

'Outlaws on camelback': State and individual responsibility for serious violations of international law in Darfur

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Introduction

The civil war in Darfur between forces of the Government of Sudan (GoS) on the one hand, and the Sudan Peoples' Liberation Movement/Army (SLM/A), and the Justice and Equality Movement (JEM) has had profound adverse effects on the civilian population of Darfur, the vast majority of whom are ethnic 'African'¹ agriculturalists. These African tribes have inhabited the Darfur region for many centuries alongside itinerant Arab tribes whose principal vocation is livestock breeding, especially cattle rearing. The Darfur conflict is further complicated by the existence and active involvement of a government-sponsored Arab militia called the Janjaweed,² which fights alongside government troops. Because of almost three years of conflict, a massive humanitarian disaster continues to unfold in Sudan: some two million Darfurians of black African descent are said to have been displaced from their communities and livelihoods; at least 200 000 people have died.³ The United Nations Security Council has, in a large number of resolutions, concluded that the situation in Darfur constitutes a threat to international peace and security.⁴

This paper examines the international responsibilities of the Sudanese government and individual perpetrators for violations of international human rights and humanitarian law during the Darfur conflict. I argue that the Government of Sudan bears international responsibility for the actions of its military forces and those of the Janjaweed militia, who acted as its de facto agents in prosecuting the war against the two rebel movements. I further submit that Sudan's responsibility under international law is neither inconsistent with, nor does it detract from, the individual responsibility of senior members of the Sudanese government and militia leadership making the key military and operational decisions in the Darfur conflict.

In the following sections, I discuss the background to the Darfur conflict and highlight the role of the key organisational units/groups involved. I then broadly discuss the nature of crimes committed in Darfur and outline the legal obligations of Sudan under international humanitarian and human rights law. This is followed by examples of serious violations of international law, a discussion of the principles of state and individual responsibility and the institutional mechanisms available to realise them. In the final part of the paper, I offer some concluding remarks.

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Background

Since February 2003, the GoS under General Omar Hassan El-Bashir has been fighting a bloody war against two insurgent movements: the SLM/A and the JEM in the Darfur region of Western Sudan. With a population of about six million inhabiting an area of 250 000 square kilometres, Darfur is home to mainly 'African' agriculturalists and herdsman. These 'African' tribes, especially Fur, Masaalit, and Zaghawa,

have lived side-by-side with some Arab nomadic tribes for many years. Traditionally, it was not uncommon for conflicts to arise between these different tribes over access to land, as well as land use rights such as grazing and agriculture. By most accounts, these disputes were peacefully settled through traditional dispute settlement mechanisms under the auspices of tribal leaders.

However, during the 1980s and 1990s divisions between the largely African agriculturalist communities and Arab nomadic tribes over land and grazing rights became more acute. As will be discussed later in this paper, from 2003, the nature of the conflict in Darfur changed substantially from inter-ethnic skirmishes, to a protracted, multi-pronged, multi-party war between forces of the GoS and government-backed Arab



militia and the two rebel movements. During this escalated military campaign, the GoS seemed to have exploited the pre-existing ethnic tensions and probably even reinforced them for the purpose of its counter-insurgency war against the Darfur rebels.

The key players in the Darfur conflict are the GoS, including the political and military leadership in Khartoum, the Sudanese ground and air forces, as well as the Janjaweed militia, who were recruited, trained, armed and supplied by the government. As used here, the term Janjaweed refers to the various civilian militia recruited, armed and supported by the GoS, and who undertake joint military operations against Darfur civilians alongside government forces. It appears that the Janjaweed movement began sometime in 2003 when the GoS called on Arab tribes in Darfur to provide men in aid of the government's counter-insurgency war against the SLM/A and JEM. Arab tribal leaders engaged in a comprehensive and largely successful recruitment drive that saw hundreds of young Arab men trained and armed to fight alongside the government forces.⁵

On the other hand, there are the two rebel movements, the SLM/A and the JEM. Both rebel groups draw most of their members from the Sudanese 'African' tribes of Fur, Masaalit and Zaghawa. It is believed that both the SLM/A and the JEM came into existence and began preparing their campaigns against the Sudanese government sometime in 2001 or 2002. While the two movements differ slightly in their political philosophies, both seem to operate under the same general objectives, including the desire to put an end to the socio-economic and political marginalisation of Darfur and its people, better representation on central government institutions, and a more equitable sharing of central revenues controlled by the authorities in Khartoum.

The Darfur rebellion by elements of the SLM/A and JEM initially started with hit-and-run tactics in which rebels attacked targeted government institutions such as police stations in the region. The objectives of these attacks seemed to have been to capture territory from central government forces and to secure weapons. From about February 2003, these irregular attacks took on a more organised and systematic pattern aimed at taking parts of the country away from the control of the GoS forces, and establishing in their place rebel-based institutions and control. In response, the Government of Sudan began to take carefully planned counter-insurgency measures, including the use of ground and air forces, as well as a network of intelligence agents and civilian militia to fight against the rebels. From that time on, an internal

armed conflict unfolded in Darfur.⁶ The clearest and most troubling aspect of the escalation in violence in Darfur has been the effect on the civilian population. As part of the war against the rebels, forces of the GoS and their allied militia, have systematically attacked and destroyed civilian villages, farms, and looted property. As mentioned, at least 200 000 civilians are alleged to have died in this conflict, while some two million others have been displaced.

Available accounts indicate that serious violations of international law have been committed by all sides to the Darfur conflict. However, the following discussion focuses on the alleged violations by forces of the GoS and its allied Janjaweed militia, and assesses the international legal responsibilities arising from them. This approach is consistent with the fact that under international law, the primary responsibility for the protection of the civilian population in Darfur falls on the government of Sudan as the territorial state in which they live. As discussed below, this responsibility is in turn consistent with Sudan's obligations under the various human rights and humanitarian law conventions concluded since the end of the Second World War.

Serious violations of international law have been committed by all sides to the Darfur conflict

It is argued that the government bears State responsibility under international law for international crimes committed by members of its armed forces, as well as Janjaweed militia, which it recruited, trained, armed and supported in aid of its counter-insurgency war against the two Darfur rebel movements. It is further argued that the relationship between the government and Janjaweed militia meets all the tests under international law for attribution of the actions of the militia to the Sudanese state for attracting its international responsibility.

In addition to state responsibility, it is submitted that there is basis for individual criminal responsibility for certain members of the Sudanese government and military, as well as militia leaders, either for directly participating in the commission of serious international crimes, or because they failed to prevent or punish their subordinates for committing such offences.

The nature of crimes committed in Darfur

The most prominent aspect of the Darfur conflict has been the systematic attacks on, and killing of civilians by government and militia forces. As already indicated these attacks have resulted in significant loss of civilian lives and produced a massive humanitarian crisis. While the Sudanese government argues that villages have been targeted because they were being

used as launch pads for rebel attacks, most of the evidence gathered on the Darfur conflict suggests quite the contrary. According to these sources, Sudanese ground and air forces, in association with the Janjaweed militia, have attacked many villages where no prior presence of rebel forces could be established.⁷ Furthermore, even in those cases where some rebel presence might have been recorded, the evidence tends to suggest that government forces and the militia violated international humanitarian law by failing to warn civilians of impending offensives;⁸ using excessive force going far beyond what was necessary to achieve legitimate military objectives, and failing to distinguish between rebels and civilians, or between legitimate military targets and civilian property and infrastructure.⁹ Excessive use of force going beyond what is necessary to achieve legitimate military objectives qualifies as a grave breach of the Geneva Conventions attracting the legal responsibility of the State.¹⁰

The military operations of the Sudanese armed forces and their allied militia, therefore, violate two key principles of international humanitarian law, i.e. the principles of distinction and of proportionality. The principle of distinction requires that all sides to an armed conflict must distinguish between legitimate military targets, such as combatants and military infrastructure, and non-combatants, such as civilians and forces placed hors de combat by sickness, injury, capture or surrender. International humanitarian law also makes it clear that the mere presence of non-civilians within a civilian population does not deny that population of its essential civilian character.

The principle of proportionality requires that parties to an armed conflict must use only such force as is necessary to achieve legitimate military objectives. Excessive use of force not justified by military necessity, causing undue suffering to civilians and captured enemy combatants, and inhumane or degrading treatment, are all prohibited by international humanitarian law. As discussed below, in addition to the violation of these humanitarian law principles, many specific violations have also been committed in Darfur that could amount to war crimes, crimes against humanity, or even genocide.

Sudan's obligations under international humanitarian law

The core of modern international humanitarian law, or the law of armed conflict, is contained in the four Geneva Conventions of 1949, together

with their two Additional Protocols of 1977.¹³ As a party to the four Geneva Conventions, Sudan is bound by the humanitarian law norms and values contained therein, especially Common Article 3, which lays down the minimum standards for the humane treatment of civilians, other non-combatants and ex-combatants in the course of internal armed conflicts.¹⁴ Common Article 3 prohibits the killing of defenceless civilians or captured members of enemy forces, mutilation, cruel treatment, torture, hostage taking, humiliating and degrading treatment, as well as summary executions or trials conducted without judicial guarantees of fairness.¹⁵ The Fourth Geneva Convention, with its emphasis on protection of civilians during armed conflicts, is of particular relevance to the Sudan context. In addition, the grave breaches provision of the Convention prohibits wilful killing, torture, inhuman or degrading treatment of protected persons, the taking of hostages, as well as the unlawful, extensive or wanton destruction or appropriation of property not justified by military necessity.¹⁶

The Rome Statute of the International Criminal Court (ICC) prohibits deliberate attacks on civilians, civilian objects and non-combatants

While initially formulated in the Geneva Conventions, the considerations contained in Common Article 3 now enjoy near universal approval and, according to the International Court of Justice (ICJ), reflect customary international law binding upon all States and other Parties to an armed conflict.¹⁷ This view of the customary law status of Common Article 3 was echoed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in 1995 in *Prosecutor v. Dusko Tadic*.¹⁸ Indeed, the consensus around Common Article 3 is further illustrated by its inclusion in the Statutes of both ad hoc international Tribunals for Rwanda

and the Former Yugoslavia, as well as the Statute of the Special Court for Sierra Leone.¹⁹ Similarly, the Rome Statute of the International Criminal Court (ICC) prohibits deliberate attacks on civilians, civilian objects and non-combatants, and calls for humane treatment of captured enemy combatants both in international and internal armed conflicts.²⁰ In light of this broad-based endorsement and incorporation of Common Article 3 in international legal instruments, the International Commission of Inquiry on Darfur has concluded that: 'the adoption of the ICC Statute... can be regarded as the culmination of a law-making process that in a matter of years led both to the crystallisation of a set of customary rules governing internal armed conflict and to the criminalisation of serious breaches of such rule'...²¹

In addition to the Conventions, Sudan has recently acceded to the Second Additional Protocol to the Geneva Conventions, implying its obligation to abide



by all the provisions relating to protection of civilians in situations of internal armed conflict, such as the one in Darfur. Despite evidence of the involvement of foreign elements from Chad and Libya in the Darfur conflict, this paper maintains that the essential character of the conflict is internal.²² An internal armed conflict is one between:

armed forces of a state and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations...²³

Additional Protocol II is intended to both develop and supplement the Geneva Conventions by specifically providing for the humane treatment of victims of internal armed conflicts.

Article 4 of the Additional Protocol sets out the fundamental guarantees for the humane treatment of all those not taking a direct part in hostilities and provides that all such persons are entitled to respect for their person, honour, convictions and religious practices. It is irrelevant whether the protected person never took part in the hostilities or if he merely ceased to do so through capture, injury or otherwise. The humane treatment provisions operate without distinction. Article 4 provides a non-exhaustive list of actions which are prohibited against civilians including violence to life, health, and physical and mental well-being; murder; cruel treatment; torture; mutilation; corporal punishment; collective punishment; hostage taking; acts of terrorism; outrages upon personal dignity, humiliating and degrading treatment; rape; enforced prostitution; pillage and threats to commit any of the foregoing acts.

The Protocol provides specific protection to children, including the need to provide them with care, education, reunion with their families in case of temporary separation, and prohibits the recruitment or use of children younger than 15 into the armed forces of any of the warring parties. Furthermore, Article 13 of the Protocol requires that civilians be protected from the dangers of military operations, and that they must not be the object of attack as long as they do not take a direct part in hostilities. Violation of any of these provisions constitutes a war crime for which States and individuals could bear international legal responsibility.

In addition to war crimes under the Geneva Conventions and their Additional Protocols, customary

international law also recognises a wide range of crimes against humanity that could be committed in either war or peacetime.²⁴ Crimes against humanity are murder, extermination, deportation, persecution or rape, committed in the context of a widespread or systematic attack on a civilian population.²⁵ It is sufficient that the attack is either widespread or systematic; it need not be both. According to the jurisprudence of the *ad hoc* Tribunals, 'widespread' refers to the scale of the attack and the multiplicity of victims; 'systematic' reflects the organised nature of the attack, excludes acts of random violence or opportunistic crime, and does not require a policy or plan.²⁶ The underlying offences of crimes against humanity include murder, extermination, enslavement, imprisonment, torture, rape, persecution, and the residual category of other inhumane acts.²⁷ In order to ground individual responsibility for crimes against humanity, it must be shown that the accused was aware of the attack on the civilian population, that his acts comprised part of that attack, and that he intended to commit the specific underlying offence.²⁸ State responsibility for crimes against humanity exists when the crimes are committed by *de jure* organs of the state such as its military forces or *de facto* agents such as militiamen and groups operating under the command, control and supervision of the state.²⁹

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The third category of crimes, which Sudan has an international obligation to prevent, is genocide. This obligation derives from both Sudan's status as a party to the Genocide Convention of 1948,³⁰ as well as the customary and *jus cogens* nature of the prohibition against genocide.³¹ Genocide, the intentional killing or causing of serious bodily or mental harm to persons based on their

membership of a specific national, ethnical, racial, or religious group, with the intention of destroying that group in whole or in part, ranks amongst the most serious crimes known to mankind.³² While the underlying acts such as killing or serious bodily or mental harm may be similar for genocide and crimes against humanity, what distinguishes the former is the specific genocidal intent (*dolus specialis*) which requires that the genocidal act must be carried out with the objective of causing the physical destruction of the protected group. In *Krstic*, the Appeals Chamber restated the position that it is the physical or biological destruction of a protected group that could constitute the *actus reus* of genocide, thereby excluding other actions such as attacking the cultural or sociological characteristics of the group.³³

While there is no numeric threshold regarding the number of victims that must be destroyed in order for genocide to exist, it must be shown that the

perpetrator of the underlying criminal act, be it killing or causing serious harm, intended to destroy at least a substantial part of the targeted group.³⁴ In the *Krstic* case, the ICTY held that the murder of 7 000 Bosnian Muslim men of military age in Srebrenica in 1995 by forces of the Bosnian Serb Army, amounted to genocide, and that the Accused, a military commander who allowed soldiers under his command to assist in the execution of the Muslim men, was guilty of aiding and abetting genocide. The Tribunal reasoned that the murder of such a large number of men in a predominantly patriarchal society 'would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica.'³⁵

The prohibition against genocide, crimes against humanity and war crimes, reflect the core of international humanitarian and criminal law norms binding upon Sudan, and for which it could incur State responsibility. Similarly, violations of any of these laws could be grounds for individual criminal responsibility for officials of the government of Sudan, its military high command, or members of the government-backed Janjaweed militia. Since the evidence from the Darfur conflict shows distinct and blatant violations of many of these norms, it is submitted that there is a strong case to invoke the international responsibility of Sudan. The manner in which such state responsibility can be invoked is discussed in the section on 'Accountability Mechanisms' below.

Sudan's obligations under international and regional human rights law

In addition to its obligations under international humanitarian law, Sudan also has obligations to respect various human rights protected by international and regional human rights instruments. The starting point for a discussion of these obligations must be Article 1(3) of the Charter of the United Nations, which requires member states to promote and encourage respect for human rights and fundamental freedoms without distinction based on race, sex, language or religion. Articles 55 and 56 of the Charter require all members to take action, whether jointly or separately, 'to ensure universal respect for, and observance of, human rights and fundamental freedoms for all...'

The Universal Declaration of Human Rights, while a non-binding resolution of the United Nations General Assembly, has provided a useful framework for the development of individual human rights standards at the global and regional level. After recognising that the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace, the Declaration recognises the right of all individuals to life, liberty, and security of the person; prohibits

torture or cruel, inhuman and degrading treatment or punishment; guarantees equality before the law; prohibits discrimination; and provides protection against arbitrary arrest, detention and exile.³⁶

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and regional instruments such as the African Charter on Human and Peoples' Rights (the Banjul Charter), further elaborate the broad human rights standards contained in the non-binding Declaration. In particular, under Articles 1 and 2 of the Banjul Charter, Member States of the African Union are required to recognise the rights, duties and freedoms enshrined in the Charter without discrimination, and to adopt legislative and other measures to give effect to the rights.³⁷ The Charter then goes on to guarantee the right to equality before the law and to equal protection of the law; the right to life and personal integrity; the right to human dignity; the right to liberty and security of the person; and prohibits torture, slavery, cruel, inhuman and degrading treatment.³⁸

As a party to these various human rights instruments, Sudan has a duty both to respect and ensure respect for these human rights norms, including the obligation to take appropriate measures to prevent violations of human rights.³⁹ In other words, Sudan has a duty to protect individuals within its territory, including *all* the people of Darfur from human rights violations. Furthermore, any violation of such rights would trigger Sudan's duty to conduct investigations, and to take remedial action in accordance with domestic and international law. Sudan is also obliged to provide victims of human rights violations with equal and effective access to justice, including the provision of appropriate remedies and reparation to victims. In *Commission National de Droits de l'homme et des Libertés v. Chad*, the African Commission on Human Rights found that Chad had violated the African Charter on Human and Peoples' Rights by failing to provide security and stability in the country thereby creating an enabling environment for the occurrence of massive human rights violations.⁴⁰ This ruling underscored the obligation of states not only to respect, but also to ensure respect for human rights enshrined in the Banjul Charter.

In light of the frequent and consistent violations of human rights by Sudanese government and militia forces, and the failure of the government of Sudan to prevent or investigate and punish those responsible for such violations, it is submitted that Sudan is in breach of its human rights obligations, possibly attracting international responsibility. While it is true that individuals affected by these violations could in principle resort to the remedies provided under domestic Sudanese law, the involvement of the government of Sudan in the crimes committed,



the likelihood of official cover-up, and the lack of independent judicial institutions especially as they relate to human rights issues, mean that domestic remedies are at best only a theoretical possibility. However, as discussed below, the Banjul Charter provides for certain international processes for holding states, such as Sudan, accountable for violating their human rights obligations. These processes include the 'Communications' procedure under Articles 55 and 56 of the Charter, which enable individuals and groups, including domestic and international NGOs, to bring complaints of human rights violations before the African Commission on Human and Peoples' Rights. Similarly, the future African Court of Human Rights would hopefully provide another effective forum for addressing human rights violations by African states.

Evidence of serious violations of international law

Previous studies on the Darfur conflict have confirmed that Sudanese armed forces, including the air force, collaborated with government-backed Janjaweed militia to attack civilians in Darfur.⁴¹ Operating under the overall leadership of the President of Sudan, who, under Sudanese law, serves as Commander-in-Chief, the Sudanese armed forces are under the immediate direction of the Minister of Defence. The Minister acts on behalf of the President and is in charge of day-to-day operational planning and decision-making. The Minister, in turn, appoints and acts through a 'Command group' or 'Committee of Joint Chiefs of Staff' comprising the Armed Forces Commander, the Chief of General Staff, and five Deputy Chiefs of Staff.⁴² Military operational plans and decisions made by these central government authorities in Khartoum are then passed down to the field commanders in Darfur for implementation. There is therefore a direct and substantial link between the political and military authorities at the highest echelons of the Sudanese government and armed forces, and the events at the battlefield in Darfur. It seems that the most significant military decisions are made in Khartoum and implemented by field commanders on the ground. As organs of the Sudanese state, the actions of these officials are deemed to be actions of the government of Sudan for the purpose of attracting international legal responsibility. Similarly, leading political and military figures could be held individually accountable at international law for serious violations of international humanitarian law in Darfur.

Political and military figures could be held accountable for serious violations of international humanitarian law

Notwithstanding the force of this argument, this paper will not explore the factual details of the hundreds of attacks on civilians in Darfur because that has already been adequately documented by the studies referred to above. Instead, the following analysis gives a few examples of attacks on civilians by government forces acting in collaboration with their allied militia, and argues that both state and individual responsibility flow from these attacks. As will become evident in these examples, in most of the attacks, government ground and air forces alongside armed and uniformed Janjaweed militia would attack a village; kill most of the able-bodied men, burn down houses, and steal valuable property, including household items and livestock. Other hallmarks of the government's offensive in Darfur were the indiscriminate nature of the attacks on civilians, and the disproportionate use of force leading to the commission of war crimes and crimes against humanity. Furthermore, in light of the fact that the attacks were predominantly directed at members of Darfur's 'African' tribes, there is a strong case to argue that genocide was also committed.

The International Commission of Inquiry on Darfur set up by the United Nations Secretary General has documented an attack by a combined force of government ground and air forces on the village of Anka in Northern Darfur, in February 2004.⁴³ According to eyewitness accounts, government air force planes embarked on a two-hour bombing campaign around the village during which a local hospital was destroyed. Following the bombing, ground troops of the Sudanese army, as well as some 500 mounted Janjaweed militia, entered the village and looted everything from bedding, to clothing and livestock. They then burnt the village. During the attack, at least 15 civilians were reportedly killed and eight others wounded. The evidence suggests that Anka was attacked because the government had received information that a group of about 30 SLM/A rebels were present there. Based on the government's avowed policy to treat whole villages in which rebels were found as legitimate military targets,⁴⁴ the Sudanese government forces did not distinguish between the rebels and civilians during the attack on Anka. In the eyes of the government, the presence of a handful of rebel forces justified killing defenceless civilians in Anka and destroying their village and livelihoods. Both the attack on, and the indiscriminate use of force against civilians in Anka, violate the humanitarian law principle of distinction, Common Article 3 of the Geneva Conventions, as well as Article 13 of Additional Protocol II.⁴⁵

The pattern of indiscriminate attacks and systematic use of force on unarmed civilians, by a combined

force of government troops and armed Janjaweed militia, was also seen in the attack on Surra, Southern Darfur, in January 2004. In an early morning attack on the village, GoS forces fired mortars at unarmed civilians. The Janjaweed militia, wearing uniforms similar to those of the Sudanese army, and armed with rifles and machine guns supplied by the army, entered the homes of the villagers and shot all the men they came across. The attackers also reportedly killed a group of ten men who had been hiding among women in a village mosque, and proceeded to search the women for male children they might have been hiding. All the boys discovered during this search were also killed. There was no evidence of rebel presence in Surra at the time of the January 2004 attack. Before the attack, the village had a population of about 1 700 people. As a result of the attack, it is estimated that at least 250 people, including women and children, were killed and 30 others listed as missing.⁴⁶

It appears that in addition to directly targeting the 'African' villagers of Surra, the government forces and Janjaweed militia specifically directed their attacks at the male members of the village. Such deliberate and selective targeting of members of the male population of Surra, could, to borrow the words of the Appeals Chamber in *Krstic*, have 'severe procreative implications' for the population of Surra, 'potentially consigning that community to extinction.'⁴⁷ Indeed, considering the size and population of Surra, it is arguable that this attack was aimed at destroying a substantial part of the 'African' villagers of Surra, and by extension, Darfur. It is submitted that on the face of it, the attack on Surra displays several elements of the offence of genocide and there is a strong case for investigations and any subsequent prosecution to be approached from that perspective.

Human Rights Watch has reported that in March 2003, a co-ordinated attack by Government of Sudan forces and Janjaweed militia was launched on the region of Wadi Saleh. This attack seemed to have been planned, co-ordinated and facilitated by senior government officials, including regional commissioners, who were present in the Wadi Saleh region at the time. The attacks were ostensibly directed against SLM/A rebels who were present in the area. However, the indiscriminate and repeated nature of the attacks, the direct assaults on groups of unarmed civilians including men, women and children, and the summary execution of captured men from the villages, all point to blatant and gross violations of international humanitarian law. A 75-year old man told Human Rights Watch that during an attack on a village in Wadi Saleh, the Janjaweed militia, whom

he described as 'numerous as ants', shot him in the back, cut him from the top of his head to his ears, and threw him into a fire. They then proceeded to loot everything in the local market.⁴⁸

In another joint operation between government forces and Arab militia, unarmed civilian men in the village of Deleig were rounded up and executed. Before the killings, men from several villages in Wadi Saleh were systematically separated from women and children, and the women were told that their men would be transferred to Deleig. The women reported that when they arrived in Deleig 12 days later, they found the corpses of their men lying in the streets. Some were executed in groups in the mountains, while others simply disappeared.⁴⁹

In a more recent attack on the village of Hamada in January 2005, Sudanese army forces and Janjaweed militia, separated men from the women and children, and proceeded to execute many men and boys. Women and children who tried to flee from the attacks were shot in flight; women and girls were repeatedly raped, and the few men and women who were not killed, were forced to guard livestock looted from them by the attackers. It is reported that during the attack, the soldiers and militia regularly professed their intention of 'cleaning the whole area' of 'African' Darfurians. When combined with other evidence that senior government officials such as regional commissioners systematically excluded displaced 'African' tribes from their former places of residence and farming it appears reasonable to conclude that a carefully-planned policy of ethnic cleansing was being pursued in Darfur.⁵⁰

The events show a high level of governmental planning, co-ordination and facilitation of the attacks on civilians

While the above examples by no means represent a comprehensive account of the incidents of gross violations of human rights and humanitarian law by forces of the Government of Sudan and the Janjaweed militia, the events discussed show a high level of governmental planning, co-ordination and facilitation of the attacks on civilians. For the limited purpose of grounding government responsibility and individual accountability for the atrocities in Darfur, they show clear evidence of the government's failure to protect civilians under its authority, and to punish or otherwise hold accountable those responsible for committing serious violations of international law. For this purpose, it is worth recalling that States have the obligation under the Geneva Conventions not only to respect, but also to ensure respect for the rules of international humanitarian law. This obligation is now said to have attained the status of a customary rule, equally applicable to situations of internal armed conflict.⁵¹ The violations referred to

above provide sufficient bases in international law for attracting Sudan's international responsibility, and for the individual responsibility of many actors in the Darfur conflict, including senior political and military figures as well as members of Janjaweed militia.

State responsibility for international crimes committed by the Sudanese armed forces and Janjaweed militia

The principle of state responsibility denotes that states are held accountable under international law for their violations of international legal obligations. The violation of an international legal obligation qualifies as an internationally wrongful act, which, under Article 1 of the International Law Commission's Articles on State Responsibility, attracts state responsibility.⁵² However, as abstract entities, States do not act by themselves; they do so through the agency of human beings such as government and military officers who represent State interests at the national and international levels.⁵³ It follows therefore that in order to hold a state responsible, it must be demonstrated that the internationally wrongful act was attributable to the State, in the sense that it was committed by *de jure* organs of the State, or by persons or groups that, although not official state organs, operated under the specific instructions or the overall control of the State.⁵⁴

The issue of attribution was discussed by the ICJ in the *Nicaragua* case, which held that for the purpose of determining the State responsibility of the United States for the actions of the *contra* rebels which it had supported financially, trained and armed against the government of Nicaragua, it must be demonstrated that the United States exercised effective control in the sense of issuing specific instructions concerning the violations of international humanitarian law committed by the *contras*. In other words, the ICJ required an agency relationship, one of dependency by the rebels on the support of the United States government, and of control by that government of the actions of the rebels with the effect that the rebels could be equated to organs of the US government. Since the Court found that such a high degree of control was not supported by the evidence, it held that the United States did not bear international responsibility for the actions of the Nicaraguan *contra* rebels.⁵⁵

In the *Tadic* Appeals Judgement, the ICTY Appeals Chamber disagreed with the approach of the International Court of Justice, and drew a distinction in the rules of attribution relevant to the situation where

the actual perpetrators of international law violations were non-state individuals on the one hand, and where they are militia groups or similarly organised military/paramilitary structures not constituting part of the government's regular armed forces. According to the *Tadic* jurisprudence, a State's international legal responsibility for the actions of individuals can only be engaged where it can be shown that the State exercised effective control over the actions of such individuals in the sense of issuing specific instructions to commit violations of international humanitarian law.⁵⁶ On the other hand, due to the organised and hierarchical structure of armed or militia groups, the Chamber held that such a high degree of control is unnecessary for the purpose of state responsibility; for attribution to States of the actions of such groups, it is only necessary to show that the State exercised overall control including the provision of financial and material support, as well as training.⁵⁷

This paper argues that through the actions of its governmental and military leaders in Darfur, as well as militiamen who acted as its *de facto* agents, Sudan violated a number of international legal obligations in the course of the Darfur conflict and that this situation attracts Sudan's international responsibility. There is no doubt about Sudan's responsibility for the violations committed by *de jure* members of its armed forces, as well as senior officials of the Sudanese government. The more interesting question is the extent to which Sudan could also be held accountable for the actions of the Janjaweed militia.

States do not act by themselves; they do so through the agency of human beings such as government and military officers

It is submitted that the government of Sudan could be held internationally responsible for the actions of the militias

on three different bases: firstly, where the militia are formally integrated into government forces such as the Popular Defence Forces which are established by law, they become *de jure* organs of the state and therefore, like the regular armed forces, their actions are deemed to be actions of the State under international law. Secondly, where militia forces are co-opted to conduct joint operations with and in support of government forces, they become *de facto* agents of the state. In this situation, it must be established that the militia operated under the overall control of the government in the sense that the government recruited, armed and supported the operations of the militia group without necessarily issuing specific instructions in respect of the violations committed. Thirdly, Sudan could be held responsible for specific violations of international humanitarian and human rights law in situations where it can be shown that individual militia men acted under effective control of the Government of Sudan forces



in the sense that the Sudanese military gave specific instructions for particular attacks or similar violations of international law.

Individual criminal responsibility

The principle of individual criminal responsibility for serious violations of international human rights and humanitarian law is one of the key indicators of a paradigm shift from a view of international law as law made exclusively for and by states, to a body of rules with potential application to individuals within states. This principle, now firmly entrenched in customary international law,⁵⁸ can be found in the constitutive instruments of all international courts and tribunals established since the Second World War to try perpetrators of serious violations of international law.⁵⁹

The Charter of the Nuremberg War Crimes Tribunal, annexed to the London Agreement, established individual responsibility for crimes against peace, war crimes and crimes against humanity and provided that individuals cannot escape criminal responsibility for serious violations of international law by claiming that they acted in an official capacity, pursuant to superior orders or that they held a particular governmental position.⁶⁰ This principle was applied in several cases at the international and national levels. In *Pinochet*, the British House of Lords held that the official position of General Pinochet as Head of State of Chile did not absolve him from criminal responsibility for torture, which violated a *jus cogens* norm.⁶¹ In the *Congo* case, the majority of the International Court of Justice held that a serving state official, in this case the Minister of Foreign Affairs, was immune from criminal trial abroad regardless of the severity of the charges against him.⁶²

However, a powerful minority and concurring opinion held that a state official who was no longer in office, did not have immunity from serious international crimes committed while in office.⁶³ More recently, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) has held that the official position of Charles Taylor as former Head of State of Liberia was not a bar to his prosecution for serious international crimes before international courts.⁶⁴ The Appeals Chamber noted that while the prosecution of such officials before national courts might not be consonant with the sovereign equality of all states because one sovereign state cannot adjudicate upon the conduct of another state, these considerations were not relevant

in trials before international courts and tribunals, which derive their mandate only from the international community. While the Appeals Chamber's conclusion is sound in principle, it is respectfully submitted that the non-availability of official immunity as a defence, has more to do with the serious nature of international crimes and the fact that they offend collective human conscience, rather than the type of court before which they are tried. After all, because most serious international crimes such as torture, war crimes and crimes against humanity are subject to universal jurisdiction, it is conceivable, as stated by the minority in *Yerodia*, that former state officials could be tried for such offences before national courts.⁶⁵

The jurisprudence of the *ad hoc* Tribunals has added meaning and substance to the principle of individual criminal responsibility. It is now widely recognised that individuals can be held responsible for serious violations of international criminal law for committing - in the sense of direct participation in the execution of a crime - for planning, ordering, instigating or for aiding and abetting the commission of a crime by others, or for participating in a joint criminal enterprise.⁶⁶ Alternatively, superior officers, be they military or civilian, could be held responsible for failing to prevent or punish the criminal conduct of their subordinates in circumstances where they had the material ability to prevent or punish such conduct but failed to do so.⁶⁷

The jurisprudence of the *ad hoc* Tribunals has added meaning and substance to the principle of individual criminal responsibility

Accountability mechanisms

The accountability of the Sudanese State

The issue of accountability for the serious violations of human rights and humanitarian law in Darfur must be analysed from the perspective of both state and individual responsibility. As far as state responsibility goes, it is imperative to recall Sudan's obligations under the Geneva Conventions and Additional Protocol II to not only respect, but to ensure respect for the international humanitarian law norms contained in those treaties. The International Court of Justice has held that the obligation to ensure respect for protection contained in the Geneva Conventions has now developed into a rule of customary law, which is also applicable in situations of internal armed conflict.⁶⁸ The customary status of the prohibitions contained in the Geneva Conventions and their Additional Protocols implies that they affect the fundamental interests of all states. As such, any state party to those treaties can, in principle, bring action against Sudan for its violation of treaty obligations and ask for reparation.⁶⁹



Similarly, because the obligation has now acquired customary status, it is in principle owed to the international community as a whole, an obligation *erga omnes*. This implies that even non-parties to the treaties can seek to protect the interests of society as a whole by invoking Sudan's responsibility. Indeed, the very nature of the crimes committed in Darfur, is such that they are said to offend the collective conscience of humanity. Due to the gravity of such offences, international law holds that the whole of international society has an interest in their prevention and punishment. It is for this reason that individuals suspected of serious violations of international human rights or humanitarian law are subject to universal jurisdiction, which allows their arrest and trial by any State able and willing to do so. It also underscores the principle of *aut dedere aut judicare*, which requires States to either try such suspects or hand them over for trial by other States. The rationale for holding individual perpetrators of serious violations subject to universal jurisdiction, applies with equal force to ground the *erga omnes* character of the obligation of States to respect the precepts and norms of international humanitarian law contained in the Geneva Conventions and their Additional Protocols.

However, in the absence of a specific material violation of the interests of another State(s), it is unlikely that any other State would take it upon itself to commence action against Sudan for the violation of the rights of the people of Sudan. This is one of the principal weaknesses of the international law of state responsibility; it is based on a state-centric paradigm, which limits the right to bring international responsibility claims to injured states. As such, the law of state responsibility makes little provision to address serious violations of international law within states, except where it can be demonstrated that either the nationals of other states or their economic interests were affected by the breach of obligation. Moreover, the politics of state sovereignty and the reality of international diplomacy, still imply that States are significantly reticent to take actions that could be deemed as interference in the domestic affairs of other States.⁷⁰

It must, however, be noted that the United Nations Security Council has determined that the situation in Darfur constitutes a threat to international peace and security.⁷¹ Acting under Chapter VII of the Charter, the Security Council has referred the situation in Darfur to the Prosecutor of the International Criminal Court for investigation and possible prosecution of individual perpetrators of human rights and humanitarian law violations.⁷² The Security Council has also imposed sanctions including a travel ban and an assets freeze on four individuals in Sudan for their role in violating international human rights, humanitarian law, or for committing other atrocities,⁷³ and called for the deployment of a United Nations peacekeeping force

in place of the ill-equipped and under-resourced African Union forces who have been unable to stop the carnage in Darfur.⁷⁴ Unfortunately, in a sovereignty-sensitive and consent-based international society, Sudan has so far successfully resisted the international community's call for the deployment of United Nations peacekeeping troops even as the slaughter of unarmed civilians continues unabated.⁷⁵ This situation entrenches impunity on the part of Sudan.

In light of the limitations of international law's traditional approach to state responsibility, one must consider alternative means of invoking Sudan's international responsibility for the events in Darfur. It is suggested that the complaints procedure under the African Charter on Human and People's Rights (the Banjul Charter) provides a useful alternative.⁷⁶ Under its protective function,⁷⁷ the Commission may receive complaints (communications) from both States and individuals or groups recognised by the African Union about the violation of human rights obligations by States.⁷⁸ The Commission is required to draw the attention of the Assembly of Heads of State and Government to massive and serious violations of human and peoples' rights committed by any Member State.⁷⁹ The Heads of State may in turn request the Commission to carry out an in-depth study of the situation and prepare a report.

Moreover, the Commission may entertain individual complaints of violations where such complaints, *inter alia*, clearly indicate their author(s), are compatible with the African Union Charter, are not written in disparaging or insulting language, are not based exclusively on media reports, and are lodged after the exhaustion of local remedies.⁸⁰ However, the exhaustion of local remedies requirement does not apply to situations of serious and massive violations of human rights such as the one in Darfur. In these situations, the State is deemed to have ample notice to remedy the violations and because local remedies are often unavailable, ineffectual, or unduly prolonged.⁸¹

Given the above jurisprudence, it is submitted that the serious and massive violations of human rights in Darfur would be admissible under the communication procedure of the African Commission on Human and Peoples' Rights from any individual or group recognised by the African Union. It is not necessary that the communication is initiated by the victims themselves or the members of their family. The Charter also does not require that those who initiate communications must be NGOs or other groups based in Africa. This liberal approach to *locus standi* before the Commission, augurs well for the principle of state responsibility for human rights violations in Africa, and is one that other human rights mechanisms could learn from.

The question of state responsibility for serious violations of human rights in the context of a civil war was considered by the African Commission in the *Chad* case.⁸² The complaints against the government of Chad alleged that several people, including opposition politicians, were assassinated by security forces, that there were scores of arbitrary arrests, killings, disappearances, torture and other forms of ill-treatment, and that journalists were harassed both directly and indirectly. The Government of Chad denied that its agents were responsible for any of the alleged violations, but further argued that even if it were established that these violations took place and were committed by non-state actors, Chad could not be held responsible because the country was in a state of civil war.

In its Decision, the Commission ruled that the African Charter obliges Chad not only to recognise the rights and freedoms contained in it, but also to 'undertake... measures to give effect to them.'⁸³ In the circumstances, Chad's failure to ensure protection of Charter rights constituted a violation attracting its international responsibility. This responsibility was irrespective of whether the violations were committed by agents of the government or were committed during civil war. The Commission specifically noted that unlike other human rights instruments, the African Charter does not allow states to derogate from their treaty obligations during emergency situations, including civil war. The Commission concluded that:

...Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.⁸⁴

It is submitted that the situation in Darfur is similar to that in Chad. There is an ongoing civil war in the course of which serious and extensive violations of human rights have been committed by all sides, including government forces and non-state actors, especially the Janjaweed militia. As already discussed, because of the support the Government of Sudan has given to the militia and the wide-scale operational collaboration between government troops and Janjaweed militia,

the actions of the militia are deemed to be actions of Sudan at international law; in other words, the militia are *de facto* agents of that country. Sudan therefore is responsible at international law for the actions of both its armed forces and the militia that it formed, trained, armed and supported in their campaign of violence against 'African' civilians in Darfur.

Individual accountability

Previous studies on the Darfur conflict have strongly demonstrated that the government of Sudan is both unwilling and unable to hold individual perpetrators of crimes in Darfur responsible for their conduct⁸⁵ The government's unwillingness largely stems from the fact that a good number of those potentially bearing the greatest responsibility for the crimes in Darfur are current or past members of the administration, or high ranking members of the Sudanese armed forces.⁸⁶ Secondly, even in the few cases in which the government attempted to invoke some accountability for crimes committed in Darfur, the efforts appear to be largely inadequate, subject to political manipulation

and intended to shield individuals from responsibility. The Government's effort to establish a Special Criminal Court to try Darfur-related crimes is viewed as largely disingenuous and intended to defeat the complementary jurisdiction of the ICC following the Chapter VII referral to the Prosecutor of that Court by the United Nations Security Council.⁸⁷ There is no doubt that the crimes committed in Darfur fall within the subject matter jurisdiction of the ICC, and because most of the crimes committed there took place after the escalation of the conflict from 2003, there is also no dispute about the temporal jurisdiction of that Court. In

these circumstances, it is submitted that all the requirements are met for investigations and trials of individuals at the ICC for the serious violations of international human rights and humanitarian law committed in Darfur.

Ongoing investigations at the ICC should therefore continue to be directed at identifying those bearing responsibility for planning, instigating, ordering, committing or otherwise aiding and abetting the commission of crimes in Darfur. This effort should aim, in particular, at key political and military decision-makers in the government of Sudan and the leadership of the Janjaweed militia. In addition to individual responsibility for direct participation in committing crimes in Darfur, the investigations and any subsequent prosecution should similarly be directed at identifying situations of command or superior responsibility in which senior government and military leaders with effective control over subordinate officers, knew or

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had reason to know about the commission of crimes by such subordinates, but failed to take necessary and reasonable measures to prevent their criminal conduct or to punish them in the aftermath of such conduct. The search for accountability and an end to impunity in Darfur would be denuded of much of its value if these two strands of individual criminal responsibility, i.e. direct participation and command/superior responsibility, are not pursued fully and vigorously in all cases.

With respect to the types of crimes for which individuals could be investigated and tried, it is suggested that there is strong prima facie evidence of the commission of war crimes under Common Article III of the Geneva Conventions and Additional Protocol II, including murder, outrages upon personal dignity such as humiliating and degrading treatment, rape, indecent assault, and pillage. Similarly, there is strong basis to suggest responsibility for crimes against humanity. There is no doubt about the widespread and systematic nature of the attacks on civilians in Darfur. There is also little doubt that during these attacks, various violations of international human rights and humanitarian law which could amount to murder, extermination, deportation, rape, persecution and other inhumane acts were committed. Finally, in view of the ethnic orientation of the attacks against the 'African' tribes of Darfur who were principally the victims, and the ethnic origin of the majority of the attackers, including the Arab Janjaweed militia and forces of the government of Sudan, the large number of ethnic 'Africans' killed, mutilated and cleansed from their traditional homelands, there is strong evidence to suggest that a campaign of ethnic cleansing, if not one with genocidal intentions, was being pursued in Darfur.

Conclusion

With so many internal armed conflicts going on between African governments and insurgent movements throughout the continent, Africa provides

the most active field for the potential application of international humanitarian law. Unfortunately, as the situation in Darfur demonstrates, most of the fundamental norms of that law, including the protection and humane treatment of civilians, continue to be flouted on a daily basis. Similarly, Africa's internal armed conflicts have resulted in the violation of the human rights of many citizens, including the right to life of innocent, unarmed men, women and children. Often, because of their own involvement in serious violations of international law, African governments, such as Sudan, are reluctant to take measures to hold the perpetrators of such violations accountable under domestic law. To fight against impunity, and to enforce international society's interest in preventing and punishing such egregious violations of human rights, states have in the past resorted to international mechanisms of accountability, such as ad hoc tribunals or Special Courts. Now, the creation of the ICC as a permanent accountability mechanism for serious violations of international law by individuals, obviates much of the need for such ad hoc institutions.

To fight against impunity, both state and individual responsibility must be pursued in Darfur

This paper has argued that to fight against impunity, both state and individual responsibility must be pursued in Darfur. In addition to individual responsibility of perpetrators, African states, NGOs and individuals also have an opportunity to invoke the State responsibility of Sudan for its violations of human rights at the African Commission on Human and Peoples' Rights.

In view of the serious nature of the crimes committed in Darfur, and the reluctance or inability of the Sudanese government to bring perpetrators to justice, the ICC provides a suitable forum for the final determination of guilt or innocence of any individuals currently suspected of involvement in these atrocities. In light of these circumstances, the international community has little option but to steadfastly support the ongoing work of the ICC to investigate and bring to trial all those suspected of serious violations of international law. Anything short of that would be to endorse impunity and give further impetus to Africa's enduring complex emergencies.

Endnotes

- 1 The word 'African' is used here for purely heuristic purposes to illustrate the distinction between Darfurians of black 'African' descent, and those of 'Arab' extraction.
- 2 The term 'Janjaweed' is an Arabic colloquialism from the Sudan meaning a man (or devil or outlaw) on a horse or camel, hence the title of the article: Outlaws on Camelback. During the 1990s, the term was used in Sudan to describe militias from Arab tribes who attacked and destroyed villages of sedentary tribes. See United Nations, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, (Geneva: 25 January 2005), para 100.
- 3 United Nations (Geneva: April 2006). Third Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Darfur, para. 21. Report of the International Commission of Inquiry, *supra*, note 2, para 226.
- 4 See UNSC Resolutions 1590 (2005); 1591(2005); 1593 (2005); 1665 (2006); 1672 (2006); 1679 (2006); 1706 (2006); 1709 (2006); 1713 (2006); and 1714 (2006).
- 5 Report of the Commission of Inquiry, *supra*, para. 102, 106. The International Commission describes the Janjaweed at para 99, as 'Arab militia acting, under the authority, with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions.'
- 6 The Prosecutor v. Jean Paul Akayesu [2 September 1998], para. 602: 'where a non-international (internal) armed conflict is defined as one taking place in the territory of a state between the armed forces of that state, and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of the state's territory as to enable them to carry out sustained and concerted military operations'.
- 7 Human Rights Watch December 2005. Entrenching Impunity: Government Responsibility for International Crimes in Darfur 17 (17(A)):7 [Hereinafter 'Entrenching Impunity'].
- 8 Article 19 of Geneva Convention IV provides an example of the requirement that civilians or civilian institutions must, where circumstances permit, be warned before an attack is launched on them.
- 9 UNHCHR, Third Periodic Report, *supra*, note 3, para 31.
- 10 Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, Art. 147, while applicable to international armed conflicts, illustrates this point.
- 11 Sassoli, M and Bouvier, A A 1999. How Does Law Protect in War: Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law. Geneva: ICRC, p 117: 'under the principle of distinction, all involved in armed conflict must distinguish between combatants, on the one hand, and civilians, on the other hand.' In The Prosecutor v. Jean Paul Akayesu [2 September 1998] para. 582, the ICTR trial Chamber noted that the term 'civilian population' referred to 'people who are not taking an active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause.'
- 12 Prosecutor v. Tharcisse Muvunyi, [12 September 2006], para 513.
- 13 The Four Geneva Conventions concluded on 12 August 1949 are: GC I – For the Amelioration of the Wounded and Sick in Armed Forces and Field; GC II – For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; GC III – Relative to the Treatment of Prisoners of War; and GC IV – Relative to the Protection of Civilian Persons in Time of War. Sudan acceded to the four Geneva Conventions on 23 September 1957. The two Additional Protocols were concluded on 8 June 1977. AP I relates to Protection of Victims of International Armed Conflicts, while AP II relates to the Protection of Victims of Non-International Armed Conflicts. Sudan acceded to Additional Protocol II on 13 July 2006.
- 14 Common Article 3 of the Geneva Conventions provides that:

In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

 1. Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b) taking of hostages;
 - c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees, which are recognised as indispensable by civilised peoples.
 2. The wounded and sick shall be collected and cared for. In Akayesu, para. 616, the ICTR Trial Chamber stated that Article 3 Common to the Geneva Conventions 'contains fundamental prohibitions as a humanitarian minimum of protection for war victims...'



- 15 Jalloh, C and Marong, A. Ending Impunity: The Case for War Crimes Trials in Liberia, in Aboagye, F B and Bah, A M S 2005. *A Tortuous Road to Peace: The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia*. Pretoria: Institute for Security Studies, pp 196-197.
- 16 Geneva Convention IV, Article 147.
- 17 In *Nicaragua v. The United States* [1968], the International Court of Justice stated that Common Article 3 to the Geneva Conventions 'constitute a minimum yardstick' applicable to any situation of armed conflict and reflect 'elementary considerations of humanity' which all Parties to an armed conflict are bound to respect.
- 18 *Prosecutor v. Dusko Tadic* [2 October 1995] Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction, para 98 [online] available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.
- 19 See Article 2 of the ICTY Statute, Article 4 of the ICTR Statute, and Article 3 of the Statute of the Special Court.
- 20 Rome Statute of the International Criminal Court, Article 8(2).
- 21 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, (Geneva, 25 January 2005), para 163.
- 22 On the involvement of these foreign elements, see Report of the International Commission of Inquiry, supra, para 102.
- 23 Additional Protocol II, Article 1. This conception of a non-international armed conflict was endorsed by the ICTR in *Akayesu*, para 602. See also Burgos, H S 1989. *Humanitarian Law and Human Rights in Internal Conflict*. Implementation of International Humanitarian Law. Dordrecht: Martinus Nijhoff publishers, who describes an internal armed conflict as 'a situation in which the armed forces of a State are confronted with dissident forces or armed groups who are under responsible command and not recognising the authority of the State'.
- 24 *Prosecutor v. Dusko Tadic* [2 October 1995] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction paras. 139-140, where the Appeals Chamber held that the requirement in Article 5 of the ICTY Statute that crimes against humanity must be committed in armed conflict did not reflect customary international law, and that the Security Council only intended to place a jurisdictional limit on the types of crimes against humanity that the Tribunal could try.
- 25 Mettraux, G 2005. *International Crimes and the Ad Hoc Tribunals*. Oxford: Oxford University Press, p 147 where he discusses the two layers of the definition of crimes against humanity. The first layer or chapeau elements require that the acts or conduct must be part of a widespread or systematic attack against any civilian population. They give crimes against humanity their specificity and dimension, and set out the context in which the acts of the accused must have been committed to ground liability for crimes against humanity. The second layer consists of the specific underlying offences such as murder, extermination, rape, or persecution, which the accused is said to have committed as part of the attack. Compare for this purpose Article 7 of the ICC Statute, which requires 'a widespread or systematic attack directed against a civilian population with knowledge of the attack' with Article 3 of the ICTR Statute which requires that the widespread or systematic attack on civilians must be committed on 'national, political, ethnic, racial or religious grounds'. See further Article 5 of the ICTY Statute, which does not include a widespread or systematic requirement, but instead provides that the underlying crime must be committed in the course of an armed conflict, whether internal or international, and directed against a civilian population.
- 26 *Prosecutor v. Tharcisse Muvunyi*, Judgement and Sentence, supra, note 12, para 512. See also *The Prosecutor v. Mikaeli Muhimana* [28 April 2005], para 527.
- 27 See Article 3 of the ICTR Statute; Article 5 of ICTY Statute; and Article 7(1) of the Rome Statute for the definition and underlying offences of crimes against humanity.
- 28 Mettraux, G 2005. *International Crimes and the Ad Hoc Tribunals*. Oxford : Oxford University Press, supra, note 25, at p 173.
- 29 I.L.C. Draft Articles on State Responsibility, (2001), Articles 4, 7, 8, 9 and 10. See also *Prosecutor v. Dusko Tadic* [15 July 1999] paras 114, 120-123, 137.
- 30 Sudan acceded to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) on 13 October 2003.
- 31 See Reservations on the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, ICJ reports, (1951), p 23; *The Prosecutor v. Jean-Paul Akayesu* [2 September 1998] para 495; *The Prosecutor v. Georges Rutaganda* [6 December 1999] para 46. A jus cogens norm is a peremptory norm of international law from which no deviation is permissible. Most jus cogens norms create obligations erga omnes, i.e. obligations owed to the international community as a whole. See Byers, M 1997. *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules* 66. *Nordic Journal of International Law*, 211.
- 32 *The Prosecutor v. Krstic* [19 April 2004] para 36: where the ICTY Appeals Chamber stated, 'those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.
- 33 *Krstic Appeals Judgement*, supra, para 25.
- 34 *Prosecutor v. Tharcisse Muvunyi*, Judgement and Sentence, supra, note 12 para 479; *The Prosecutor v. Aloys Simba*, Judgement and Sentence 2006, para 412; *The Prosecutor v. Laurent Semanza*, Judgement and Sentence 2000, para 316.
- 35 *Krstic, Appeals Judgement*, supra, para 28.
- 36 Universal Declaration of Human Rights, UNGA Res.



217 A (III) of 10 December 1948, (UN Doc. A/811), Articles 3, 5, 7, & 9.

- 37 In *Civil Liberties Organization v. Nigeria* (Communication 129/94), the African Commission found that despite the Nigerian government's repeal of the African Charter (Ratification and Enforcement) Act which incorporated the Banjul Charter into domestic Nigerian law, Nigeria was still under an obligation to give effect to the Charter, until such time that it withdraws its ratification of the Charter and ceases to be a party to the treaty. This is tantamount to the principle that States cannot invoke the provisions of their domestic law to justify non-compliance with their international human rights obligations.
- 38 African Charter on Human and Peoples' Rights, (the Banjul Charter), adopted 27 June 1981, 22 I.L.M. 58 (1982), Articles 3, 4, 5 and 6.
- 39 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147, 16 December 2005, Article 3. See also Freeman, M and Van Ert, G 2005. *International Human Rights Law*. Toronto: Irwin Law Publishers, p 343.
- 40 ACHRs, Communication 74/92 (1995). See also *Velasquez Rodriguez v. Honduras* [1988] I/A Court HR Series C no. 4.vk, where the Inter-American Court of Human Rights held that the obligation to ensure free and full exercise of human rights goes beyond the creation of a legal system designed to make it possible to comply with this obligation; it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.
- 41 See United Nations 25 January 2005. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. Geneva; Human Rights Watch May 2004. *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, Human Rights Watch January 2005. *Targeting the Fur: Mass Killings in Darfur*; Human Rights Watch December 2005. *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*; Human Rights Watch June 2006. *Lack of Conviction: The Special Criminal Court on the Events in Darfur*.
- 42 Report of the International Commission of Inquiry, supra, pp 27-28.
- 43 Ibid, at para 251.
- 44 UN, Report of the International Commission of Inquiry, supra, para. 249 where the Sudanese Minister of Defence is reported to have said that he considered the presence of even one rebel sufficient to make a whole village a legitimate military target. According to the Minister, once the Government received information that there were rebels within a certain village, 'it is no longer a civilian locality, it becomes a military target.'

45 Article 13 of the AP II provides:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
 3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.
- 46 Ibid. para 272.
- 47 *Krstic Appeals Judgement*, para 28.
- 48 Human Rights Watch 2005, *Entrenching Impunity*, supra, p 27.
- 49 Ibid. p 28.
- 50 Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) 27 May 1994, defining ethnic cleansing as a 'purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.... This purpose appears to be the occupation of territory to the exclusion of the purged group or groups.
- 51 Sassoli, M and Bouvier, A A 1999. *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Geneva: ICRC, p 231, citing the *Nicaragua Case*, ICJ paras 115, 216, 255, 256.
- 52 Article 1 of the ILC's Draft Articles on State Responsibility (2001) provides: 'every internationally wrongful act of a State entails the international responsibility of that State.'
- 53 *Judgement of Nuremberg War Crimes Tribunal* [1947], 1. *Trial of Major War Criminals*, p 171: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced...'
- 54 Draft Articles on State Responsibility (2001). Article 4 provides inter alia: 'the conduct of any State organ shall be considered an act of that State under international law....' Article 8 provides: 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.' See also *Prosecutor v. Dusko Tadic*, *Judgement A.C.*, para 137 where the ICTY Appeals Chamber drew a distinction between international law's tests for determining the degree of control required for attribution to states of the actions of individuals on the one hand, and organised militias or paramilitary groups on the other. The former requires effective control, in the sense of specific instructions



issued by the State to commit the particular wrongful act performed by the individual; the latter requires overall control, including the provision of financial support, equipment and training, but does not require the issuance of specific instructions.

- 55 Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America) Merits, Judgement, ICJ Reports [1986], p 14 [Hereinafter Nicaragua case]. See in particular para. 115, where the Court stated that all the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.'
- 56 Tadic seems to have laid down a slightly different notion of 'effective control' as a basis for state responsibility when compared to what the jurisprudence requires for 'effective control' as a requirement for individual criminal responsibility as a superior/commander. The latter only requires the accused to have material ability to prevent or punish the actions of subordinates in order to be found liable.
- 57 Tadic Appeals Judgement, *supra*, paras 120-123, 137. For a discussion of the Nicaragua and Tadic tests on attribution, see Milanovic, M. State Responsibility for Genocide, 17. European Journal of International Law. 553.
- 58 Prosecutor v. Delacic et al, ICTY TC Judgement, para 321; Prosecutor v. Tharcisse Muvunyi, *supra*, para 459.
- 59 Article 1 of the ICTY, ICTR, SCSL and ICC Statutes limit the personal jurisdiction of those institutions to trials of natural persons (individuals) for serious violations of international law. Article 6 of the ICTR and SCSL and Article 7 of the ICTY Statutes respectively lay out the forms of participation that could ground individual responsibility for serious violations. Direct participation under Article 6(1) and 7(1) involves planning, ordering, instigating, committing or aiding and abetting the commission of crimes subject to the jurisdiction of the Tribunals. Articles 6(3) and 7(3) invoke the customary law rule of command/superior responsibility under which a military commander or civilian superior may be held criminally liable if he fails to prevent or punish the criminal acts of his subordinates in circumstances where he had effective control over such subordinates and knew or had reason to know about their criminal conduct. This principle applies to both internal and international armed conflicts. See also Articles 25 and 28 of the Rome Statute for the principle of individual responsibility and the forms of participation, including command/superior responsibility and joint criminal enterprise.
- 60 Nuremberg Charter, Articles 6 and 7. See also Article 6 (2) Statute of the Special Court for Sierra Leone; Article 6(2) of the ICTR Statute; Article 7(2) of the ICTY Statute; and Article 27 (1) & (2) of the Rome Statute of the International Court of Justice.
- 61 R. v. Bow St. Magistrates, Ex. P Pinochet Ugarte [1999] 2 All. E.R. 97., where the Majority of the British House of Lords stated that 'the immunity of a former Head of State persists only with respect to acts performed in the exercise of the functions of the Head of State, that is official acts, whether at home or abroad. The determination of an official act must be made in accordance with international law. International crimes in the highest sense, such as torture, can never be deemed official acts of State.'
- 62 Democratic Republic of Congo v. Belgium [14 February 2002] [Hereinafter 'Yerodia case'].
- 63 de Than, C and Shorts, E 2003. International Criminal Law and Human Rights. London: Sweet and Maxwell, p 60.
- 64 Prosecutor v. Charles Ghankay Taylor [31 May 2004], Case Number SCSL-2003-01-I, Decision on Immunity from Jurisdiction [online] available at <http://www.sc-sl.org/SCSL-03-01-I-059.pdf>. For a discussion of the international legal significance of this Decision, See Jalloh, C C October 2004. Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone. ASIL Insights [online] available at <http://asil.org/insights/insights145.htm>.
- 65 The Indictment in December 2006 in Miami, USA, of Chuckie Taylor, son of the former Liberian President Charles Taylor, for torture committed in Liberia in 2002, further illustrates the point. Chuckie Taylor headed the notorious anti-terrorism unit in Liberia during his father's Presidency from 1997 to 2003. The Unit is accused of widespread human rights abuses including harassment and detention of political opponents, torture and summary execution. The trial is brought under the United States Anti Torture Law, 18 USC (1994), Sections 2340A and 2441, which enables the Federal Government to try United States citizens for torture committed abroad. The Indictment of Chuckie Taylor is the first time that the Federal Government has invoked this legislation. See Human Rights Watch, US: Justice Department Brings First Charges for Torture Abroad: Ex-Liberian President's Son Indicted for Torture in Liberia, [online] available at <http://hrw.org/english/docs/2006/12/06/usint14777.htm> [accessed 10 December 2006].
- 66 A wide range of individuals from many different backgrounds and professions has been tried for their individual participation in serious international crimes. At the ICTR, See The Prosecutor v. Jean Kambanda [2001] (Where a former Prime Minister pleaded guilty and accepted individual responsibility for genocide and other serious violations of international law). The Prosecutor v. Jean Paul Akayesu (a provincial bourgmestre); The Prosecutor v. Alfred Musema (A public servant, Director of Gisovu Tea Factory); The Prosecutor v. Georges Rutanganda (A private businessman); The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Media practitioners); The Prosecutor v. Elizaphan



Ntakirutimana and Gérard Ntakirutimana (Father and son, the former a pastor, the latter a medical doctor); and *The Prosecutor v. Tharcisse Muvunyi* (Military Commander). Recently, the trial of Simon Bikindi, a popular Rwandese composer and singer, commenced before Trial Chamber III of the ICTR. He is charged with conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, murder, and persecution as crimes against humanity. One of the principal allegations against Bikindi is that he composed, performed, recorded and disseminated music, which extolled Hutu solidarity and characterised Tutsis as enslavers of the Hutu. According to the Prosecutor, Bikindi's music was used during the genocide as a propaganda tool that portrayed the Tutsi as the enemy or accomplices of the enemy, and encouraged the Hutu to eliminate them. On 29 January 2007, in *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I of the ICC decided that there was sufficient evidence to confirm against Mr. Lubanga Dyilo, three charges of enlisting and conscripting children younger than 15 to fight as rebels in the Democratic Republic of Congo. The Chamber reasoned that there were substantial grounds to believe that Mr. Lubanga Dyilo was a co-perpetrator of the war crimes charged; that he and others had concluded a common plan or agreement to enlist and train children as fighters; and that such enlistment and training was a systematic practice involving a large number of children. The confirmation of the charges means that Mr. Lubanga Dyilo can now be tried before the Trial Chamber of the ICC. Mr Lubanga Dyilo is the only accused person in the custody of the ICC, and his trial will be the first before that court.

- 67 See the ICTR case of *Prosecutor v. Tharcisse Muvunyi* (Command responsibility; a military commander found guilty of genocide and crimes against humanity for the actions of soldiers under his command; *The Prosecutor v. Musema* (Superior responsibility; a civilian head of a tea factory, found guilty for failing to prevent his employees from committing acts of genocide).
- 68 *Nicaragua v. The United States*, Case No. 118, ICJ, paras 115, 216, 255, 256.
- 69 In the *Chorzów Factory (Indemnity)* (Merits) Case, P.C.I.J. Rep., Ser. A. No. 17 (1928) p. 29, the Permanent Court of International Justice stated *inter alia*: '...it is a principle of international law...that any breach of an engagement involves an obligation to make reparation...reparation is the indispensable complement of a failure to apply a convention...' Traditional international law, as reflected in Article 42 of the Draft Articles on State Responsibility only permits 'injured states' (i.e. those whose citizens or material interests are adversely affected by the actions of offending state), to bring claims for reparation.
- 70 Happily, African states have begun an important shift in thinking from a state-centric, sovereignty, non-interference model of regional intercourse, to one

of non-indifference and interdependence. Compare for this purpose, the provisions of the Charter of the Organisation of African Unity (1963), and the Constitutive Act of the African Union (2000). Article III of the former guarantees non-interference in internal affairs and respect for the sovereignty and territorial integrity of all Member States. On the other hand, Article III of the Constitutive Act emphasises sovereign equality and interdependence of African states; the right of the Union to intervene in Member States in cases of genocide, war crimes, and crimes against humanity; and the right of Member States to request the Union's intervention in order to restore peace and security in a particular member State.

- 71 See UNSC resolutions cited *supra*, at 4.
- 72 UNSC Res. 1593(2005), 31 March 2005. The resolution calls upon the Government of Sudan and all other parties to the conflict to co-operate fully and provide all necessary assistance to the ICC in the conduct of its work.
- 73 UNSC Res. 1672 (2006), 25 April 2006 which imposes sanctions on Major General Gaffar Mohamed Elhassan (Commander of the Western Region of the Sudanese Armed Forces); Sheikh Musa Hilal (Paramount Chief of the Jalul Tribe of Northern Darfur); Adam Yacub Shant (Sudanese Liberation Army Commander); and Gabril Abdul Kareem Badri (National Movement for Reform and Development Field Commander).
- 74 UNSC Res. 1706 (2006) 31 August 2006, which expanded the mandate of the United Nations Mission in Sudan (UNMIS) to include authority to deploy forces in Darfur with the objective of supporting the implementation of the Darfur Peace Agreement. The resolution provides that the UNMIS force 'shall take over from AMIS responsibility for supporting the implementation of the Darfur Peace Agreement' not later than 31 December 2006, and asked the Government of Sudan to give its consent to the deployment of such a force.
- 75 Statement of Mr. Kofi Annan, United Nations Secretary General delivered on 7 December 2007, where he notes that in the past six weeks alone, more than 80 000 people have been forced to flee from their homes as government troops and allied militia fight with rebels in Darfur. He reiterated that over 200 000 lives have been lost in the conflict, and reminded the government of Sudan of its patent failure to meet its obligation to protect civilians in Darfur, noting that 'in time they may have to answer collectively and individually for what is happening.' See UN News Centre 7 December 2006, *Escalating Violence Across Darfur Sparks Urgent Appeal from Annan*, [online] available at <http://www.un.org/apps/news/ticker/tickerstory.asp?NewsID=20891> [accessed 11 December 2006]. Meanwhile, on 10 December 2006, the United Nations Mission in Sudan (UNMIS) announced that 30 civilians were killed when gunmen, alleged to be Janjaweed militia, attacked a convoy carrying medical and relief supplies in Darfur. See BBC News 10 December 2006, *Civilians*



Killed in Darfur Attack [online] available at <http://news.bbc.co.uk/2/hi/africa/6166305.stm> [accessed 11 December 2006].

- 76 The Commission is established under Article 30 of the Charter to promote and protect human rights in Africa.
- 77 In Mugwanya, G W 2003. *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System*. New York: Transnational Publishers, p 243, he distinguishes between the promotional and quasi-judicial functions of the African Commission. He further notes that the quasi-judicial function is divisible into an 'interpretative' and a 'protective' function. The former relates to the power to interpret the provisions of the Charter; the latter reflects the Commission's mandate to resolve disputes over allegations of human rights violations.
- 78 Articles 45(2) and 55 of the Charter. See also Mugwanya, G W 2003. *Human Rights in Africa*, supra, note 77, especially Chapter 7, where he discusses the composition, mandate, jurisprudence and the normative impact of the Commission's work.
- 79 See African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981 (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)), Article 58.
- 80 Ibid. Article 56. See also Mugwanya, G W 2003. *Human Rights in Africa*, supra, at pp 255-257.
- 81 See *Organisation Mondiale Contre la Torture v. Rwanda*, Comm. Nos. 27/89, 46/91, 49/91, 99/93(1996). These communications arose out of allegations of mass expulsions of Burundian citizens from Rwanda on the ground that they posed a national security risk; allegations of arbitrary arrests and summary executions in Rwanda; the arbitrary arrests and detention of large numbers of Tutsi people by Rwandan security forces; and alleged series of serious and massive violations of human rights between October 1990 and January 1992. The Commission reasoned that these communications revealed serious and massive violations of human rights, and that they were therefore admissible without the need to exhaust local remedies.
- 82 *Commission Nationale de Droits de l'Homme et des Libertés v. Chad*, Comm. No. 74/92 (1995).
- 83 Ibid. para 20.
- 84 Ibid. para 22.
- 85 Report of the International Commission of Inquiry, supra, note 2, especially at paras 428-449.
- 86 Report of the International Commission of Inquiry, supra, note 22, para 531, where the Commission states that it has identified ten high-ranking central government officials, 17 local government officials, 14 members of the Janjaweed militia, seven members of rebel groups and three foreign army officers on suspicion of bearing individual responsibility for serious international law violations in the course of the Sudan conflict.
- 87 Human Rights Watch, *Lack of Conviction*, supra, note 7; Human Rights Watch, *Entrenching Impunity*, supra, note 7, at pp 556-57. In both reports, Human Rights Watch argues that the establishment of the Special Court fell short of demonstrating a genuine desire on the part of Sudan to prosecute serious violations of international law in Sudan. They argue that not a single mass crime has been prosecuted, and not a single official has been tried either for direct participation or for command/superior responsibility with respect to the events in Darfur. The fact that Sudan announced the establishment of the Special Court on 7 June 2005, a day after the ICC Prosecutor announced that he was opening investigations into the events in Darfur with a view to identifying those bearing the greatest responsibility for serious violations of international law in that situation, reinforces the perception that the Special Criminal Court is intended to defeat the ICC's jurisdiction.

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About this paper

The complex humanitarian emergency in Sudan's Darfur region, since the upsurge in the conflict in 2003, has served to bring to the fore practical difficulties in the operationalisation of the 'responsibility to protect' centring on the question of civilian protection and state sovereignty, vis-à-vis international options. In the aftermath of violent armed conflict, this responsibility involves action at two levels: the normative and the physical coercive—military—protection. Given the challenges in the role of the regional intervention—the African Mission in Sudan (AMIS)—in ensuring civilian protection in Darfur, the paper argues that Sudan bears international responsibility for the violations of international law committed by its military forces as well as the civilian Janjaweed militia, formed, organised, funded and armed by the government to support its war against the Darfur rebels. The paper further argues that Sudan's state responsibility is neither inconsistent with, nor does it detract from the individual responsibility of senior members of the Sudanese government, the Sudanese armed forces, and militia leaders. It concludes by arguing that to challenge impunity for the violations committed in Darfur, both state and individual responsibility must be vigorously pursued, and that the international community must support the ongoing work of the International Criminal Court to investigate and prosecute all those bearing responsibility for the heinous crimes committed in that region since 2003.

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