Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects

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Abstract

The Darfur armed conflict, which is still ongoing between Sudanese armed forces, their affiliated militia and various rebels (some of whom receive external support), has inflicted unspeakable consequences upon civilians, their villages, towns, homes and other civilian objects—in particular relief assistance. The international community, including Sudan, has made, and is still making, albeit slowly, various efforts to secure peace and to stop violations of humanitarian principles in Darfur, including the controversial referral of some criminal cases to the ICC (which led to the indictment of the president of Sudan and the first head of state to be so) and the deployment of peacekeepers/enforcers which constitute the main features of the responses. Scholarly focus has been on the criminal side of the issue. This article deals with international humanitarian law (IHL) rules relating to the protection of civilians and civilian objects in the conflict. It examines the nature of the conflict, the applicable rules and compliance with those rules and the weakness and strengths, if any, of the responses of the international community in providing physical protection to civilians and their objects. It is argued that while the primary responsibility to stop violating civilian immunity rests on the warring parties there, and the regional approach to prevent widespread IHL violations in Darfur may have some obvious advantages, the erga omnes nature of the concerns at issue necessitates a concerted, adequate and timely global action to prevent further atrocities on the ground. The paper concludes with some suggestions which may help further prevent/mitigate armed violence against civilians.

1. Introduction

The armed conflict in Darfur (Eastern Sudan) was started in April 2003 by the Sudanese Liberation Movement/Army (SLM/A led by Mini Minawi) and the Justice and Equality Movement (JEM led by Khalil Ebrahim) claiming to represent the black Darfurians on the one hand, and the Government of Sudan and the Arab militia called the Janjaweed (under the command of Ali Koyshb), on the other.1 Later, the war spilled over into neighbouring provinces, in

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1 For the causes such as political, economic, ethnic and natural factors see J. Flint and A. Waal, Darfur: A Short History of a Long War (African Arguments) (2008); see also...
particular, into Southern Kordofas. However, with the rising tension and claims and counterclaims of interference by Sudan and Chad in each other’s domestic affairs through supporting armed rebels and sending in their armed forces, the conflict may well have an inter-state (or regional) dimension too.

The consequences of this armed conflict for the people of Darfur are immense; hundreds of thousands of people are said to have lost their lives and while the Sudanese Government figures estimate the casualties to be around 10,000, millions have been internally and externally displaced with the situation being particularly harsh for women and children.

The response of the international community (as represented by the UN, AU, the Arab League, etc.) to the crisis ranged from mediation and undertaking an inquiry, to deploying peacekeepers and the criminal indictment of individuals on grounds of war crimes in Darfur. Most importantly (and perhaps most disturbingly to Sudan and its President), Pre-Trial Chamber I of the International Criminal Court (ICC) issued an arrest warrant for President Omar Al-Bashir on 4 March 2009 (the first incumbent head of state to be so), on grounds of both crimes against humanity and war crimes ‘allegedly committed during a five-year counter-insurgency campaign’ in Darfur. The decision triggered (as anticipated) anger from Sudan, and opposition from other African and Arab countries, China and Russia; their main concern (as reported in the media) being that ‘the warrant will destabilise the whole region, bring even more conflict in Darfur’ and in the country generally.


3 ‘Sudan: Thousands at Risk as Darfur Violence Restricts Aid Deliveries’, *IRIN*, 12 September 2008; see also *Save the Children*, ‘Crisis in Darfur and Chad’, 25 June 2007 at <http://www.savethechildren.org.uk/en/41_2406.htm>. It was said that ‘over 70 children under the age of five are still dying every day across Darfur’.

4 See ‘ICC Issues a Warrant of Arrest for Omar Al-Bashir, President of Sudan’ (*Press Release*, ICC-CPI-20090304-PR394) 4 March 2009. The Court took an unprecedented stance to state that ‘Omar Al-Bashir’s official capacity as a sitting Head of State does not exclude his criminal responsibility, nor does it grant him immunity against prosecution before the ICC’.

5 Mike Corder, ‘Wanted for War Crimes in Darfur: Sudan’s President’ (*Associated Press*, 5 March 2009); see also ‘Warrant Issued for Sudan’s Leader’, *BBC News*, 4 March 2009.

6 See ‘Kenya Protests at Bashir Warrant’, *Daily Nation*, 6 March 2009. But the reason for objecting to the ICC’s move may well be beyond security concerns in Darfur/Sudan. The Sudanese Ambassador to Kenya, Mr. Majok Guandong, for example, warned African states that ‘if the ICC is left to indict President Bashir, no African head of state or government will be safe. “We don’t know who will be next”’. But, it must be noted that, while African countries may raise legitimate questions of sovereignty, immunity, fear of unexpected arrests of their officials and questions of double standards by the international criminal justice system, they must not ignore the need to ensure justice and accountability in response to massive and systematic abuses against innocent civilians; this may be achieved at national, or regional, or global level(s).
Countries such as the USA and UK, and human rights and pacifist groups, for example, Amnesty International, Human Rights Watch and the International Crisis Group (ICG) welcome the decision. The ICG submitted that ‘for the millions of Darfur victims of the conflict, this landmark decision provides independent legal recognition of the massive crimes committed against them’.

Moreover, the SLM-Minawi and JEM rebel groups (of Darfur) supported the indictment; the latter considered it as a ‘victory for international law’ and called upon the President to resign; while the southern Sudan People Liberation Movement (SPLM) spoke ‘about the dangers posed by Bashir’s indictment to the stability of the country’.

The relevant legal implications of this development on the subject of this paper will be considered further.

In spite of this recent phenomenon and the controversies it has triggered, the measures and the attention given to Darfur have generally been criticized for the lack of commitment, delays and inadequacy. For instance, the SC’s first resolution on Darfur was adopted in July 2004, that is one year after the war had begun, which was similar to that of the response of the SC to the Rwandan genocide.

This paper examines the international humanitarian law (IHL), also called *jus in bello*, aspects of the Darfur problem, with the emphasis on the duty to respect and protect civilians and civilian objects (which embraces humanitarian aid), and will ask: first, how and to what extent IHL applies to the situation? Second, what are the main legal obligations of the parties to the conflict vis-à-vis the civilian population? Third, how is compliance with such norms on the ground by both government and rebel forces? And finally, what is the response of the international community, which includes Sudan, in respect of providing physical protection to civilians and their objects?

### 2. The Application of IHL to Darfur: Characterization and Applicable Rules

#### A. IHL in General

*jus in bello* deals with the rules and customs of war, the details of which are mainly found in the four Geneva Conventions of 1949 and their Additional...
Protocols of 1977 and customary international law. Four core principles summarize the salient features of IHL. The first concerns the protection of civilians (alongside their civilian objects) during armed conflict, also called the rule of distinction between combatants and civilians; civilians being protected subject to not taking a direct part in hostilities. The nature and extent of the protection have been explained by Sandoz et al.:

The danger arising from military operations. This means that the obligation does not consist only in abstaining from attacks, but also in avoiding, or in any case reducing to a minimum, incidental losses, and in taking safety measures.

Moreover, women and children, especially those who have been affected by war, have been given special protection; for example, warring parties are obliged not to recruit children under 15 years of age and to prevent them from taking part in hostility.

The second principle underlines that the purpose of war is to defeat an adversary, with minimum human and resource losses, rather than total destruction and extermination. By so doing, IHL provides protection for combatants and civilians and embodies the principles of proportionality and necessity in its ambit.

The third principle concerns the limitation on means and methods of warfare; weapons that cause unnecessary suffering or superfluous injury on human beings such as poison gases must not be used in warfare (this rule requires adherence to the notion of humanity in armed conflict) and again, certain methods of warfare

\[\text{13 See L. Green, } \textit{The Contemporary Law of Armed Conflict} (2008) 52–53; see also } \textit{Nicaragua, op. cit.}, fn. 51, para. 42.\]

\[\text{14 See e.g. } \textit{Geneva Protocol I (GP I)}, Art. 48; for an excellent account on the customary nature of this rule, see A.P.V. Rogers, } \textit{infra}, fn. 28, pp. 7–17.\]

\[\text{15 } \textit{GP II}, \text{ Art. 13(3)}; \text{ see also A.P.V. Rogers, } \textit{infra}, fn. 28, p. 10; \textit{The UN Commission of Inquiry (infra), fn. 39, para. 292} \text{ stated that: ‘Although in certain instances victims of attacks have willingly admitted having been armed, it is important to recall that most tribes in Darfur possess weapons, which are often duly licensed, to defend their land and cattle. Even if it were the case that the civilians attacked possessed weapons, this would not necessarily be an indication that they were rebels, hence lawful targets of attack, or otherwise taking active part in the hostilities’.}\]


\[\text{17 See e.g. } \textit{GP I}, \text{ Arts 76, 77(1), (2), (3); Convention on the Rights of the Child, 28 ILM (1989) 1448, Art. 38(2); see also S. Breau, } \textit{infra}, fn. 28, pp. 198–203.\]

\[\text{18 } \textit{1868 St Petersburg Declaration Renouncing the Use, in Times of War, of Explosive Projectiles under 400 Grammes Weight}, \text{ preamble, paras 2–4; Hague Convention IV 1907 Respecting the Laws and Customs of War on Land (HC IV), preamble, paras 2 and 3; see also Z. Yihdego, } \textit{The Arms Trade and International Law (2007) 196.}\]

\[\text{19 See e.g. } \textit{1925 Gas Protocol; 1972 Biological and Toxic Weapons Convention; the 1980 Convention of Conventional Weapons} \text{ have put restrictions on the use of mines, booby traps and incendiaries.}\]
such as perfidious attacks upon an enemy have been prohibited. Finally, when a gap in the law occurs relating to armed conflict, the principle of humanity and the dictates of public conscience apply. This and similar rules have been widely accepted in conventions.21

The extent of application of these and other jus in bello norms in general and their detailed regulation in particular varies according to the nature of armed conflicts. While a war between states ‘through the medium of their armed forces’ is considered as an international armed conflict, a war within the territory of a state ‘between its armed forces and dissident armed forces or other organized armed groups’ is deemed to be a non-international conflict. This means that, on the one hand, the whole regime of IHL, including the four Geneva Conventions and Geneva Protocol I, is applicable to international armed conflict (of course to states parties to these treaties) and, on the other hand, Common Article 3 of the Conventions sets out the minimum IHL protections applicable during non-international armed conflict. The Article prohibits, inter alia, the following acts:

20 HC IV, Annex, Hague Regulations, Art. 24; GP I, Art. 37(2); see also Z. Yihdego, op. cit., fn. 18, p. 197.
22 L. Green, op. cit., fn. 13, pp. 54–55; however, GP I, Art. 1, para. 4 extended the definition of international armed conflict to wars of national liberation; for an excellent account of characterising conflicts, see J. Pejic, ‘Status of Armed Conflicts’, in Wilmshurst et al. (eds) infra, fn. 30, pp. 77–100.
23 See GP II Art. 1(2); the difference between internal security problems (riots, disturbances, etc.) and internal armed conflict is that the latter considers, inter alia, the following indicators: (a) political motive (power), (b) control of territory, (c) complete breakdown of law and order (which takes into account intensity of military operations, use of heavy weapons, etc.), (d) recognition of belligerency, (e) UN involvement (in particular the SC) and (f) the declaration or agreement by the parties to respect IHL.
24 This means that the notion of grave breaches and the universal obligation to prosecute or extradite offenders of such crimes, prisoners of war and the wide-ranging protections provided by the fourth Geneva Convention (also called the Civilian Convention) to civilians only apply to international armed conflicts. See GC I, Arts 49–50; GC II, Arts 50–51; GC III, Arts 129–30; GC IV, Arts 146–47; see also J. S. Pictet, ‘The Geneva Conventions of 12 August 1949, Commentary (1952) 362–73 and the International Criminal Court Statute, 37 ILM (1998) 999–1019. Art. 8(2)(a) of the Statute makes a distinction between war crimes arising from grave breaches of the GCs in the sense of international armed conflicts, and as enshrined in sub (c), war crimes committed in non-international armed conflict, as ‘serious violations’ (and not grave breaches).
(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.

Thus, civilians and other victims must be treated humanely, and acts such as torture and murder are absolutely prohibited—the list of prohibited acts under this article is not exhaustive. Geneva Protocol II (GP II) reinforces the notion of civilian protection. It is widely endorsed in the context of the second Protocol (which deals with non-international conflict) that ‘a civilian is anyone who is not a member of the armed forces or of an organized armed group’.25 Article 13(1), (2) and (3) of the Protocol provides civilian immunity (which includes a civilian person, property and honour as elaborated under Article 4 of the Protocol) to civilians during internal armed conflict. It is prohibited to kill civilians (Article 4). Deliberate attacks on civilians and their objects are also war crimes. The ICC Statute under Article 8(2)(c), (d) and (e) stipulates that ‘serious violations of Common Article 3 of the GCs would amount to war crimes of the same severity as grave breaches’.26

GP II has endorsed, even if ambiguously (compared with Article 58(c) of GP I), that ‘the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations’ (Article 13(1)), and so reflects the duty of taking all available measures of precaution during internal armed conflict.

Moreover, Article 14 of the Protocol proscribes launching attacks on ‘objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas’; it is therefore unlawful to starve ‘civilians as a method of combat’. However, even if attacks are not meant to starve civilians, the requirements of proportionality and measures of precaution must be undertaken. Article 18(2) of the Protocol provides that, ‘relief actions for the civilian population ... shall be undertaken subject to the consent of the High Contracting Party concerned’.27 This duty must be read in the light of relevant SC resolutions and various agreements entered into by parties to a conflict, and so the consent element may not be a bar to its application. Finally, forced ‘displacement of civilians’ is forbidden as a result of armed conflict, unless justified by the security of civilians and military necessity (Article 17).


27 See also Common Art. 3(2) and Agreement No. 2 on the Implementation of the Agreement of 22 May 1992 between the Parties to the Conflict in Bosnia and Herzegovina, para. 2(d).
Later developments supported the application of customary IHL norms to non-international armed conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadic case expounded that the basic rules of IHL, including the rule of distinction (between combatants and civilians and military and non-military objectives) and the restriction on means and methods of war, apply to non-international armed conflict. Rogers agrees that ‘the basic customary law principles of military necessity, humanity, distinction and proportionality . . . provide guidelines’, and so bind all states whether or not they are parties to the GCs or GP II.28

While Greenwood noted such developments in the law during the 1990s and their reflection in the ICC Statute, he emphasized that these claims are based upon a ‘somewhat creative approach to the law and some of its conclusions [of the ICTY as discussed above] are not easy to justify’.29 There are some elements of truth in this doubt as the application of some of the principles of IHL to internal armed conflicts may be problematic (e.g. the combatant status of warring parties). Yet, though some criticize it as an ambitious project, the ICRC Study on Customary Humanitarian Law seriously challenged the distinction under consideration and narrowed down the traditional difference between the two types of armed conflicts in terms of applying the basic rules to both situations.30

What seems to be certain, however, is that those states who are involved in civil wars must comply with the basic (treaty and customary) rules of IHL. The notions of combatant and prisoner-of-war (PoW) status may well be applicable if the warring parties to a conflict agree to do so. However, the biggest difference between international and non-international armed conflict law is that in the latter, combatant and PoW status is not provided for and states have been very reluctant to accept such provision. The main reason for this is that internal wars occur within a state’s territory, and domestic law regulates the behaviour of rebels—Article 3 of GP II, for example, refers to the non-intervention rule of

28 A. P. V. Rogers, Law on the Battlefield (2004) 222; see also Prosecutor v Tadic, ICTY Trial Chamber (II) (Judgment), 16 November 1998, IT-96–21-T, paras 202, 235. While the ICTY in the former case stated that grave breaches only apply to international conflicts, the Trial Chamber of the same tribunal in the Delalic case explicitly said that Common Art. 3 violations must now be considered as ‘grave breaches’ of war. See also J.-M. Henckaerts et al., op. cit., fn. 25, pp. 27–29. The ICRC Study generally strengthens this position; see also S. Breau, ‘Protected Persons and Objects’ in Wilmshurst et al. (eds) infra, fn. 30, pp. 198–203. See also J. Pejic, op. cit., fn. 22, p. 77. She pointed out that ‘the [ICRC] study showed and proved to be useful in the meantime, because it was focused that the great majority of customary rules apply to both types of armed conflict, thereby rendering the issue of qualification less central’.


30 J.-M. Henckaerts et al., op. cit., fn. 25, pp. 3–68; for criticisms and comments on the Study, see e.g. M. Schmitt, ‘The Law of Targeting’, in E. Wilmshurst and S. Breau (eds), Perspectives on the ICRC Study on Customary International Humanitarian Law (2007) 135. He noted that ‘the study (ICRC’s) ambitiously purports to capture both international and non-international armed conflict norms’.
international law;\textsuperscript{31} although this ought not serve as an excuse for contravening customary and treaty-based humanitarian norms.

Similarly, the argument that ‘armed opposition groups are bound by the rules governing internal armed conflict is beyond doubt’;\textsuperscript{32} this is subject to (a) a group acting ‘under responsible command’, and (b), it exercising control ‘over a part of its [a state’s] territory’, as stated in Article 1(1) of GP II. Their obligations can be derived from customary or treaty obligations. The latter may be the case when they expressly accept compliance with Common Article 3 and GP II.\textsuperscript{33} Finally, IHL is binding on everybody in his/her personal capacity.\textsuperscript{34}

But the threshold for the application of Common Article 3 and AP II differs. While the latter does apply to ‘all conflicts’ except those ‘covered by Article 1’ of AP I, it only governs conflicts ‘which take place in the territory of a High Contracting Party between its armed forces and dissonant armed forces or other organized armed groups’,\textsuperscript{35} subject to fulfilling the conditions mentioned earlier. In contrast, the application of Common Article 3 is not restricted to conflicts which involve a state’s armed forces, conflicts between (and among) different armed groups within a state,\textsuperscript{36} for example, the conflict between the various war lords

\textsuperscript{31} Moreover, the ICC Statute under Art. 8(3), in the context of war crimes arising from violations of Common Art. 3 of the GCs, stipulates: ‘Nothing in paragraphs 2(c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means’.

\textsuperscript{32} S. Sivakumaran, ‘Binding Armed Opposition Groups’ (2006) 55 ICLQ 369. However, he claims: ‘Four reasons that are commonly put forward to explain the binding nature of the rules governing internal armed conflict on armed opposition groups—customary international law; general principles; the rules governing the effect of treaties on third parties and the principle of succession—are not in fact capable of binding all types of armed opposition groups by all the rules of internal armed conflict. This is so even when all four reasons are used in conjunction with one another. The legislative jurisdiction explanation—the principle whereby the state binds all individuals within its territory upon ratification of a treaty—is the only one that is capable of binding all types of armed opposition groups by all the rules that govern internal armed conflict’.

\textsuperscript{33} Ibid., p. 379. It was stated, for example, that ‘There has also been more widespread acceptance of Additional Protocol II by armed opposition groups than is commonly thought. This was true of the Frente Farabundo Marti Para La Liberacion Nacional (FMLN) in El Salvador which stated in 1989 that [t]he FMLN shall ensure that its combat methods comply with the provisions of Common Article 3 of the Geneva Conventions and Additional Protocol II’. So too Filipino armed opposition groups in 1991, the RPF in Rwanda, which considered itself bound by international humanitarian law, the LTTE in Sri Lanka, which in February 1988, ‘announced that it will abide by the Geneva Conventions and their Additional Protocols’, and the National Liberation Army (ELN) in Colombia, which ‘specifically declared that it considers itself to be bound by the 1949 Geneva Conventions and Protocol II’; see also C. Greenwood, op. cit., fn. 29, p. 807.

\textsuperscript{34} Ibid., p. 371; see also Rogers, op. cit., fn. 28, pp. 217–8.

\textsuperscript{35} AP II, Art. 1; see also Green, op. cit., fn. 13, at pp. 348–349. See also the Darfur Commission of Inquiry Report, infra, fn. 39, para. 74. It noted that ‘Additional Protocol II . . . seems to narrow the scope of Common Art. 3 of the Geneva Conventions’.

\textsuperscript{36} See also Rogers, op. cit., fn. 28, at 221 and Green, ibid., at 346–348.
and clans of Somalia, assuming that there was an armed conflict among the different clan factions/militias. In this sense, hence, AP II conflicts are different from Common Article 3 conflicts. But there are situations where both regimes concurrently apply. Rogers explains that:

there may be ... armed conflicts governed by both instruments (Common Article 3 and AP II), for example, where there are sustained and concerted military operations between government forces and organized armed groups.

What is certain, however, is that when the specific rules enshrined in the treaties at issue attain a customary status (including some of the provisions of AP II), the discussion on the differences between the types of internal conflicts becomes less important. These and other legal issues can only be properly understood with reference to specific situations and facts, which the next section endeavours to do. I shall also turn to some of these issues.

B. Applicability to Darfur

The implication of these issues (and ultimately the rules) to Darfur first and foremost relies on determining whether or not there is an armed conflict in Darfur. The ICTY in Tadic defined the existence of an armed conflict and the application of IHL as follows:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government authorities and organized armed groups within a state ... international humanitarian law applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached ... IHL continues to apply ... in the whole territory under the control of a party, whether or not actual combat takes place there. (para. 70)

The relevance of this to Darfur can be discussed in the light of the responses of various international actors to the situation. SC Res. 1556 of 2004 on Darfur

37 Ken Menkhaus, ‘Somalia, a situation Analysis’, 30 November 2000 at <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/b320c66bd7fada7de852569fa00515929/>. He noted that ‘in the years since the UNOSOM departure [1995], Somalia has remained vulnerable to chronic armed clashes ... and lawlessness. The once relatively cohesive factions have splintered into quarrelling sub-clan militias, so that most armed conflict since 1995 has been within, rather than between, major clans. This has meant that the country is less vulnerable to major armed clashes, but more prone to smaller, localized, and less predictable armed hostilities in neighbourhoods and towns’.

38 Rogers, op. cit., fn. 28, at 221; see also the UK Manual of the Law of Armed Conflict (2004), para. 3.5.
determined the situation as ‘a threat to international peace and security and to stability in the region’ in general, the implications of which often serve as an endorsement of the existence of an armed conflict by the Council. While the Council’s resolutions do not decisively determine the existence and nature of an armed conflict and the applicability of IHL, they may be of vital importance as evidence of those phenomena.

The UN Commission of Inquiry on Darfur specifically examined the question of determining the existence of an armed conflict in Darfur. The Commission, outlining the legal requirements for an armed conflict as discussed (Section 2(A)), focused on the nature and intensity of the conflict and the standing of the parties to the conflict. It noted that both the JEM and SLM/A, the main rebel groups, organized themselves to fight the Government of Sudan and ‘spoke on behalf of all Darfurians, and mainly directed their attacks at government installations’.39 While the initial military attacks targeted police stations and the like, ‘the scale of rebel attacks increased noticeably in February 2003’ (para. 75). It also noted that ‘the rebels exercise de facto control over some areas of Darfur’ (para. 75). The SLM/A was, and still is, active in north-west and south Darfur, while the JEM is mainly active in northern Darfur (paras 127, 133). In one instance, for example, the military operations of the rebels went as far as Khartoum and its outskirts.

Likewise, the government responded by involving its regular armed forces including the Sudanese air force, the Janjaweed militia and the PDF who had been ‘recruited’, ‘organized’, ‘financed’ and directed by the government (paras 98–115). These operations involved intensive aerial bombardment, complete destruction of villages and towns, and fierce fighting against rebel stronghold positions. For these and similar reasons, the Commission was rather explicit and stated that:

the conflict . . . does not merely amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (i) existence of organized armed groups fighting against the central authorities, (ii) control by rebels over part of the territory and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict under Common Article 3 of the Geneva Conventions are met. (para. 75)

This may be challenged on two grounds: firstly, from the beginning, as indicated by the Commission (para. 55), the black movements and the Arab tribes were in conflict over resources—including land, grass, etc., and thus such sporadic attacks between Darfur tribes may be characterized as internal disturbance and violence which existed for some time in the region. This argument was entertained by the Government of Sudan, as we shall later see (para. 201). Secondly,

later developments witnessed the fragmentation of rebel groups, the creation of
new movements and widespread banditry in Darfur. It may well be argued thus
that the government is taking law enforcement measures to control these factions
and criminal elements (para. 78).

Despite the motives and purposes of the warring parties and the criminal activ-
ities there, however, the facts that the main rebel groups have been engaged in or-
ganized, planned and targeted military operations (including against air force and
other military bases and government infrastructure), that their measures were
mainly connected to each other, and that the government and its militia have
been engaged in an intensive and prolonged military crackdown which led to
colossal destruction of villages and towns and to the deaths and displacement of
hundreds of thousands of people affirm the high intensity of the armed conflict—
and so does the validity of the Commission’s conclusion on the issue. It has to be
said that it is not necessary for the whole of Darfur (or for that matter Sudan)
to be used as a field of military operations in order to establish an armed conflict
and the application of IHL to the situation. For example, the ICTR in Prosecutor
v. Akayesu underlined that in case of a non-international armed conflict, Com-
mon Article 3 to the GCs applies ‘in the whole territory of the State engaged in
the conflict’. This is valid to Darfur/Sudan, although the most important rules
applicable to hostilities are in areas of military engagement.

In a nutshell, the factual evidence (as related to the legal requirements) re-
garding the ongoing armed conflict in Darfur and in the region since 2003 (as
endorsed by the international community and the parties to the conflict, as we
shall discuss later), affirms the existence of an armed conflict and, thus, IHL ap-
plies to the conflict. The ICC’s arrest warrant for the President of Sudan assumes
this. Yet the search for answers to questions relating to the extent of the appli-
cation of IHL to Darfur does not seem to be straightforward. Solutions may be
found in examining the characteristics of the conflict.

A threefold argument can be put forward here: The first is that the Darfur
conflict is an international armed conflict. There are two dimensions to this ques-
tion. The first is whether or not there was/is a direct armed hostility between
Chad and Sudan. Common Article 2 to the GCs provides that the Conventions
‘shall apply to all cases of declared war or of any other armed conflict which
may arise between two or more High Contracting Parties, even if the state of
war is not recognized by one of them’. In the present case, international organ-
isations, publicists and media reports have highlighted the regional dimension
of the conflict. The Secretary-General’s report of February 2008 submitted that

40 Prosecutor v Akayesu (Trial judgment) ICTR-96-4-T (2 September 1998) para. 635; the tribunal has also noted that the application of all rules may not be the same in all parts of a territory; see also Prosecutor v Tadic (decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-49-1AR 27 (2 October 1995), para. 68.
‘Chadian regular armed forces and the JEM launched several attacks inside Sudanese territory’. Moreover, ‘both countries accused each other of using rebels to launch proxy attacks on their capitals last year’. Both countries deny these allegations including the allegation made by the UN.

It may well be that the incursion of Chadian armed forces into Darfur and their subsequent engagement in military operations met the requirements of Common Article 2 of the GCs. It must be mentioned that the Chadian air force also conducted air raids in Darfur. Dinstein, for example, submitted that IHL ‘is brought to bear upon the conduct of hostilities between sovereign States, even if [the] hostilities fall short of war, namely, constitute a mere incident’. While the involvement of Chadian troops seems to be more than an incident, the fact that their main target was Chadian rebels and that there appears no evidence that they fought against the Sudanese armed or irregular forces there does undermine the argument in favour of the existence of an international armed conflict between the two countries. There was no plan (or an agenda) of occupation either. Even if there was such an armed conflict for a brief period between December 2007 and early January 2008 (as can be inferred from the UN Report of February 2008) involving Chadian troops in the territory of the Sudan, it may be said that it had ceased when the troops withdrew from the Darfur region.

The second dimension leads one to raise (irrespective of the direct engagement of Chadian troops in Darfur) the question of whether Chad is in overall control of any of the militias, which may thus constitute an armed conflict between Chad and Sudan. The UN Under-Secretary General for Peacekeeping Operations Mr. Jean-Marie Guehenno, in his February 2008 report to the SC, said as follows:

The potentially destabilizing regional implications of the crisis have been highlighted by numerous media reports of Chadian rebel movements receiving support in the Sudan, on the one hand, and Sudanese rebel movements that have acted in support of the Chadian Government, on the other hand. Continuing accusations by both Governments of their support for rebel movements on each side of the border increase the climate of mistrust, fuel tensions between the two countries and once again demonstrate the potential for a conflict of international dimension in the area.

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42 Report of the Secretary-General on the Deployment of the African Union–United Nations Hybrid Operation in Darfur, UN doc: S/2008/98, 14 February 2008, para. 2. It was also noted that ‘74 vehicles carrying Chadian regular armed forces entered Western Darfur during December 2007 and linked up with JEM elements’ there (para. 3).


45 Report of the Secretary-General, 14 February 2008, op. cit., fn. 42.

SC resolutions\textsuperscript{47} and reports of the UN Secretary-General\textsuperscript{48} have reiterated the concerns of the UN over the Sudan–Chad tension and their military confrontation.

More specifically, Darfur rebels, the JEM in particular, have been receiving logistical, financial and similar support from the Government of President Déby of Chad (who is a Zaghawan tribe member, the same as the JEM leaders/rebels). JEM leaders were also operating from N’Djamena and their forces, accompanied by Chadian military forces, were deployed.\textsuperscript{49} However, the help and extent of support to the rebels has varied due to the ups and downs of the peace agreements and diplomatic relations between the two countries. As a result, for example, in 2007 ‘many Darfur rebels left Chad’ and some of them were ‘briefly arrested’ in N’Djamena.\textsuperscript{50} With such uncertainty, it is difficult to establish ‘effective control’ (a test set out in the \textit{Nicaragua} case) of Chad over the rebels and their operations.

The ICJ in the \textit{Nicaragua} case, while acknowledging the US’ provision of logistics, finance and weapons to the \textit{Contra}, concluded that this did not prove that the USA was directing, commanding and effectively controlling the operations of the \textit{Contra}.\textsuperscript{51} If one tries to compare the level of intervention of the USA in Nicaragua with Chad’s intervention in Sudan, it seems difficult to see or claim ‘effective control’ of Chad over the rebels. As mentioned earlier, the latter have territorial control over some parts of Darfur, they have their own leadership and they appear to carry on their military business even when their relationship with Chad deteriorates.

Although the details of this are not within the realms of this paper, however, the fact that foreign troops have been deployed as peace enforcers (with Chapter VII enforcement powers) may underpin the position that the conflict is not an internal armed conflict. These forces are bound by IHL norms in their conduct of operations;\textsuperscript{52} although whether their presence in a civil war situation can

\textsuperscript{47} See e.g. Resolutions 1556/2004 and 1706/2006.
\textsuperscript{48} The Secretary-General in his 14 February 2008 Report (\textit{op. cit.}, fn. 42) affirmed that: ‘Tension increased significantly along the Chad–Sudan border after approximately 74 vehicles carrying Chadian regular forces entered Western Darfur during December 2007 and linked up with JEM elements in the area of Jebel Moon (Western Darfur) late in December and early in January … The Government of Sudan responded by reinforcing El Geneina with two additional battalions from Nyala and, by mid-January, started a ground and air military operation to push JEM north of El Geneina’.
\textsuperscript{49} ICG 26 November 2007 Report, \textit{op. cit.}, fn. 78, pp. 17–18.
\textsuperscript{50} \textit{Ibid.}, p. 18.
\textsuperscript{51} \textit{Nicaragua v. USA} (Merits) ICJ Repts 1986, para. 115. However, the ICTY ruled (in \textit{Prosecutor v Tadić} [Appeal Judgment] IT-94-1-A, 15 July 1999, paras 99–145) that mere ‘overall control’ is enough to establish the existence of an international armed conflict.
\textsuperscript{52} See e.g. C. Greenwood, \textit{op. cit.}, fn. 29, p. 786; see also S. Wills, ‘Military Interventions on behalf of Vulnerable Populations: The Legal Responsibilities of State and International Organisations Engaged in Peace Support Operations’, (2004) \textit{9 JCSL} 387; UNAMID officials often claim that they are not there to fight against anyone rather
transform conflicts from internal to international is something difficult to claim.\textsuperscript{53} This will be specifically considered with reference to the UN mission(s) in Darfur.

With this emphasis and reading of the situation and if one is content with the argument that the main feature of the conflict is international (involving two states, militaries and territories), then the entire IHL regime would be applicable to the conflict.

However, since Chad and Sudan do not seem (in spite of instances of accusation and counter-accusation of aggression and intervention\textsuperscript{54}) to be in a state of (declared or undeclared) armed conflict and the salient features of the Darfur conflict are of a civil war nature, it can persuasively be argued that it is not an inter-state war and so it is subject to Common Article 3 of the Conventions and GP II obligations (for Sudan’s treaty obligations, see Section 3). The UN treatment of the conflict by and large reflects this position.\textsuperscript{55} The UN Commission of Inquiry determined the conflict as an internal war by stating as follows:

\begin{quote}
The conflict in Darfur opposes the Government of the Sudan to at least two organized armed groups of rebels . . . (SLM/A) and (JEM) . . . the first two groups of insurgents took up arms against the central authorities . . . The rebels exercise de facto control over some areas of Darfur. (para. 76)
\end{quote}

It also emphasized that the requirements of Common Article 3, namely, organized armed groups (fighting the government of Sudan), persistent and protracted fighting, and the control of some parts of territory by the groups are met (para. 74).

What is interesting, however, is that the Commission considered not only the regular armed forces of Sudan but also the \textit{Janjaweed} militia and others as to restore peace and mediate the parties, while SC Res. 1769/2007 . . . empowers the mission to take enforcement action in defence of civilians; see Pejic, \textit{op. cit.}, fn. 22, pp. 94ff.

\textsuperscript{53} C. Greenwood (\textit{op. cit.}, fn. 29, p. 786) underlined that ‘it is still unclear to what extent the United Nations force in such a case is to be treated as a party to hostilities and whether the full body of the law of war applies to it. The picture is further complicated by the fact that the Convention on the Safety of United Nations and Associated Personnel, 1994, which prohibits acts of violence against United Nations peacekeepers, applies only if the law of war is not applicable’. Pejic (\textit{op. cit.}, fn. 22, p. 94) suggests that when UN forces intervene against a state the conflict becomes international, ‘where they intervene against non-state-actors, the rules of non-international armed conflict would apply’.

\textsuperscript{54} See e.g. \textit{Letter from the Permanent Representative of Chad to the UN addressed to the President of the SC}, S/2008/21, 15 January 2008; see also \textit{Letter from the Permanent Representative of the Sudan to the UN addressed to the President of the SC}, S/2008/20, 14 January 2008. Also, it is not certain whether Chad has direct control over Darfur rebels (over JEM in particular). See also Pejic (\textit{op. cit.}, fn. 22) pp. 89–92. She underlined that ‘very few non-international armed conflicts are waged without any form of external involvement’.

\textsuperscript{55} Almost all SC Resolutions (including 1556/2004, 1590/2005 and 1705/2006) \textit{basically} refer to the situation as a civil war.
state forces (para. 111). The Commission also noted that the parties to the conflict agree on the internal nature of the armed conflict (para. 76), although the Sudanese Government consistently maintained the view that the ‘conflict is tribal’ which must be resolved ‘through traditional reconciliation’ methods (para. 201), to which I will return.

Later SC resolutions focused on the internal aspects rather than external factors. SC Res 1591 of 2005, for example, determined the situation as ‘a threat to international peace’ without a mention of ‘regional stability’, and acting under Chapter VII, condemned both parties to the conflict, the Government and rebels, *inter alia*, for continuing military confrontation. The UN Secretary-General, Ban Ki-moon, after his recent return from Darfur, while touching upon the regional aspect of the problem, braced this approach, by stating as follows:

> We speak often and easily about Darfur. But what can we say with surety? By conventional shorthand, it is a society at war with itself. Rebels battle the government; the government battles the rebels. Yet the reality is more complicated. Lately, the fighting often as not pits tribe against tribe, warlord against warlord.

Therefore, unless one can clearly distinguish the Chad–Sudan conflict from that of the internal conflict in Darfur similar to what the ICTY did in characterizing the conflict in the former Yugoslavia, in terms of the timeline of the war, and as expressly conceded by the UN Commission of Inquiry, the conflict is predominantly a civil war and so subject to the rules applicable to the internal armed conflict. Further evidence would be that Pre-Trial Chamber I of the ICC relied on Article 8(2)(e) of the ICC Statute, which concerns ‘other serious violations of the laws and customs applicable in armed conflicts not of an international character’, in issuing a warrant for Mr. Bashir’s arrest.

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56 The Council ‘Deplores strongly’ that the Government of Sudan and rebel forces and all other armed groups in Darfur have failed to comply fully with their commitments and the demands of the Council referred to in resolutions 1556 . . . , and condemns the continued violations of the . . . 2004 N’djamena Ceasefire . . ., including air strikes by the Government of Sudan in December 2004 and January 2005 and rebel attacks on Darfur villages in January 2005, and the failure of the Government to disarms Janjaweed militiamen’.

57 Ban Ki-moon, ‘What I Saw in Darfur’, *Washington Post*, 14 September 2007. See also Rogers *op. cit.*, fn. 28, p. 221. He noted that a conflict between two or more armed groups within a state is governed by Common Article 3 and not GP II.

58 The ICTY (in *Tadic [op. cit.*, fn. 28], paras 74–77) determined the character of the Yugoslavia war and said that the conflict was initially internal but after three states (including Slovenia and Croatia) declared independence in 1991 and got recognition by other states turned into international conflict; see also T. Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout’ (1998) 92 *AJIL* 136–137.

Again, this can be challenged by the *Nicaragua* approach. The ICJ, while generally faced with a similar situation, ruled as follows:\(^{60}\)

The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character. (para. 219)

The Court seemed to differentiate the war (and the applicable law) between Nicaragua and the USA from that of the conflict between the Contra and the Government of Nicaragua. However, it emphasized the *identical* nature of the minimum IHL standards applicable to both types of conflicts—it can be said that the threshold which was referred to by the ICJ is valid for Darfur also. Yet, the Nicaragua case seems to be different from Darfur in that a foreign state was directly and indirectly involved as a main actor in the war (as clearly established by the world Court). It is not clear whether Chad is the main actor/participant in the Darfur situation.

The following points recapitulate the debate: firstly, although the Darfur conflict comprises elements of both types of conflicts, it is basically a civil war situation. Common Article 3 of the Conventions, GP II, and appropriate customary rules apply,\(^{61}\) the specific and most relevant rules will be elaborated subsequently; secondly, in terms of applying the fundamentals of IHL (e.g. rules of distinction, humanity, proportionality and necessity) to an armed conflict, the difference between the two types of conflicts arguably lacks real substance, although there are differences on the extent of the protection and application of the rules at issue; finally, even if the conflict is a mix of both, the interest here is to look at the specific duties of the internal parties and their compliance therewith.

\(^{60}\) *Op. cit.*, fn. 51, para. 219; however, the ICTY (in *Tadic, op. cit.*, fn. 28) sharply differed from this approach—it made a distinction between the conflict up until 1992 as internal and afterwards as international; for detailed discussion on mixed conflicts, see Dinstein (*op. cit.*, fn. 41, at 14–16); and Kolb *et al.* (*op. cit.*, fn. 44, at 93–106).

3. Specific Duties and Questions of Compliance

A. The Parties and Their Specific Duties

In order to comprehend properly the duties and compliance with them, a brief re-mention of the parties to the conflict is imperative. The parties can broadly be categorized into two: the Sudanese armed forces (including the Popular Defence Forces and the ‘Borders Intelligence’) and the Janjaweed militia,\(^\text{62}\) on the one hand, and the rebels, mainly the SLM, JEM (and the National Movement for Reform and Development [NMRD]), on the other. All factions and ‘bandits’ of Darfur\(^\text{63}\) may not necessarily qualify as parties to the conflict for purposes of IHL, as they do not seem to satisfy the aforementioned requirements.

The forces in the first cluster must respect the laws and customs of war applicable to this internal armed conflict for the simple reason that Sudan has been a party to the Geneva Conventions of 1949 since 1957 and to GP II since (7 July) 2006. While the obligations of Common Article 3 are applicable to the conflict (both as a matter of treaty obligation and customary law) from day one, GP II has only been applicable (as a treaty obligation) to Darfur since 2006. GP II is also binding on rebels and individuals from their entry into force for Sudan (Article 23).

However, the parties in both clusters (including the rebels and individuals) must respect the provisions of the Protocol and other duties which reflect customary law. At least three relevant areas/obligations can be identified here: Firstly, indiscriminate attacks against Darfur civilians, bombardment of cities, towns, villages ‘or other areas containing a similar concentration of civilians or civilian objects’\(^\text{64}\) (as enshrined in Article 13(2)) are customary bans. Secondly, it is generally accepted that attacking objects used for ‘humanitarian relief operations’ and ‘humanitarian relief personnel’ are prohibited; the former is a ‘corollary of the prohibition of starvation’ as a deliberate method of war and the protection of civilian objects. The personnel involved in such efforts are civilians and thus not legitimate targets of military attack.\(^\text{65}\) And finally, peacekeepers (and not peace enforcers) are not a party to a conflict and therefore enjoy the protection

\(^{62}\) For details on the forces, see the UN Commission on Darfur, op. cit., fn. 39, paras 76–88, and on the link between the Janjaweed and the State, paras 111–116.

\(^{63}\) Crisis Group Report, infra, fn. 54, pp. 14–15; see also Commission of Inquiry Report, op. cit., fn. 39, paras 172–174. The problem of fragmentation and proliferation of rebel groups in Darfur will be discussed later in the same section.

\(^{64}\) Henckaerts et al., op. cit., fn. 25, p. 43, see also pp. 40–44; for a critical support of this position, see Breau, op. cit., fn. 28, p. 187–189; see also Amended Protocol II to the Convention on Certain Conventional Weapons 1980, Art. 3(9) and ICTY Statute, Art. 3. Attacking undefended towns, villages, dwellings, or buildings is contrary to the laws and customs of war; however, a ban on indiscriminate attacks is not in the ICC Statute, Art. 8(2)(e).

\(^{65}\) Henckaerts et al., op. cit., fn. 25, pp. 105–111; see also Breau, op. cit., fn. 28, pp. 177–180. She agrees that the prohibition on attacking relief assistance and personnel is a customary ban ‘provided that there is a clause inserted in each Rule about the necessity
provided for civilians. It is well established that killing a peacekeeper is a war crime even in internal armed conflict.\textsuperscript{66}

It is interesting to note that ‘in 2004 the two rebel groups and the Government of the Sudan entered into a number of international agreements, \textit{inter se}, in which they invoke or rely upon the Geneva Conventions’.\textsuperscript{67} In particular, the Protocol on the Establishment of Humanitarian Assistance in Darfur, signed on 8 April 2004 by the Government of the Sudan with the SLA and JEM, referred to the commitment of the parties to the provision of humanitarian assistance in Darfur in accordance with international rules, including GP II(2).

It can also be said (though not the main issue here) that both sides to the conflict in Darfur, unlike the South–North divide in Sudan, are Muslims and, therefore, subject to Islamic rules of warfare. Al-Zuhili, underlining the legitimacy, \textit{inter alia}, of wars of ‘self-defence’ and ‘assistance for the victims of injustice’ in Islam, has referred to the decree (of 632–634) of the first Caliph of Islam, Abu Bakr, issued to his commander:\textsuperscript{68}

\begin{quote}
I prescribe ten commandments to you: do not kill a woman, a child, or an old man, do not cut down fruitful trees, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palms, nor inundate them, do not embezzle (commit \textit{ghulul}), not be guilty of cowardliness.
\end{quote}

This reference may be useful in terms of preventing violations of humanitarian norms in the region; reference to rules of Islam may well be more easily understood and received than IHL (or human rights) treaties which may be perceived as ‘inventions’ of, and ‘impositions’ from, western civilization.

Because of these treaty and customary law-based duties, as endorsed by the parties, government forces, their affiliated militia, the rebels (who satisfy the aforesaid conditions) and individuals in Darfur must, as a minimum, respect and protect the basic rules and customs of war.

\textsuperscript{66}Henckaerts, \textit{ibid.}, pp. 112–114; see also ICC Statute, Art. 8(2)(b); \textit{Statute of the Special Court for Sierra Leone}, Art. 4(b); see also Breau, \textit{op. cit.}, fn. 28, p. 183. While she agrees that peacekeepers enjoy protection the same as civilians, she thinks that customary law has not yet crystallized to protect peacekeepers.


\textsuperscript{68}Sheikh W. Al-Zuhili, ‘Islam and International Law’ (2005) 87 (858) \textit{IRRC} 282. However, the \textit{Commission of Inquiry} noted (\textit{op. cit.}, fn. 39, at 5) that: ‘Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts’.
B. Questions of Compliance

Breaches of IHL rules are regrettably widespread in Darfur, the details of which can be traced from various credible sources and reports. While denouncing the alleged genocide by the Government of Sudan in Darfur during the initial years of the conflict (2002–2004), the UN Commission of Inquiry:

finds that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law . . . In addition, it appears that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. (para. 631)

The Sudanese Government denied this, and other similar assertions of systematic breaches of humanitarian law for several reasons: First, the atrocities were committed by the rebels, and not by government forces as a result of the tribal conflict there. And second, the armed forces reacted to maintain law and order and their targets were the rebels and not civilians (pars 205, 249). However, the evidence obtained by the UN Commission and the findings of the National Commission of Inquiry established by the Government of Sudan (as referred to by the UN Commission) uncovered breaches of Common Article 3 by both government and rebel forces.69

While the [UN] Commission did not find a systematic or a widespread pattern to violations committed by rebels, it nevertheless found credible evidence that members of the SLA and JEM are responsible for serious violations of humanitarian law . . . In particular, these violations include cases of murder of civilians and pillage. (para. 693)

The rebels denied these allegations and blamed the government and the Janjaweed for the violations; for instance, JEM affirmed to the Commission that ‘its internal regulation contained strong commitment’ to IHL and the protection of civilians (pars 218–19). The Report is much more critical of the government than the rebels on the issue of deliberate attacks against the civilian population; however, the killing of humanitarian workers as civilians was generally attributed to the rebels, to the new rebel movement called NMRD in particular (pars 289–90).

Moreover, other crucial violations which are alleged to have been perpetrated mainly by government forces and the Janjaweed militia included: the failure to take precautionary measures in military engagement when civilians and civilian targets are at risk (pars 262–66), forcible transfer of civilians and abuses in IDP

widespread rape and other forms of sexual violence against women and girls (paras 333–36), the destruction of objects important to the survival of the people and the targeting of African tribes, such as ‘members of the Zaghawa, Fur and Masaalit tribes’ (para. 193). The salient features of acts ‘committed’ by the Janjaweed seemed to focus on widespread rapes, pillages, burning villages and civilian objects, etc., while indiscriminate air bombardment and the likes ‘featured’ the actions of the regular armed forces of Sudan.

The credibility of these findings can be inferred not only from the legal, forensic, military and investigative expertise of members of the team, but also from the extensive investigation conducted on the ground and the diverse sources of information gathered in the process.

During its presence in the Sudan, the Commission held extensive meetings with representatives of the Government, the Governors of the Darfur States and other senior officials in the capital and at provincial and local levels, members of the armed forces and police, leaders of rebel forces, tribal leaders, internally displaced persons, victims and witnesses of violations, NGOs and United Nations representatives. (Executive Summary, para. 4)

Given the scale of violations and the complexity of the situation, the time, budget and expertise constraints of the Commission (it was only mandated for three months and its budget was not enough to hire more than 13 experts [para. 18]), it has to be underlined, as stated in the Report, that ‘the Commission has been able to take a first step towards accountability’ (para. 19).

Be that as it may, the findings (in respect of breaches) have been endorsed by the UN and others, which led to the referral of the case by the SC to the ICC.

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70 Ibid., paras 322–31; for the obligations relating to IDPs, see K. Hulm, op. cit., fn. 26, p. 91.
71 The Commission (op. cit., fn. 39, para. 305) found that ‘many of the villages were reportedly completely destroyed by deliberate demolition of structures and more frequently by burning down the whole village. Straw roofs of the traditional circular houses were torched, as well as all other inflammable material, and vegetation inside and in the immediate vicinity of the village was destroyed by burning. Some of these villages had hundreds of homes that were torched and burnt to the ground. During the attacks Janjaweed are reported to have destroyed utensils, equipment for processing food, water containers and other household items essential for the survival of the inhabitants’.
73 For a detailed account on the arrest warrant process against the President of Sudan, see S. Williams and L. Sherif, ‘The Arrest Warrant for President Al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court’, in this issue (working paper, presented at Legal Developments in Darfur, Symposium, Oxford Brookes
in accordance with the recommendation of the Commission (para. 569). Indeed, serious violations occurred in the first two- to three-year period of the conflict by government forces, the Janjaweed and the rebels, the details of which have been well articulated by the Inquiry Commission.

Contrary to what some hoped for, however, the Commission’s work and subsequent referral of cases to the ICC do not seem to have stopped or even mitigated the violence against civilians. For instance, the February 2008 Report of the UN Secretary-General to the SC expressed serious concern over the hostilities between Government forces and JEM-Khalil Ibrahim rebels, and strongly condemned:

The attacks on 8 February [2008] on civilians on the Western Darfur towns of Abu Suruj, Sirba and Seleia, which have caused an estimated 200 causalities and have led over 10 000 civilians to flee their homes and seek refuge across the border in Chad. Such brutal attacks on civilian towns, including aerial bombardments, represent grave violations of international humanitarian law.

The Government claimed that the operations were aimed at rooting out the JEM forces from the area, while the latter alleged that the actions of Government targeted civilians. The ICC prosecutor told the SC in June 2008 that ‘the entire Darfur region is a crime scene’, and ‘evidence shows an organized campaign by Sudanese officials to attack civilians’. While Libya thought that such labelling of Sudanese officials is mainly based on ‘media and political reports’, other members of the Council have basically agreed with the Prosecutor. China’s representative ‘reaffirmed his Government’s condemnation of crimes against civilians’.

Those civilians who sought refuge in IDP camps are not safe from violence either. The November 2007 Report of the International Crisis Group explained the situation in the camps around Zalingei stating that ‘twenty assassinations or attempted assassinations (pitting suspected rebel sympathizers against suspected government sympathizers) were reported; an IDP suspected of working for the national security agency was shot; guns have been fired at; the deputy sheikh was

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75 Report of the Secretary-General, op. cit., fn. 42, para. 44; see also SC Res 1769/2007, p. 2.

76 ‘Hundreds of Children Missing after Darfur Attack’, IRIN, 14 February 2008; see also ‘UN Heads into Razed Darfur Town’, BBC News, 23 March 2008. The town Haskanita, which had been home to 7000 people, had been destroyed allegedly by government forces and their militia.

77 UN doc SC/9349, 5 June 2008, pp. 1, 7.
killed’. They occurred over a period of six months or so. In addition, an IDP from Zamzam camp reported in October 2008 that ‘four vehicles entered the camp filled with men wearing police khaki uniforms . . . and started shooting . . . . They shot me in the back before I got the chance to escape’. Government forces (in particular the Janjaweed) are often blamed for such actions, although the rebels are also implicated in similar violations. The SLM/A (mostly from the Fur and Massaleit tribes), for instance, ‘committed so many atrocities that it became known locally as the “Janjaweed” II’; and this continued in 2007.

As reported by the UN SC Monitoring Panel on Sudan, moreover, ‘the increased attacks against humanitarian personnel and vehicles have frustrated delivery of humanitarian assistance’. This may well constitute a breach of IHL for three main reasons. First, such military attacks are contrary to the prohibition of targeting civilians and civilian objects; and second, starvation of the civilian population (by obstructing relief assistance) appears to be prohibited if they are intentionally used as a method of warfare; and third, if such objects are attacked contrary to the requirements of proportionality and precautionary measures, they would be in violation of IHL duties, regardless of whether they are purported to starve civilians or not. The UN spokesperson, Michele Montas, expressed concern in September over ‘military bombardments and attacks on aid workers’ and added that ‘the cut in aid compromises the health and well-being of numerous towns and villages and affects up to 450 000 people’. In the early years of the conflict such acts were said to have been committed by rebels; however, the ICG’s Report of 2007 stated that ‘violence against them (humanitarian

79 Adam, ‘They shot me in the back’, IRIN, 22 October 2008; see also the Secretary-General’s Report, op. cit., fn. 42, para. 7. He referred to ‘harassment and intimidation by armed militia’ in the camps, and the pressure the government puts on IDPs to return to their homes while ‘the security situation has not improved’. For an excellent account of the expectations and failures to protect IDPs in Darfur, see Islam, op. cit., fn. 61, p. 354.
81 ICG, 2007, op. cit., fn. 78, p. 11.
83 ‘Sudan: Thousands at Risk as Darfur Violence Restricts Aid Deliveries’, IRIN, 12 September 2008; see also ‘Worsening Banditry Threatens Humanitarian Efforts in Darfur’, IRIN, 27 March 2008. The WFP-Sudan told IRIN that there has been ‘very alarming rates of banditry’ directed at WFP convoys’. It was also stated that ‘three humanitarian workers and one contract truck driver have been killed and nearly 90 people working on behalf of the humanitarian operation abducted . . . since the beginning of 2008. There have been 23 break-ins and armed assaults at humanitarian and UN compounds’. See also the UN Secretary-General’s Report, 14 February 2008, para. 8. He pointed out that ‘During 2007, 154 vehicles of international organisations were taken, a trend continued in 2008 with 30 vehicle hijackings including, as at 24 January, 23 full-loaded food trucks or the WFP. . . . On 13 January . . . a WFP driver was shot and killed in an attempted carjacking in El Geneina’.
84 The UN Commission blamed rebels for killing humanitarian workers, op. cit., fn. 39, paras 289–90.
works and objects) comes from all sides: government militias, non-signatory rebels, SLA/MM forces; the implications of which raise serious questions of compliance of the parties with the rules at issue. However, it is not clear whether this is done deliberately for starvation purposes or whether people are just helping themselves to these supplies. It is also not clear whether the parties engaged in such attacks have complied with the proportionality and precautionary rules either.

Peacekeepers (and peace enforcers) and their convoys have also been subjected to military attacks by the parties to the conflict. Attacks against the personnel of the African Union Mission in the Sudan (AMIS) ‘have been numerous and deadly in 2007’; 21 soldiers have been killed, others have been wounded and vehicles, weapons and ammunition have been taken. It seems that these are mainly acts of rebels (both the signatories to the peace process such as SLA and JEM and other groups), although the Mission does not normally determine responsibility. Some think that the reason for such attacks is related to frustration and mistrust of AMIS on the part of the various rebels. Similarly, ‘on 7 January [2008], a UNAMID [AU/UN Hybrid operation in Darfur] resupply convoy was shot at by Sudanese armed forces two kilometres outside of Tine [Western Darfur]. A Sudanese driver was injured while a diesel tanker and an armoured personnel carrier were severely damaged’.

This situation raises a twofold legal problem. The first one concerns the protection provided for peacekeepers vis-à-vis peace enforcement personnel. Under IHL, attacks on AMIS personnel amount to attacks on civilians, while attacks

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85 Op. cit., fn. 78, p. 1; see also the executive summary of the Report, para. 3. It has been said that ‘the Sudan Liberation Army faction of Minni Minawi (SLA/MM) have been responsible for attacks on civilians, humanitarians, the AU Mission (AMIS) and some of the violence in the internally displaced person (IDP) camps. Their leaders have been given Government jobs and land’.


87 Secretary-General’s Report, op. cit., fn. 42, para. 9.

against UNAMID\textsuperscript{89} personnel may not necessarily be so as the latter is specifically mandated with enforcement powers and so may be a legitimate target of combat, and entitled to ‘rights of a belligerent’.\textsuperscript{90} It has to be noted (though the details are not within the scope of this work) that any action against (or for that matter by) UNAMID personnel must be in compliance with the rules of IHL\textsuperscript{91} (in particular, the rules of necessity, humanity and proportionality) the contraventions of which may constitute war crimes.

Moreover, the 1994 Convention on the Safety of the United Nations and Associated Personnel provides protections for UN peacekeepers including those deployed under Chapter VII such as UNAMID (to a civil war situation), unless they ‘are engaged as combatants against organized armed forces and to which the law of international armed conflict applies’.\textsuperscript{92} Article 7(1), for example, imposes a duty upon states (the host state in particular) to ensure that ‘United Nations and associated personnel, and their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate’. In principle, hence, UNAMID personnel (that embraces military, police and civilian units) must enjoy these and similar protections, as they are not in any sense engaged in combat with organized military forces there. But Sudan is not a party to the 1994 Convention, despite the fact that it signed ‘the Status of Forces Agreement’ with the UN/AU for the deployment of UNAMID on 10 February 2008.\textsuperscript{93}

The second and probably the most serious challenge is that the assaults against aid workers, aid convoys, peacekeepers and even civilians in IDP camps by rebel groups and bandits have increased. Determining the identities of the attackers has become difficult due to the proliferation and fragmentation of the movements there. The SLA-Mini Minawi has splintered into nearly five groupings, while JEM has suffered perhaps fewer but, nevertheless, similar splinters.\textsuperscript{94}

\textsuperscript{89} See SC Res 1769/2007. Under para. 15 and on the basis of Chapter VII of the UN Charter, UNAMID ‘is authorized to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities in order to: (i) protect its personnel, facilities . . . and humanitarian workers, (ii) support . . . effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians . . .’; by the same token, the United Nations Mission in Sudan’s (UNMIS) mandate was extended to Darfur by SC Resolution 2706/2006—it was a Chapter VII mandate and therefore not merely a peacekeeping operation.

\textsuperscript{90} See Green, \textit{op. cit.}, fn. 13, p. 381; see also B. Flappe, ‘International Peace Operations’ in Dieter Fleck (2nd ed.), \textit{The Handbook of International Humanitarian Law} (2008) p. 647, para. 1308. This paragraph underlined that: ‘when peace operations include elements of peace enforcement, international humanitarian law must be applied’.

\textsuperscript{91} Green, \textit{ibid.}, p. 385; for some endeavours to extend the protections to some special operations, see \textit{Optional Protocol to the Convention on the Safety of the United Nations Personnel} (New York, 8 December 2005).

\textsuperscript{92} Art. 2(2); see also M. Bourloyannis-Vrailas, \textit{op. cit.}, fn. 88, at 560–590.


\textsuperscript{94} According to the ICG Report (\textit{op. cit.}, fn. 78, pp. 13–14), SLA (Mini Minawi) has been splintered into five: SLA/Unity, the Ahmed Abdelshaafie group, the Abdel Wahid
Several new rebel groups have also emerged during the past few years or so. The Special Envoy of the Secretary-General for Darfur, Mr. Jan Eliasson, underlining this challenge to the peace process, submitted that, ‘the movements have coalesced around five groupings’. That is why the requirement for combatants to distinguish themselves from civilians is so important.

This challenge (and the developments therein) obviously affects the efforts to protect humanitarian norms in Darfur. The proliferation and fragmentation of rebel groups and their respective leadership would mean that determining command and hierarchy (in effect the application of IHL to their operations) within each rebel group becomes blurred. Another aspect of this problem is that it would be difficult to identify who does what in their own respective localities and areas of movement. It may be assumed that the signatories to the Darfur Peace Agreement (as recognized by Sudan, the UN, AU and other regional actors) as parties to the conflict have expressed commitment to abide by IHL (including not to attack aid workers, peacekeepers and civilians) and, therefore, the crimes are committed by non-signatory rebels or bandits. However, some reports in fact indicate the commission of grave violations by DPA signatories. The SLA/M factions of Mini Minawi rebels ‘have been responsible for attacks on civilians, humanitarians, the AU mission [AMIS] and some of the violence in the . . . IDP camps’ (ICG, 2007, i).

In short, the Sudanese Government and Darfur rebels have unambiguous duties to protect the civilian population and civilian objects, including aid workers, peacekeepers and humanitarian aid during the conflict. The latter has an aspect on the prohibition of starvation of a population during the conflict. In spite of denials and accusation and counter-accusation from both sides, the violations are apparent and are of a serious nature. Breaches by the government armed forces involved indiscriminately attacking villages and towns, mostly during military engagement. The ICC, in the Al-Bashir case referred, for example, to ‘two counts of war crimes: intentionally directing attacks against a civilian group, and the Khamees Abdallah (later formed National Redemption Front Coalition in Asmara) group; similarly, the Darfur Independent Front, JEM-Eastern Command, JEM-Collective Leadership, the Shahama Movement, etc., emerged from JEM in defiance of Khalil Ebrahim’s leadership.  

95 Including the NMRD, the Revolutionary Democratic Front Forces (RDFF), United Revolutionary Force Front, Sudan National Liberation Movement, United Front for Liberation and Democracy (ICG, 2007:14).

96 Report of the Secretary-General (S/PV5832), p. 3. The groups are: SLA-Unity, the United Resistance Front (URF), SLA-Abdul Shafi, SLA-Abdul Wahib and JEM-Khalil Ibrahim.

97 The Inquiry Report (op. cit., fn. 39, para. 283) stated: ‘Based on its investigations and the pattern of air attacks which it has established, the Commission is of the view that the military bears responsibility for a very large number of indiscriminate air attacks which resulted in the death of numerous civilians’. However, whether the nature of later attacks and alleged violations (such as the 2008 operations in towns of Abu Suruj, Sirba and Seleia) can be characterized as indiscriminate attacks against military targets or proportionality issues relating to military targets is not clear.
population as such or against individual civilians not taking direct part in hostilities—Article 8(2)(e)(i); and pillaging—Article 8(2)(e)(v)’ (see Press Release op cit); the President persistently denied the charges. The crimes of the Janjaweed centred on widespread abuses against civilians and civilian objects. Equally, the main actions of rebel movements can be characterized as crimes committed against aid workers, peacekeepers and humanitarian assistance. The acts of some factions or banditries may not be governed by the rules of IHL, yet their actions/omissions may entail personal criminal responsibility under IHL (and also under Sudanese law), depending on the nature of their acts and the link between what they do and the Darfur civil war (Inquiry Commission, para. 296).

How is then the international community (including Sudan) responding to these extreme breaches?

4. Responses of the International Community

The parties to this conflict, in particular the Government of Sudan, have certainly primary responsibility to respect and protect the civilian population in Darfur. This entails the duty to ensure that state forces (and associated militia) do obey the rules, and taking appropriate measures against violations by government forces and others. Sudan has been persistent in its claim that it is acting to restore law and order as a response to ‘the tribal conflict’ in Darfur. It also insisted that there are no systematic and deliberate assaults against civilians by its regular and other armed groups operating under its control. However, it is widely believed ‘that ... Sudan has failed to protect the rights of its own people. The measures it has taken to counter the insurgency in Darfur have been in blatant violation of international law’.

The government has undertaken some positive measures: The ICRC noted that ‘Sudan’s ratification in 2006 of the 1977 Additional Protocols signified a step forward in the protection of conflict victims’. The arrest of Ali Kushayb in Sudan, a Janjaweed militia leader who was implicated for war

98 Sarah El Deeb, ‘Sudan’s President: Arrest Warrant a Conspiracy’, Associated Press, 5 March 2009. Al-Bashir told his cabinet that ‘the tribunal, the United Nations ... were “tools of the new colonization”’.

99 See e.g. SC Res 1769/2007, para. 15; see also Inquiry Commission Report, op. cit., fn. 39, para. 626; see generally Green, op. cit., fn. 13, ch. 17.


101 Ibid.; see also ICC Press Release op. cit., fn. 4. The ICC ‘alleged that this campaign started soon after the April 2003 attacks on El Fasher airport as a result of a common plan agreed upon at the highest level of the Government of Sudan by Omar Al-Bashir and other high-ranking Sudanese political and military leaders. It lasted at least until 14 July 2008, the date of the filling of the Prosecutor’s Application for the warrant of arrest for Omar Al-Bashir’.

102 See <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/sudan>. 
crimes, and ‘launching a campaign to disarm militias and restrict the use of weapons in Darfur—an apparent reference to the notorious Janjaweed and other government-aligned forces’ must also be noted. While the UN Secretary-General rightly welcomed the call for a ceasefire, saying the world expects “concrete progress”, the JEM rebel group considered it as ‘rhetoric and propaganda’. Because of the fluidity of the situation, and the fact that the rebels are also particularly involved in gross crimes against civilians, aid workers and humanitarian assistance, the international community’s crucial role (and duty) to respond collectively to prevent violence remains.

From a humanitarian law perspective, the ongoing, widespread and indiscriminate violence against the people of Darfur (and other civilians) is a breach of an erga omnes character, which must be met with appropriate, timely and concerted international response. So far, the international community has tried to help out in various ways, inter alia, facilitating specific settlement of the conflict, imposing arms embargo, carrying out an inquiry into violations, inter alia, of IHL, referrals of some criminal cases to the ICC, and deploying peacekeeping and peace enforcement operations to Darfur. Taking into account the focus of academic endeavour, which is on the criminal and ICC aspects of the issue, the effectiveness and challenges of peacekeeping operations in Darfur and their implications for protecting civilians merit particular attention.

The UN SC, in its Res. 1556 of 2004 (as a first Council action), strongly condemned ‘violations of ... humanitarian law by all parties to the crisis ... including

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106 See Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory Advisory Opinion, ICJ Repts, 2004, paras 157, 158; see also Yihdego, op. cit., fn. 18, pp. 199–203.

107 For the efforts of the AU through its especial Envoy for Darfur, Dr. Salim Ahmed Salim, see at <http://www.africa-union.org/DARFUR/homedar.htm>; see also International Crisis Group, ‘The EU/AU Partnership in Darfur: Not yet a Winning Combination’, African Report No 99, 25 October 2005. The EU has been a major financial contributor as well.


109 See M. Happold, op. cit., fn. 72, p. 226. This has been both legally and politically controversial, in particular the indictment of the Sudanese incumbent President as war criminal in 2008. It is not yet clear whether this factor has helped or aggravated the humanitarian crisis in Darfur. See further Williams et al., op. cit., fn. 73.

110 The measure was not unanimous. While countries such Russia, USA, and UK were in favour of this Resolution, China and Pakistan abstained. Some claim economic and other ties as reasons for such division; see Peter Goodman, ‘China Invests Heavily in Sudan’s Oil Industry: Beijing Supplies Arms Used on Villagers’ Washington Post, 23: 12:2004, p. A01 at <http://www.washingtonpost.com/wp-dyn/articles/A21143-2004Dec22.html>.; for responses of the SC to violations of IHL in general, see
indiscriminate attacks on civilians’, and acting under Chapter VII, endorsed ‘the deployment of international monitors, including the protection force’ of the African Union to Darfur ‘under the leadership’ of the AU. The Resolution emphasized that the deployment of peacekeepers will be from African countries, while the international community was also urged to support the process (in material and financial terms). This led to the deployment of AMIS to Darfur, the initial mandate of which was only to monitor the humanitarian ceasefire and the protection of its monitors. This operation was terribly under-resourced in both human and logistical terms and, therefore, was not able to protect AMIS personnel let alone Darfur civilians from violent and indiscriminate attacks.111

This led to the Council taking further measures, and later in 2006, it expanded the mandate of the United Nations Mission to Sudan (UNMIS) to Darfur, which was initially deployed in 2005, to oversee the North–South peace process.112 Unlike AMIS, UNMIS was empowered, inter alia, to facilitate humanitarian aid in Darfur; to support the AU mission; and most importantly to use force in defence of its personnel and ‘without prejudice to the responsibility of the Sudanese Government, to protect civilians under imminent threat of physical violence’.113 Again, UNMIS could not cope up with the dynamics of the conflict; not only was it fully mandated to defend the civilian population but also it was not fully deployed due to human and logistical constraints and, thus, was not an effective peacekeeping operation114—in fact, the murders of AMIS personnel occurred while UNMIS was deployed in Darfur.

Consequently, the Council, ‘noting with strong concern ongoing attacks on the civilian population and humanitarian workers’ (emphasis original), and the obstacles to humanitarian assistance, among other things, unanimously adopted Res. 1769 of 2007 to deploy the AU/UN Hybrid Operation in Darfur (UNAMID). Based on Chapter VII, the Mission was authorized (a) ‘to take the


112 The North–South problem is different from the Darfur situation—for further details see ICG Report 2008, infra, fn. 129.

113 The mandate enshrined in Res 1706/2006 was based on Chapter VII, but the details also contain some enforcement measures. Sudan (and maybe the people) had strong objections on this move; see e.g. ‘Darfur protesters condemn UN plan’, BBC News, 8 March 2006 at <http://news.bbc.co.uk/2/hi/africa/4785066.stm>. It was decided to have up to 10 000 military personnel and 715 civilian police personnel, but this was not practical and so UNMIS was as ineffective as AMIS.

114 ‘UNMIS admits delay of Darfur Heavy Support Package’, Sudan Tribune, 29 June 2007; see also ICG Report, op. cit., fn. 54.
necessary action’ subject to its area of deployment and its capabilities, (b) ‘to ensure the security and freedom of movement of . . . humanitarian workers, and (c) to ‘prevent the disruption’ of the peace process and ‘armed attacks, and protect civilians’—the caveat ‘without prejudice to the responsibility of the Sudanese Government’ was also reiterated. This mandate is much broader than the powers of UNMIS, and the Mission is now operational in around 55 locations of deployment in Darfur.115 UNAMID has been making efforts to protect civilians and investigate military attacks against them.116 In the early months of the Mission’s deployment, the UN Special Envoy for Darfur held that:117

The Mission is doing its utmost to adopt a more proactive a posture through increased presence, especially in internally displaced persons camps. To that end, the UNAMID Police Commissioner has dramatically increased the number of police patrols, which now take place from 8 a.m. to 6 p.m., and is constructing a number of police posts in those areas with a view to maintaining a 24-hour presence. The Force Commander is also exploring options for increasing the presence of forces in key areas.

Despite the commendable effort and commitment of peacekeepers and troops and other resources contributing countries, however, UNAMID is not yet effective in providing civilian security. For example, a cattle-herder in October (2008) told reporters that ‘these peacekeepers . . . can’t stop the government or those who attack us’.118 It was also reported that:119

In May (2008), when government police attacked the town of Tawila in North Darfur and its camp for the displaced—burning houses, looting the market and beating people—UNAMID did not intervene militarily, opting instead to try to pressure the government’s police commander to stop the attack.

These and other similar occurrences are evidence of the helplessness of the Mission to protect civilians in Darfur. However, it is equally difficult to blame UNAMID for each occurrence of this sort. For example, it is not clear whether UNAMID is supposed to use force to protect civilians in the Tawila incident as the action involved policing rather than military action of the parties to the conflict. However, the Darfur (UN) Commission stated as follows:

115 For details and activities, see at <http://www.un.org/Depts/dpko/missions/unamid/>. It was authorized to have up to 26 000 military and police personnel (including civilian staff).
118 ‘Darfur Peacekeepers Offer no Protection – IDPs’, IRIN, 20 October 2008. The interviewee added that ‘even UNAMID is scared’.
119 Ibid.
Normally, in an international armed conflict the civil police force does not formally take part in the hostilities and can, at least theoretically, be considered as a non-combatant benefiting from the safeguards and protections against attack. However, in the particular case of the internal conflict in Darfur, the distinction between the police and the armed forces is often blurred. There are strong elements indicating occurrences of the police fighting alongside Government forces during attacks or abstaining from preventing or investigating attacks on the civilian population committed by the \textit{Janjaweed}. There are also widespread and confirmed allegations that some members of the \textit{Janjaweed} have been incorporated into the police. President Al-Bashir confirmed in an interview with international media that in order to rein in the \textit{Janjaweed}, they were incorporated in ‘other areas’, such as the armed forces and the police. Therefore, the Commission is of the opinion that the ‘civilian’ status of the police in the context of the conflict in Darfur is questionable.\footnote{The \textit{UN Commission of Inquiry (op. cit., fn. 39, para. 422)}; see also \textit{ICC Press Release op. cit.} (fn. 4). The Court referred to the Sudanese police as participants of the Government crackdown in Darfur. It was, however, noted (by the \textit{Darfur Commission}), as a claim of the Government, that: ‘between January 2003 and November 2004, 685 policemen were killed by rebels, 500 were injured, 62 were missing, and 1247 weapons were looted from police stations’ (para. 421).}

It may well be that whenever the police forces take a direct part in armed hostility in Darfur, they forfeit their civilian status, and that the prevention of such attacks rests within the mandate of the Mission.\footnote{For the interaction between IHL and other legal regimes applicable to such situations, see e.g. S. Wills, ‘Military Interventions’, \textit{op. cit.}, fn. 52, at 387; see also \textit{ICC Press Release, op. cit.}, fn. 4. The Court referred the Sudanese police as participants in the government crackdown in Darfur.}

Clearly, UNAMID is essentially failing to meet its mandate (in particular, the protection of civilians) for three main reasons at least. Firstly, human and logistical constraints remain problems of the operation. The deployment of personnel is now only at a level of about 50\% of the anticipated number. The mission suffers serious logistical hurdles including the absence of monitoring helicopters.\footnote{As of 20 October 2008, it only secured to have 13 000 personnel—of that number, 7200 are armed soldiers. There are also three police units. See ‘Darfur Peacekeepers Offer no Protection – IDPs’, \textit{IRIN}, 20 October 2008; see also Report of the Secretary-General, \textit{op. cit.}, fn. 27, pp. 6–7.}

Secondly, there have been incidents when the mission and its convoys have become targets of attack. While most attacks are believed to be from rebel groups, there was one openly reported incident involving government forces.\footnote{Daniel Van Oudenaren, ‘UNAMID, IDPs and rebels attacked in North Darfur incidents’, \textit{Sudan Tribune}, 15 September 2008) at <http://www.sudantribune.com/spip.php?article28601>; ‘UNAMID forces were ‘ambushed by up to 60 men armed with AK-47s’, \textit{BBC}, 23 May 2008.} Finally, while the troops are hailed for their ‘friendly’ and supportive attitude towards
local people, there seems to be a growing sense of frustration and mistrust for failing to provide security and protection. The UN Special Envoy for Darfur, in his call upon the international community to strengthen UNAMID, was honest in saying that ‘the Mission will not be able to meet the high expectation of Darfur’s civilians . . . this is particularly worrying since we risk losing their confidence if we are not able to meet those expectations’. These are, and will be, failings of the international community indeed, although it is not too late to rectify them.

5. Conclusion

Many draw a parallel between the responses of the international community to Darfur and Rwanda and assert some identical failures including: ‘The issue of whether state sovereignty should deter international action, an emphasis on keeping an existing peace process on track and not confronting human rights abuses . . ., and a tardy and inadequate response to a crisis in Africa by the United Nations Security Council’. Clearly, actual and widespread attacks against civilians and their objects during armed conflict, as concerns of IHL, are beyond matters of state sovereignty. They are, and must be, concerns of the international community as a whole. This notion accommodates neither the exclusion of a state that has direct entitlement and responsibility to do something about such challenges nor the various excuses or disguises of third states not to discharge their international obligations. The inability of Sudan to arrest the situation is clear, although the government may (or may not) deserve credit for its recent measures. However, the inability of the international community to respond adequately to this crisis, in the context of offering multilateral protection to civilians, can be neither explained nor defended persuasively. The question to be asked here should certainly not be about bombing Sudan like the former Yugoslavia to end atrocities there. It must not be about unilateral humanitarian intervention either. Rather, why is UNAMID lacking the necessary human and logistical resources? How is the international community’s engagement with the parties in addressing IHL issues in Darfur?

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124 Report of the S-G, op. cit., fn. 46, p. 6. It was also said that ‘[E]xperience in United Peacekeeping has shown that the loss of the local population’s confidence can deal a severe blow to our efforts’ (clarification added).

There is perhaps a twofold explanation for this. The first explanation as stated in Res. 1769/2007 is that the Mission should be ‘predominantly African in Character’. This appears to be a good idea for several reasons: firstly, Sudan (as a host state) favours this approach. Secondly, it is good to delegate powers of the SC and empower the AU to deal with the crises in the African continent. Thirdly, it may be said that there are cultural and psychological benefits of such an approach.\textsuperscript{126} Aside from these advantages, however, ‘there are a number of reasons why a broader mix of troops is necessary. To obtain the required capabilities will necessitate seeking troop and police contributors from non-African countries’.\textsuperscript{127} More importantly, in responding to Darfur (and similar calamities), the primary issue must be how the civilian population can best be protected and not other differences (or ties) of third states with Sudan. The UN (and its member states) must be fully engaged in addressing this global concern and making such multilateral responses effective,\textsuperscript{128} of course without neglecting the crucial input of the AU (and its member states).

The second possible explanation concerns the need to focus on securing long-lasting peace in Darfur. Various actors (the UN, AU, individual states and key players such as Egypt, Chad, Libya, Eritrea and the SPLM of southern Sudan) have been active in engaging the parties in the peace process. Despite problems, these endeavours must be commended as positive deeds. The effort to unite rebel groups with the objective of bringing them into a negotiated agreement is particularly necessary for securing a lasting peace in Darfur (and in Sudan at large).\textsuperscript{129} The success (or failure) of these efforts undoubtedly has an impact on safeguarding civilian immunity in Darfur. In particular, uniting the various factions of Darfur will mean clarity in command and accountability of the rebel groups. However, it is doubtful whether these endeavours include putting pressure on, or offering help for, warring parties to comply with their IHL obligations.

By way of conclusion, the following points can be recommended or recalled for the benefit of both the parties to the conflict and the international community. First, as stated earlier, the parties to the conflict must cease attacking unarmed civilians, including those who are trying to help, or face consequences of their actions/omissions. They have to cooperate with UNAMID to care for the

\textsuperscript{126} Zwanenburg, \textit{op. cit.}, fn. 111, pp. 493–495.
\textsuperscript{128} See generally V. Röben, ‘Managing Risks to Global Stability: The UN Security Council’s New-found Role Post Iraq’, in D. König \textit{et al.} (eds), \textit{International Law Today: New Challenges and the Need for Reform}, (2008) p. 88. For critical appraisal on the reluctance of European and developed countries to participate in UN peacekeeping operation, see C. Gray, \textit{op. cit.}, fn. 84, pp. 223–224; she questioned: ‘how far is it legitimate for developed states to pay their peacekeeping contributions, to provide commanders and perhaps logistical support and transport, but not to provide significant numbers of actual troops for UN operations?’ See also E. Wet, ‘The International Constitutional Order’, (2006) 51 \textit{ICLQ} 6–8.
\textsuperscript{129} For the efforts underway to secure a peace deal, see ICG, ‘Sudan’s Comprehensive Peace Agreement: Beyond the Crisis’, \textit{Policy Briefing} 50, 13 March 2008; see also ICG Report, 2007, \textit{op. cit.}, fn. 78, pp. 16–20.
civilian population there. The world community must have the same voice on this. In this respect, the recent initiatives of the Government of Sudan should generally be encouraged (excluded is, of course, the general policy of expuling foreign relief and other socities from Darfur). Second, the international community in general and those third states who are overtly (or covertly) involved in the dynamics of the (Darfur) conflict in particular, as the ICRC President Jakob Kellenberger pointed out, ‘are under an obligation both to respect the rules of . . . [IHL] and to ensure that they are respected by others’.\textsuperscript{130} Specifically, those who are either uniting, or helping create new, rebel groups in Darfur, seem to have special responsibility to do so, owing to their connection with, and ability to influence, the rebels. The same is true for those states that are said to be good political and economic allies of Sudan—they ought to discharge their IHL duties (as stated in Common Article 1 of the CGs). Third, the community of states must dedicate and enhance their human, financial and logistical support to UNAMID with the aim of providing a better physical protection and relief assistance to Darfur and other civilians—especially to victims of the conflict (children, women and the displaced). Fourth, a concerted effort is needed to disseminate the rules (of IHL) and the consequences of their violations among Sudanese forces, the militia, the rebels and the population in Darfur, through all available means. Fifth, the crisis and tension over the issuance of an arrest warrant for the President, and its implications on the Darfur problem (and civilian protection), must be managed with calm and prudence, by both Sudan and the international community. While Sudan (and other countries) may protest the ICC’s action and claim ‘sovereign immunity’, this must not lead to further breaches of IHL and other duties. Finally, while Sudan can lawfully regulate the operations of foreign humanitarian agencies working within its territory, this must not be abused at the expense of the survival of its people.\textsuperscript{131} These suggestions would be fruitful if combined with efforts to secure durable peace, and a better political and economic condition in Darfur (and in the country more generally).


\textsuperscript{131} See Corder, \textit{op. cit.} (fn. 5): The UN said ‘the humanitarian groups Sudan had ordered expelled include Oxfam, Solidarities, Doctors Without Borders, Care and Mercy Corps . . . The UN Secretary-General Ban Ki-Moon called the move a “serious setback to lifesaving operations in Darfur”’. 