

Legalising a Contemporary ‘War of Peace’: A case for humanitarian intervention in the Sudan

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PHOTO: USAID

Destroyed village, Darfur, Sudan: Government of Sudan (GOS) military forces and GOS supported militias, known as Jingaweit, have systematically burned and looted towns and villages of tribal groups that the Government claims are supporting opposition forces. More than 1.1 million civilians have been displaced due to these attacks.

Why are massacres of civilians allowed to happen in Sudan?

Why has no-one even counted the dead? ...

It has gone this far in Darfur, because no-one really noticed or did anything to stop it.¹

¹ From Hilary Anderson's moving account of the death Nadia, one of the children she got to know over the past two months in Abu Shouk refugee camp in Darfur. Anderson, Hilary; 'Sudan's cruel and slow starvation', BBC, 24 August 2004, http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/3922461.stm

Against the backdrop of the international community's post-Cold War penchant for 'humanitarian'² intervention; the events of 11 September 2001, which saw a global retreat into national security agendas; and the current retrospective contextualisation of the invasion of Iraq as a humanitarian enterprise, this paper deals with the legal and politico-legal aspects of humanitarian intervention in the Sudan – an issue elucidating the pressing need for the international community to determine lawful criteria by which the authorisation of the use of force to protect the human rights of the vulnerable and the neglected might be made use of as an humanitarian option of last resort.

² The extent to which the use of force can ever be referred to as humanitarian is highly contested.

BACKGROUND

In February 2003, the Sudan Liberation Movement and the Movement for Justice and Equality, two groups mainly drawn from Fur, Zaghawa and Maasalit Muslim African tribes, launched an armed rebellion in response to what they perceived to be pro-Arab racial discrimination by the Sudanese Government in their struggle over land and resources in the Darfur region.³ The Sudanese Government promptly retaliated employing the Jangaweit militia in concert with government defense forces⁴ to embark upon national security measures to quash the rebels and institute government policy which some human rights groups have deemed to constitute ethnic cleansing.

As a consequence, more than 1.1 million refugees and internally displaced persons (IDPs) are at risk of famine and disease in the Sudan. Over the past year alone, an estimated 50,000 Darfuris have been killed by the Sudanese Government-backed Jangaweit militia and 200,000 have been forced to flee over the border into Chad.⁵

The African Union has committed a 300 strong monitoring and protection force to the Darfur region. Drawing upon the Chicago Doctrine, the British Government has prepared plans to send its military to the Sudan as part of an international contingent. The Australian Government has also advised that it will commit Australian troops for peacekeeping operations pending diplomatic and political outcomes associated with *United Nations Security Council Resolutions 1547* (11 June 2004) and *1556* (30 July 2004).⁶ The Sudanese Government has publicly declared that any such intervention for the purposes of either peace-enforcement or peacekeeping will be construed as an attack on state sovereignty and will be aggressively resisted.

USAID Director Andrew Natsios has stated that, "even in a best-case scenario, under optimal conditions, we could see as many as 320,000 people die. Without optimal conditions, the numbers will be far greater."⁷ Some internal UN and NGO reports estimate that the final death toll could reach 1 million if humanitarian organisations are

3 Darfur has a population of 6.5 million, is the size of France, and suffers from severe desertification.

4 Lindijer, Koert; 'Analysis: Reining in the militia', BBC, 5 August 2004, <http://news.bbc.co.uk/1/hi/world/africa/3540126.stm>

5 According to World Health Organization up to 10,000 refugees are dying from starvation and disease each month. The onset of water-borne diseases such as cholera in over-crowded refugee camps will see numbers soar. Goodspeed, Peter; 'Genocide emergency' in Sudan: Aid group says a million may die if ethnic cleansing not halted', National Post, Canada, 27 July 2004, A1.

6 "Defence Minister Robert Hill said on Sunday that Australia was likely to contribute a modest contingent of medical, engineering and transport specialists to any peacekeeping force. New Zealand Foreign Minister Phil Goff said Wellington also was likely to send monitors but its contribution would be in the "single figures"." AFP and Reuters Wire Services; 'Sudan to reject 'foreign threats' - Crisis in Sudan', The Australian, 27 July, 10

7 See press release at www.usaid.gov.us

unable to deliver aid. The United States Congress has determined that, in accordance with international law, such killings constitute an act of genocide.

SOVEREIGN IMMUNITY, HUMAN RIGHTS AND THE USE OF FORCE

The Treaty of Westphalia (1678) formulated the doctrine of sovereignty⁸, which declared a state's domestic conduct and institutions to be beyond the reach of other states. According to Spiro, since Westphalia "states have served as the sole repository of international rights and duties ..."⁹ The *Island of Palms Case* (1928), *Corfu Channel Case* (1949), UN Charter Articles 1 and 2, GA Resolution 2625, the *Charter of the Organization of American States* (1948)¹⁰ and *Helsinki Accords* (1975) establish that the sovereign equality of all states is a fundamental principle of international law.¹¹

Article 1 of the Montevideo Convention (1934) determines that the state as a legal personality possesses amongst other things, a defined territory and a government with the capacity to enter into relations with other states.¹² There are strong connections between territory, independence and sovereignty and respect for a state's 'territorial integrity' is a fundamental principle enshrined in Article 2(4) of the UN Charter.¹³ According to Higgins, despite growing attempts by the international community to reconcile human rights and sovereign immunity, "... it still has to be said that the territorial issue does come first."¹⁴

8 As Wallace-Bruce notes, "claims of sovereignty were historically asserted by European colonial powers against indigenous populations including the Native Americans, Canadian Indians, Africans, Australian Aborigines, and New Zealand Maori. With the exception of Australia, whose acquisition was rationalized by classifying the continent as terra nullius despite the presence of Aborigines, and with the further exception of Latin America, which was conquered by conquistadores, almost all other acquisitions of colonial territory by European powers were rationalized as the supposed de jure cession of territory to the conquering country by treaty with the natives. This was the operative model in the United States, Canada, New Zealand, and most of Africa and Asia." See Wallace-Bruce, NL; *Claims to Statehood in International Law*, (1994).

9 Spiro, Peter; 'New Players on the International Stage', 2 Hofstra L. & Pol'y Symp. 19, 1997.

10 See www.oas.org

11 As Charlesworth and Chinkin note, "the fiction of equality is preserved through such arrangements being presented as dependent on the consent of all state parties." Charlesworth and Chinkin; *The Boundaries of International Law*, in Dixon and McCorquodale at 135.

12 For feminist analysis of statehood see also K. Knop, "Re/Statements: Feminism & State Sovereignty in International Law" (1993).

13 Charlesworth and Chinkin; *The Boundaries of International Law*, in Dixon and McCorquodale at 136.

14 Higgins, R., *Problems and Process: International Law and How to Use it*, (Oxford: Clarendon Press, 1994).

The Preamble of the UN Charter upholds the territorial integrity of member states noting the equal rights of nations large and small. In accordance with the UN Charter¹⁵, the outcomes of the *Nuremberg Trials* (1945 – 1949) and the norms and principles of non-intervention, espoused most notably in the *Nicaragua Case*, the prohibition of the use of force is a peremptory norm of international law, that is *jus cogens*. There are only two internationally recognised exceptions to this rule whereby the territorial integrity of a member state may be breached: (1) in the interests of self-defence under Chapter VII, Article 51 of the UN Charter¹⁶ and (2) in the interests of collective security where the express authorisation of the UN Security Council has been granted under Chapter VII, Article 42¹⁷.

Further, in the *Oil Platforms Case* the ICJ determined that force could only be resorted to in self-defence in accordance with the test posed by the *Caroline Case*¹⁸. The ICJ, detailing the nature of the use of force at length made it clear that there were only two exceptions to the rule. Stewart asserts that the ICJ's post-Iraq invasion "... analysis of the holding, along with examination of the statements made by judges ... exhibit the ICJ's desire to reprimand the US for its current actions in Iraq and the US' fundamental

15 Article 31, of the Vienna Convention on the Law of Treaties (1969), says that a treaty must be interpreted in accordance with its object and purpose. The Preamble of the United Nations Charter determines 'to unite our strength to maintain international peace and security', and to ensure 'that armed force shall not be used, save in the common interest.' Article 1 states the UN's purposes including 'to maintain international peace and security .. and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace' Article 2(3) of the UN Charter states that 'All Members shall settle their international disputes by peaceful means' and following on from the General Treaty for the Renunciation of War (1928), Article 2(4) states that 'All Members shall refrain in their international relations from the threat or use of force' and is supported by the General Assembly's Declaration on Friendly Relations (1970) and the Resolution on the Definition of Aggression (1974). See McCormack, T; 'The Use of Force', in *Public International Law: An Australian Perspective* (Oxford UP: 2003), pp.238 – 270. For the law before the inception of the United Nations see Brierly, 'The Use of Force by States: the law before 1945', (1932) *Cam LJ* 308 as extracted at 859 – 860 in Harris, *Cases and Materials on International Law*, (London: 2003).

16 Article 51 enables the Security Council to take 'at any time such action as it deems necessary in order to maintain or restore international peace and security.'

17 Article 42 states that 'the Security Council 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'.

18 In the situation of (a) an armed attack is launched, or is immediately threatened, against a state's territory or forces (and probably its nationals); (b) there is an urgent necessity for defensive action against that attack; (c) there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect; (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, that is to the needs of defence." See Jennings and Watt.

misunderstanding of ‘proper’ use of force.”¹⁹ The current *Kosovo Case* before the ICJ dealing with NATO’s humanitarian intervention in Serbia to protect Kosovo Albanians will shed further light on the legal nature of humanitarian intervention.²⁰ There is therefore at this time no *de jure* basis upon which a state may invade another state’s territory in order to protect the rights and livelihoods of the citizens of an offending state.

Nonetheless, this position appears to be changing.²¹ The ongoing development of human rights law has modified the traditional concept of sovereignty. Human rights are no longer purely domestic concerns – “sovereignty cannot be used by governments to shield themselves from responsibility for gross violations of these rights, or from shirking their obligations with respect to the protection and treatment of civilians in situations of intra-state conflict.”²² Some states now require other states or want-to-be states to abide by express human rights principles if recognition is to be forthcoming. *The European Community and Member State’s Guidelines on Recognition of New States in Eastern Europe and the Soviet Union*, and the *EC’s Declaration on Yugoslavia* appear to require additional criteria for statehood which incorporate a need to respect human rights.²³ As Kofi Annan noted in 1999, reflecting the position of the last three Secretaries General,²⁴ “emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of state sovereignty.”²⁵

Global will may as yet still be absent but the intention is there. More than 190 states, including the Sudan, have signed on to the Preamble of the UN Charter, which seeks to “reaffirm faith in fundamental human rights” and constitutes a supra-treaty to which all other multilateral and bilateral treaty arrangements must abide. Indeed since the inception of the UN an attempt to codify human rights, and thereby better protect the rights and

19 See Young, Stewart; ‘Destruction of Property (On An International Scale): The Recent Oil Platforms Case and the International Court of Justice’s Inconsistent Commentary on the Use of Force By the United States’, *Stanford Law Review*; March 10, 2004; and Smith, D.H.; and ‘The Oil Platforms Case: Jurisdiction Through the – Closed – Eye of the Needle’, *The Law and Practice of International Courts and Tribunals* 1 March 2004, vol. 3, no. 1, pp. 113-124(12)

20 See preliminary proceedings at International Court of Justice 1999, *Legality of Use of Force (Yugoslavia v. Belgium)*, www.icj-cij.org/cijwww/cdoocket/cyall/cyall_cr/cyall_cybe_ccr9915_19990510.html

21 See for example Falk, Richard; *Law in an Emerging Global Village: A Post-Westphalian Perspective* (Ardsley, NY: Transnational Publishers, 1998).

22 Simons, Penelope C.; ‘Humanitarian Intervention: A Review of Literature’ <http://www.ploughshares.ca/content/working%20PAPERS/wp012.html#Shawcross>, 3.

23 Croatia, for example, was required to amend its constitution to include a clause on the protection of its minorities. While the Ukraine was required to commit to the non-proliferation of WMD.

24 See THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).

25 Statement by Secretary-General Kofi Annan, Press Release SG/SM/6949/HR/CN/898, April 7, 1999. Also Annan, Kofi 2000, “‘We the Peoples’: The Role of the United Nations in the 21st Century,” *Millennium Report of the Secretary-General of the United Nations*. <http://www.un.org/millennium/sg/report/>.

livelihoods of 'We the peoples', has led to an impressive list of international treaty instruments including the International Covenant on Civil and Political Rights, the International Covenant on Social, Cultural and Economic Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.²⁶

Such instruments have been accompanied by increasing *de facto* state practice, government policy, and *opinio juris* in support of such protection mechanisms. Is there in fact a third exception to the rule against the use of force developing in customary international law which takes into account a need to better balance sovereign immunity, national security and human rights agendas?

There is a widely held belief amongst qualified legal publicists that in the post-Cold War era state practice appears to have shifted towards a greater tolerance for humanitarian intervention in the domestic affairs of other sovereign states for the purpose of protecting human rights.²⁷ Interventions in West Africa in the early 1990s, including by Ecomog (the Economic Community of West African States) in Liberia from 1990, the Great Lakes, Somalia, Northern Iraq in 1991, and most notably NATO's intervention in Kosovo in 1999, are oft cited as examples of a growing shift towards a global willingness to breach state sovereignty for humanitarian purposes. As Falk has noted, "the domestic jurisdiction exclusion of UN intervention expressed in Article 2(7) was definitely under challenge from the widespread grassroots and governmental advocacy of humanitarian intervention in the years following the cold war."²⁸

26 The Sudan is a signatory to all these treaties.

27 See Abiew, Francis Kofi 1998, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, (Kluwer Law International, The Hague, 1998).

28 The UN Secretary-General's Millennium Goals display an unusual candidness on the need for state sovereignty to bow to human rights; the three year old African Union has committed troops to the Sudan and other African trouble spots; the Arab World has long called for the UN Security Council to approve humanitarian intervention in order to uphold more than 87 resolutions it alleges Israel remains in breach of in the cases of the Occupied Palestinian Territory and the Occupied Arab Territories; the British Government's Chicago Doctrine expressly states that force is appropriate where human rights abuses are taking place; NATO invaded Serbia and the Kosovo Commission and its predominately European members upheld their own illegal humanitarian intervention as moral necessity; the Canadian Government supports limited intervention in extreme and precise cases; and the United States, Australia, and 81 other members of the Coalition of the Willing - representing a wide geographic representation of UN member states - appear to have retrospectively situated the invasion of Iraq as a humanitarian intervention, suggesting their approval of such ventures. Indeed in the relative absence of South American comment, the only significant geographic blocs opposed to humanitarian intervention seem to be the Asian states. See Falk, Richard; 'After Iraq Is There a Future for the Charter System? War Prevention and the UN', *Counterpunch*, 2 July 2003. See also Donnelly, Jack; *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2nd ed., 2003) 242-260. *HUMANITARIAN INTERVENTION: MORAL AND PHILOSOPHICAL ISSUES* (Aleksandar Jokic, ed., 2003); *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* (J. L. Holzgrefe and Robert O. Keohane, eds., 2003).

Reviving the 'Wars of Peace'?

*Take up the White Man's Burden
The savage wars of peace –
Fill full the mouth of Famine
And bid the sickness cease.*²⁹

The application of humanitarian intervention is inherently paternal and subjective.³⁰ Cardinal Paulo Evaristo Arns of Sao Paulo, Brazil has noted that throughout the South “there is hatred and fear: When will they decide to invade us [next?]”.³¹ And Chomsky asks “on what pretext? The first question that comes to mind about humanitarian intervention is whether the category actually exists. ... Are states moral agents? Or were Machiavelli, Adam Smith, and a host of others correct in concluding that they commonly act in the interests of domestic power ... the category of "humanitarian intervention" is vanishingly small.”³²

Military intervention by the international community for allegedly humanitarian purposes has a long and chequered past in the Sudan. The 1898 Battle of Omdurman led to the death of 10,000 Sudanese at the hands of colonial Egyptian troops on the site of present day Khartoum. The battle heralded the first triumph for troops sent to conquer the Sudan at the behest of the British Government pressed to end the slave trade there by the Anti-Slavery Society - a forerunner of today's non-government organisations (NGOs).³³ The

29 The poem which came to define the imperialist agenda was written to commemorate the Battle of Orduman in the Sudan (Khartoum in Arabic means “the Elephant’s Trunk” and Balad a-Sudan means “the Country of the Blacks”). Kipling, Rudyard; Rudyard Kipling’s Verse, London: Hodder & Stoughton, 1958.

30 Walzer, Michael 1992, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed., Basic Books, New York.

31 Daudelin also raises similar questions. Daudelin, Jean 2000, "Rethinking Humanitarian Intervention," The North-South Institute.

32 Chomsky has critiqued the Soviet role in Afghanistan; the war in Vietnam which some US officials saw as ideological and others as moral; the Carter Administration’s “state terror and aid” package to the world; various US administration’s fronts for the Cold War in Haiti, Nicaragua, Panama, the Dominican Republic and elsewhere; and Mussilini’s and Hitler’s attempt to “save” peoples from the Bolsheviks. According to Chomsky, all such military interventions were at the time or post-facto justified on humanitarian grounds. See Chomsky, Noam; *Humanitarian Intervention*, Boston Review, December, 1993 - January, 1994.

33 The exploitation of foreign lands for ‘king and country’ was, at the time, perceived as the right of the British Empire. Yet “the international community” – colonial officers, diplomats and journalists - warned that there would in fact be no material gain from this particular victory. See Baker, Samuel W; *Ismailia: A Narrative of the Expedition to Central Africa for the Suppression of the Slave Trade*, New York: Harper Brothers, 1875; Churchill, Winston; *The River War: An Historical Account of the Reconquest of the Soudan*, Rhodes, F; (ed.), London, Longmans, Green & Co., 1899; Hill, George (ed.); *Colnel Gordon in Central Africa, 1874-70*, Thomas de la Rue & Co, 1885; Hill, Richard;

conquering of the Sudan was thus based on the White Man's burden, that is, the humanitarian responsibilities the Occident had inherited by virtue of its implicit cultural, social, political, economic and technological superiority.³⁴

As G.W. Stevens wrote, "the vindication of our self-respect was the great treasure we won at Khartoum and it was worth the price we paid for it".³⁵ To what extent is the international community merely reinventing the 'savage wars of peace' 105 years later by determining to intervene in the latest incarnation of the Sudan's national security versus human rights quandary? From the "White Man's burden" of the British Empire to Hitler's "humanitarian intervention" in Czechoslovakia in 1938, moral motives for military intervention have been widely abused. As Chomsky reminds us, "the prospective leader of "humanitarian intervention" is also notorious for its ability to maintain a self-image of benevolence."³⁶

Yet we are also told that one of the greatest crimes of colonialism came at the very end of that era when ... "synthetic tribes were left behind with weapons and civil powers that allowed them to oppress and exploit all the natural tribes; having grown hugely since independence, their oppression and exploitation has grown in proportion. Outrageous misgovernment is pervasive ... with the ultimate result that millions die needlessly each year from easily preventable diseases, and the vast majority of the productive population is kept in extreme poverty."³⁷ Indeed much of the African continent and Arab World is

Egypt in the Sudan, 1820-1881, Oxford UP, 1959; Holt, PM; The Mahdist State in the Sudan, 1881 – 1898, A Study of its Origins and Overthrow, Oxford: Clarendon Press, 1970; Lovejoy, P; Transformations in Slavery: A History of Slavery in Africa, Cambridge UP, 1983; Toledano, Ehud; Slavery and its Abolition in the Ottoman Middle East, Seattle: University of Washington Press, 1998. For an illuminating comparative of colonial events and those occurring in the context of humanitarian affairs over the past two decades in the Sudan see Scroggins, Deborah; Emma's War, HarperCollins, London, 2004.

34 For a discussion of these seminal ideas see for example, Said, Edward; Orientalism: Western Conceptions of the Orient, London: Pantheon Press, 1978); Said; Edward; Culture and Imperialism, London: Vintage Press, 1993); and from a legal perspective Rajagopal, Balakrishnan; International Law from Below: Development, Social Movements and Third World Resistance, (London: Cambridge UP, 2003).

35 Stevens, G.W; With Kitchener to Khartoum, New York: Dodd, Mead, 1898.

36 OpinionJournal.com; 'Beware Wars of Altruism', July, 2003. According to Chomsky, humanitarian intervention was "a trait that impressed de Tocqueville 150 years ago. Observing one of the great atrocities, he was struck that Americans could deprive Indians of their rights and exterminate them "with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world." It was impossible to destroy people with "more respect for the laws of humanity". Chomsky, Noam;

Humanitarian Intervention, Boston Review, December, 1993 - January, 1994

37 Luttwak, Edward; 'Kofi's Rule, The National Interest, Winter 1999,

http://www.findarticles.com/p/articles/mi_m2751/is_1999_Winter/ai_58381622

still plagued by the repercussions of colonialism - dictatorial regimes, broken beuarocracies and neo-colonial proxies dominating the public scene.³⁸

Any such humanitarian intervention in the Sudan should be mindful of the 'wars of peace' analogy and all that comes with it. Humanitarian intervention in the Sudan must be undertaken with the full knowledge of the historical and cultural context in which such action is occurring. Every effort should be made to comunication clearly and consistently to the Sudanese people the precise nature of and intentions behind such intervention. And every effort should be made to incorporate the Sudanese people into calibrated enforement decision-making processes and outcomes. If humanitarian intervention is to be more than a 'war of peace' Sudanese civil society must be actively encouraged to engage in advocacy and dialogue at the highest levels of the international community through, for example, UN and NGO capacity building and partnership arrangements.

TOWARDS A LEGAL FRAMEWORK FOR HUMANITARIAN INTERVENTION

The term humanitarian intervention is referred to here as the utilisation of military force for humanitarian purposes.³⁹ The concept determines that there are certain actions, regardless of their perceived national security needs, that states cannot undertake against their citizens or other persons under their charge. The concept also presupposes that all individuals can demand external assistance when subjected to egregious human rights abuses. If a state fails to protect such persons by committing offenses that "shock the moral conscience of mankind"⁴⁰ steps towards humanitarian intervention may be brought into action.

In 1999 the UN Secretary-General requested that where massive and ongoing human rights abuses were taking place, the Security Council consider taking action⁴¹ in accordance with (1) the scope of the breaches of human rights and international humanitarian law, including the numbers of people effected and the nature of the violations; (2) the inability of local authorities to uphold legal order, or the identification of a pattern of complicity by local authorities; (3) the exhaustion of peaceful or consent-based efforts to address the situation; (4) the ability of the Security Council to monitor

38 See Khalid, Mansour; *The Government They Deserve: The Role of the Elite in Sudan's Political Evolution*, London and New York: Kegan Paul International, 1990.

39 Arthur C. Helton, "Forced Displacement, Humanitarian Intervention, and Sovereignty," *SAIS Review* (Winter/Spring 2000), vol. 20, no. 1.

40 Walzer, Michael; *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: Basic Books, 1977, 107.

41 Edward Luttwak, "Kofi's Rule": Humanitarian Intervention and Neocolonialism," *The National Interest* (Winter 1999/2000).

actions that are undertaken; and (5) the limited and proportionate use of force, with attention to repercussions upon civilian populations and the environment.⁴²

In 2002 the *Independent International Commission on Kosovo* proposed a three-step process designed to ensure the UN Charter system acknowledges severe human rights violations.⁴³ “The first step consists of a framework of principles designed to limit claims of humanitarian intervention to a narrow set of circumstances, and to assure that the dynamics of implementation adhere to international humanitarian law and promote the well being of the people being protected. The second step is to draft a resolution for adoption by the General Assembly in the form of a Declaration on the Right and Responsibility of Humanitarian Intervention that seeks to reconcile respect for sovereign rights, the duty to implement human rights, and the responsibility to prevent humanitarian catastrophes. The third step would be to amend the Charter to incorporate these changes as they pertain to the role and responsibility of the UN Security Council, and other multilateral frameworks and coalitions that undertake humanitarian interventions.”⁴⁴

Building upon the careful considerations of the United Nations Secretary-General’s request, the findings of the *Kosovo Commission*⁴⁵, and Human Rights Watch’s⁴⁶ commentary on the invasion of Iraq by the US-led Coalition of the Willing in 2003, the institution of a six (6) point legal test might ensure humanitarian intervention in the Sudan should:

- (1) only be undertaken where such action seeks to prevent imminent genocide, mass killings or analogous loss of life;
- (2) be an option of last resort - all other measures for reconciling the human rights of the peoples of Darfur and the national security of the Sudan must have been explored to their fullest. Any such intervention must attend to the historicity of the Sudan - any such legal remedy must be firmly situated both temporally and spatially within the historic and cultural context in which the authorisation to use force takes place;
- (3) either be authorised by the United Nations Security Council or if current circumstances persist and a situation of factual emergency arises, must be authorized retrospectively by the Council;

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

43 THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2002) 185-198, 187.

44 Falk, Richard; ‘After Iraq Is There a Future for the Charter System? War Prevention and the UN’, *Counterpunch*, 2 July 2003.

45 THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2002) 185-198, 187.

46 Ken Roth is the current director of Human Rights Watch. See Roth, Ken; ‘War in Iraq: Not a Humanitarian Intervention’, *Human Rights Watch World Report 2004*, <http://www.hrw.org/wr2k4/3.html>.

- (4) be primarily motivated by humanitarianism - the chief intent behind such an act must be the protection of the rights and livelihoods of the refugees and IDPs of Darfur;
- (5) employ military mechanisms and measures undertaken in accordance with international human rights and humanitarian law; and
- (6) be embarked upon only where the international community is confident that such action will do more good than harm. A thorough exploration of alternative legal remedies such as sanctions should therefore be undertaken in accordance with the United Nations Charter.

What follows focuses on these six (6) criteria in the context of current events. Our analysis here is both legal and politico-legal in accordance with the *Namibia Advisory Opinion (1971)*⁴⁷ which allow for both a textual and contextual interpretation of the circumstances surrounding the possible use of force in a given case.⁴⁸ Indeed the need to locate international law within given political and policy frameworks has been well documented elsewhere.⁴⁹

INVOKING THE GENOCIDE CONVENTION

Humanitarian intervention not agreed to by the Sudanese Government should only be justified where it attempts to prevent imminent genocide, mass killings or analogous loss of life. Is genocide occurring in the Sudan? *Article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide* defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

In June 2004 John Heffernan of Physicians for Human Rights undertook interviews with African Sudanese fleeing Darfurian villages. Heffernan’s account mirrors other reports provided by NGOs and the United Nations and is supported by photographic evidence obtained by the United States Agency for International Development (USAID).⁵⁰

Heffernan’s version of events reveals much about the nature of Jingaweit attacks and is reproduced here in an attempt to establish the facts associated with allegations of genocide in the Sudan:

47 This opinion states that ‘the language of a resolution of the Security Council should be carefully analysed ... having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences’.

48 This approach is also espoused by McDougal and Feliciano in ‘The Initiation of Coercion: A Multi-Temporal Analysis’, in Dixon and McCorquodale at 524.

49 See for example, Franck, T; ‘Who Killed Article 2(4)’ and Henkin, ‘The Report of the Death of Article 2(4) are Greatly Exaggerated’, in Dixon and McCorquodale at 525 - 527 on the importance of locating rules within contextual and policy frameworks.

50 To view the photos go to http://www.usaid.gov/locations/sub-saharan_africa/sudan/images/destruction_in_darfur/photo15.html

... When we talked to people, over and over again they spoke of some type of aerial assault on their village, perhaps sometimes not firing. It would either be a fixed-wing aircraft - and they would even identify it as an Antonov, which has been used by the Sudanese military - or a helicopter that would essentially circle the village, warning folks that something was going to happen.

And typically what did happen was either that day or the next day, groups of people that were described as being both Sudanese army as well as “jinjaweed” [“guns on horseback”], which is the Arab militia, would enter the town by foot or by horseback or perhaps even in vehicles, and go from house to house, forcing people to leave, on occasion raping women, stealing all of their possessions and then quite frequently burning what was left.

A number of the people, particularly the men, said that upon the knowledge that the attack was imminent, the men would flee and the women would gather what they could, including their children and what possessions they could take, and would leave later - the feeling being that the men were at greater risk of being killed, and the women were probably not at risk of being killed, as much as perhaps being raped. And this is what people told us over and over - this pattern of attack was common.

... Clearly, there was an effort to destroy whatever livelihood these people had. Not only were their possessions taken, particularly their animals, which is a crucial part of this culture - in many instances, people spoke about their water supply, their wells being poisoned, their crops being burned. Destroying anything and everything that essentially were their means of livelihood.

It wasn't just the government supporting them with weapons or money – [the Sudanese Government was] actually there in the process of attacking these folks. And they were the perpetrators (*sic*) as much as the jinjaweed were. They act in concert. This was told to us over and over again.

... [A]t the end of the interview [we would ask], “So why you? What was it that you did or said that you felt was reason enough for these people to come in and destroy your entire livelihood?” And over and over, repeatedly, people said it was because we are ethnically black Africans and the people - Khartoum and the jinjaweed - simply do not want us on their land. So it wasn't really a matter of them saying that they want our land, but they want us - black Africans - off their land.⁵¹

51 McElligott, Margaret; 'Genocide Unfolding': Physicians Group Faults Sudan Government, Lack of World Response', www.AllAfrica.com, 23 June 2004. Human Rights Watch has obtained official documents which show that

UNOCHA has reported that Khartoum is directly supporting indiscriminate killings of civilians, rape, the looting of both private property and humanitarian aid, the burning of villages, abductions, forced migration and general intimidation. Similarly, in early June 2004, Asma Jahangi, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions went on the public record as saying that the number of black Africans killed by Arab Jinjaweit militias is “bound to be staggering ... There is no doubt that Khartoum had sponsored, armed or recruited the so-called Jinjaweit militias.” Jahangi noted that the militias often wear the uniforms of Sudanese soldiers and use vehicles provided by Khartoum.⁵²

“In April 2004 the UN Secretary-General said that according to the Un Emergency Coordinator, “a sequence of deliberate actions [in Darfur] has been observed that seem aimed at achieving a specific objective: the forcible and long-term displacement of the targeted communities, which may also be termed ethnic cleansing.” The Secretary-General entreated the international community to not “stand idle”.

On 20 June 2004, the Secretary-General said the international community cannot “complain that, yet again we have had mass killings or a high number of people have been killed or starved to death. So, the Security Council also has the responsibility to protect the innocent and the weak and if the situation continues, we have to take it up and determine what measures it should take,” he added. Yet the Secretary-General then went on to say on 30 June 2004 that, “based on the reports that I have received, I can't at this stage call [what is happening in Darfur] genocide. There are massive violations of international humanitarian law but I am not ready to describe it as genocide or ethnic cleansing.”⁵³ For others, there has been “a kind of pogrom”.⁵⁴

the Sudanese Government approved the supply of provisions to the Jinjaweit; issued a directive in February 2004 preventing security units from interfering with militia activities; and embarked upon an organized programme of ethnic cleansing by authorising the resettlement of Arab Sudanese in areas occupied by the African farmers of Darfur. The agency has put on the public record that Khartoum appears to be actively seeking to destroy any evidence that may be used by the international community to determine allegations of genocide. According to Tom Lantos, one of the key US Congressmen behind the US campaign for humanitarian intervention in the Sudan, “Members of the Jinjaweit militia, already identified as human rights offenders, are being issued official death certificates so that they do not have to stand trial for their crimes. There are reports that Jinjaweit members are being flown to the Red Sea Province on the return routes of the planes that bring humanitarian supplies to Darfur and are issued military identification for the Sudanese army to prevent human rights investigators from identifying them as perpetrators.” The Observer; ‘Comment: The UN must not fail Sudan again: Stop the murdering militias’, 25 July 2004 and Lantos, Tom; ‘We Must stop the Slaughter in Darfur’, The Boston Globe, 4 May 2004, A19.

52 Deen, Thalif; ‘U.S., U.N. Withhold Genocide Label for Sudanese Crisis’, Inter Press Service, 30 June 2004.

53 Deen, Thalif; ‘U.S., U.N. Withhold Genocide Label for Sudanese Crisis’, Inter Press Service, 30 June 2004.

54 Traub, James; National Public Radio; ‘James Traub and Bill Fletcher discuss the situation in Sudan and whether intervention is necessary’, The Tavis Smiley Show 9:00AM ET, 23 July 2004.

According to US Congressman Tancredo, the leading proponent of humanitarian intervention in the Sudan, “[what is happening in Darfur is] a perfect example of genocide. The aggression is designed to remove a group of people, either by force in terms of moving them out, making them part of a diaspora, but if not that, to actually destroy them. And ... they include rape as a tactic to impregnate women with, quote, “lighter-skinned” children. ... if this isn't, in every single way, meeting the criteria we've established, the UN has established, for genocide, I really don't know what is.”⁵⁵ Democratic U.S. presidential candidate Senator John Kerry has called for humanitarian intervention in the Sudan identifying the campaign against Darfur's black population as “genocide”.⁵⁶

The US Congressional Declaration of Genocide in the Sudan brings into effect the *Convention on Genocide*. While such declarations up the political ante on the Sudanese Government to respond to such allegations, the Convention does not detail precisely the responsibilities Member State signatories are required to action upon the making of such assertions. Some claim that the requisite instruments for responding are missing. According to Lyman, “We don't have the political analysis and intelligence that six months ago would have said definitively in the UN, 'We have an impending genocide coming' [in the Sudan]. We don't have the instruments that say, 'Let's respond quickly with either security or humanitarian mechanisms.' We're still struggling ad hoc with how to respond, and I think that is a terrible lesson for what we haven't yet learned from the Rwanda experience.”⁵⁷ The Declaration forms a non-binding resolution. If the US Government agrees, and it has yet to, such a finding would set off action under the Genocide Convention, though as mentioned, exactly what is not certain.⁵⁸

However, on 26 July 2004, Mustafa Osman Ismail, Sudan's Foreign Minister, insisted that “What is happening in Darfur is not genocide. It is a humanitarian crisis provoked by fighting which is not our fault.”⁵⁹

The French Government also posits that there is no genocide occurring in Darfur. According to the French Secretary of State in charge of Foreign Affairs Renaud Muselier “It is a real humanitarian tragedy but not a genocide. Atrocities have taken place, have been carried out, with very serious violations of human rights, during the war period which led to the fact that men were murdered, villages were burnt out and women were

55 Congressman Tancredo; ‘Options for international intervention in Sudan’, Talk of the Nation, National Public Radio, 2:00PM ET, 27 July 2004.

56 United Press International; ‘Kerry calls for intervention in Sudan’, 15 July, 2004.

57 Lyman, Princeton; ‘Options for international intervention in Sudan’, Talk of the Nation, National Public Radio, 2:00PM ET, 27 July 2004.

58 Reynolds, Paul; ‘Sudan: step by step pressure’, BBC, 8 August 2004,

<http://news.bbc.co.uk/1/hi/world/africa/3928093.stm>

59 Goodspeed, Peter; ‘Genocide emergency’ in Sudan: Aid group says a million may die if ethnic cleansing not halted’, National Post, Canada, 27 July 2004, A1.

raped and that people got together in camps. So there are one million displaced people and probably between 30,000 and 50,000 people died in the war.”⁶⁰

As Heffernan states, “arguing over the semantics of whether this is genocide, whether this is ethnic cleansing, does not do justice to the crisis. The fact is that hundreds of thousands of people are at risk, and if arguing over whether this is genocide halts some type of intervention ... then there's a real problem.”⁶¹ Indeed, whether or not genocide is taking place in the Sudan or not is a moot point, for even if there are indicators of genocide, then the Genocide Convention comes into play with signatories having a responsibility not just to respond to such allegations but to prevent mass killings from occurring in the first place. What appears to be clear from UN and NGO accounts is a massive assault on the black African population in Darfur indicating that signs of genocide have either already taken place, are taking place or will in all probability take place. Such scenarios have been occurring in the Sudan for at least the past 20 years require a timely response from the international community.⁶²

60 Europe No 1 Radio; ‘Darfur crisis "humanitarian tragedy" not genocide’, Paris (in French), 1000 GMT, 27 July 2004.

61 McElligott, Margaret; ‘Genocide Unfolding’: Physicians Group Faults Sudan Government, Lack of World Response’, www.AllAfrica.com, 23 June 2004.

62 The Sudan’s human rights record is appalling. Oxfam International and Medicine sans Frontiere documented atrocities occurring in areas such as Safaha and Wau in southern Darfur resulting from a collapse in security associated with the Sudanese north-south civil war from as early as 1986.⁶² African tribes have been left to starve to death in Darfur literally in their thousands over the duration of the war. Mass killings, torture, rape, population resettlement and other unconscionable human rights abuses in the area are well documented by NGOs and human rights organizations alike. One of the most significant massacres occurred in Al Dheinin in southeastern Darfur in 1987. (Mahmud, Ushari Ahmad, and Suleyman Ali Balbo; *The Al Dheinin Massacre: Human Rights Violations in the Sudan*, Khartoum: University of Khartoum, 1987.) In all cases atrocities were carried out by Arab militias in coordination with the Sudanese military. As Scroggins has noted, in the late 1980s journalists including Carol Berger and Jane Perlez of The New York Times and herself sent back report after report detailing the death of tens of thousands of African Sudanese seeking refuge in the north. The United Nations estimated that by 1988 250,000 Sudanese had died of starvation but the US Committee for Refugees whilst attempting to ‘quantify genocide’ in the Sudan placed the number at 500,000 people.⁶² The existence of such precedents makes the case for humanitarian intervention in the Sudan on the pretext of preventing further mass killings all the more timely. This is not a humanitarian crisis or human rights predicament that has been facing the international community since February 2003. Rather, the international community has been documenting ethnic cleansing and the people of the Sudan have been engulfed by massive human suffering for more than 20 years. Over this period (1989 – 2004) USAID alone has invested more than US\$1 billion in humanitarian assistance in an attempt to relieve civil war associated famine and disease. See <http://www.state.gov/r/pa/ei/pix/events/b/af/35146.htm> . See for example Africa Watch; *Denying the Honour of Living: Sudan, a Human Rights Disaster*, New York; Human Rights Watch, March 1990; Amnesty International; *Sudan: The Military Government’s First Year in Power: A Permanent Human Rights Crisis*, London, November, 1990; AMNESTY; *Sudan: Patterns of Repression*, London, February 1993; AMNESTY; *Sudan: The Ravages of War*:

HUMANITARIAN INTERVENTION – AN OPTION OF LAST RESORT

Alternative Enforcement Measures

Any form of humanitarian intervention utilizing military forces must be an option of last resort. In recognition of this fact the Secretary General, the Secretariat, UN specialized agencies and others have increasingly utilised advocacy measures to persuade states of policy change for the sake of protecting the rights and livelihoods of peoples under their responsibility.⁶³ Such enforcement measures could take the form of international condemnation, fact-finding missions, sanctions, international dispute resolution, and the threat of and subsequent use of force. In the case of Sudan all such measures have been undertaken over the past five (5) months with the exception of a direct threat to use (and subsequent use of) force in the form of a UN Security Council resolution.

Resort to enforcement actions is undertaken in response to threats to international peace and security in accordance with Chapter VII of the UN Charter. Widespread, serious human rights abuses appear to constitute such threats in the post-Cold War era and indeed the language of ‘threat to international peace and security’ was invoked in Security Council resolutions concerning state repression and IDPs in Iraq and Bosnia, and after-the-fact in Kosovo.⁶⁴ As the Secretary-general noted on 7 April 2004, “... the international community must be prepared to take swift and appropriate action [in the

Political Killings and Humanitarian Disaster, London, September 1993; AMNESTY; The Tears of Orphans, No future without Human Rights, London, March 2000. AMNESTY; Oil in Sudan: Deteriorating Human Rights, London, March 2000; Human Rights Watch; Civilian Devastation: Abuses by all Parties in the War in Southern Sudan. New York: February, 1999; Human Rights Watch; Famine in the Sudan, 1998, New York February 1999; Human Rights Watch; Sudan, Oil and Human Rights Abuses, New York, 11 April 2000; Idris, Amir; Sudan’s Civil War: Slavery, Race and Formational Identities, Lewiston, NY; Edwin Mellen Press, 2001; Kaplan, Robert; Surrender or Starve: The Wars Behind the Famines, Boulder, CO: Westview Press, 1988; and Karadawi, Ahmed; Refugee Policy in Sudan, 1967-1984, Oxford, Berghahn Books, 1999.. For details of the Sudanese Government’s militia strategy see de Waal, Alex; ‘Some Comments on Militias in the Contemporary Sudan’, in Daly, Martin and Sikainga, Ahmad (eds.); Civil War in Sudan, (London: British Academic Press, 1993) 142 – 156; and Keen, David; The Benefits of Famine: A Political Economy of Famine and Relief in Southwestern Sudan, 1983 – 1989 (Princeton: Princeton UP, 1994).

63 Helton, Arthur C and DeVecchi, Robert P; ‘Human Rights, Humanitarian Intervention & Sanctions’, Council on Foreign Relations, 2000, <http://www.foreignpolicy2000.org/library/issuebriefs/IBHumanRights.html>

64 See for example, Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo," American Journal of International Law (October 1999) vol. 93, no. 4; Christine M. Chinkin, "Kosovo: A 'Good' or 'Bad' War?" American Journal of International Law (October 1999), vol. 93, no. 4 and "Kosovo, World Order, and the Future of International Law," American Journal of International Law (October 1999) vol. 93, no. 4; Thomas M. Franck, "Lessons from Kosovo," American Journal of International Law (October 1999), vol. 93, no. 4; Louis Henkin, "Kosovo and the Law of Humanitarian Intervention," American Journal of International Law (October 1999), vol. 93, no.4; W. Michael Reisman, "Kosovo's Antinomies," American Journal of International Law (October 1999), vol. 93, no. 4; and Ruth Wedgwood, "NATO's Campaign in Yugoslavia," American Journal of International Law (October 1999), vol. 93, no. 4.

Sudan] ... by 'action' in such situations, I mean a continuum of steps, which may include military action. But the latter should always be seen as an extreme measure, to be used only in extreme cases.”⁶⁵

The idea of calibrating international response is not new. Article 33, of the UN Charter provides that “the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” What is new is the willingness of a post-Cold War UN, under the leadership of active Secretaries General – most notably Boutros Boutros-Ghali and Kofi Annan – to go beyond the scope of Chief Administrative Officer and develop the role of Secretary-General as statesperson.

Diplomatic Pressure

A diplomatic precedent has been set through negotiations for UN humanitarian access, which showed that the Sudanese Government shuns negative publicity⁶⁶ and the issuance of UN Security Council Resolution 1556 giving Sudan 30 days to meet the Security Council’s international peace and security demands appears to have sent Khartoum into crisis mode.

Sudanese Foreign Minister Mustafa Osman Ismail, visiting Turkey has warned that Sudan is “not looking for confrontation and we hope that we will not be pushed [but] if we are being attacked, definitely we are not going to sit silent, we will retaliate. ... We admit that the government is responsible to bring back law and order, the government is responsible to disarm the militia and arrest the Jinjaweit [but] the government of Sudan never started this war. Those who started are the rebels. So the rebels should be held responsible for the catastrophic situation.”⁶⁷

65 CNN Wire Service; ‘Bush, Annan call for end to Sudan fighting, www.CNN.Com, 7 April 2004. Despite cynical but accurate invocations of the unwillingness of the international community to protect the rights and livelihoods of Palestinians living under Israeli control as a pretext to continue human rights abuses under the guise of national security measures in Darfur, the Sudanese Government is neither being targeted nor singled out for the application of such advocacy measures. Specific examples in the African, Arab and Muslim context include international condemnation of the Zimbabwe Government’s treatment of white farmers; international condemnation of the Mubarak Government’s treatment of political detainees; the Jenin Fact-Finding Mission established to investigate alleged massacres by the Israeli Defense Force in the Palestinian refugee camp of Jenin during Operation Defensive Shield (subsequently aborted)⁶⁵; UN sanctions in Iraq; international dispute resolution leading to the end of sanctions on Libya; and the (threat of) and subsequent use of force (retrospectively authorised) by NATO to protect Kosovo Albanians.

66 Hilsum, Lindsay; ‘Thousands of people have been killed and a million displaced in Darfur. So why does our government, which believes in humanitarian intervention, do nothing to stop this crisis?’, *New Statesman*; May 3, 2004.

67 AP Wire; ‘Sudan’s Cabinet condemns prospect of foreign intervention in Darfur province’, *Associated Press*, 27 July 2004. Islamic militants [in the Sudan] have subsequently threatened to resist any foreign military intervention with force. Mohammed’s Army has called on Muslims to prepare to fight Western forces sent to western Sudan. “We have

At an emergency meeting of the Sudanese cabinet, ministers ordered the “political and strategic mobilisation of all government institutions”. They also decided to “strongly resist all UN Security Council resolutions calling for despatching international forces to Darfur. According to government officials, Khartoum is prepared to face down any foreign intervention in Darfur, by force if necessary.”⁶⁸ Information Minister El-Zahawi Ibrahim Malik “absolutely rejects any hints of military intervention in Sudanese affairs.”⁶⁹

However, according to US Congressman Tancredo - the leading advocate for intervention in the Sudan, “... in every case, when we have pushed [the Sudanese Government] to the limit, they have stepped back ... I think that they will eventually retreat from their position if we show them a solid force.”⁷⁰ Sustained diplomacy by the international community could eventually persuade Khartoum to implement the 3 July 2004 Agreement. What is required is the political will and sustained global media attention needed to sway public opinion and force the international community to act collectively in a timely fashion.⁷¹

UK Development Minister Hilary Benn has outlined a multi-part plan for Sudan - get money for aid, provide that aid, ensure security for it, pressure the Sudanese government to provide safety for the people and finally get a political settlement of the underlying rebellion. The European Union as a whole has now added its voice to the warnings.⁷²

seen and heard of the American and British interference in Darfur and there is no doubt that this is a crusader war that bears no relation to the citizens of Darfur,” the group said in a statement handed out Sunday at a mosque in Khartoum. “We call upon you to speedily head towards Darfur and prepare mass graves for the crusader army.” Goodspeed, Peter; ‘Genocide emergency’ in Sudan: Aid group says a million may die if ethnic cleansing not halted’, National Post, Canada, 27 July 2004, A1.

⁶⁸ Jenkins, Simon; ‘Sudan ready to fight foreign intervention’, The Times (London), 28 July 2004, 16.

⁶⁹ AP Wire Service; Sudan rejects suggestions of international military intervention in Darfur’, Associated Press, 26 July 2004.

⁷⁰ Congressman Tancredo; ‘Options for international intervention in Sudan’, Talk of the Nation, National Public Radio, 2:00PM ET, 27 July 2004.

⁷¹ Chomsky as discussed at length the morality of humanitarian intervention where people rather than states create such an impetus to respond to the human rights of their fellow global citizens. However, it should be noted that the invasion of Iraq showed that democratic accountability can prove not to be a factor in decisions to use military force. In the absence of identification of weapons of mass destruction the invasion of Iraq has been sold to Coalition of the Willing domestic constituencies as a humanitarian intervention motivated by an intent to liberate the people of Iraq from their oppressor, Saddam Hussein. For a discussion of the relationship between domestic politics, democratic accountability and the use of force see Mingst, Karen; ‘Domestic political factors and decisions to use military forces’, in Democratic Accountability and the Use of Force in International Law, Cambridge UP, London, 2003, 61-81.

⁷² Reynolds, Paul; ‘Sudan: step by step pressure’, BBC, 8 August 2004,

<http://news.bbc.co.uk/1/hi/world/africa/3928093.stm>

Regional Response

The African Union having committed 300 troops to bolster the 60 monitors already in place, is now considering sending a force of 2000 to Darfur (with troops from Nigeria and Rwanda), with the Sudanese Government agreeing that the African Union should oversee a possible ceasefire arrangement between government and opposition groups.⁷³ Foreign ministers of the Arab League met in Cairo on 8 August 2004 to discuss ways of extending the 30 day deadline for Sudan to comply with Security Council Resolution 1556. The League has also determined a three step humanitarian, political and security plan which mirror's the British plan, and coordinates with the Security Council's mandate.⁷⁴

There is a genuine fear throughout the Middle East, however, that foreign intervention in the crisis will signal an Iraq Invasion style overthrow of the Sudanese Government. At the least, according to Ibrahim Dekche, a Sudanese and former senior official at the Organization of African Unity – the predecessor of the African Union - the crisis in Darfur could entail a “geopolitical reorganisation of the Horn of Africa weakening Sudan's position”.⁷⁵ However, there is also “considerable reluctance in Western capitals to get engaged in another direct confrontation with the government of a largely Muslim country. Sudan itself is aware of that and is hinting at the potential for regional destabilisation if there is military aggression.”⁷⁶

73 Reynolds, Paul; ‘Sudan: step by step pressure’, BBC, 8 August 2004,

<http://news.bbc.co.uk/1/hi/world/africa/3928093.stm>

74 Official Arab government involvement in the Darfur crisis is somewhat belated and appears to be motivated by Arab populations whose concern for the humanitarian crisis in Darfur has grown over the past months. A perusal of Arabic newspapers since April 2004 suggests that concern over the crisis throughout the Middle East has been overshadowed by events in Iraq. Nonetheless interest has grown over time and predictably Arabic editorial comment has been far more critical of the Sudanese Government than Arab government officials. For example, in Saudi Arabia a pro-western Arab News editor recently wrote, “it will not be long before no one is interested in hearing Khartoum's side of events and the focus will be entirely on alleviating the humanitarian tragedy that is unfolding for over a million black Sudanese citizens.” See Editorial Comment; Arab News, Saudi Arabia, 30 June 2004. In Lebanon the Daily Star opined “there are a number of festering wounds marking the collective body of the Arab world, and not all of them can conveniently be attributed to the aggression of outsiders ... the world - the world beyond the Arab world that is - is justified in asking the following question: "What are the Arabs doing about this atrocity in their own back yard?" Editorial Comment; Daily Star, Lebanon, 30 June 2004.

75 Zenati, Hassen; ‘Arab nations look to buy Sudan time after UN sets 30-day Darfur deadline’, Agence France Presse, 7 August 2004.

76 Reynolds, Paul; ‘Sudan: step by step pressure’, BBC, 8 August 2004,

<http://news.bbc.co.uk/1/hi/world/africa/3928093.stm>. Libyan Foreign Minister Abdul Rahman Mohammed Shalgham has criticised what he calls “the US and Western escalation” in calling for foreign intervention. Editorial Comment; Sudan Tribune, (in Arabic) 30 June 2004. According to Samir Hosni, in charge of Sudanese issues at the Arab League, foreign ministers may determine to send an observer force with African Union troops. Countries including Morocco,

The African Union – despite its relative youth – has been comparatively proactive in response to this crisis. The Arab League has not been. While the international community can rely on Arab member states of both the African Union and the Arab League, and should do so when forming peace-enforcement/peacekeeping forces, to rely upon the Arab League for more than political support would be ill-advised given current regional schisms created by the invasion of Iraq.

Ceasefire Agreements

The Sudanese Government is hoping for increased regional and international legitimacy and a dividend of donor aid and foreign investment if peace deals with Southern Sudan prove effective. The international community should insist that bringing an end to mass killings and ethnic cleansing in Darfur be made part of that deal. Indeed, countries such as France and the United States, which have been involved in the machinations of exploiting Sudan's oil reserves since the 1980s should use more political leverage.⁷⁷

On 8 April 2004 parties to the conflict began closed-door talks in the Chadian capital of Ndjamena, discussing a renewable 45-day ceasefire. The agreed cease-fire has not, however, come to fruition, and insecurity remains. The Sudanese government denies its responsibility for the growing crisis, refuses to restrain the Jingaweit, and regularly impedes humanitarian access. Yet the international community has been loath to act for fear of undermining the final peace agreement between the North and the South. It would be morally reprehensible for the international community to overlook the atrocities in Darfur in order to achieve a north-south peace.

According to UNOCHA further “talks between the GoS and the Darfur rebels SLA and JEM are scheduled to take place in Abuja, Nigeria on Monday, 23 August 2004.” Such talks provide an important forum for the international community to again make its concerns clear. However, on their second day of meetings (24 August 2004) the African Union sponsored talks “are showing little sign of progress ... and ... it is increasingly beginning to look as if there is little real desire to make them succeed”.⁷⁸ This comes as

Algeria, Tunisia, Libya, Egypt, Mauritania, Sudan and Somalia are members of both the Arab League and the African Union. Zenati, Hassen; ‘Arab nations look to buy Sudan time after UN sets 30-day Darfur deadline’, Agence France Presse, 7 August 2004.

⁷⁷ Hilton Dawson, Chairman of the British Parliamentary Group on Sudan, believes there is no genocide in Darfur and says that “this is a country which has been at war for more than 20 years. We are coming to the comprehensive peace agreement which should end all fighting between north and south. It's vital that that isn't disrupted, because many more lives would be lost. We should be mindful that a decade ago, a secret US Defence Department document argued a ceasefire in Rwanda would be jeopardised by pressure to punish those organising killings. Another memo, for the Under-Secretary of Defence, gave this advice: “Talking points for your dinner tonight with Mr Kissinger: Is the US government willing to get involved? Not inside Rwanda or Burundi until peace is restored.” Welsh, Paul; ‘Darfur: A repeat of Rwanda?’, BBC, <http://news.bbc.co.uk/1/hi/world/africa/3928093.stm>

⁷⁸ BBC; Straw demands action in Darfur, BBC, 24 August 2004, <http://news.bbc.co.uk/1/hi/world/africa/3593190.stm>

no surprise given that talks have already broken down in June 2004. There is little to suggest that ceasefire arrangements will be successfully devised in the immediate future, let alone implemented.

National Security Measures

On 3 July 2004, Sudan deployed 3,600 of the 6,000 Sudanese police called for by the UN to protect refugee and IDP camps and rein in the Jinjaweit and other outlawed rebel militia conducting what the UN has termed “systematic” human rights abuses of Sudanese living in “sub-human conditions”. Yet on the 22 July 2004 the Secretary-General’s Special Representative on Darfur, Jan Pronk noted that Sudan had subsequently made “no progress whatsoever” in reigning in the militias.⁷⁹ On 5 August 2004, Pronk stated that Sudan was not expected to fully disarm the militias by the deadline, but had to show serious progress. He noted that the Sudanese Government had over the previous week deployed more policemen in the region and had seemingly stopped its own military activities against villagers. Pronk also said that security in IDP camps had improved.⁸⁰ However, the Secretary-General’s advisor on IDPs, Francis Deng said that security in the region remained poor.

Also on 5 August 2004, the Secretary General advised the Security Council that the Sudanese Government had improved access for humanitarian workers, supplies and equipment. “But there is much, much more to be done on the protection side, and this is something that has been brought to the attention of the Sudanese government quite forcefully.”⁸¹ The African Union similarly advised that militias were continuing to loot and burn villages in Darfur.⁸² On the same day the Sudanese Government announced that it would double the UN’s call for 6,000 police to be deployed to Darfur to 12,000. While UNOCHA noted on 20 August 2004 that there appears to have been a significant breakthrough on 7 August 2004 in relation to humanitarian access to affected areas in Darfur, atrocities including rape and forced resettlement continue.⁸³

79 Lederer, Edith; ‘Annan warns of international intervention if Sudan doesn't disarm militias in Darfur’, Associated Press, 22 July 2004.

80 Dixon, Robyn; U.N. Sees Positive Actions in Sudan; A special envoy says the government has stopped militia attacks on villagers in Darfur and improved security’, Los Angeles Times, August 5, 2004, 3.

81 Dixon, Robyn; U.N. Sees Positive Actions in Sudan; A special envoy says the government has stopped militia attacks on villagers in Darfur and improved security’, Los Angeles Times, August 5, 2004, 3.

82 Dixon, Robyn; U.N. Sees Positive Actions in Sudan; A special envoy says the government has stopped militia attacks on villagers in Darfur and improved security’, Los Angeles Times, August 5, 2004, 3.

83 UNOCHA; ‘Note to Management on Action Point/Key Development’, Issue No. 206, 20 August 2004. On 24 August 2004, British Foreign Minister, Jack Straw said Khartoum had made progress with humanitarian access and security within the camps. “But more needs to be done to make the area safe enough for people to feel they could go back home. It is critical that Khartoum establish safety and security across Darfur and get the political process going.” BBC; Straw demands action in Darfur, BBC, 24 August 2004, <http://news.bbc.co.uk/1/hi/world/africa/3593190.stm>

To what extent can the Sudanese Government which has a significant history of causing humanitarian disaster and intentionally stalling the implementation of requisite remedies be trusted to implement national security measures and restore law and order in Darfur? Can the deployment of police forces quell the fighting and end the atrocities, or, given that many of the atrocities have actually been committed by the police themselves, is the international community actually exacerbating the problem by handing over responsibilities to law enforcement personnel who lack the capacity to provide requisite protection functions? The national security question in the Sudan is not the number of police that need to be deployed but the quality of the protection forthcoming. In this regard, the issue of accountability for war crimes is also currently on the table and according to US Congressman Royce, Chairman of the House Sub-Committee on Africa, “those doing the killing need to understand that the world is changing. We have international courts to hold human rights criminals accountable. The days of impunity are ending”⁸⁴ Indeed, UN Security Council Resolution 1556 sets out to hold the perpetrators of such crimes in Darfur accountable.⁸⁵

Drawing upon the lessons learnt from attempts to secure post-war Iraq, the UN Secretary-General should insist in his next report on the Situation in Darfur that Sudan embarks upon a significant rule of law program led by joint African Union and Arab League nations. Such a program should aim to: (1) promote awareness raising and the training of soldiers on international humanitarian and human rights law using scenarios as well as theory; (2) negotiate between the Sudanese Government and organised resistance movements; (3) establish and communicate to the people of Sudan, as a matter of urgency, plans for improving security; (4) Deploy, as a matter of urgency military police or constabulary units to provide security throughout Darfur; (5) establish training facilities and programs for Sudanese law enforcement agencies, focusing on proper treatment of suspects, effective investigative techniques, and international standards of due process; (6) immediately deploy emergency judicial teams of international judges, prosecutors, and correctional officers to operate an interim judicial system capable of addressing the growing number of criminal suspects apprehended by Sudanese forces; (7) establish national level law enforcement regulations consistent with international human rights standards; (8) integrate the special rights of women as part of any training for law enforcement officials, including judges, prosecutors, and police; integrate the special needs and rights of children as part of any training for law enforcement officials, including judges, prosecutors, police, and other officials whose work brings them in contact with children; (9) undertake mine action activities (survey, marking, risk education, and clearance).⁸⁶

84 Reynolds, Paul; ‘Sudan: step by step pressure’, BBC, 8 August 2004,

<http://news.bbc.co.uk/1/hi/world/africa/3928093.stm>

85 The Government of Sudan having failed to respond to this request thus far has less than one week to establish mechanisms for holding offenders to account.

86 These guidelines have also been suggested by Amnesty and others in the case of Iraq. See AMNESTY; Iraq: Looting, lawlessness and humanitarian consequences, April 11, 2003; Ken Guggenheim, “Iraq’s Looting Appears More Serious Year after War,” Associated Press, March 14, 2004. <http://cnews.canoe.ca/CNEWS/World/2004/03/14/382373->

On 30 August 2004, the UN Secretary General will decide whether the Sudanese authorities have done enough by way of instituting national security measures mandated by the UN Security Council.⁸⁷ Further recommendations to institute a comprehensive program of law enforcement and protection should be implemented. In addition to increasing police numbers, as required by UN Security Council Resolution 1556, it should be made clear that the Government of Sudan must begin working with UN specialized agencies to broaden law enforcement measures as recommended here. If a serious commitment is not forthcoming in this regard then the UN Secretary-General should recommend humanitarian intervention in the form of either immediate deployment of peace-enforcement or peacekeeping forces.

AUTHORISING THE USE OF FORCE

Humanitarian intervention in the Sudan, be it for peace enforcement or peacekeeping purposes, should be endorsed by the United Nations Security Council or the African Union with post facto endorsement by the Council.

Existing UN Security Council Resolutions on the Sudan

UN Security Council Resolution 1556 passed on 30 July 2004 gives Sudan 30 days in which to disarm the Jangaweit militia, commit law enforcement resources to Darfur and bring human rights violators to justice. If the Sudan does not respond accordingly, the Security Council will consider “further actions, including measures as provided for in Article 41 of the Charter of the United Nations on the Government of Sudan.”

Article 41 does not authorise force but rather authorises economic measures such as the “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” If humanitarian intervention is to be embarked upon with full Security Council authorization further resolutions permitting the use of “all necessary means” will need to be drafted.⁸⁸

ap.html; Richard Norton-Taylor, “Violence blamed on US decision to disband Iraq army,” *The Guardian*, April 7, 2004; Human Rights Watch, *Sidelined: Human Rights in Postwar Iraq*, January 26, 2004.

http://hrw.org/wr2k4/6.htm#_Toc58744955; Human Rights Watch, *Climate of Fear: Sexual Violence and Abduction of Women and Girls in Baghdad*, July 16, 2003. <http://hrw.org/reports/2003/iraq0703/>; and Jordan J. Paust, “The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War,” *ASIL Insights*, April 2003.

⁸⁷ BBC; Straw demands action in Darfur, BBC, 24 August 2004, <http://news.bbc.co.uk/1/hi/world/africa/3593190.stm>

⁸⁸ Resolution 678 authorised force against Iraq, including for the purpose of restoring international peace and security using the phrase “all necessary means” which is the Security Council’s recognized diplomatic term for authorizing the use of force. This identical language was used in the cases of military intervention in Rwanda, Bosnia, Somalia, and Haiti. See Singh, R and MacDonald, A; *Legality of Use of Force Against Iraq*, Matrix Chambers, London, (2002), 23-24. The resolution therefore suggests that when the Security Council intends to authorise the use of force, it does so

The Emergency Exit Clause - The Kosovo Precedent

If the UN Security Council fails to respond in a timely manner to continued mass killings because of an unwillingness on the part of any of the Permanent Five to do so,⁸⁹ humanitarian intervention might be undertaken as a deviation from international law justified solely on moral grounds – that is as “illegal but legitimate” as was the approach adopted by the *Independent International Commission on Kosovo*.⁹⁰ As Rytter notes, “this leaves open an option for intervention in extreme cases of human suffering, but at the same time avoids jeopardising the existing, hard-earned, international legal order and the central role of the Security Council. NATO’s intervention in Kosovo has been justified in these terms.”⁹¹

A collective process undertaken in response to a imminent humanitarian catastrophe in the Sudan might trigger a Coalition of the Willing, or preferably, the African Union with international logistical assistance to thereby undertake humanitarian intervention without UN Security Council approval which might then be legalized *post facto*. As Falk notes, “the *Kosovo Commission* tackled this issue of principled humanitarian intervention, as have scholars, seeking to provide guidance that preserves the balance between the prohibition on uses of force and the moral/political imperatives to mitigate impending or ongoing humanitarian catastrophes.”⁹²

As in Kosovo, the moral and political case for intervention seems strong in the case of the Sudan, that is “a vulnerable and long abused majority population facing an imminent

expressly. Legal arguments surrounding “implied authorization” as purportedly contained in UN Security Council Resolution 1441 on the situation between Iraq and Kuwait do not apply here as there has been no authorization to use force in the Sudan in any of the Council’s resolutions.

89 In the case of Sudan the objector to action would most probably be China, given its own appalling human rights record.

90 THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2002) 185-198, 187.

91 Rytter, Jens Elo; ‘Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond’, *Nordic Journal of International Law* 70: 121–160, 2001, 121. As Falk notes “in that instance, a formal mandate was sought and provided by NATO, but without what seemed to be textually required by Article 53(1) of the UN Charter, that is, lacking some expression of explicit authorization by the UN Security Council. Legal apologists for the initiative insisted that such authorization could be derived from prior UN Security Council resolutions, as well as from the willingness of the UN to manage the post-conflict civil reconstruction of Kosovo that amounted to a tacit assent, providing the undertaking with a retroactive certification of legality. To similar effect were arguments suggesting that the failure of the Security Council to adopt a resolution of censure introduced by those members opposed to the Kosovo War amounted to an implied acknowledgement of legality. Falk, Richard; ‘After Iraq Is There a Future for the Charter System? War Prevention and the UN’, *Counterpunch*, 2 July 2003.

92 Falk, Richard; ‘After Iraq Is There a Future for the Charter System? War Prevention and the UN’, *Counterpunch*, 2 July 2003.

prospect of ethnic cleansing by ... rulers, a scenario for effective intervention with minimal risks of unforeseen negative effects or extensive collateral damage; and the absence of significant non-humanitarian motivations on the intervening side.”⁹³ As such, a principled departure under exceptional circumstances from a strict interpretation of UN Charter as it pertains to the use of force seems to be present if needed.⁹⁴

HUMANITARIAN INTENT

93 Falk, Richard; ‘After Iraq Is There a Future for the Charter System? War Prevention and the UN’, Counterpunch, 2 July 2003.

94 As Falk also notes, “the legality/legitimacy gap, however, was recognized to be unhealthy, eroding the authority of international law over time, and the Commission recommended strongly that it be closed at the earliest possible time by UN initiative. Its report urged, for example, that the Permanent Members of the Security Council consider agreeing not to cast adverse votes in the setting of impending humanitarian catastrophes.” Falk, Richard; ‘After Iraq Is There a Future for the Charter System? War Prevention and the UN’, Counterpunch, 2 July 2003. Humanitarian intervention should not be associated with alleged security threats posed by, for example, the war on terror. The war on Afghanistan by the Coalition of the Willing was at least convincing in terms of the security argument. The humanitarian benefits of that war are still being weighed however, Afghanistan was not a humanitarian intervention it was an act of self-defense following on from the events of 11 September 2001. The reasons for the invasion of Iraq, however, were totally unconvincing, and as yet no WMD has been found. The links between Saddam Hussein’s regime and Al-Qaeda and other such fanciful arguments were known to be such at the time by any Middle East scholar of repute. We now find ourselves confronted with unpalatable government spin and rhetoric which inevitably attempts to revive what appeared in January 2003 to be a short-lived notion of a just war in Iraq for the sake of the humanitarian and human rights of Iraqis. As Falk surmises, “such post hoc efforts at legalization should not be accorded much respect, especially in the context of a major war where prior efforts to obtain a mandate for the use of force were not endorsed by the Security Council even in the face of major diplomatic pressures mounted by Washington in the several months prior to the Iraq War. Recourse to war is too serious a matter to allow decisions about it to proceed on the basis of a rationale that are not fully articulated and debated in advance.” Yet one might still wonder to what extent do UN Security Council Resolutions 1483 and 1511 actually contribute to such post facto justifications? Does the passing of UN Security Council Resolutions 1483 legitimising the occupation of Iraq by the US and the UK and Resolution 1511 which allows for the transformation of Occupying Forces into a multilateral force with international recognition, although very limited participation, actually impute retrospective UN Security Council approval for such actions on humanitarian grounds? I think not. Indeed Falk and Schachter are both right when they say that “the law can be stretched as new necessities arise, but the stretching must to the extent possible be in accord with procedures and norms contained in the UN Charter, with a factually and doctrinally persuasive explanation of why a particular instance of stretching is justified.” The war on Iraq clearly had nothing to do with the UN Charter and despite UK and Australian protestations to the contrary, the US, at least, was very honest about this very fact, up until that is, the WMD argument proved lost. See Falk, Richard; ‘After Iraq Is There a Future for the Charter System? War Prevention and the UN’, Counterpunch, 2 July 2003 and Oscar Schachter, "In Defense of International Rules on the Use of Force," 53 U. Chi. L. Rev 113 (1986).

Humanitarian intervention must be primarily motivated by humanitarianism, that is, the chief intent behind such an act must be the protection of the rights and livelihoods of the refugees and IDPs of the Darfur region. In the case of the Sudan there are three (3) main sets of proponents advocating humanitarian intervention: (1) the UN Secretary-General (and his Secretariat, most notably UNOCHA, DPA and DPKO); (2) a core group of 12 members of the US Congress (predominantly but not exclusively from the Democratic Party); and the UN Security Council (of the permanent five the US, UK, and now France and Russia appear to support limited intervention). To what extent are these proponents of humanitarian intervention motivated by a humanitarian as opposed to other agendas?

Ibrahim Ahmed Omar, Secretary General of the Sudanese ruling National Congress party has suggested that intervention in the Sudan is “not being launched for the interest of the people of Darfur, nor is it prompted by the humanitarian situation, but is only taken as a pretext like that of the weapons of mass destruction used by the US and Britain to invade Iraq.”⁹⁵ Although the Sudanese Government has suggested at various moments in the debate that humanitarian intervention in the Sudan is primarily motivated by national security agendas, Christian-Zionist designs, and oil and gold reserves, no serious analysis has arisen on the question of the humanitarian intent - unlike the case of the invasion of Iraq.

National Security and the War on Terror

It is well documented that Sudan's regime supported Osama bin Laden for many years. Indeed Hassan al Turabi, the former head of the National Islamic Party, who still enjoys much popularity and respect despite currently being locked up in a Sudanese prison⁹⁶ is Bin Laden's mentor. The Sudanese Government gave Bin Laden land in the South to cultivate cash crops and run terrorist training camps. Since Bin Laden transferred his enterprise (which was named Al-Qaeda - “the Base” – whilst still in Sudan) to Afghanistan the Sudanese Government has been attempting to build Washington's trust. However, while cooperating in the war on terrorism, it is still listed as a sponsor of terrorism by the US. For this reason, covert operations by CIA operatives have been ongoing in the Sudan since at least the 1980s.⁹⁷

Could humanitarian intervention in the Sudan become the latest front on the ‘war on terror’? Given the Bush Administration's relative reluctance to embark upon military action in the Sudan this seems unlikely. Indeed in recent statements US Secretary of State Colin Powell has determined that “it is too early to talk about military intervention”.

95 AFP Wire Service; ‘Sudan warns against foreign intervention’, Agence France Presse, 25 July 2004.

96 There is some speculation that Omar Al Bashir will release Hassan al Turabi in the coming weeks or months as a good will gesture following on from peace talks with the south.

97 For in depth analysis of Bin Laden's ties to and activities in the Sudan see Bodansky, Yossef; Bin Laden: The man who Declared War on America, (Rocklin, CA: Forum, 1999). For an understanding of the important role played by Hassan al Turabi see AlEffendi, Abd el-Wahab; Turabi's Revolution: Islam and Power in the Sudan, (London: Grey Seal Books, 1991); Hamdi, Mohammed Elhachmi; The Making of an Islamic Political Leader: Conversations with Hassan al-Turabi, Ashur A. Shamis, trans (Boulder, CO: Westview Press, 1998).

Covet CIA activities against terror suspects will no doubt continue with or without the Sudanese Government's approval and with or without humanitarian intervention in the Darfur region.⁹⁸

A Christian-Zionist Crusade?

If one reflects on the inaction of the Arab League, the initial dragging of the feet by the African Union and the unwillingness of the Asian bloc to support humanitarian intervention as a legal remedy for the protection for human rights - in extreme cases - it is indeed the case that those from the North are predominately driving humanitarian intervention in the Sudan. This leaves its proponents wide open to Sudanese and other criticisms from the South – including the Muslim world – that humanitarian intervention is nothing more than a “crusade” intent upon spreading Christian – Jewish values at the expense of local custom, norms and mores.⁹⁹

It is perhaps unfortunate then that the leading US congressional proponent of humanitarian intervention in the Sudan and author of the *Sudan Peace Act* (22 October 2002), is a self-proclaimed Christian active in the controversial Sudanese slave freeing movement. Congressman Tom Tancredo does use the anachronistic language of crusade¹⁰⁰ and believes he has been called to the task of freeing Sudan's Christians by his Church.¹⁰¹ Although we have no reason to doubt his sincerity in terms of his concern over

98 More worrisome to US civil liberties groups is covert CIA involvement in destabilizing the Islamic fundamentalist government of the Sudan. ... Over \$20 million has been spent on the pretext that the rogue Khartoum regime sponsors international terrorism. Egyptian intelligence and Al-Sha'b newspaper report that up to 850 US military advisers are training guerrillas ... Vesely, Milan; 'Africa's New Friend: Is the US just playing catch-up, or stumbling toward neo-colonialism?', *Toward Freedom*, February 1998 at <http://www.hartford-hwp.com/archives/45/240.html>

99 Indeed, in the Sudan the at least 20 year old relationship between the Sudanese Government and the international humanitarian aid community has been tumultuous to say the least. Access to areas in need of humanitarian assistance is more often than not prevented and a general sense of distrust pervades government-UN-NGO relations. Some including Hassan Al-Turabi see western humanitarianism and its foreign aid worker and journalist cadres as using humanitarian assistance as a ruse for espionage, as a front for the 'Christian-Zionist conspiracy'. See Hamdi, Mohamed Elhachmi; *The Making of an Islamic Political Leader: Conversations with Hasan al-Turabi*, trans. Ashur A. Shamis (Boulder, CO: Westview Press, 1998).

100 This war is being fought by the Islamic northern regime in Khartoum against the mostly Christian and animist population in the south. ... Raiders, who fight alongside the northern regime, have enslaved southern women and children as they carried out attacks in the south. I supported the actions of fourth grade students at Highline Community School ... who raised money to free southern Sudanese from their human bondage. These brave students raised nearly \$100,000 in their redemption efforts, and helped to free over 1000 slaves. ...” Statement attributed to Congressman Tom Tancredo at his official House of Representatives website www.house.gov/tancredo/issues/human_rights.html

101 His biography reads “Upon completion of the 107th Congress, Tom was invited by President Bush to attend a White House signing ceremony of the Sudan Peace Act, legislation originally authored by Tom, which became public law on October 21, 2002. This was the fulfillment of Tom's dreams instigated at his church, Cherry Hills Community

“human rights abuses all over the world ... People all over the world deserve the same freedoms and rights that we enjoy every day in the United States.” Indeed, Christianity is not incompatible with human rights agendas. However, as Lyman, Former Ambassador, Council on Foreign Relations has pointed out, “the United States is in a difficult position, because while we have been taking a lead role in trying to get international pressure on this, we are faced with the Sudanese very cleverly portraying our interests and other interests as a kind of anti-Islamic, anti-Arab campaign.”¹⁰²

Similarly, as US Republican Congressman Coyers has noted, “... the American reputation in the Middle East is that all they see is our troops and our use of force, and it's going to take a lot of negotiations. ... we've got to get them to believe that we're coming in here for totally humanitarian purposes.”¹⁰³ The invasion of Iraq has done much to build such skepticism, as has the running sore that is the Occupied Palestinian Territory. Although Christian and Zionist agendas have very little to do with a conflict that situates Muslim against Muslim, such fears suggest a level of cynicism, uncertainty, and even disbelief that will plague the humanitarian community working in the Sudan and inevitable compromise the community's security for many years to come.

Gold and Black Gold

The Sudanese Newspaper Al Anba has asked “is the crisis related to the struggle for control over oil resources?”¹⁰⁴ Sudanese critics highlight the activities of a number of international oil firms and note that Petrochina was recently sponsored by Goldman Sachs to raise investment funding in America. The investment offering by Goldman Sachs might have failed if it were not for BP/Amoco, which invested billions of dollars into the Sudan pipeline.¹⁰⁵ Such investment activities are ongoing. As the recent *Securities Investigation*¹⁰⁶ into Goldman Sachs IPO dealings show, PetroChina could use

Church, to help the Sudanese Christians enslaved by the North Sudanese.” See www.house.gov/tancredo/issues/human_rights.html

102 Lyman, Princeton; ‘Options for international intervention in Sudan’, Talk of the Nation, National Public Radio, 2:00PM ET, 27 July 2004.

103 Congressman Coyers; ‘Options for international intervention in Sudan’, Talk of the Nation, National Public Radio, 2:00PM ET, 27 July 2004.

104 Editorial Comment; “How will the UK ambassador answer these questions” Al-Anba (in Arabic), Khartoum, 9 Aug 04.

105 According to CNN, “some members of Congress, labor unions and public interest groups were threatening to block PetroChina's IPO because its parent, CNPC, had invested in a oil project in Sudan, which the U.S. now sanctions for human rights abuses. Critics, who feared some of the proceeds would be diverted to Sudan, lambasted Goldman Sachs, which stood to reap millions of dollars in fees, for taking part in the controversial offering. Crawford, Krysten; ‘Goldman Sachs fined \$2 million: Wall Street firm settles charges that it violated IPO ‘waiting period’ regulations, CNN Money, <http://money.cnn.com/2004/07/01/markets/goldman/>

106 See also UNITED STATES OF AMERICA Before the SECURITIES AND EXCHANGE COMMISSION SECURITIES ACT OF 1933 RELEASE NO. 8434 / July 1, 2004, SECURITIES EXCHANGE ACT OF 1934

monies raised through Goldman Sachs' stock dealings to make investments that could funnel oil revenues to support human rights abuses in the Sudan¹⁰⁷ A small number of US human rights groups have focused in on PetroChina and other oil companies with an investment in the Sudan because profits from those investments, it has been claimed, have funded the Sudanese Government's war against rebels in the country's largely south."¹⁰⁸

What, if anything does Goldman Sachs and global oil companies have to gain by supporting humanitarian intervention? Do they see a solution to the Darfur crisis as part of the overall north-south peace package deal opening the way to oil and gold exploration and associated financial dividends? Are their rights to exploit oil reserves in the Sudan secure enough to go out on a limb and challenge the Sudanese Government? Are they hoping humanitarian intervention will eventually led to the overthrow of Khartoum and the ushering in of a capitalist, pro-western puppet regime along the lines of the recently appointed Iraqi Interim Authority? Goldman Sachs involvement in such matters needs further, thorough investigation, especially given that a former co-chairman and co-chief executive officer is now one of the Democratic Party's leading US Senators, Jon Corzine is behind the push for humanitarian intervention the Sudan.¹⁰⁹ It would appear that at least one of the proponents for humanitarian intervention in the Sudan was at one time, if not now, actively involved in financial speculation surrounding political developments in the Sudan.

The Spectre of Rwanda

Upon the 10th 'anniversary' of the Rwandan Genocide the UN Secretary-General called on the international community to respond to the crisis in Darfur. The US President George W. Bush responded to the UN Secretary-General's call on the same day urging

RELEASE NO. 49953 / July 1, 2004 ADMINISTRATIVE PROCEEDING FILE NO. 3-11533, at

<http://www.sec.gov/litigation/admin/33-8434.htm>

107 See Bloomberg News, 2 July 2004.

108 Ponfret, John; 'PetroChina IPO Arrives In U.S. With Weak Pulse', The Washington Post, April 6, 2000, at

<http://www.tew.org/archived/petro.ipo.html>. Indeed, the direct involvement of US, European and Chinese foreign oil companies in armed conflict in the Sudan has been documented and detailed extensively elsewhere and focuses on oil companies such as Chevron, Talisman and Mobile hiring local militias and international mercenaries - including Executive Outcomes - with the consent of Khartoum, to 'clear' land of its inhabitants in order to secure oil fields and pipelines. Canadian government investigators have reported that Talisman Energy, Canada's largest oil company, has been allowing human rights abuses in Sudan and may even be playing a role in that country's civil war. "... [T]he oil company's revenue was funding the [Sudanese] military... [G]overnment backed slave raids and attacks on villages, enabling Talisman to build an oil pipeline. During the raids and attacks, men were reportedly killed, women forced into slavery, and children forced into the army. Although investigators could not directly link Talisman to the raids, they did uncover evidence of civilians forcibly displaced from areas near oil operations and of the military's use of the oil company's equipment." As reported by the InterPress Service, 7 February 2000 and appearing in the Los Angeles Times on 15 February 2000.

109 See <http://corzine.senate.gov/bio/index.html>

the Khartoum government to take immediate action in Darfur, calling upon the Sudanese Government to “immediately stop local militias from committing atrocities against the local population and ... provide unrestricted access to humanitarian aid agencies. I condemn these atrocities, which are displacing hundreds of thousands of civilians.”¹¹⁰

The British Prime Minister Tony Blair clearly remains haunted by the ghosts of Rwanda. At the 2001 Labour Party Conference Blair noted, “if Rwanda happened again today, when a million people were slaughtered in cold blood, we would have a moral duty to act there.”¹¹¹ Blair has since said Britain has a 'moral responsibility' to respond to the events taking place in Darfur.¹¹²

If we investigate the backgrounds of the main proponents for humanitarian intervention in the Sudan it would appear that, as a generalisation, their primary motive is humanitarian.¹¹³ As Congressman Coyers notes, “We have Rwanda hanging over us like a specter”.¹¹⁴ According to Congressman Tancredo, “No one wants to be in this position that we've been in since Rwanda, saying, 'Oh, my God, if we'd only known. Oh, my goodness, if we'd only taken action.' We do know. It is the same. The action needs to be taken.”¹¹⁵

RESPECTING IHL AND HUMAN RIGHTS LAW

Peace-enforcement or Peacekeeping?

110 AFP Wire Service; ‘Sudan rejects pressure for international intervention in Darfur’, Agence France Presse, 8 April 2004.

111 The Observer; ‘Comment: The UN must not fail Sudan again: Stop the murdering militias’, 25 July 2004.

112 The Observer; ‘Comment: The UN must not fail Sudan again: Stop the murdering militias’, 25 July 2004.

113 Other than the professional UN humanitarians behind this endeavour – including the Secretary -General, a core bipartisan group of 10 US Congressional members including John Conyers (D), Henry Hyde (R), Tom Lantos (D), Tom Tancredo (R); Donald Payne (D); Elijah Cummings (D), Frank Wolf (R); and Senators Richard Lugar (R); Jon Corzine (D), and Sam Brownback (R). As generalization this group has a strong background in international relations, human rights and national security advocacy.

114 Congressman Coyers; ‘Options for international intervention in Sudan’, Talk of the Nation, National Public Radio, 2:00PM ET, 27 July 2004.

115 Congressman Tancredo; ‘Options for international intervention in Sudan’, Talk of the Nation, National Public Radio, 2:00PM ET, 27 July 2004. Two former Clinton aides, Susan Rice, Assistant Secretary of State from 1997 to 2001, and Gayle Smith, Special Assistant to the President and Senior Director for African Affairs at the National Security Council from 1998 to 2001 noted recently in reference to the situation in Darfur that “[t]en years ago CNN ran footage of bloated corpses floating down Rwanda’s rivers, while Washington debated whether to call it “genocide”. ... [L]ike many others, we remain haunted by the Rwandan genocide. ... It is too late to change the historical record on Rwanda. But it is not too late to set a better precedent for the future.” Rice, Susan and Smith, Gayle; ‘The Darfur Crisis’, The Washington Post, 30 May, 2004, B07.

Any military mechanisms and measures utilized in the Sudan, including for the purposes of humanitarian intervention, must be undertaken in accordance with human rights and humanitarian law. In the absence of immediate military intervention, it is proposed possible lawful military mechanisms and measures for peace-enforcement and peacekeeping operations in the Sudan, include:

- (1) short-term increased current African Union (AU) monitoring and protection with the international community meeting the current logistical – including equipment - challenges facing AU forces;
- (2) where it is determined that United Nations and other aid agencies can no longer cope, short-term AU support to the delivery of humanitarian assistance;
- (3) short-term AU protection of refugee camps beleaguered by the Jinjaweit and other militias to which the Sudanese Government has committed to dismantle;
- (4) medium-term creation and maintenance of ‘zones of peace’ or refugee and IDP safe havens to be negotiated by the international community with the Sudanese Government and to be overseen by AU-led UN peacekeeping forces; and
- (5) in coordination with United Nations and other aid agencies, longer-term AU-led UN peacekeeping oversight of the return of refugees and IDPs to their places of origin in accordance with the N’Djamena ceasefire agreement and Addis Ababa agreement of 28 May 2004.

Jus Ad Bellum and Jus in Bello

In any armed conflict, a distinction is made between the legality of resorting to force and the legality of the way in which force is used. The law relating to the right to resort to the use of force (*jus ad bellum*) and the law governing the actual use of force in war (*jus in bello*) are separate.¹¹⁶

Yet despite the formal connectivity between *jus ad bellum* and *jus in bello*, in a situation of humanitarian intervention they do interact. For example, observance of *jus in bello* may contribute to perceptions of the justice of a cause in the following ways:

- international public support, the consent of other states, and avoidance of problems within the military forces undertaking the intervention might be ensured by observing international laws of war standards;
- the committing of atrocities by humanitarian interventionists will assist the cause of the warring parties to the conflict and provide further justifications for use of force; and
- in humanitarian interventions, definite moral distinctions between the types of actions engaged in by the warring parties and those engaged in by intervening military forces are established. Observance of *jus in bello* can form a part of that moral distinction.¹¹⁷

¹¹⁶ Green, L.C. 1993, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester.

¹¹⁷ For comparisons with situations involving counter-terrorism see Roberts, Adam; *Counter-terrorism, Armed Force and the Laws of War*, *Survival*, vol. 44, no. 1, Spring 2002, The International Institute for Strategic Studies, London, pp. 7-32.

Hague and Geneva Conventions

The basic principles of International Humanitarian Law, as contained in the *Hague Regulations* and the *Geneva Conventions* are applicable in situations of humanitarian intervention. Such regulations include: protection of civilian populations, the wounded and sick, and PoWs; a balance between military necessity and proportionality must be maintained at all times in the interests of protecting civilian populations (As a US Army manual succinctly interprets it, 'the loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained'.¹¹⁸); humanitarian and peacekeeping personnel must be respected; neutral or non-belligerent states have certain rights and duties; and the use of certain weapons is prohibited, as are other means and methods of warfare that cause unnecessary suffering.

Fourth Geneva Convention

The *Fourth Geneva Convention (1949)* is concerned with the protection of victims of war under situations of occupation. The extent to which a UN mandated, regional or 'Coalition of the Willing' military force undertaking humanitarian intervention is subject to the laws of occupation is contested. However, precedents have been set for the application of the *Fourth Geneva Convention* in such situations as a result of humanitarian intervention in Somalia, Kosovo, Bosnia and Iraq. Indeed, *Common Article 1* specifies that the parties "undertake to respect and to ensure respect for the present Convention in all circumstances". *Common Article 2* specifies that the Conventions "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." As Roberts notes, "the existence or non-existence of a declaration of war, or a formal state of war, is not necessary for the application of the Conventions."¹¹⁹

National laws, Jus Cogens and Peacekeeping Directives

The laws of war may be seen to constitute a principal (though not exclusive) legal framework regarding the conduct of humanitarian intervention, and such responses should abide by these laws.¹²⁰ However, the laws of war are not the only body of law potentially relevant to the consideration of humanitarian intervention in the Sudan. Indeed reference to the national laws of the Sudan; international treaties that apply in

¹¹⁸ US Army, *The Law of Land Warfare*, FM 27-10, Department of the Army Field Manual, Washington DC, July 1956, revised 15 July 1976, paragraph 41.

¹¹⁹ Roberts, Adam; *Counter-terrorism, Armed Force and the Laws of War*, Survival, vol. 44, no. 1, Spring 2002, The International Institute for Strategic Studies, London, pp. 7-32.

¹²⁰ See for example, Amnesty International; "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force, 7 June, Document no. EUR 70/025/2000, 2000,

<http://www.amnesty.org/ailib/intcam/kosovo/index.html>.

Amnesty International, "NATO violations of the laws of war during Operation Allied Force must be investigated," 7 June, press release, 2000 <http://www.amnesty.org>.

peacetime as well as wartime, for example the rules relating to genocide, crimes against humanity and, with a few exceptions, the rules relating to human rights are also applicable in accordance with the *UN Charter*, specific human rights treaty instruments, the judgment of the *International Military Tribunal at Nuremburg* in 1945-46 and *Article 7 of the 1998 Rome Statute of the International Criminal Court*.

Humanitarian intervention can have fundamental characteristics that are different from inter-state conflicts. This is because humanitarian intervention does not necessarily constitute conflict between states. Those militaries engaged in humanitarian intervention themselves generally have a non-state character, that is they are multi-state based as in a UN peacekeeping/peace enforcement mission, a 'Coalition of the Willing' or a regional force. Military operations between a state and such forces may not necessarily bring them within the full scope of application of the full range of provisions in the *1949 Geneva Conventions* and the *1977 Geneva Protocol I*. Humanitarian intervention could come within the law relating to non-international armed conflict. *Common Article 3 of the 1949 Geneva Conventions* is the core of these rules, but it says little about the scope of application.¹²¹ Nonetheless, the latest *Secretary-General's Bulletin on observance of IHL* by UN forces makes it clear that humanitarian intervention conducted upon authorization of the UN Security Council is subject to the laws of war.¹²²

DO NO HARM

If military intervention is resorted to in the Sudan, the international community must be confident that it will do more good than harm. As Pfaff has noted, "... there has been intense debate about humanitarian intervention, politically interested or otherwise, and about the role of peacekeepers for whom there is no peace to keep, and armed peacemaking - as in Kosovo, where it is not working very well, or Somalia, where the peacemakers were ejected, or in Iraq now, where American ex-warmakers, become

¹²¹ It should be noted that both the United States and Australian militaries, for example, have indicated their intention to observe the rules governing international armed conflicts, "even in situations which may differ in certain respects from the classical model of an inter-state war." The Standing Rules of Engagement issued by the US Joint Chiefs of Staff on 15 January 2000 spells this out, "US forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations." Chairman of the Joint Chiefs of Staff Instruction, Standing Rules of Engagement for US Forces, Ref. CJCSI 3121.01A, 15 January 2000, p. A-9. See Gasser, Hans Peter; 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon', *American University Law Review*, vol. 33, no. 1, Fall 1983, pp. 145-61. See also Parks, W Hays; 'The United States military and the law of war: inculcating an ethos - International Justice, War Crimes, and Terrorism: The U.S. Record', *Social Research*, Winter, 2002.

¹²² Secretary-General's Bulletin; 'Observance by United Nations Forces of International Humanitarian Law', 6 August 1999, ST/SGB/1999/13, www.un.org

peacemakers, confront nationalist and sectarian resistance they don't know how to deal with.”¹²³

The Application of Sanctions to the Sudan

In accordance with Article 41 of the United Nations Charter, United Nations Security Council Resolution 1556 allows for the future application of a sanctions regime on the whole of the Sudan. In the absence of a full implementation of ceasefire arrangements might humanitarian intervention as opposed to sanctions better protect the rights and livelihoods of the people of Darfur or could intervention would in fact produce a wider conflagration and thereby greater human suffering?

Economic sanctions enable the UN Security Council to coerce states without resorting to the use of military force. Ideally, sanctions should be targeted, such as arms embargoes, travel and international participation bans, or freezing of financial assets yet typically they are not. In the case of the Sudan they might include “travel and financial sanctions, as well as a ban on the purchase of Sudanese oil, effective automatically within 14 days unless the government takes immediate and effective action.”¹²⁴

However, as the application of economic sanctions on Iraq in accordance with UN Security Council Resolution 668 demonstrated, sanctions cause inordinate humanitarian suffering among ordinary people, “border control limitations often impede effective implementation, and negative unintended consequences of sanctions result, such as the corruption and criminalisation of society.” In 2001, CARE International and UNICEF estimated that the unintended consequences of sanctions on Iraq included the death of 500,000 Iraqi children from malnutrition.

Limiting Military Intervention

Military action in the Sudan could also be limited to airdrops, establishing a no-fly zone to protect civilians from government bombing, the establishment of humanitarian safe zones and security for critical humanitarian deliveries.¹²⁵ Establishing a no-fly zone would have to be enforceable from within the region. Unlike in the situation of Iraq where the US was able to use Saudi Arabian air space and military bases throughout the Middle East, no such equivalent exists on the Horn of Africa.¹²⁶ Whether or not the African Union has the airpower or the political will to undertake such an activity remains to be seen.

The international community should be mindful of the full humanitarian effects of sanctions, limited intervention or full humanitarian intervention will have not just on the people of Darfur but the people of Sudan and indeed, the wider region.

123 Pfaff, William; ‘The debate on humanitarian intervention; Iraq’, International Herald Tribune, 31 March 2004, 8.

124 Rice, Susan and Smith, Gayle; ‘The Darfur Crisis’, The Washington Post, 30 May, 2004, B07.

125 Rice, Susan and Smith, Gayle; ‘The Darfur Crisis’, The Washington Post, 30 May, 2004, B07.

126 Lyman, Princeton; ‘Options for international intervention in Sudan’, Talk of the Nation, National Public Radio, 2:00PM ET, 27 July 2004.

CONCLUSION

As this paper has shown and Donnelly has noted, “when faced with massive suffering, both intervening and not intervening often seem both demanded and prohibited.”¹²⁷ However, there is clearly a legal case for humanitarian intervention in the Sudan.

This paper has determined a six (6) point legal test that might be used to justify any such intervention and, in accordance with international humanitarian and human rights law, has recommended a series of short, medium and long-term enforcement strategies and military options which respect Sudan’s national security concerns while better protecting the rights and livelihoods of the people of Darfur.

It is time for the adoption of a codified right of humanitarian intervention in international law and the creation of an international force capable of acting outside of narrow national interests. “If this tension between state sovereignty and human rights is not resolved then we will continue periodically to bear witness to the abhorrent juxtaposition of human suffering and international political inertia and obfuscation.”¹²⁸

127 Donnelly, Jack 1993, "Human rights, humanitarian crisis, and humanitarian intervention," *International Journal* XLVIII, Autumn, 607-640.

128 Hehir, Adrian; 'Laws on Humanitarian Intervention Needed', *The Irish Times*, 27 July 2004, 14.

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