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# INTERNATIONAL APATHY: DARFUR AND THE RESPONSIBILITY TO PROTECT

Submitted for LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2007

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***Word Length***

The text of this paper (excluding table of contents, footnotes and bibliography) comprises 8,989 words.

## *I INTRODUCTION*

In 1999, in the wake of the atrocities that shocked the world in Srebrenica and Rwanda, the United Nations (UN) Secretary-General Kofi Annan said:[1]

> Of all my aims as Secretary-General, there is none to which I feel more deeply committed than that of enabling the United Nations never again to fail in protecting a civilian population from genocide or mass slaughter.

Studies, Commissions and academics have, since 1999, debated how the international community should achieve the Secretary-General's goal. One landmark consequence of these efforts was the report of the International Commission on Intervention and State Sovereignty (the ICISS).[2] The report, released in 2001, advocated the concept of a "responsibility to protect" (R2P) in an attempt to redefine and increase acceptance of the right of humanitarian intervention, as it was known until then.

This paper will analyse the doctrine of R2P with reference to the current humanitarian crisis in the Western Sudanese region of Darfur. A 26,000 strong peacekeeping force has recently been authorised by the UN Security Council to help bring peace to this troubled region.[3] This force however, comes after four years of international inaction.

Darfur has been chosen as the test case for R2P in this analysis as, in the writer's opinion, it presents the most plausible case on the current international scene for intervention pursuant to this doctrine. This paper will, therefore, begin by providing an overview of the conflict in Darfur and the wider Sudan. It will then endeavour to briefly outline the background against which R2P was developed, followed by a comprehensive analysis of the intervention aspect of this doctrine and its applicability to the current

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[1] Report of the Independent Inquiry into the Actions of the United Nations and Srebrenica "Report of the Fall of Srebrenica" (15 November 1999) A/54/549.
[2] Report of the International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre for ICISS, Ottawa, 2001) www.iciss.gc.ca (accessed 7 August 2007) [ICISS Report].
[3] UNSC Resolution 1769 (31 July 2007) S/RES/1769/2007.

conflict in Darfur. It will be shown that the conflict in Darfur presents to the world a classic case of R2P and that the international community failed in its responsibility to protect. It, therefore, becomes necessary to briefly analyse the possible reasons for such a failure and to consider the future of the concept of R2P. This paper will focus particularly on the difficulties in gaining Security Council authorisation for intervention. It will also put forward some suggestions for operationalising R2P in light of apparent international apathy in the face of humanitarian catastrophe.

## *II THE SUDAN*

The Sudan is the largest country in Africa, sharing its borders with nine countries.[4] The population of the country is estimated at 39 million, consisting of numerous tribes, religions and languages. In 1956, Sudan gained independence from British rule and has since had a tumultuous history of coups d'état and military regimes. The Government of Sudan is currently led by Omar Hassan El-Bashir who took power by military coup in 1989. Sudan is one of the least developed countries in the world, ranking 141 out of 177 countries on the 2006 Human Development Index,[5] despite being rich in natural resources. In addition, it has been marred by conflict and violence since independence, stymieing development and destabilising the region. Two conflicts in particular require additional analysis.

### *A The North-South Conflict*

The conflict between the North and the South of the Sudan began in 1962 when the traditionalist, Christian South rebelled against Government policies that favoured Islam and Arabic, encouraging their expansion throughout the country. After ten years of violence, the Addis Ababa Agreement ended the conflict in 1972, and a period of relative

[4] Chad, Libya, Egypt, Eritrea, Ethiopia, Kenya, Uganda, the Democratic Republic of the Congo, and the Central African Republic.

[5] United Nations Development Programme "Human Development Report 2006" www.undp.org (accessed 7 August 2007).

peace followed.[6] However, several factors led to a second North-South conflict, which began in 1983. These factors included the discovery of oil in the South and the decision of the central Government to declare the Sudan an Islamic republic, thus imposing Shari'a law on all Sudanese. The removal of the limited autonomy given to the South in 1972 under the Addis Ababa Agreement also contributed to the South's reasons for rebelling. This second war was ended by the Comprehensive Peace Agreement (CPA), signed in January 2005.[7] During the 22-year conflict an estimated two million people were killed and four million displaced from their homes. The UN is currently involved in monitoring the implementation of the CPA. Although there seems to be general compliance with the ceasefire, the peace in this region is still a fragile one.[8]

### *B The Conflict in Darfur*

The conflict in Darfur began in February 2003 when, first, the Sudan Liberation Army and then, the Justice Equality Movement attacked government military installations, complaining of discrimination and oppression of the Darfur region.[9] The seeds of the conflict are complex.[10] Sources include tribal feuds fuelled by environmental problems and a feeling of socio-economic and political marginalisation of Darfuris. The Government in Khartoum attempted to quell the rebel forces by deploying Sudanese troops and, more importantly, by allegedly arming the Janjaweed militia.[11] The

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[6] Addis Ababa Agreement, Ethiopia (27 February 1972).

[7] The Comprehensive Peace Agreement Between the Government of the Republic of Sudan and the Sudan People's Liberation Movement / Sudan People's Liberation Army, Nairobi (9 January 2005).

[8] UNSC Resolution 1755 (30 April 2007) S/RES/1755/2007. For a brief overview of the progress of the implementation of the Comprehensive Peace Agreement see Mariam Bibi Jooma "Darfur Realities: Peace and war in the Sudan – An update on the implementation of the CPA" (16 May 2007) Institute for Security Studies Situation Report www.iss.ca.za (accessed 7 August 2007).

[9] A detailed history and composition of these two rebel groups can be found in International Crisis Group "Darfur Rising: Sudan's New Crisis" Africa Report 76 (25 March 2004) www.crisisweb.org (accessed 14 August 2007).

[10] For a detailed overview of the causes of the conflict in Darfur and in the greater Sudan see International Commission of Inquiry on Darfur "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General" (25 January 2005) S/2005/60, paras 40-72 [Commission of Inquiry Report].

[11] Khartoum denies allegations that it supports the Janjaweed. However, there seems little doubt that the Janjaweed, at least initially, was backed by the Sudanese Government. See, for example, United Nations News Centre "Sudan: Government forces, militias have committed atrocities – UN rapporteur" (14 July 2007) www.un.org (accessed 7 August 2007). See also Commission of Inquiry Report, ibid, para 111.

term "Janjaweed" is an Arabic expression generally meaning "a man (a devil) on a horse",[12] and refers to a loosely organised militia force that has been accused of committing many of the atrocities in Darfur.[13] The counter-insurgency campaign of the Government focused on attacking communities and civilians suspected of supporting the rebel groups, resulting in the present humanitarian crisis in which at least 200,000 people have died.[14] An estimated further two million people have been forced from their homes, many fleeing to neighbouring Chad. The Commission of Inquiry on Darfur[15] concluded that while the mens rea element of genocide was not satisfied, violations of other international offences that "may be no less serious and heinous than genocide" have been committed in Darfur.[16] Indeed, there is clear evidence of a policy directly targeting the civilian population. The Commission of Inquiry found that:[17]

> [G]overnment forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.

The Commission concluded that the government of Sudan had acted in "blatant violation of international law" in response to the insurgency in Darfur,[18] and that human rights violations, crimes against humanity, and possible war crimes, have been committed by the Government of Sudan, the Janjaweed and the rebel groups.[19] The principal recommendation of the Commission was that the situation in Darfur be referred to the International Criminal Court (ICC).[20]

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[12] Commission of Inquiry Report, above n 10, para 100.
[13] For a general discussion of the Janjaweed militia see ibid, paras 98-126.
[14] Calculating the number of deaths in Darfur is impossible given the size and inaccessibility of parts of the region. One of the latest estimates puts excess deaths at "no fewer than 200 000." These figures include both direct and indirect deaths: John Hagan and Alberto Palloni "Death in Darfur" (2006) 313 Science 1578.
[15] UNSC Resolution 1564 (18 September 2004) S/RES/1564/2004.
[16] Commission of Inquiry Report, above n 10, 4. For a detailed analysis of the violations of international law committed by the parties involved in the Darfur conflict see paras 237-418.
[17] Ibid, 3.
[18] Ibid, para 628.
[19] Ibid, para 630.
[20] Ibid, para 647.

## *III HUMANITARIAN INTERVENTION*

The idea of a right of humanitarian intervention is not a new concept. Instances of states intervening on proclaimed humanitarian grounds predate Alexander the Great.[21] Often, however, interventions were not purely humanitarian, and the rhetoric of humanitarianism was frequently used as a guise for other motives.[22] Nevertheless, prior to the signing of the UN Charter, humanitarian intervention justifications were widely used, leading some academics to assert that a rule of customary international law existed.[23]

The establishment of the UN called into question the existence of a doctrine of humanitarian intervention because of its express prohibition on the use of force in circumstances other than self-defence or pursuant to Security Council authorisation.[24] Commentators are divided on what effect the Charter had on the doctrine. States also seemed reluctant to openly rely on the doctrine, meaning that instances of intervention based primarily on humanitarianism were rare until the end of the Cold War. Most states preferred instead to rely on individual or collective self-defence. Indeed, many interventions that may have had a sufficient humanitarian aspect were not argued on humanitarian bases, but on the basis of self-defence. Examples of such instances include, India's invasion of East Pakistan in 1971, Tanzania's intervention in Idi Amin's Uganda throughout the 1970s, and Vietnam's intervention into Pol Pot's Cambodia in the late 1970s.

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[21] Thomas G Weiss *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect* (2ed, Rowman and Littlefield Publishers Inc, United States of America, 2005) 8.

[22] See, for example, Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty *The Responsibility to Protect: Research, Bibliography, Background* (International Development Research Centre for ICISS, Ottawa, 2001) 17, quoting Ian Brownlie asserting that "no genuine case of humanitarian intervention has occurred with the possible exception of the occupation of Syria in 1860 and 1861" [ICISS Supplementary Volume].

[23] See for example Lassa Oppenheim and Hersch Lauterpacht (ed) *International Law* (8ed, vol 1, Longmans Green, London, 1955) 312; Jean-Pierre Fonteyne "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter" (1974) 4 Cal W Int'l LJ 203, 235.

[24] Charter of the United Nations 1 UNTS xvi, art 2(4) (prohibition on the use of force), art 51 (the exception of self-defence) and Chapter VII (the ability of the Security Council to authorise interventions).

### *A Iraq*

The first post-Charter assertion of a right of humanitarian intervention came from Britain as an ex post facto justification for its actions in protecting the Kurds in Northern Iraq in 1991. Following the withdrawal of Iraq from Kuwait in 1991, the Iraqi government began persecuting the Kurds in the north of Iraq in response to Kurdish uprisings. Despite a lack of Security Council authorisation, the United States, France and the United Kingdom intervened to protect civilians, imposing a no-fly zone. After the invasion, the intervening states appeared to justify their actions on implied Security Council authorisation based on Resolution 688.[25] This resolution, which was not passed under Chapter VII, called on Iraq to end the repression of civilian populations and allow access to humanitarian organisations. Later, however, the United Kingdom began to make a case for the doctrine of humanitarian intervention. Eventually, it also suggested some criteria upon which humanitarian intervention would be justified.[26] This assertion by the United Kingdom attracted criticism and little support demonstrating the highly controversial nature of the doctrine.

### *B Kosovo*

The end of the Cold War created a different dynamic in world order, with more of a focus on human rights and the security of peoples. The ensuing years of the 1990s thus saw the international community intervene in Somalia, Liberia, Haiti, Sierra Leone and Kosovo to avert or quell humanitarian catastrophe. While the Somali and Haitian operations were authorised by the UN Security Council, Liberia, Sierra Leone and Kosovo were not, at least initially. The North Atlantic Treaty Organisation's (NATO) intervention in Kosovo in 1999 is the most commonly cited example of humanitarian intervention. The members of NATO launched a bombing campaign against Serbia to protect Kosovar Albanians from Serb repression. NATO's principal legal basis for intervening was based on the doctrine of humanitarian intervention. The United

[25] UNSC Resolution 688 (5 April 1991) S/RES/688/1991.
[26] Geoffrey Marston (ed) "United Kingdom Materials on International Law 1992" (1992) 63 BYIL 615, 826 – 828.

Kingdom especially relied on this doctrine.[27] Its position was made clear in its submissions to a House of Commons Foreign Affairs Select Committee set up to report on the legality of the NATO intervention. The British Government stated that in the case of "overwhelming humanitarian necessity ... a limited use of force is justifiable as the only way to avert a humanitarian catastrophe."[28] Tony Blair also made the British Government's position clear in a famous speech to the Chicago Economic Club in April 1999.[29] Finally, in 2000, the Foreign Secretary developed a set of guiding principles to aid in the interpretation of the right of humanitarian intervention.[30]

During the intervention, Russia sought to pass a resolution in the Security Council condemning NATO's actions. Only China, Namibia and Russia itself supported the Resolution. The other 12 members, including seven non-NATO states,[31] supported the actions of NATO. Some commentators have asserted that this vote demonstrated "... grudging acceptance that in extreme cases it is legitimate to take measures outside of the Council."[32] Coupled with Resolution 1244, establishing an international civilian presence in Kosovo,[33] and Security Council actions vis-à-vis Liberia,[34] and Sierra Leone,[35] the *legitimacy* of NATO's actions now seemed undisputed.

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[27] For an overview of key statements made by the United Kingdom see Ian Brownlie and C J Apperley "Kosovo Crisis Inquiry: Memorandum on the International Law Aspects" (2000) 49 ICLQ 878.
[28] House of Commons' Foreign Affairs Select Committee "Fourth Report on Kosovo" HC 28 – I/II (7 June 2000) www.publications.parliament.uk (accessed 7 August 2007) para 124 [Forth Report on Kosovo].
[29] Tony Blair "Doctrine of the International Community" (Hilton Hotel, Chicago, United States, 22 April 1999).
[30] Geoffrey Marston (ed) "United Kingdom Materials on International Law 2000" (2000) 71 BYIL 517, 646-649. These guidelines are broadly reflected in the ICISS report discussed intra Part IV The Responsibility to Protect.
[31] Argentina, Bahrain, Brazil, Gabon, Gambia, Malaysia and Slovenia.
[32] Paul D Williams and Alex J Bellamy "The Responsibility to Protect and the Crisis in Darfur" (2005) 36 Security Dialogue 27, 41. See also, Nicholas J Wheeler "The Humanitarian Responsibilities of Sovereignty" in Jennifer M Welsh (ed) *Humanitarian Intervention and International Relations* (Oxford University Press, Oxford, 2004).
[33] UNSC Resolution 1244 (10 June 1999) S/RES/1244/1999.
[34] UNSC Resolution 1497 (1 August 2003) S/RES/1497/2003 establishing a multinational force for Liberia.
[35] UNSC Resolution 1270 (22 October 1999) S/RES/1270/1999 establishing UNAMSIL.

### C *The State of Humanitarian Intervention after Kosovo*

The intervention in Kosovo generated a wealth of academic commentary. Opinions remain divided over whether or not the NATO intervention in Kosovo constituted a valid use of the right of humanitarian intervention. Most academics agreed that, strictly speaking, the intervention was illegal due to the lack of Security Council authorisation. Many argued however, that while not legal, the intervention was legitimate and evidence of the re-emerging right of humanitarian intervention as an exception to the Charter.[36] Others though, found these arguments for a right of humanitarian intervention unconvincing.[37]

In April 1999, Yugoslavia brought a case against ten NATO members alleging the illegal use of force.[38] The International Court of Justice (ICJ) denied their application for provisional measures, relating to the immediate cessation of the intervention, on the basis that prima facie jurisdiction on the merits of the case was not established. This procedural decision in no way reflected on the legality of NATO's use of force and the ICJ did not make a decision in this respect. It did however express concern.[39] Over ten years earlier, in the case of *Nicaragua v United States*, the ICJ had seemed to reject the existence of a right of humanitarian intervention as a way of ensuring respect for human rights.[40] Many commentators have claimed that this assertion is not a definitive rejection of the right of humanitarian intervention.[41] Indeed, the ICJ also recognised the ability of

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[36] See for example, Antonio Cassese "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community" (1999) 10 EJIL 23; Bruno Simma "Nato, the UN and the Use of Force: Legal Aspects" (1999) 10 EJIL 1.

[37] See for example, Simon Chesterman "Legality Versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law" (2002) 33 Security Dialogue 293; Simon Chesterman *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, Oxford, 2001), in which he analyses the arguments for the existence of a right of humanitarian intervention post-UN Charter and concludes that they are unconvincing. See also, Christine Gray *International Law and the Use of Force* (Oxford University Press, Oxford, 2004).

[38] *Legality of Use of Force (Yugoslavia v Belgium) (Yugoslavia v Canada) (Yugoslavia v France) (Yugoslavia v Germany) (Yugoslavia v Italy) (Yugoslavia v Netherlands) (Yugoslavia v Portugal) (Yugoslavia v Spain) (Yugoslavia v United Kingdom) (Yugoslavia v United States of America)* (Provisional Measures) [1999] ICJ Rep 259 [*Legality of Use of Force*].

[39] Ibid, paras 16-17.

[40] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, paras 267-268 and 243 [*Nicaragua*].

[41] ICISS Supplementary Volume, above n 22, 19.

customary law to develop and be modified by changing circumstances in the international arena, thus leaving open the possibility of a right of humanitarian intervention developing.[42] Problematically, however, as noted above, there have been very few cases in which states have relied primarily on a doctrine of humanitarian intervention to justify their actions.[43] This does mean that such a customary law rule could not develop. Many developments in the international community in recent years have aimed to bridge the gap between the morality and legality of humanitarian intervention.

## *IV THE RESPONSIBILITY TO PROTECT*

### *A From Humanitarian Intervention to R2P*

Thus, the issue of humanitarian intervention presented a seemingly unresolvable dilemma between the prohibition on the use of force (a jus cogens norm)[44] and the fundamental right of all peoples to basic human rights. It was with this dilemma in mind that former Secretary-General Kofi Annan challenged the international community:[45]

> [I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?

In response, the ICISS was set up by the Canadian government. While other commissions were also set up to explore this issue, most notably by the Dutch and Danish governments,[46] the report of ICISS is regarded as the most comprehensive and has subsequently received the most recognition. The ICISS report was released in December 2001 and substantially changed the way intervention on humanitarian grounds is now

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[42] *Nicaragua*, above n 40, para 207.
[43] See intra Part III Humanitarian Intervention.
[44] *Nicaragua*, above n 40, para 190. A jus cogens norm is a norm from which no derogation is permissible.
[45] Kofi A Annan "We the Peoples: The Role of The United Nations in the 21st Century" (3 April 2000) A/54/2000, 48 ["We the Peoples"].
[46] The study commissioned by the Danish Government through its think-tank DUPI, and the report of the Netherlands Government through its Advisory Council on International Affairs.

viewed. The report essentially refocused humanitarian intervention away from a "right" to intervene to a "duty" to protect.

### *B The ICISS Report*

The ICISS report made two conceptually important contributions to the humanitarian intervention debate. First, the ICISS changed the focus of the debate from a "right to intervene" to a "responsibility to protect" incumbent on states when mass atrocities are occurring within the territory of another sovereign state.[47] This change in terminology helped refocus attention on the victims of atrocities and took some of the "heat and emotion out of the policy debate."[48]

Secondly, the ICISS sought to redefine sovereignty. The essence of the report was not to weaken the concept, but to advocate a transition "from sovereignty as control to sovereignty as responsibility."[49] Sovereignty entailed a dual responsibility: to one's citizens, and to the international community. Consistent with the norm of non-intervention in article 2(7) of the UN Charter, individual states have the primary responsibility to protect their citizens.[50] However, the international community has a "fallback" responsibility, which is engaged when a state is either unwilling or unable to exercise its responsibility to protect.[51]

The report stressed that the responsibility to protect of the international community went beyond intervention to halt human rights violations. It entailed three responsibilities: to prevent, to react and to rebuild.[52] Indeed, in the ICISS's view, the most important of these responsibilities was not that of reaction, but of prevention.[53] Given the highly contentious nature of the right to react by military intervention, the

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[47] ICISS Report, above n 2, para 2.4.
[48] Gareth Evans "From Humanitarian Intervention to the Responsibility to Protect" (2006) 24 Wis Int'l LJ 703, 708.
[49] ICISS Report, above n 2, para 2.14.
[50] Ibid, para 2.8 and para 2.30.
[51] Ibid, para 2.31.
[52] Ibid, para 2.29.
[53] Ibid, para 7.15.

ICISS spent considerable time preparing a set of guidelines for when such intervention would be appropriate. It should be stressed that the essence of R2P is not on legitimising military intervention. While such intervention can be taken pursuant to the doctrine, it is essentially a last resort in "extreme and exceptional cases",[54] following international action in political, diplomatic or economic fields.

The ICISS set out six criteria to justify the use of force to protect civilians in the case of "large scale loss of life or ethnic cleansing": just cause, right intention, last resort, proportional means, reasonable prospects and right authority.[55] These will be discussed in more detail below with regard to the situation in Darfur.

### *C International Acceptance of R2P*

The terminology of R2P has been used in several international documents since 2001 and has received substantial support from non-governmental organizations (NGOs).[56] The concept was endorsed in the report of the High Level Panel on Threats, Challenges and Change.[57] This report also approved of the criteria for legitimacy presented by the ICISS, even recommending that such criteria be considered by the Security Council in any context involving authorisation of the use of force, not just for interventions based on humanitarian concerns.[58]

Importantly, the Outcome Document of the World Summit by the UN General Assembly in 2005 adopted the concept,[59] representing, in theory, wide support for the concept in the international community. Kofi Annan also approved of R2P in his report *In Larger Freedom*.[60]

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[54] Ibid, para 4.10.
[55] Ibid, XII.
[56] For a list of NGOs that have expressed support for the concept of R2P see, Responsibility to Protect: Engaging Civil Society www.responsibilitytoprotect.org (accessed 23 August 2007).
[57] Report of the Secretary General's High Level Panel on Threats, Challenges and Change "A More Secure World: Our Shared Responsibility" (2 December 2004) A/59/565, para 203 [High Level Panel Report].
[58] Ibid, para 207.
[59] UNGA "2005 World Summit Outcome" (24 October 2005) A/RES/60/1, paras 138-139.
[60] Kofi A Annan "In Larger Freedom: towards development, security and human rights for all" (21 March 2005) A/59/2005, para 135.

The Security Council has also used the language of R2P in many resolutions, the first being resolution 1674 pertaining to the protection of civilians in armed conflict.[61] Resolution 1706 in relation to Darfur was the first time the UN Security Council made reference to R2P with respect to a specific country.[62]

## *V THE APPLICATION OF R2P IN DARFUR*

Given the acceptance, in theory, of R2P, the intensity of the crisis in Darfur, and international unwillingness to act during the first four years of the conflict, it will now be considered whether the doctrine of R2P would have been applicable to this crisis.

### *A Whose R2P?*

The primary responsibility to protect Darfuris lies with the Sudanese Government. It seems clear that Khartoum has failed in this responsibility. It initially armed and supported the Janjaweed militia and has done nothing to disarm them despite undertaking to do so on several occasions.[63] Khartoum has been obstructive in peace talks and shows little sign of living up to its obligation to protect Darfuris.[64] Darfur is clearly one of the situations envisaged by the ICISS when they spoke of governments unwilling to protect

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[61] UNSC Resolution 1674 (28 April 2006) S/RES/1674/2006.

[62] UNSC Resolution 1706 (31 August 2006) S/RES/1706/2006. This resolution refers to paragraphs 138 and 139 of the "2005 World Summit Outcome", above n 59, which describe the responsibility to protect.

[63] The government in Khartoum has agreed to disarm the Janjaweed in the following instances: N'Djamena ceasefire agreement of 8 April 2004; the N'Djamena agreement of 25 April 2004; the 3 July 2004 communiqué signed with the UN; the 5 August 2004 Plan of Action signed with the UN; the 9 November 2004 Protocol on Security Arrangements signed at the AU-led Abuja talks; and in the Darfur Peace Agreement of 5 May 2006. The Security Council has also directed Khartoum to disarm militias in Resolutions 1556 (30 July 2004) S/RES/1556/2004, 1564 (18 September 2004) S/RES/1564/2004, 1574 (19 November 2004) S/RES/1574/2004, and 1591 (29 March 2005) S/RES/1591/2005.

[64] House of Commons International Development Committee "Darfur, Sudan: The responsibility to protect" HC 67-I (30 March 2005) (The Stationary Office Limited, London, 2005) [House of Commons Report on Darfur] paras 20-22 (noting the obstructiveness of the Sudanese government in allowing humanitarian access) and para 95 (noting the difficulties in dealing with the Government of the Sudan). For an overview of the actions to address human rights violations taken by the Sudanese government, see Commission of Inquiry, above n 10, 108-123. The general conclusion of the Commission was that these efforts have been half-hearted and ineffective.

their civilians. The collective responsibility of the international community is therefore engaged.

### *B The International Response to the Crisis in Darfur*

On 31 July 2007, the Security Council authorised the world's largest peacekeeping force to be deployed in Darfur.[65] While this indicates that the international community has now begun to take responsibility for the people of Darfur, this action comes over four years after the conflict began. It is also interesting to note that Resolution 1769 does not explicitly refer to the concept of R2P.[66]

Until Resolution 1769, the international response to Darfur amounted to mere rhetoric of its R2P. It would, however, be misleading to say that *nothing* was done by the international community over Darfur. Individual states and the UN provided humanitarian assistance to the region, repeatedly called for peace negotiations and action on the part of the Government of Sudan, provided financial support to the African Union mission, established a commission of inquiry and referred the situation to the ICC. However, these actions were feeble in the face of the grave atrocities being committed in Darfur. Darfur was not even mentioned by the Security Council until 11 June 2004 in Resolution 1547, over a year after the conflict began.[67]

#### *1 The African Union in Darfur*

The involvement of the African Union (AU) in Darfur began in 2004, pursuant to the N'Djamena Peace Agreement. Under this Agreement, the African Union Mission in Sudan (AMIS) was mandated to send in ceasefire monitoring troops. However, it was clear from an early stage that parties to the conflict did not intend to comply with the ceasefire. This forced the AU to reassess AMIS's mandate, which saw it develop from

[65] UNSC Resolution 1769 (31 July 2007) S/RES/1769/2007.
[66] Ibid. R2P is implicitly referred to in that this Resolution re-affirms Resolution 1674 (28 April 2006) S/RES/1674/2006, which explicitly used the language of R2P.
[67] UNSC Resolution 1547 (11 June 2004) S/RES/1547/2004.

an observer mission to a peacekeeping one.[68] From this time onwards, AMIS was gradually expanded to its current 7,000 troops. The AU has made considerable effort although it is effectively too under-funded and understaffed for such a mission.[69] It seems that the international community used the AMIS force as a reason not to get their own hands dirty. Recognising the deficiencies of AMIS, suggestions for an AU-UN hybrid force began in early 2006. Finally, on 31 July 2007, the UN Security Council passed Resolution 1769 authorising an AU-UN hybrid force of 26,000 peacekeepers.[70]

### *C Would the Concept of R2P Provide a Basis for Intervention in Darfur?*

During the four years of international inaction over the atrocities occurring in Dafur, many NGOs and other organisations called for intervention in the region to halt the suffering of civilians. It therefore seems necessary to assess whether or not an international force would have been justified in intervening in Darfur.

The ICISS established several criteria to determine when using the norm of R2P to intervene in another state would be acceptable. For any international force or individual country to intervene pursuant to this doctrine, they would need to show that the criteria had been met to validly claim that the intervention was legal. These criteria were also accepted by the High Level Panel as being relevant to any type of intervention.[71]

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[68] African Union Peace and Security Council "Report of the Chairperson of the Commission and the Secretary-General of the United Nations on the Hybrid Operation in Darfur" (22 June 2007) PSC/PR/2(LXXIX).

[69] For an analysis on what AMIS would have needed to be successful see Paul D Williams "Military responses to mass killing: the African Union mission in Sudan" (2006) 13 International Peacekeeping 168; International Crisis Group "The AU's Mission in Darfur: Bridging the Gaps" (6 July 2005) Africa Briefing 28 www.crisisgroup.org (accessed 19 August 2007).

[70] UNSC Resolution 1769 (31 July 2007) S/RES/1769/2007.

[71] High Level Panel Report, above n 57, para 207.

*1 Just cause*

The threshold for R2P was set by the ICISS at actual or apprehended "large scale loss of life" or "large scale ethnic cleansing". In the ICISS's view, this amounts to "serious and irreparable harm".[72] The Commission of Inquiry on Darfur found that a policy of genocide had not been pursued in Darfur.[73] Nevertheless, they did conclude that equally serious international offences had been committed.[74] The ICISS noted that the just cause threshold would be satisfied if there was large scale loss of life, "whether the product of genocidal intent or not."[75] They, however, expressly made no attempt to quantify "large scale", noting that in most circumstances there will be no disagreement.[76] With approximately 200,000 deaths and at least two million displaced persons it seems clear that the threshold of "large scale loss of life" set by the ICISS has been satisfied for quite some time.

*2 Right intention*

Any intervention must be carried out with the "right intention", meaning that the primary purpose must be to "halt or avert human suffering".[77] Fernando Tesón argues that provided the intention is to rescue "victims of tyranny", the fact that the intervening country had other motives is irrelevant so long as they do not negate the intention to rescue.[78] This seems also to be the position of the ICISS, which recognises that mixed motives are inevitable in international relations.[79]

The main concern of the major powers with respect to intervening in Sudan is that they be viewed as either pursuing a neo-colonialist agenda or seeking to control Sudan's

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[72] ICISS Report, above n 2, para 4.18.
[73] Commission of Inquiry, above n 10, 124-132.
[74] Ibid, 4.
[75] ICISS Report, above n 2, para 4.20.
[76] Ibid, para 4.21.
[77] Ibid, XII.
[78] Fernando R Tesón *Humanitarian Intervention: An Inquiry into Law and Morality* (3ed, Transnational Publishers, New York, 2005) 385.
[79] ICISS Report, above n 2, para 4.35.

oil resources. The ICISS notes that concerns over ulterior motives may generally be alleviated if the action taken is multilateral.[80] Additionally, as a means of ensuring right intention, the ICISS identifies assessing whether the intervention is supported by those it is aimed at saving.[81] In Darfur, there is clear evidence among civilians of support for action by the international community to ensure their effective protection.[82] The ICISS also notes the position of neighbouring countries vis-à-vis an intervention as being a factor to consider.[83] Chad is the country that shares the largest border with Darfur. The violence has spread to Eastern Chad, and scores of Darfuri refugees are living in camps on the Chadian border. Chad has condemned many times the violence in Darfur and relations between the two countries are strained, with Chad accusing Khartoum of arming the Janjaweed militia. Now fighting a rebellion of its own on the Eastern border, Chadian President, Idriss Deby, recently said that he supported the idea of a European Union peacekeeping force in the East to help minimise the spill-over of violence from Darfur.[84] This does not necessarily mean that Chad would support an international intervention into Darfur itself. However, the international community may have been able to persuade Chad to agree.

*3 Last resort*

Military intervention must be a "last resort".[85] This will be the case where all other non-military methods of resolution have been exhausted. As Gareth Evans notes "[t]his guideline was not intended to mean that every non-military option must literally have been tried and failed."[86] Given the urgency with which many of these situations

[80] Ibid, para 4.34.
[81] Ibid.
[82] United Nations Human Rights Council "Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101" (7 March 2007) A/HRC/4/80, para 70.
[83] ICISS Report, above n 2, para 4.34.
[84] The Chadian President agreed in principle to such a force after talks with French President Nicholas Sarkozy on 19 July 2007: "Chad: President Agrees to Admit European Force" (20 July 2007) *New York Times* New York.
[85] This reflects the well-established international law principle of necessity. For a comprehensive analysis of the law of necessity see Judith Gardam *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, Cambridge, 2004).
[86] Evans, above n 48, 710; ICISS Report, above n 2, para 4.37.

arise, if a certain method is not employed, intervention may still be justified if there is a reasonable belief that that method would have failed to resolve the conflict. Peace talks have been attempted several times in Darfur. The African Union has a force of 7,000 troops on the ground attempting to restore peace and, before Resolution 1769, the United Nations had tried time and time again to get the Government of Sudan to agree to the deployment of a multinational peacekeeping force. However, these attempts were not coupled with coercive instruments such as effective and targeted sanctions against Khartoum. [87] It must be considered whether effective sanctions would have been necessary before any intervention.

(a) Sanctions

The ICISS identifies many measures short of military intervention such as arms embargoes, financial or trade sanctions and restrictions on diplomatic representation and travel.[88] Sanctions are seen as a valuable international tool in forcing governments to change their behaviour. In the case of Darfur, the Security Council was unacceptably slow to use this tool. Indeed, sanctions were not contemplated by the Council until March 2005, and sanctions against specific individuals were only imposed in April 2006. Even then, the sanctions applied to only four individuals: a low-level air force commander; a Janjaweed commander; and two rebels.[89]

The international community seemed determined to secure the consent of Khartoum before any sort of international force was sent in. In this situation, more targeted and effective sanctions need to be applied in order to force agreement. Such agreement will only come when allowing an international force is less detrimental than the effect of the sanctions placed upon the country. While sanctions through the Security Council on Sudan have proved difficult due to China's interests in the Sudan, individual countries can and should have imposed their own sanctions on Khartoum. It is important

[87] David Mepham and Alexander Ramsbotham "Safeguarding Civilians: Delivering on the Responsibility to Protect in Africa" Institute for Public Policy Research www.ippr.org (accessed 12 August 2007) 27.
[88] ICISS Report, above n 2, paras 4.1-4.9.
[89] UNSC Resolution 1672 (25 April 2006) S/RES/1672/2006.

that sanctions imposed are targeted so as to mitigate as much as possible the harm to the general population.

It may be that targeted sanctions would have forced Khartoum's consent at an earlier stage. However, without the support of China, it seems unlikely that truly effective sanctions could have been imposed. Given the reluctance of the Chinese to take action against the Sudan, and a history of unfulfilled promises on Kartoum's part, it is at least arguable that this mechanism would have failed to resolve the conflict.

(b) The International Criminal Court

It must be considered whether possible proceedings before the ICC weigh against an argument for intervention. The situation in Darfur was referred to the ICC in March 2005,[90] and on 27 February 2007 the ICC identified two suspects to appear before the Court.[91]

The supplementary volume to the ICISS report notes that international criminal prosecution may in fact be better regarded as a preventative mechanism or post-conflict method of reconciliation, than as a reactionary tool.[92] The supplementary volume also notes that prosecution is ineffective in the face of humanitarian catastrophe given how time-consuming it is.[93] The final report of the ICISS discusses criminal prosecution as a "direct prevention method".[94] It may be argued that international prosecution should be regarded as having a more indirect effect on the prevention of conflict. The effect would be more in deterring future conflicts, than directly preventing the escalation of existing ones. Additionally, the concept of R2P should be interpreted in the context of the

[90] UNSC Resolution 1593 (31 March 2005) S/RES/1593/2005.
[91] Warrants have been issued for Ahmad Muhammad Harun (former Minister of State for the Interior of the Government of Sudan and currently Minister of State for Humanitarian Affairs) and Ali Muhammad Ali Abd-Al-Rahman (a Janjaweed leader).
[92] ICISS Supplementary Volume, above n 22, 22.
[93] Ibid.
[94] ICISS Report, above n 2, para 3.30.

increased international focus on the security of individuals,[95] and the primary concern should therefore be to stop actual human suffering. Thus, it is submitted that prosecution would not and should not impact on the necessity of the international community to intervene as, in reality, the prosecution of a limited number of individuals will do little to alleviate the human suffering that is occurring in Darfur.

*4 Proportional means*

Any intervention on the basis of R2P must employ "proportional means", meaning that intervening states must use the least destructive means to realise their goal of protecting the civilian population.[96] In this context, it is clear that an aerial bombing campaign, like the one conducted by NATO in Kosovo, would not be an appropriate means in Darfur, as it would most likely cause more destruction and create more refugees. On the other hand, it is clear that the AU force of 7,000 is insufficient. A larger force with a clear mandate for human protection is more likely to be able to provide the necessary protection for civilians without disproportionately aggravating the humanitarian situation.

The UN has recently authorised a force of 26,000 peacekeepers, comprising up to 19,555 military personnel and 6432 civilian police, to be deployed in Darfur. The force will be the world's largest peacekeeping force. Acting under Chapter VII of the Charter, Resolution 1769 authorises the use of force in self-defence, to ensure the free movement of humanitarian aid workers, and to protect civilians under attack.[97] Due to Chinese reluctance to authorise any sort of intervention in Darfur, the Resolution was significantly watered down in order to gain the Chinese vote. This meant that the mandate to disarm the warring forces was removed. This has led critics to argue that the 26,000-strong force will be unsuccessful in halting the violence.

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[95] As opposed to the traditional view that security was a state-centred concept. See for example, *The Human Security Report 2005* (Oxford University Press, Oxford, 2005) www.humansecurityreport.info/ (accessed 14 August 2007); United Nations Development Programme "1994 UN Human Development Report" www.undp.org (accessed 14 August 2007).

[96] The concept of proportionality is a well-established principle in international law. For a comprehensive analysis of proportionality in international law see Gardam, above n 86.

[97] UNSC Resolution 1769 (31 July 2007) S/RES/1769/2007, para 15.

*5 Reasonable prospects*

The ICISS notes that "some human beings simply cannot be rescued except at unacceptable cost … in such cases, however painful the reality, coercive military action is no longer justified."[98] Before intervening it must be believed that the intervention has reasonable prospects of success and will not create or inflame a larger conflict.[99] In this respect, the international community would need to consider whether or not intervention in Darfur could reignite the North-South conflict in Sudan. However, this consideration must surely also be weighed against the possibility of non-intervention causing destabilisation of the wider region and igniting conflicts in neighbouring countries. In the case of Darfur, Chad is especially at risk because of the large number of refugees crossing the border and indeed is already dealing with unrest on the Eastern border with Darfur.

*6 Right authority*

Finally, and perhaps the most problematic of all, the intervention must have the "right authority". The ICISS notes that there "is no better or more appropriate body than the Security Council to authorise military interventions for human protection purposes."[100]

Security Council authorisation may be sought in one of three ways: by request for such authorisation, by the Council considering the issue on its own initiative, or by the Secretary-General raising the issue under his powers in Article 99 of the Charter.[101] Regional organisations may also seek authorisation from the Security Council under Chapter VIII of the Charter.[102]

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[98] ICISS Report, above n 2, para 4.41.
[99] Ibid.
[100] Ibid, XII.
[101] Ibid, para 6.15.
[102] Ibid, paras 6.31 – 6.35.

Gaining Security Council authorisation for any intervention in Darfur would be difficult, simply because, all other potential hurdles aside, of China's oil interests in Sudan. Additionally, authorising intervention in Darfur would mark a new era for the Security Council as it would be the first time they had authorised intervention in another fully functioning state on humanitarian grounds, without that state's consent.[103]

One of the main issues facing the ICISS was the veto power of the permanent five members of the Security Council and the very real possibility that this could effectively frustrate efforts to invoke R2P in specific situations. The ICISS did not see the answer to this issue as being in the creation of a different basis for legality.[104] Instead, they considered ways in which the Security Council could be made more effective. Most importantly, they suggested that the "Permanent Five" should agree to a code of conduct that they abstain from using their veto when action is needed to stop or avert humanitarian crises.[105] However, any reform of the UN system to modify the veto power has been the subject of discussion in the UN for several years now. Accordingly, it will be of little help for those suffering in Darfur as consensus may be years away.

Given the tardiness of the Security Council in authorising intervention in Darfur, this may be one of the situations the ICISS was referring to when it remarked:[106]

> It is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by.

It seems that a good case could be made for intervention in Darfur on the principles stated by the ICISS. The international community, therefore, seems to have failed in its responsibility to protect. Some reasons for this failure will now be briefly considered.

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[103] In this respect the intervention in Somalia may be distinguished. See intra Part V D 2 United Nations Intervention in Somalia.
[104] ICISS Report, above n 2, paras 8.4 and 6.14.
[105] Ibid, para 6.21.
[106] Ibid, para 6.37.

## *D Why has the International Community Failed to Protect in Darfur?*

### *1 What did Kosovo have that Darfur doesn't?*

It was mentioned above that the NATO intervention in Kosovo seems to have been accepted as a legitimate humanitarian intervention by the international community.[107] However, if assessed according to the criteria laid down by the ICISS, it seems clear that this intervention would not have been justifiable. This is so principally because it is not clear whether the "just cause" threshold had been meet. Did the mistreatment of the ethnic Albanians by Milosevic amount to actual or apprehended large scale loss of life or ethnic cleansing? Even if it did, the 78-day bombing campaign could not be regarded as proportionate given the destruction it caused. This begs the question: what did Kosovo have that Darfur doesn't?

The primary explanation why the international community chose to intervene in Kosovo and not in Darfur seems to be strategic considerations. Kosovo was set against the backdrop of the Yugoslav wars that had been causing unrest on the fringes of Europe since the early 1990s. The crisis in Darfur, however, is just another removed African conflict in the eyes of many Western nations. Accordingly, the prospect of renewed conflict in the former Yugoslavia was of significantly greater strategic significance to the NATO forces that intervened than Darfur is to the powerful states that have the capacity to intervene.

The different political landscape is also relevant. Notably, powerful countries have been reluctant to intervene in Africa for fear of being viewed as pursuing a neo-colonialist agenda.[108] Such a fear did not exist in the Balkans.

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[107] See intra Part III B Kosovo.

[108] See, for example, S Neil MacFarlane, Carolin J Thielking and Thomas G Weiss "The Responsibility to Protect: is anyone interested in humanitarian intervention?" (2004) 25 Third World Quarterly 977.

## 2 *United Nations intervention in Somalia*

In 1992, the Security Council authorised for the first time intervention in another state on the basis of humanitarian protection. Prima facie, this seems like a valuable precedent for intervening in Darfur. However, a closer analysis reveals some fundamental differences between the two cases, which may explain to some extent the different reaction to the crisis in Darfur. The most important of which is that Somalia had no effective government in control of the country at the time of intervention. Khartoum, on the other hand, is a functioning Government, and has the capability to protect its citizens, even if only by accepting an international force. Accordingly, David Vesel argues that there is an important difference between humanitarian intervention in failing states and humanitarian intervention in states unwilling (but capable) of protecting their citizens.[109] His view is that "intervention in failing states can be legitimised and legalised without destroying the principles of sovereignty or international consensus",[110] largely because in those cases intervention is far less of a threat to international peace and the principle of sovereignty.[111] This argument is also alluded to by the ICISS.[112] Vesel suggests that a principle of customary international law allowing intervention in failing states is emerging.[113] However, he views intervention in fully functioning states as much more contentious. Because Khartoum has the ability to control Darfur, though not the will, the case of Somalia is unhelpful as a precedent for intervention in Darfur.

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[109] David Vesel "The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World" (2003-2004) 18 BYU J Pub L 1, 53-55.
[110] Ibid, 55.
[111] Ibid, 54.
[112] ICISS Report, above n 2, para 4.22; ICISS Supplementary Volume, above n 22, 10.
[113] Vesel, above n 109, 54. See also Mona Fixdal and Dan Smith "Humanitarian Intervention and Just War" (1998) 42 Mershon International Studies Review 283, 291; William I Zartman (ed) *Collapsed States: the disintegration and restoration of legitimate authority* (Boulder, Lynne Reinner Publishers, 1995); Gene M Lyons and Michael Mastanduno "State Sovereignty and International Intervention" in Gene M Lyons and Michael Mastanduno (eds) *Beyond Westphalia? State Sovereignty and International Intervention* (John Hopkins University Press, Baltimore, 1995) 264; Walter Clarke and Jeffrey Herbst "Somalia and the Future of Humanitarian Intervention" (1996) 75 Foreign Affairs 70, arguing that the international community should be able to declare a state "bankrupt" and go in to restore order.

## 3 *Contemporary concerns over intervening*

Bellamy and Williams also suggest three contemporary reasons why intervention has not been pursued in the case of Darfur: western abuse of humanitarian justifications during the war on terror; the relative importance of Darfur compared to the war on terror; and the potential for military intervention to jeopardise the Peace Agreement between the North and South of Sudan.[114]

Indeed, the war on terror, and more specifically the invasion of Iraq, had unfortunate ramifications for the acceptance of the doctrine of R2P.[115] With the United States relying to a certain extent on humanitarian justifications, opponents of R2P began to fear that the doctrine could be used to justify Iraq-style interventions. In reality, the intervention in Iraq was not a case of R2P. The criteria set out by the ICISS is reasonably narrow and it would be difficult to argue that the "just cause" threshold, or the requirement of "right intention", had been met in the case of Iraq.[116] Nonetheless, the intervention in Iraq did have serious consequences in terms of mobilising international will to intervene in other states.[117]

It seems, therefore, that the key ingredient is political will. The ICISS addressed the issue of mobilising political will both domestically and internationally.[118] Sadly, however, there is no quick fix. As one commentator has remarked, "the sad reality is that Darfur simply does not matter enough, and the Sudan matters too much, for the international community to do more to stop the atrocities."[119]

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[114] Williams and Bellamy, above n 32.
[115] For further discussion on the effect of the war on terror on R2P see, Welsh, above n 32; Kenneth Roth "War in Iraq: Not A Humanitarian Intervention" Human Rights Watch World Report 2004 www.hrw.org (accessed 24 August 2007).
[116] Alicia L Bannon "The Responsibility to Protect: The UN World Summit and the Question of Unilateralism" (2006) 115 Yale L J 1157, 1163; Thomas G Weiss "The Sunset of Humanitarian Intervention? The Responsibility To Protect in a Unipolar Era" (2004) 35 Security Dialogue 135, 148-149.
[117] Alex J Bellamy "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq" (2005) 19 Ethics and International Affairs 31, 37-40; Williams and Bellamy, above n 32, 40.
[118] ICISS Report, above n 2, paras 8.8 - 8.23.
[119] Nick Grono "Briefing – Darfur: the International Community's Failure to Protect" (2006) 105 African Affairs 621, 628.

## *VI A FUTURE FOR R2P?*

### *A An Emerging Doctrine?*

What does Darfur tell us then about the future of the doctrine of R2P? The ICISS claimed in its report that, while insufficient to amount to a principle of customary international law, state practice and Security Council precedent suggested an emerging principle of R2P.[120] However, it seems at present that the doctrine is most useful as political rhetoric. There are essentially two ways in which the doctrine of R2P could become a legal principle of international law; either through its acceptance in a multilateral treaty, or through development into a rule of customary international law. Many creases need to be ironed out before any such development could occur. This highlights what the writer considers to be the two main impediments to the practical adoption of R2P in international affairs: authorisation and operational capacity. This section will assess what, if anything, can be done to improve the adoption of R2P in these areas.

### *B Authorisation*

The UN Security Council is considered by the ICISS to be the most appropriate body to authorise interventions pursuant to R2P.[121] This may be so in theory, but in practice the Security Council is often unable or unwilling to act in crises that would otherwise warrant international intervention. The decision to save suffering peoples from genocide or crimes against humanity should not be determined by power politics. Additionally, so long as the veto power continues to be used in these situations, the legitimacy of the Council remains questionable. The "Permanent Five", who hold the effective decision-making power in the Security Council, are unrepresentative of the international community, comprising of members of only three of the world's six continents. Most importantly, there is no representative from Africa, where a significant

[120] ICISS Report, above n 2, para 2.24.
[121] Ibid, XII and para 6.14.

number of modern conflicts take place. This takes the decision to use R2P squarely out of the hands of the people upon whom it will impact the most.[122] Including African representation in decisions to use R2P would, in most instances, make its employment more difficult initially. It would, on the other hand, lend more legitimacy to such decisions, aiding in the development of the norm.

In support of Security Council authorisation, it may be argued that acting without the support of the Security Council could threaten the international rule of law and the peace and security of the international community. Conversely, if the doctrines of state sovereignty and non-intervention are strictly applied by the Security Council, the resulting number of unchecked internal conflicts could also threaten international stability.

*1 Other options for authorisation*

The answer of the ICISS to this problem is to improve the functioning of the Security Council.[123] While the Security Council may be the most *desirable* body for authorisation, change to the decision-making powers and procedure of the Council to improve its effectiveness is unlikely, at least in the near future. Such change requires consensus, of which there is little evidence at present.[124] If the international system is to retain (or perhaps regain) its credibility, the morality of an intervention must be considered paramount to Security Council authorisation, especially when intervention is blocked by the veto of a state pursuing its own interests. If the international community is serious about protecting civilians from gross violations of human rights, other sources of authorisation must be considered. This paper will now consider two options: the viability of the "Uniting for Peace" procedure and the possibility of setting up a new body to deal with R2P.

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[122] Mepham and Ramsbotham, above n 87, 43.
[123] ICISS Report, above n 2, para 6.14.
[124] The High Level Panel narrowed the options for reform to two, but was unable to come to consensus on one or the other: High Level Panel Report, above n 57, paras 244-260.

(a) "Uniting for Peace"

As noted by the ICISS,[125] one option for authorisation in the face of Security Council inaction is for the General Assembly to recommend military action under the "Uniting for Peace" procedure.[126] Indeed, the British Foreign and Commonwealth Office, in its report on the intervention in Kosovo, suggested that the illegality of that intervention could have been avoided had the NATO countries followed this procedure.[127] Under this Resolution, where the Security Council is unable to act due to the constraints of the veto power, the General Assembly may make "appropriate recommendations to members for collective measures ... to maintain or restore international peace and security."[128] Such a session may be called pursuant to either a request by seven members of the Security Council or by the majority of members of the UN.[129] This procedure does not technically authorise an intervention due to the mere recommendatory nature of the General Assembly's powers. However, such a decision would legitimise the intervention given the amount of states in favour. This procedure requires a two-thirds majority, which, as the ICISS noted, will be difficult to obtain except in exceptional circumstances, given the opposition of most African and Asian states to intervention.[130] However, this appears to the writer to be consistent with the intention of the ICISS in terms of intervention which, in their own words, should only be used in "extreme and exceptional cases".[131]

(b) An independent body

It may be that a separate body will need to be set up to consider when interventions will be necessary under R2P if the Security Council and the General Assembly procedures prove unsatisfactory. Ideally, this body will be part of the UN system, and representative of the international community. It will authorise interventions

[125] ICISS Report, above n 2, para 6.30.
[126] UNGA Resolution 377 (V) (3 November 1950).
[127] *Fourth Report on Kosovo,* above n 28, para 128.
[128] UNGA Resolution 377 (V) (3 November 1950) para 1.
[129] Ibid.
[130] ICISS Report, above n 2, para 6.30.
[131] Ibid, para 4.10.

on the basis of consensus. Given the seriousness of intervention in other states it may be desirable that a two-thirds majority be required. This body could act as a substitute to the Security Council. It would only be seized of a certain matter where the Council either fails or is unable to act in a timely fashion on an issue engaging R2P. This would maintain international order to a certain extent while still overcoming the problem of Security Council inaction.

It is in the interests of those states determined to uphold the norm of R2P to find a way to implement it consensually. If it is left to individual states or "coalitions of the willing", it is more likely to be abused,[132] which will inevitably lead to a reassertion of the principle of absolute sovereignty. It is also in the UN's own interests to establish an effective mechanism to deal with R2P, for if the UN fails to authorise intervention in a situation that warrants outside involvement, it risks significant damage to its credibility.[133] Recent suggestions for a separate UN Special Adviser for R2P indicate commitment, by the Secretary-General at least, to find a way to implement R2P in practice.[134]

### 2 *Unilateral action*[135]

While the concept of R2P does not rule out unilateral action in circumstances of extreme humanitarian catastrophe, such action remains, and probably will remain, the most contested exercise of the doctrine. Therefore, the best way to ensure the emergence of a rule or guiding principle of R2P would be to emphasise a collective application of it. If the catastrophe in question is truly grave enough to meet the "just cause" threshold, then it is highly likely that at least a small group of states will take their responsibility to protect those civilians seriously. Thus, a coalition or regional organisation could invoke

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[132] House of Commons Report on Darfur, above n 64, para 100.
[133] Gareth Evans "Banishing the Rwanda Nightmare: The Responsibility to Protect" (31 March 2004) www.pbs.org (accessed 22 June 2007).
[134] United Nations News Centre "Secretary-General Appoints Francis Deng of Sudan as Special Adviser for Prevention of Genocide, Mass Atrocities" (29 May 2007) www.un.org (accessed 12 August 2007).
[135] Some commentators have used the term "unilateral action" to refer to all action which is not authorised by the Security Council. This paper uses the term in the more traditional sense of the word to refer to any action taken by a single state.

R2P as a basis for intervening to protect those civilians, lending more legitimacy to the claim of humanitarianism and in turn aiding in the acceptance of R2P as a principle of international law. Therefore, phrasing R2P as a doctrine which, potentially allows unilateral action, is counterproductive in terms of its acceptance internationally, and probably will not be necessary.

### *C Operational Capacity: Implementing R2P in Practice*

The crisis in Darfur has highlighted one of the principal difficulties with R2P, namely the question of who will carry out operations deemed to fall within the doctrine's realm. R2P will not become a valid rule, guiding principle or doctrine of international law until the problem of operational capacity is addressed. Presently, the international community simply does not have the capacity to deploy rapidly to avert humanitarian catastrophe. This deficiency must be addressed. Kofi Annan alerted the international community to the need to address this problem when he asked "whether the institutions and methods we are accustomed to are really adequate..."[136] Darfur demonstrates clearly that they are not. While the UN Security Council has recently passed Resolution 1769 authorising a 26,000 strong peacekeeping force in Darfur,[137] UN officials expect that it will take a year for the entire force to be deployed. In the meantime, thousands more Darfuris could die. The UN needs to be able to react faster to crises such as the one in Darfur.

One of the main problems is that more powerful countries, such as the United States, are generally unwilling to contribute troops to UN activities and instead tend to donate money, leaving troops to be sourced mainly from smaller countries.[138] Along with the protracted nature of national deployment decisions, this contributes to the difficulties the UN faces in deploying rapidly into crisis zones. It is submitted that some sort of permanent or semi-permanent force could enhance the effectiveness of the UN

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[136] Kofi Annan, quoted in Felicity Barringer "Annan warns of World 'Crisis'" (31 July 2003) *New York Times* New York A16.
[137] UNSC Resolution 1769 (31 July 2007) S/RES/1769/2007.
[138] Report of the Panel on United Nations Peace Operations (21 August 2000) A/55/305 – S/2000/809, para 103 [Brahimi Report].

and operationalise the concept of R2P. There are several possibilities for such a force. This section will briefly outline two options for the international community: the use of private military companies (PMCs) and the development of UN rapid reaction capacity.

### *1 Private Military Companies*

One option to overcome issues of operational capacity is for the UN to contract out some of its military services to PMCs. The issue of using "mercenary forces" to enhance UN capacity to react was raised during the roundtable consultation conducted by the ICISS in Ottawa, and deemed an important issue to consider.[139] It was not, however, addressed in the ICISS's final report. If used, such contracting would be based on necessity and employed as a last resort when national governments are unable to offer troops. This essay does not seek to analyse the legal, moral or ethical issues surrounding the use of PMCs in conflict. [140] It is undeniable that PMCs have serious disadvantages, namely surrounding the inadequacy of legal regulation of their actions. However, if an international regulatory scheme were set up to regulate such companies they could provide the link necessary to shift R2P from the realm of political rhetoric into reality.

### *2 Development of UN rapid reaction capacity*

The implementation of R2P relies on there being capacity, at the international level, to deploy rapidly into crisis zones. Any force that needs several months to fully deploy will do little to save suffering civilians as thousands more could die in the interim. Indeed, a decision to intervene could even anger the warring factions and result in an increase in violence. It is essential, therefore, that a rapidly deployable force be developed within the UN system, or alternatively within regional organisations.

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[139] ICISS Supplementary volume, above n 22, 353.

[140] For discussion on the debate surrounding the use of private military companies in conflict zones, see the work of Peter Singer. For example, P W Singer "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law" (2004) 42 Colum J Transnat'l L 521.

The deficiencies of the UN in this respect have been evident for some time now. Support for some form of rapid reaction capability intensified in the early 1990s, leading to several attempts to enhance the capacity of the UN. Some of these attempts will be considered briefly.

(a) United Nations Standby Arrangements System (UNSAS)

UNSAS was established as part of the Department of Peacekeeping Operations in 1994.[141] The system works on the basis of conditional commitments of resources by member states, with agreed response times.[142] Former Secretary-General Kofi Annan, however, recognised the constraints of UNSAS in 2000, labelling it "unpredictable".[143] Essentially, the deployment of UNSAS is still dependant on national political will with the conditional agreements of the states involved providing no guarantee that troops will be available for any specific operation.[144] Indeed, in 1994, in the face of genocide in Rwanda, not one of the 19 states that had pledged support for UNSAS agreed to contribute troops to the mission in Rwanda.[145]

(b) Multinational Standby High Readiness Brigade for United Nations Operations (SHRIBRIG)

In 1996, a Danish-led initiative established SHRIBRIG, which exists as a peacekeeping brigade that can be made available to the UN within 15-30 days.[146] Troops are sourced from the militaries of each participating country. The pool of possible troops exceeds those needed in case countries subsequently become unwilling to provide the

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[141] See the United Nations Standby Arrangement System website www.un.org (accessed 13 August 2007).
[142] Ibid.
[143] "We the Peoples", above n 45, para 225.
[144] Boutros Boutros-Ghali "Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations" (3 January 1995) A/50/60 - S/1995/1, 11, para 43; Brahimi Report, above n 138, para 84.
[145] Boutros-Ghali, Ibid; H Peter Langille *Bridging the Commitment-Capacity Gap: Existing Arrangements and Options for Enhancing UN Rapid Deployment* (The Center for United Nations' Reform Education, New York, 2002) 40.
[146] Multinational Standby High Readiness Brigade for United Nations Operations website http://shirbrig.dk/ (accessed 9 August 2007).

number of troops pledged.[147] Despite this caution, the deployment of the brigade still relies on national political will.

Additionally, the resources of both UNSAS and SHIRBRIG are to be used only for Chapter VI peacekeeping purposes.[148] Strictly speaking then, these resources could not be used for an intervention pursuant to the doctrine of R2P where the operation demands a mandate wider than Chapter VI.

(c) Future proposals

It seems that the only way to develop an effective rapid deployment force will be to overcome the issue of political will by removing the process from national governments. One proposal by a group of scholars led by Robert Johansen is to establish a permanent UN service comprised of volunteers called the UN Emergency Peace Service (UNEPS).[149] This proposal is not the only one of its kind with many similar proposals sharing similar features.[150] This paper takes the example of the UNEPS to illustrate the potential of such a force.

Such proposals have proved popular in theory. For example, a Bill expressing support for the UNEPS is currently before the United States Congress.[151] Additionally,

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[147] Langille, above n 145, 44.

[148] "United Nations Standby Arrangements System Description" www.un.org (accessed 9 August 2007).

[149] Robert C Johansen (ed) *A United Nations Emergency Peace Service: To Prevent Genocide and Crimes Against Humanity* (World Federalist Movement, United States of America, 2006). The term volunteer is somewhat misleading. It means that the troops volunteer to be in the service, as opposed to compulsory troop donations. The troops will be paid. See also, Rebecca J. Hamilton "The Responsibility to Protect: From Document to Doctrine – But What of Implementation?" (2006) 19 Harv Hum Rts J 289, 295-296.

[150] Other proposals include, The United Nations Legion of Professional Volunteers, the Permanent Rapid Deployment Brigade, the UN Constabulary and the Standing UN Rapid Deployment Police and Security Force. For more information on these proposals see, Langille, above n 145, 64-106.

[151] H. Res. 180 [109th] was proposed on 17 March 2005 but was cleared from the books at the close of the 109th session of Congress. A Bill to the same effect, H. Res. 213 [110th], was introduced on 5 March 2007 and is currently in the first stage of the legislative process, having been referred to the House Committee on Foreign Affairs. The title of the Bill reads, "Expressing the sense of the House of Representatives that a United Nations Emergency Peace Service capable of intervening in the early stages of a humanitarian crisis could save millions of lives, billions of dollars, and is in the interests of the United States."

both the European Union and the AU have agreed to establish similar forces that could be called on in the event of a humanitarian emergency.[152]

The primary advantage of such a force is its permanent existence outside of national forces, as troop deployments are often delayed by lengthy national decision-making processes. However, such a force will not absolve national governments of their responsibility to react to international crises. The proposed UNEPS would be designed as a complementary rapid reaction force to other UN, national or regional responses to conflict.[153] The proposal notes that the Security Council would be the preferred source of authorisation for the deployment of UNEPS. It, nevertheless, agrees with the ICISS report that where the Security Council is unable to act, other sources of authorisation may be acceptable.[154]

It has also been noted that having a rapid reaction capacity in the UN would have a deterrent effect, providing "a psychological, but tangible influence of a UN that was actually ready to prevent bad leaders from engaging in bad behaviour."[155]

### *D Will these Changes Result in the Adoption of R2P?*

A rapid reaction capacity could provide the timely response necessary to successfully avert humanitarian crises. Nevertheless, if the problem of authorisation is not addressed, an increased capacity to intervene in conflicts will *only* serve a deterrent purpose, the effect of which will be seriously weakened if it becomes clear that the force is in fact unable to be deployed.

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[152] "EU Approves Rapid Reaction Force" (23 November 2004) *BBC News* http://news.bbc.co.uk (accessed 14 August 2007); Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002) www.african-union.org (accessed 30 August 2007) art 13.
[153] Johansen, above n 149, 27.
[154] Ibid, 28.
[155] Peter Langille "UN Efforts and Options to Improve Diverse Peace Operations: Protection of Civilians, Prevention of Armed Conflict, Modest Enforcement and Rapid Deployment" Commissioned Paper prepared for the World Federalist Movement Canada's Annual Conference "UN Reform to Address The Responsibility To Protect" (McCord Museum of Canadian History, Montreal, 7 May 2004).

There may very well be no immediate solution to this problem. Authorisation essentially relies on states, whether granted by the Security Council or another body of the UN. Presently, sovereignty is still, in practice, regarded as an absolute concept by the majority of states, especially in Asia and Africa. In 1999, Algerian President, Abdelaziz Bouteflika called sovereignty "our final defense against the rules of an unjust world" while speaking to the General Assembly in his capacity as head of the Organisation of African Unity.[156] Many states still perceive sovereignty in this way. It is only when the attitude of states will change that R2P will really be used as a justification for intervening to halt human rights abuses. Until then, the consent of the country concerned, or Security Council authorisation, will still be necessary for any intervention unless an individual state is willing to risk intervening alone; Darfur illustrates that such a country will not be easily found.

## *VII CONCLUSION*

With the world's largest peacekeeping force due to begin deployment in Darfur in October,[157] there may finally be hope for the millions of suffering Darfuris. However, Darfur, like Rwanda, seems to be an example of the unacceptable tardiness of the international community in responding to grave crises. Indeed, it may be that the international community will now speak of averting "the next Darfur".

The concept of R2P has been accepted, in principle, by a wide range of actors in the international arena.[158] Even so, the conflict in Darfur demonstrates that this theoretical acceptance of R2P has not yet translated into practical application.

This paper argued that the practical acceptance of R2P in the international community will depend on reform of international practice, especially in the areas of

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[156] Shashi Tharoor and Sam Daws "Humanitarian Intervention: Getting Past the Reefs" (2001) 18 World Pol'y J 21, 25.
[157] UNSC Resolution 1769 (31 July 2007) S/RES/1769/2007.
[158] See intra IV C International Acceptance of R2P.

authorisation and deployment of troops. It has been concluded that the development of R2P into a rule of international law is largely dependant on the transformation of state perceptions of sovereignty. In this way, establishing different forms of authorisation may have little practical effect until states accept that their sovereignty is not absolute. This transformation may take years, or even decades, and it is clear that some states will need more convincing than others. In the interim, it may be that the true use in practice of R2P will be in its ability to persuade rogue governments to take responsibility for their citizens, or to agree to accept help from the international community.

While the international community has clearly failed the "test case" of R2P,[159] all is not lost. The way forward for the doctrine is to first work on changing the normative perception of sovereignty. Only when the majority of states accept the concept of "sovereignty as responsibility"[160] will R2P be able to take its place as a rule of international law.

[159] Lee Feinstein "Darfur and Beyond: What Is Needed to Prevent Mass Atrocities" Council on Foreign Relations (January 2007) www.cfr.org (accessed 9 August 2007) 38.
[160] ICISS Report, above n 2, paras 2.14 - 2.15.

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