitarian intervention. See, for instance, Kritsiotis (1998), generally. In this study, the term 'duty' is preferred because human rights law creates a duty to protect, promote and fulfil fundamental rights.
- 4 See, for instance, International Commission Report on Darfur; Smith, Russel, *How many have died in Darfur?* BBC News Online, [www.news.bb.co.uk](http://www.news.bb.co.uk) (accessed 31 August 2006).
- 5 See 'Sudan may allow UN Force in Darfur', *Washington Post*, 27 December 2006, [www.washingtonpost.com](http://www.washingtonpost.com) (accessed on 20 February 2007).
- 6 See Damrosch (1989: 1) (discussing intervention by governments in the internal affairs of others by granting financial assistance to influence the outcome of elections).
- 7 Non-derogable rights (include the right to life, prohibition of torture, slavery, servitude, detention for debt and retroactive criminal laws, as well as recognition) are those from which states are not allowed to derogate even in extreme circumstances which threaten the life of the nation (e.g. war or other serious cases of violent internal unrest, natural or man-made disasters). On this question, see for instance, art 4, ICCPR; article 15(1) of the European Convention on Human Rights (the 'ECHR'), reprinted in United Nations (1994b: 7); s 85, Constitution of Kenya, Act 5 of 1969, reprinted in Heyns (ed) (1996: 175); and section 34 of the South African Constitution, Act 200 of 1993, reprinted in Heyns (ed) (1996: 339).

- 8 For instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR) reprinted in United Nations (1994a: 8).
- 9 These terms were adopted by participants of a workshop under the auspices of the Academic Council on the UN System, Windhoek, Namibia 5–18 August 2001. See ACUNS (2001) (copy with the author).
- 10 However, if military force were used to ensure an uninterrupted delivery of food and relief supplies to the non-combatant population, such application of force would constitute humanitarian intervention.
- 11 On self-defence and protection of nationals abroad in international law, see generally, Green (1976); see also Barrie (2000: 94).
- 12 See Ronzitti (1985: xv); also Damrosch (1993: 97). Although it may seem hard to draw a definite line between humanitarian intervention and intervention aimed at facilitating self-determination, the two phenomena should be treated as being separate. This is because the right of resistance, which peoples fighting for their self-determination are entitled to, is a right granted to peoples under colonial and racist or alien domination, but such a right is not granted to people being mistreated by the established government.
- 13 Pro-democratic intervention differs from humanitarian intervention principally on the ground that the targets of pro-democratic intervention are usually not engaged in wholesale systematic violations of the human rights of the populations under their control but rather in lesser (or less obvious) repression. See *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US) (merits)* (1986) ICJ Rep 14, (1986) 25 ILM 1023 in which the ICJ rejected that there exists a right of pro-democratic intervention.
- 14 For example, Turkey entered into a treaty with Great Britain, France and Russia, pursuant to which Turkey agreed that the three countries could intervene in her domestic affairs to restore the rule of law.
- 15 Such as article 4(h) of the AU Act, which grant the AU the right to intervene in member states where genocide, war crimes and crimes against humanity are being committed.
- 16 The *opinio juris* element of customary international law is enshrined in the maxim *opinio juris et necessitatis*.
- 17 ‘Non-intervention’ means the prohibition of ‘improper interference by an outside power with the territorial integrity, or political independence of states’. See Damrosch (1993: 93). The concepts of *state sovereignty* and *non-intervention* are often conterminous with each other. See Kwakwa (1994: 9–12).
- 18 Referred to variously as ‘the pillar’ of international law’ and ‘the bedrock’ of international law, the doctrine of state sovereignty and its concomitant principle of non-intervention enjoy a high prominence in international law.



- 19 See Henkin (1995: 11) noting that sovereignty 'suggests that a state is not subject to any external authority unless it has voluntarily consented to such authority'.
- 20 Permanent Court of Arbitration, 4 April 1928, 2 UNRIAA 829–838.
- 21 Article 3 of the International Law Commission Draft Declaration on the Rights and Duties of States (1949); Parts I and II of the Helsinki Final Act (1975), 14 ILM 1292. See, for instance, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (commonly referred to as the Declaration on Non-intervention. UNGA Res 2131 (XX) of 21 Dec 1965; see also the 1970 UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (the 'Friendly Relations Declaration').
- 22 See, for instance, article 3, Charter of the Organisation of American States, 119 UNTS 3 noting that '[n]o state or group of states has a right to intervene directly or indirectly, *for any reason whatsoever*, in the internal or external affairs of any other state'; article 8 of the Pact of the League of Arab States (1945), 70 UNTS 234; article 3 of the OAU Charter 1963) 2 ILM 768.
- 23 As in the case of Security Council Resolution 221 adopted on 9 April 1966, 5 ILM 534 (1966), which called upon the government of the United Kingdom 'to prevent by the use of force, if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia'.
- 24 For the full text see Kofi Annan 'Secretary-General's Speech to the 54th Session of the General Assembly, 20 September 1999, SG/SM/7136 GA/9596.
- 25 See also, Reisman (1990), 'International law still protects sovereignty, but not surprisingly-it is the peoples' sovereignty rather than the sovereign's sovereignty'); But see Henkin (1990: 183-208), arguing that the view expressed by Reisman is rejected by legal scholars.
- 26 Under article 27 Rome Statute, the official position is not a bar to prosecution. For instance the ICTR in 1998 convicted Jean Kambanda, the former Rwandan Prime Minister for genocide and sentenced him to life imprisonment. See article 6 ICTR Statute
- 27 See, for instance, article 25 Rome Statute of the ICC which provides for individual criminal responsibility
- 28 This is reflected in the number of UN Security Council resolutions on humanitarian crises, and the increase in the number of UN peacekeeping troops and military coalitions deployed around the globe since 1990.
- 29 For a discussion on the 'spill-over' effects of national armed conflicts, see Parsons (1995) especially chapters 14, 16, 17, 18 and 19.
- 30 See Kritsiotis (1998: 1015), according to whom lawyers should base their judgment regarding the legality or otherwise of humanitarian intervention on the

formal sources of international law as formulated in article 38(1) of the Statute of the ICJ in order to 'locate evidence of a general practice accepted as law'.

- 31 Before the ICJ in the *Barcelona Traction, Light & Power Co. (Belgium v Spain)* 1970 ICJ Rep 3 (Feb 5), policies were built into legal arguments in an area where there was 'no clear authority [and] no express judicial decision'. See Kritsiotis (1998: 1015 n 30); also, Brownlie (1963: 323).
- 32 According to Helman & Ratner (1992–1993: 10) states that attained independence after 1945 greatly value the concept of sovereignty, and they view an unqualified doctrine of sovereignty as a shield 'against the predatory designs of the stronger states'.
- 33 See Kritsiotis (1998: 1034), quoting Walzer, M (1992) *Just and unjust wars: A moral argument with historical illustration* 102 ('the lives of foreigners don't weigh heavily in the scales of domestic decision-making').
- 34 These questions are posed in a similar manner in Advisory Council for International Affairs and Advisory Committee on Issues of Public International Law (2000). However, this study integrates the discussions in relation to the four questions in many other studies including: Reisman and McDougal (1973); Lillich (1979); Bazylar (1987); Arend and Beck (1993); Charney (1999); Danish Institute of International Affairs (1999); Independent Commission on Kosovo (2000); ICISS (2001a); ICISS (2001b) and Zacklin (2001).
- 35 See Deng (1991: 207): 'In most cases, the collapse of the state is associated with humanitarian tragedies, resulting from armed conflict, communal violence, and gross violations of human rights that culminate in the massive outflow of refugees and internal displacement of the civilian populations.'
- 36 The rules of customary international law of armed conflicts are codified in a number of Hague Conventions. These are discussed in Part Three.
- 37 Article 39 states that '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with [a]rticles 41 and 42, to maintain or restore international peace and security'.
- 38 Resolution 929 of 1994: '[t]he current situation in Rwanda constitutes a unique case which which demands urgent response by the international community'.
- 39 Resolution 940 of 1994: 'the unique character ... its deteriorating, complex and extraordinary nature, requiring an exceptional response'.
- 40 See, for instance, Resolution S/1080 (1996) on Zaire.
- 41 For an examination of the process leading to the transformation of the OAU into the AU, see generally, Baimu (2001); Gutto (2001) and Magliveras and Naldi (2002).

- 42 Declaration of the AU Assembly, Lusaka Summit in July 2001; See 'Decisions on the Implementation of the Sirte Summit Decision on the African Union' OAU Doc AHG/Declaration 1 (XXXVII), para 8.
- 43 Established under article 30 of the African Charter on Human and Peoples' Rights, (1982) 21 *ILM* 58; For a discussion on the establishment, mandate, functions and an evaluation of the commission see Viljoen (1998); Murray (2001); Claude (1992); Ondinkalu (1998); Murray (2000).
- 44 Established under article 32 of the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/153/REV 2 (1999), adopted in 1991, entered into force on 29 November 1999.
- 45 See AU 'Decision on Interim Period' *1st Ordinary Session of the AU Assembly of Heads of State and Government* 9–11 July 2001, AU DOC ASS/AU/Dec 1(I) para 9.
- 46 See *Report of the Secretary-General*, CM/2210 (LXXIV), Council of Ministers, 74th Ordinary Session/9th Ordinary Session of the AEC, 2–7 July 2001, 10.
- 47 Scholarly opinion is sharply divided on the meaning of article 2(4) of the UN Charter. Frank (1970), for instance, 'declared' article 2(4) 'dead', concluding that this provision is so permissive that 'only the words remain'. On the other hand, Henkin (1971) replied that 'the reports of the death of article 2(4) were greatly exaggerated'.
- 48 (1998) 37 *ILM* 999. The Rome Statute of the International Criminal Court entered into force on 1 July 2002, 60 days after the 60th ratification, pursuant to article 126 of the Statute. The definitions are in article 6 (genocide), article 7 (crimes against humanity) and article 8 (war crimes).
- 49 In this regard, see de J. P. Cueller (1990) *Report of the Secretary-General on the work of the organisation* 21; B. Boutros-Ghali, (1992) 'An agenda for peace: Preventive diplomacy, peacemaking and peacekeeping' *Report of the Secretary-General Pursuant to Security Council Statement of 17 June 1992* UN Doc A/47/277-S/24111 Paras 60-65; Boutros-Ghali, B (1992) *A supplement to an agenda for peace: Position Paper of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations* UN Doc A/50/60-S/1995/1 of 3 January 1995 paras 79–96; Annan, K (1997) 'Renewing the United Nations: A programme for reform' *Report of the Secretary-General* UN Doc A/51/950 of 14 July 1997.
- 50 For a fuller discussion of these, see Deen-Racsmany (2000: 298ff).
- 51 What constitutes a 'regional arrangement or agency' is not defined in the UN Charter. The meaning of the term is quite controversial. For definitions, see for instance, Kelsen (1951: 161–145) and Akehurst (1967: 177–180).
- 52 *Certain expenses of the United Nations*, Advisory Opinion of 20 July 1962, *ICJ Rep* (1950) 151 paras 170-175.

- 53 The Uniting for Peace Resolution, UN Doc A/Res/5/377 (1950).
- 54 France advocated for intervention by regional bodies without prior authorization in urgent cases, while Bolivia opposed all intervention without Security Council authorization. See UNCIO Vol XII para 767, reproduced in (1948) *Yearbook of the International Law Commission* 211.

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