

Vacillating on Darfur: Responsibility to Protect, to Prosecute, or to Feed?*

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Abstract

The international community has responded to the crisis in Darfur in a seemingly haphazard manner. Yet, a closer examination reveals a complex normative environment where states must respond to three related, but sometimes conflicting, sets of human rights norms – the responsibility to protect, international criminal justice, and humanitarianism. Using competing theoretical explanations of state behaviour – those based on self-interest and those based on norms – allows us to examine the relationship between these norms and map the international response to Darfur.

Keywords

constructivism, Darfur, humanitarian intervention, humanitarianism, International Criminal Court, international criminal justice, rationalism, Responsibility to Protect

For more than six years, a human rights and humanitarian disaster has been simmering in Darfur in western Sudan. It has taken place against the backdrop of the end of a civil war in southern Sudan as well as the US global war on terror in which Sudan has come to be seen as a key ally. Up to 300,000 people have been killed and 2½ million displaced¹ as a result of the fighting between the Sudan Liberation Army (SLA), the Justice and Equality Movement (JEM), the Sudanese government in Khartoum, and the government-back *janjaweed*.

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¹ IRIN, 'IDPs out of reach as violence hinders agencies', 2 October 2008, <http://www.irinnews.org/Report.aspx?ReportId=80703>, accessed 24 October 2008.

There has been much hand wringing, large amounts of money have been given to humanitarian efforts, war criminals have been indicted, multiple cease-fires and peace deals have been signed and ignored, a weak African Union (AU) peacekeeping force was sent to Darfur to monitor a non-existent peace, and an equally toothless UN peacekeeping force has been (partially) deployed.

All of this has occurred in the midst of three interrelated international normative, legal, and political developments. The first is the debate over the so-called ‘responsibility to protect’ (R2P), which was first put forth in a coherent and internationally relevant form by the International Commission on Intervention and State Sovereignty (ICISS)² and recognised by states at the World Summit in September 2005.³ The second area of development is international criminal justice, and in particular the creation of the International Criminal Court (ICC). Third, humanitarianism – the provision of food, medical, and other assistance in the midst of conflict – has a long-standing place in the history of war. R2P⁴ formed the background to the discussion over how the international community⁵ should respond to Darfur. However, it proved less than decisive, as no muscular intervention or other similar activity has occurred to deal with what has variously been identified as genocide, war crimes, and crimes against humanity. Rather, the ICC allowed – for a while anyway – the member states of the UN to avoid their responsibility to protect by engaging in their responsibility to prosecute, as such human rights violations in Darfur were referred to the ICC two years after the conflict in Darfur broke out. Humanitarianism, has also allowed states to avoid more concrete action to address the widespread violence. Darfur has thus represented the normative developments in the areas of human rights, international criminal justice, and humanitarianism while also highlighting the role that realist perceived state interests play in responding to human rights violations and humanitarian crises in the midst of contemporary conflict.

² International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: IDRC, 2001).

³ ‘2005 World Summit Outcome’, UNGA Res. 60/1, 15 September 2005, <http://www.un.org/summit2005/documents.html>, accessed 19 November 2008.

⁴ Even though the World Summit did not happen until two and a half years after the start of the current conflict in Darfur, the concept was still ‘out there’ and talked about as an evolving norm, and was thus part of the discussion even before the World Summit officially recognised it. The World Summit was only one step – albeit a very important one – in the normative evolution of R2P.

⁵ I am using ‘international community’ in its most simplest and basic sense – the collection of states and state-based organisation.

A number of important questions regarding these normative developments are relevant: What does R2P mean in practice? Has the reification of international criminal justice allowed states to evade R2P? If so, have these courts actually allowed conflict to fester while maintaining a veneer of the reassertion of civilised norms? To what extent does humanitarianism allow states to evade other international responsibilities? How can we conceptualise the interaction between these norms and state interest? This paper will thus trace the development of the international response to Darfur and place it within the context of these three norms which seem to represent the 21st century commitment to human rights while at the same time representing the international community's continuing propensity to avoid the responsibility found in these norms. It will place the interaction between these norms in the continuing metatheoretical debate between rationalism and constructivism. It will ask which best explains how the international community has dealt with Darfur in the context of these emerging/developing norms – arguments from state interests or arguments from norms? I will argue that it is not an either/or situation, and, drawing on previous work,⁶ will show that both lines of reasoning play a role in explaining international responses to Darfur.

The focus here is on the West and other associated democratic powers – and in particular the US. This is for two reasons. First, these are the states that actually have the capabilities to organise, pay for, and carry out humanitarian interventions. Second, these, along with some democratic/democratising post-conflict states, are the states which have the greatest cognitive association with these norms and which, theoretically, would be the most vulnerable to domestic and international activism on these issues. They are thus the most likely to engage in activities which conform to these norms (e.g. to support humanitarian interventions or international prosecutions). If they do not respond to such norms, it is highly unlikely that other great powers, such as Russia or China would. This generic group of democratic powers will be handled as one entity for this high-level metatheoretical exercise, although variations obviously exist and will be noted.⁷

⁶ Kurt Mills and Anthony Lott, 'From Rome to Darfur: Norms and Interests in US Policy Toward the International Criminal Court', *Journal of Human Rights*, 6/4: 497–521 (2007).

⁷ One might object that the US, especially during the administration of George W. Bush, and as exemplified by UN Ambassador John Bolton, has been extremely resistant to the norms and actions discussed in this article. However, as this article will detail, even the Bush administration has been forced to change its declared behaviour as a result of the ongoing debate over Darfur. Further, calling into question assumptions about the unitary and rational nature of states, it can be pointed out that the Clinton administration had different approaches to the issues in question, even if its actions were not 100% different from the Bush administration, and that the new

The Responsibility to Protect

The discourse on the right and responsibility to intervene militarily to protect the rights of people outside of one's particular country has existed for decades, and even centuries.⁸ However, the modern normative framework must be traced back to the aftermath of the Holocaust when, in the wake of this tragedy, the world stated its determination that it would not allow genocide to occur again. The Cold War saw little development of the 'never again' norm and did not witness its invocation in any meaningful sense.⁹ Although there was certainly discussion about intervention before the 1990s,¹⁰ it was not until the end of the Cold War that a serious international political debate on humanitarian intervention could occur as the UN Security Council began citing human rights and humanitarianism as bases for UN sanctioned military action.¹¹ However, hopes that the international community would act forcefully to enforce the dormant norms against genocide and other human rights violations were quickly dashed, with the UN failing to respond quickly – or at all – in Bosnia, Rwanda and Kosovo, among other crises.

The developing norm of a right and, indeed, a duty to intervene to protect gross violations of human rights was given voice in 2001 by the International Commission on Intervention and State Sovereignty in a report entitled *The Responsibility to Protect*. It recognised a shift in the human rights vs. state sovereignty discourse by arguing that claims to sovereignty entailed responsibilities. It also moved the debate away from discussing a *right* to intervene to a *responsibility* to protect those who might be threatened by gross violations of human rights or humanitarian crises.¹²

Obama administration has, rhetorically at least, put forth a very different vision of US responsibilities and its relationship with the international community than its immediate predecessor.

⁸ See Alex J. Bellamy, *Responsibility to Protect* (Cambridge: Polity Press, 2009); Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, DC: The Brookings Institution, 2008); Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Ithaca: Cornell University Press, 2003), pp. 52–84; Kurt Mills and Cian O'Driscoll, 'From Humanitarian Intervention to the Responsibility to Protect', in Robert Denemark et. al. (eds.), *The International Studies Compendium Project* (Oxford: Wiley-Blackwell, forthcoming 2010); Thomas Weiss, *Humanitarian Intervention: Ideas in Action* (Cambridge: Polity Press, 2007).

⁹ Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

¹⁰ See Mills and O'Driscoll, 'From Humanitarian Intervention to the Responsibility to Protect'.

¹¹ Kurt Mills, 'United Nations Intervention in Refugee Crises after the Cold War', *International Politics*, 35/4: 391–424 (1998).

¹² ICISS, *The Responsibility to Protect*.

This norm was endorsed by the UN Secretary-General's High-level Panel on Threats, Challenges and Change¹³ and the UN Secretary-General, Kofi Annan, highlighted and affirmed this developing norm in a report intended to set the agenda for the 2005 World Summit.¹⁴ He also called on the Security Council to adopt principles for the use of force. The 2005 World Summit Outcome document stated that the international community has a responsibility to address widespread gross violations of human rights, even if it means using force.¹⁵ Yet, the devil is in the details, and the final document included a reference to 'on a case-by-case basis' and had no clear criteria on which to make such a decision, indicating continuing discomfort with this norm. The emerging R2P norm gained further support in April 2006 when the UN Security Council passed resolution 1674 which echoed the World Summit Outcome document language on the responsibility to protect.¹⁶

It should be noted at this point that the concept of R2P, as elucidated by both the ICISS and the World Summit Outcome document, is wider than humanitarian intervention. In addition to the 'responsibility to react,' the ICISS also identified the 'responsibility to prevent' and the 'responsibility to rebuild'. While both of these latter are important, they are not as germane to the current discussion given that the recognised 'responsibility to react' was the most important, far-reaching, and innovative of these 'responsibilities'. Further, the focus of the argument in this article is on what the international community does when prevention fails or is not attempted in the first place. In addition, as the World Summit Outcome document argues, the responsibility to react might involve 'appropriate diplomatic, humanitarian and other peaceful means' as well as the use of force under Chapter VII. Again, though, the recognition of the responsibility to use Chapter VII action in cases of widespread gross violations of human rights is the most significant, given the potential new duties it imposes on states and the direct challenge to sovereignty. States and non-state actors have been pursuing humanitarianism for a long time; the practice and development of the idea of intervention has been much more haphazard. One might consider both activities to be on a continuum, but they are in some ways fundamentally different activities¹⁷ - palliative vs.

¹³ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, (2004), <http://www.un.org/secureworld/>, accessed 19 November 2008.

¹⁴ Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, 21 March 2005, <http://www.un.org/largerfreedom/>, accessed 19 November 2008.

¹⁵ 'World Summit Outcome', p. 30.

¹⁶ UNSC Res. 1674, 28 April 2006.

¹⁷ Kurt Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (Basingstoke: Macmillan Press, 1998), pp. 128–130.

curative¹⁸ - and thus will be considered as different sets of norms and practices for purposes of this article.

The Developing International Criminal Justice Regime: The Responsibility to Prosecute

Just as the R2P regime has accelerated its pace of development in the last few years, so the international criminal justice regime has grown dramatically since the 1990s. The modern international criminal justice regime has its roots in attempts to prosecute the perpetrators of the Holocaust. The International Military Tribunal at Nuremberg established the precedent that individuals who committed the most heinous violations against fellow humans could be tried by international courts. The crimes for which they could be tried were established and given legitimacy. The 1948 Genocide Convention expanded upon the crimes against humanity prosecuted at Nuremberg to add the element of intent to eliminate particular groups of people.¹⁹ And that is where the development of the institutional foundations of international justice stayed for a few decades. Most who perpetrated atrocities in numerous wars faced no prosecution. Suggestions of an international criminal court led nowhere.

In the 1990s, however, things changed dramatically, as the international justice regime acquired teeth and was institutionalised. The UN Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY), which served to resurrect the principles of Nuremberg. The International Criminal Tribunal for Rwanda was created in 1994 after 800,000 people were killed in the space of 100 days. It was supposed to represent the world's revulsion at such brutality, although, like the ICTY, as much as anything it served as an attempt to divert attention from the fact that the world had allowed genocide to happen yet again. Yet, the very fact that there was a felt need to cover up the failure to respond illustrated the effect of the developing responsibility to protect. Why try to cover up inaction unless there was an expectation that the UN, the Security Council, states – somebody – should respond?

¹⁸ Mills and O'Driscoll, 'From Humanitarian Intervention to the Responsibility to Protect'.

¹⁹ Dawn L. Rothe and Christopher W. Mullins, 'Darfur and the Politicization of International Law: Genocide or Crimes against Humanity?', *Humanity & Society*, 31/1: 83-107 (2007), pp. 90-92.

The pinnacle of the developing international justice regime was, of course, the creation of the International Criminal Court with the signing of the Rome Statute in 1998, which represented a dramatic leap forward in the international community's commitment to prosecute individuals for the most horrible of crimes. It has taken on cases in four countries to date. Over the strenuous objection of the US, the Security Council voted to refer Darfur to the ICC for investigation. Fifty-one individuals, including some Sudanese government leaders, were identified for investigation for complicity in war crimes and crimes against humanity.

The Neo-Humanitarian Moment: The Responsibility to Feed

Along with the responsibility to protect and the international criminal justice regime, norms and practices associated with providing humanitarian assistance in the midst of conflict have evolved. Provision of humanitarian assistance has become an expected activity of states. Over the last three decades, supplying humanitarian assistance in conflict has grown dramatically, and international humanitarian organisations (IHOs) – nongovernmental as well as intergovernmental – have grown in prominence. In fact, they have become so prominent that they can affect the course of conflicts and have found themselves the objects of manipulation. I have identified this elsewhere as neo-humanitarianism, 'which is characterised by the embeddedness of humanitarianism within, rather than at the margins of, contemporary conflict. It is distinguished by the explicit manipulation of humanitarianism for political or military gain on the ground in a conflict, or as a substitute for political and military action'.²⁰ Thus, humanitarian action has become part of the conduct of war.²¹ This is certainly not to say that humanitarian assistance – and the state and non-state actors involved in its provision – have not had a significant impact in saving peoples' lives. They obviously have – including in Darfur. The point here, though, is that such assistance frequently becomes entangled with political agendas. Further, while IHOs may see protection as part of their

²⁰ Kurt Mills, 'Neo-Humanitarianism: The Role of International Humanitarian Norms and Organizations in Contemporary Conflict' *Global Governance*, 11/2: 161–183 (2005), p. 162.

²¹ For more on the development of humanitarianism see Arthur C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (Oxford: Oxford University Press, 2002); Larry Minear, *The Humanitarian Enterprise: Dilemmas and Discoveries* (Bloomfield, CT: Kumarian Press, 2002); Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action* (Ithaca: Cornell University Press, 2002); David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (New York: Simon and Schuster, 2002).

mandate, there are fundamental limits to the kind of protection they can provide. There are thus, as indicated above, significant differences between the potentially curative – or at least much more robust palliative – protection humanitarian intervention can provide – and the purely palliative protection humanitarian action entails.²²

In the case of the Former Yugoslavia, the international community did little to stop the fighting and killing that was going on. Instead, it provided a lot of money to the UN High Commissioner for Refugees (UNHCR) to deliver food to the civilians stuck in the middle of conflict. It also provided UN peacekeepers with a very weak mandate – essentially to protect themselves and sometimes to help out UNHCR and other IHOs. By providing such assistance, the big powers could say they were doing something – that is, responding to the as yet unnamed responsibility to protect – while not endangering their soldiers too much – as well as providing a rationale for bottling displaced people up in a few so-called safe zones, rather than allowing them to leave the Former Yugoslavia and become refugees in Europe. Airlifting in large amounts of aid to Rwanda and the refugee camps in eastern Zaire, while focusing on the humanitarian nightmare being faced by more than two million refugees, allowed the major countries to reorient discussion away from the fact that they failed to prevent or stop genocide and from the need to separate militants from the refugee population.²³

We thus see an interesting dynamic emerging between the responsibility to protect norm, international justice, and humanitarianism. The former creates pressure for states and the UN to respond to highly visible armed conflicts and gross violations of human rights. The latter two, however, provide states and the UN the ability to evade such responsibilities. However, the very fact that they have recourse to such mechanisms demonstrates, first, that international justice norms are acquiring increased normative status and second, that there is a ‘responsibility to feed’ norm. In the following sections I will, first, briefly introduce the theoretical milieu in which the response to Darfur will be analysed, then I will discuss the development of the response to Darfur in terms of the theoretical synthesis, and finally I will map out this response into a more specific model for understanding state behaviour in humanitarian crises through the prism of the responsibilities to protect, to prosecute, and to feed.

²² For a discussion of the limits of such protection activities on the part of IHOs, see Kurt Mills, ‘Refugee Return from Zaire to Rwanda: The Role of UNHCR’, in Howard Adelman and Govind C. Rao (eds.), *War and Peace in Zaire/Congo: Analyzing and Evaluating Intervention, 1996-1997* (Trenton, NJ: Africa World Press, 2004).

²³ Ibid.

Norms vs. Interests?

What does the international response to Darfur indicate about developing norms/practice in the areas of humanitarian intervention (R2P), international justice mechanisms, and humanitarianism? To answer this question, I will place these developments in the context of the continuing debate within international relations theory between interest-based explanations (rationalism) and norms-based (constructivism) explanations of state behaviour.

Dominant international relations theory paradigms, including neorealism and neoliberalism, assume that states have predefined interests and that they pursue these interests in a rational manner. They thus come under the 'rationalist' metatheoretical framework. States are portrayed as working within a logic of consequences. The only thing that matters is what a state hopes to get out of a situation – i.e. how best to achieve its particular interests. Constructivism, on the other hand, makes no such assumptions. Instead, it argues that state interests are not predefined and that they can change with a state's changing identity. Thus, external factors, most importantly international norms, can affect how a state views itself and its interests. In this view, states act from a logic of appropriateness. States are forced (or socialised) into acting in a way consistent with patterns of expected international behaviour.²⁴

The debate between these two metatheoretical frameworks usually puts them in opposition – either rationalism is correct or constructivism better explains how states act; yet, state action is much more complex than either of these approaches admits. Instead, a mixture of the two is usually required to understand how states make decisions and act. Yes, states act on their interests, but they may be forced (or drawn) into changing their interest calculations based on non-material forces – i.e. norms. Sometimes, the logic of consequences seems to explain state action, while other times the logic of appropriateness makes more sense. And sometimes, both will operate simultaneously.

This suggests that, rather than being discreet explanations, the two logics interact with each other in a variety of ways. Indeed, March and Olsen argue that:

Political action generally cannot be explained exclusively in terms of a logic of either consequences or appropriateness. Any particular action probably involves elements of each. Political actors are constituted both by their interests, by which they evaluate their expected consequences, and by the rules embedded in their

²⁴ Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996).

identities and political institutions. They calculate consequences and follow rules, and the relationship between the two is often subtle.²⁵

There are three possible relationships between these two logics. First, both logics may operate simultaneously. That is, state decision makers may be influenced both by realist self-interest and by externally generated expected patterns of behaviour. In such a situation, neither logic is more important than the other, although they may lead in different directions. This has been described elsewhere as a concurrent ordering logic. Second (and third), one logic may structure the decision-making environment of the state. There are two modes of structuring – constraint and constitutive. Self-interest may constrain the effect of normative inputs (i.e. internationally expected behaviour) and the possible responses to such inputs. Or, norms may constitute the identity and perceived interests of the state.²⁶

As noted above, the responsibility to protect, or the so-called ‘never again’ norm, creates an expectation that states will respond to genocide and other mass violations of human rights. This norm is observed much more in the breach. States thus respond to their internal interests not to be drawn into conflicts in which they have little stake. Yet, media outcry and NGOs put pressure on states to respond in some manner. They tap into commitments states have made not to abuse human rights and stop the most egregious violations. States feel pressure to act in a way that is expected of them – particularly liberal democratic countries whose identity is based on respecting human rights and being a model for other countries.

The creation of regional war crimes tribunals and the ICC have led to an international normative framework supportive of bringing perpetrators of crimes against humanity to trial. Many states, including all European states and quite a number which have recently emerged from widespread societal conflict, have signed on to the crowning achievement of the international justice regime, although the US has not. This indicates that both a logic of appropriateness and a logic of consequences are active, although domestic normative expectations are also at work simultaneously.²⁷

Pictures of starving children on TV in developed countries help to activate the humanitarian normative framework – it is our duty to provide food and

²⁵ James G. March and Johan P. Olsen, ‘The Institutional Dynamics of International Political Orders’, *International Organization*, 52/4: 943-969 (1998), p. 952.

²⁶ For a more in-depth exposition of this framework, see Mills and Lott, ‘From Rome to Darfur’.

²⁷ Ibid.

medical aid to helpless victims. Yet, the logic of consequences can also play a role in leading states to engage in humanitarianism.

Thomas Risse suggests that there is a third 'logic' which governs how states decide which norms or rules to apply. He calls this the logic of arguing. In many situations actors' interests are not fixed but may be in conflict, or at least unsettled, and open to change:

Argumentative and deliberative behaviour is as goal oriented as strategic interaction, but the goal is not to attain one's fixed preferences, but to seek a reasoned consensus. Actors' interests, preferences, and the perceptions of the situation are no longer fixed, but subject to discursive challenges. Where argumentative rationality prevails, actors do not seek to maximize or to satisfy their given interests and preferences, but to challenge and to justify the validity claims inherent in them – and they are prepared to change their views of the world or even their interests in light of the better argument.²⁸

Further, as with the logic of appropriateness, the process of arguing can be constitutive: 'Interest and identities are no longer fixed, but subject to interrogation and challenges and, thus, to change... Since the validity claims of identities and interests are at stake in theoretical and practical discourses, an argumentative consensus has constitutive effects on actors'.²⁹ Thus, in periods of normative flux, for example, states may feel a conflict between norms and may move between them in more unpredictable ways. This article posits a multi-stage process where states may move through various responses as normative pressures from the three responsibilities become more important in constituting state interests. However, there may be real conflicts between these sets of norms which will make the normative milieu more complex, leading to a fourth type of ordering logic – argumentative. Here, while norms constitute the decision-making environment of states, the evolving and ongoing conflictive nature of different norms complicates the relationship between them, opening up more space for 'argument' among states. Thus, as R2P and international criminal justice norms evolve, there is scope for ongoing vacillation between them.

It should be noted here that there is no assumption that military intervention of the type envisioned in R2P and amongst its advocates is always the appropriate response to genocidal and genocide-like situations as have been seen in Darfur³⁰ – although it might be. Rather, it sits atop a hierarchy of

²⁸ Thomas Risse, "Let's Argue!": Communicative Action in World Politics', *International Organization*, 54/1: 1-39 (2000), p. 7.

²⁹ *Ibid.*, p. 10.

³⁰ Indeed, some have argued that the risks of intervention might outweigh the benefits in Darfur. See, for example, Gareth Evans, 'The Responsibility to Protect and The Use of Military

responses in terms of costs to states – financial, military, and sovereignty – and as such is the least likely to be used. It is also frequently the most advocated for by civil society and thus states come under significant pressure to intervene. The relative newness of R2P and international criminal justice as normative frameworks, and their application – either theoretically or practically – in Darfur make this an interesting test case for investigating the complex interaction between norms and interests in state decision-making, as well as the interaction among different norms.

Interests, Expectations and Responsibilities in Darfur

In February 2003 the Sudan Liberation Army, a group of rebels in the province of Darfur in western Sudan, attacked government forces in response to a perceived marginalisation and underdevelopment of the ‘black’ region by the ‘Arab’ government in Khartoum.³¹ The government labelled them bandits³² and engaged in further repression, including supporting the *janjaweed* (Arab nomad militants) who attacked villages.³³

The conflict rapidly expanded and by April, refugees from Darfur began arriving in Chad to escape the fighting and the attacks on villages by the *janjaweed*. These attacks amounted, according to many observers, to ethnic cleansing, given that they were carried out against particular ethnic groups – the Fur, Zaghawa and Masalit (the same groups from which the rebels came) – by rival ethnic groups (with the support of the government). In July the government ‘unleashed the *Janjaweed* on a grand scale’.³⁴ The violence was aimed, to a large extent, at civilians and seemed intended to displace them.³⁵

Force,’ Presentation by Gareth Evans, President, International Crisis Group, to Seminar on International Use of Force, World Legal Forum, The Hague, 11 December 2007, <http://www.crisisgroup.org/home/index.cfm?id=5209&cl=1>, accessed 9 April 2009.

³¹ As Gérard Prunier points out, this division into ‘African’ and ‘Arab’ is inherently contested and bears little connection to the reality of the complexity of identity construction in the region. Gérard Prunier, *Darfur: The Ambiguous Genocide* (2nd ed.) (Ithaca: Cornell University Press, 2007).

³² Ibid., pp. 92–93.

³³ In fact, this movement did not come out of nowhere. Darfur has a long history of marginalisation by the government, short-lived low intensity conflict, and regional interference. On the recent history of Darfur, see Ibid; Julie Flint and Alex de Waal, *Darfur: A Short History of a Long War* (London: Zed Books, 2005).

³⁴ Prunier, *Darfur: The Ambiguous Genocide*, p. 99.

³⁵ Ibid., p. 102.

Humanitarian Responses to 'Tribal Conflict'

The first cease-fire between the rebels and the government came in September, although this rapidly fell apart. By this time, there were 65,000 refugees from Darfur in Chad and on 1 September UNHCR put forth an appeal for humanitarian assistance for these refugees. At the same time, the UN Resident Co-ordinator estimated that there were 400,000 internally displaced persons in Darfur.³⁶ The government was doing everything it could to prevent assistance from reaching those in need. It prevented a USAID mission from visiting parts of Darfur, stopped the first US shipment of food aid arriving at Port Sudan, and declared soon after that there was no food crisis. At the end of December the government denied that there was an insurrection in Darfur; rather, it was just a local tribal conflict (although just a few days later President Omar al-Bashir did identify it as a rebellion).³⁷

This identification as tribalism has significant parallels with Rwanda. In Rwanda, the genocide was identified as tribal conflict. By identifying it thus, the international community was able to obfuscate the situation, evade its responsibilities, and fend off pressure to intervene to stop the killing, seeing little interest in involving itself with a conflict in central Africa. Later on, when more than two million refugees had fled Rwanda, hiding perhaps 50,000 genocidaires and other militants who continued to destabilise the region, talking about the humanitarian crisis and focusing on the cholera epidemic in Goma allowed the US to use its military might to bring in food to the camps rather than intervene to address the ongoing security crisis. In the same way, the tribalism discourse allowed states to focus on the effect of the government-sponsored violence in Darfur and focus on humanitarian aid rather than dealing with the underlying causes of the conflict.

The humanitarian discourse continued into 2004 as UNHCR characterised the situation as 'a race against time' to feed the refugees and IDPs in January.³⁸

³⁶ UNHCR, 'Supplementary Appeal for Emergency Assistance to Sudanese in Eastern Chad', 1 September 2003, <http://www.unhcr.ch>.

³⁷ Prunier, *Darfur: The Ambiguous Genocide*, p. 109.

³⁸ UNHCR, 'UN refugee agency appeals for emergency funds for Sudanese refugees', 30 January 2004, <http://www.unhcr.org/news/NEWS/401a74fb2.html>, accessed 21 October 2008. 'Race against time' became a favorite phrase to describe the situation in Darfur, as the UN, governmental officials and NGOs also used it throughout 2004 and beyond. Focusing on the immediate need to feed people contributed to the depoliticisation of the situation. 'Sudanese Children Dying of Hunger', *BBC News*, 9 June 2004, <http://news.bbc.co.uk/1/hi/world/africa/3790559.stm>, accessed 21 October 2008; 'Sudan aid arrives, "more needed,"' *BBC News*, 29 July 2004, <http://news.bbc.co.uk/1/hi/uk/3935783.stm>, accessed 21 October 2008; World

The first aid did not reach the camps in Chad until mid-February, and most of the IDPs were still out of reach because of insecurity. The humanitarian discourse initially allowed Western states to pursue their interests, which were two-fold: First, ensure that the peace deal between Khartoum and the southern rebels succeeded. There was worry that focusing on Darfur the peace accord could negatively impact the peace accord. Second, avoid direct military involvement, since there was little upside in terms of cold, hard traditional state interests in sustained engagement. In fact, given the post-9/11 interest in Sudan as an ally in the war on terror, US interests might have been negatively impacted.³⁹ Portraying it in terms of humanitarian disaster made it possible for the US and other countries to argue that they were doing something by providing humanitarian assistance without affecting other interests.

The interest-norms equation began to change in March 2004, a year after the conflict erupted, when Western editorial pages started using the ‘G’ word – genocide. For the previous year, the ‘never again’ norm was safely in the background. However, once more information started coming out and editorial writers and publics had a better idea of what was going on – and ‘*janjaweed*’ started to become a common phrase among the chattering classes – there was pressure to start addressing the situation. February and March brought a series of massacres which, to a certain extent, represented a turning point. The US, focusing on the humanitarian aspect of the conflict, said that food production in Darfur would decrease by 60% over the course of the year.⁴⁰ A chorus of calls to do ‘something’ began to erupt. One of the first was an opinion piece by Nicholas Kristof in late March, using the previously unspoken word ‘genocide’.⁴¹ Other editorials followed. The UN Humanitarian Coordinator for Sudan, Mukesh Kapila, who was leaving Sudan, spoke out forcefully, comparing Darfur to Rwanda.⁴² April 2004 was the 10 year anniversary of the beginning of the Rwandan genocide and it was impossible to ignore the parallels – George Bush talked about the ‘atrocities’ in Darfur and

Food Program, ‘New donations boost rations but more contributions needed for Sudan’, 29 May 2006, <http://www.wfp.org/ENGLISH/?ModuleID=137&Key=2117>, accessed 12 October 2008.

³⁹ Prunier, *Darfur: The Ambiguous Genocide*, pp. 89-90; Samantha Power, ‘Dying in Darfur’, *The New Yorker*, 30 August 2004, <http://www.newyorker.com/archive/2004/08/30/040830fa>, accessed 21 October 2008.

⁴⁰ Prunier, *Darfur: The Ambiguous Genocide*, pp. 112-114.

⁴¹ Nicholas D. Kristof, ‘Will We Say “Never Again” Yet Again?’, *The New York Times*, 27 March 2004.

⁴² Prunier, *Darfur: The Ambiguous Genocide*, pp. 114; Power, ‘Dying in Darfur’.

Kofi Annan (on whose watch as head of UN peacekeeping the genocide occurred) talked about possible ‘military action’.⁴³

In April, the AU came to an agreement with the government and other parties to the conflict to deploy a small force – African Union Mission in Sudan (AMIS) – to monitor a humanitarian ceasefire which fell apart almost immediately. It did not have a mandate to stop the fighting, or even to protect civilians and use force.⁴⁴ Yet, it was the first concrete action taken by the international community to address even a small portion of the security situation.

In July, the UN Security Council finally got into the act when it passed Resolution 1556 calling on Sudan to disarm the *janjaweed* by the end of August. Yet, there was little prospect that this would or could happen. Resolution 1564 of 18 September called for the end of human rights violations, suggested that the AU send in more troops, and set up a commission to investigate whether or not genocide was taking place. It had little practical value, nor did Resolution 1574 in mid-November. The members of the Security Council thus felt international pressure to address a situation that was acknowledged as going beyond a simple humanitarian disaster, although the steps they took up to this point allowed them to evade their responsibilities.

Yet, the ‘G’ word would not go away. Andrew Natsios of USAID had described the situation in Darfur as genocide, and the US House of Representatives passed a resolution declaring Darfur a genocide in July 2004 and asked President Bush to consider intervening. The following month, a group of evangelical Christian leaders representing 45,000 churches called on Bush to send troops to Darfur to stop the ‘genocide’.⁴⁵ In September, US Secretary of State Colin Powell uttered the ‘G’ word, at least partly because of pressure coming from fundamentalist Protestants who were crucial for the upcoming elections, as well as prominent Jewish groups. Yet, at the same time, Powell stated that this did not require the US to take any military or other action to stop the genocide. Thus, on the one hand, the logic of appropriateness as expressed in the never again norm, filtered through various international and domestic levels, found verbal expression at the highest reaches of the US government. At the same time, however, its normative force (or lack thereof) was demonstrated by Powell’s disclaimer. Yet the very fact that the disclaimer had

⁴³ Power, ‘Dying in Darfur’.

⁴⁴ International Crisis Group, *To Save Darfur*, Africa Report No. 105, 17 March 2006, pp. 14–15, http://www.crisisgroup.org/library/documents/africa/horn_of_africa/105_to_save_darfur.pdf, accessed 23 October 2008.

⁴⁵ ‘US House calls Darfur “genocide”’, *BBC News*, 23 July 2004, <http://news.bbc.co.uk/1/hi/world/africa/3918765.stm>, accessed 23 October 2008; Power, ‘Dying in Darfur’.

to be made illustrated the growing salience of the nascent responsibility to protect.⁴⁶ This point was further illustrated the same month when the European Parliament passed an almost unanimous resolution saying that Darfur was “tantamount to genocide.” Although there is no meaningful distinction between something being labelled as ‘genocide’ or ‘tantamount to genocide,’ using such terminology serves as an escape hatch from the responsibility to protect and the (disputed) obligations which flow from the Genocide Convention. Moral outrage (flowing from a logic of appropriateness) can be expressed while logic of consequence-based interests (avoiding military entanglement) can be upheld. Both the German Foreign Minister and British Foreign Secretary have also identified Darfur as genocide, with little further action.⁴⁷

However, the debate over whether or not Darfur amounted to genocide also allowed the international community to evade calls for concrete action. In Europe, some countries providing a lot of money and saying nothing (Scandinavia and the Netherlands), other countries pursuing their various interests in the region, and, as noted, the European Parliament saying that it was ‘tantamount to genocide’. Further, some European countries seemed to tie Darfur in with disapproval of the US’ invasion of Iraq and opposed US initiatives to condemn Sudan (France claimed that it was civil war rather than genocide or ethnic cleansing).⁴⁸ The AU, which had agreed to send in an observer force in 2004, said, in the words of Gérard Prunier, that it was ‘a case of mass-murder without any known perpetrators’.⁴⁹ In January 2005, the UN Commission of Inquiry came out with a report saying that it had identified crimes against humanity but not genocide.⁵⁰ This set off a firestorm of debate, and rather than saying that there was very little functional difference between genocide and crimes against humanity – large numbers of people were being killed regardless – there was debate about why the UN had not found genocide and whether or not the ‘lesser’ crimes against humanity also qualified under the

⁴⁶ Although, certainly not for Sudan. It had signed the Genocide Convention only ten months before Powell’s statement, and, as Flint and de Waal observe, ‘now saw this legalistic quibbling as proof that even an international covenant like the Genocide Convention was just a piece of paper,’ Flint and de Waal, *Darfur: A Short History of a Long War*, pp. 131–132.

⁴⁷ Eric Reeves, ‘Europe’s Indifference to Darfur,’ *The New Republic*, 27 October 2006, posted on the JUSTWATCH e-mail list, 27 October 2006.

⁴⁸ Power, ‘Dying in Darfur’.

⁴⁹ Prunier, *Darfur: The Ambiguous Genocide*, p. 145.

⁵⁰ William A. Schabas, ‘Darfur and the “Odious Scourge”: The Commission of Inquiry’s Findings on Genocide’, 18 *Leiden Journal of International Law*, 18/4: 871–885 (2005); Rothe and Mullins, ‘Darfur and the Politicization of International Law’.

emerging responsibility to protect norm. These side debates allowed states to continue to have recourse to humanitarianism without committing anything except money. Or, to put it another way, the availability of humanitarianism allowed states to evade their responsibility to protect.

Prosecuting Genocide

Another out for the international community also, ironically, demonstrated the power of perceived international standards of behaviour. During the first few months of 2005 the international community debated referring Darfur to the ICC. A number of countries wanted to support the fledgling ICC and further develop international justice norms. At the same time, in the same way that the ICTY and ICTR helped to shift criticism from inaction in Bosnia and Rwanda, it would help deflect pressure for intervening in Darfur. The Bush administration was implacably opposed to the ICC, and argued vociferously against this, maintaining that Darfur could be added to the ICTR's mandate in Arusha. Yet, it faced a conundrum. There was very great pressure to 'do something' in Darfur. And, having identified it as genocide there were increasing expectations that it put something behind the words. Further, it had come under a lot of pressure after it 'de-signed' the Rome Statute in 2002. So, there was pressure from the 'never again' norm and from the international justice norm. Although caving into either one was not palatable to the Bush administration, it used good, old fashioned realist calculation to resolve the issue – go for the lesser of two 'evils' – support the ICC even while denying you are doing so and in the process gain points for 'doing something' in Darfur while sparing your troops, even as this calculation was framed by normative pressures.

The Security Council voted to refer Darfur to the ICC on 31 March 2005.⁵¹ The ICC officially began an investigation in Darfur in early June 2005.⁵² However, the referral to the ICC, and eventual investigation, had, at best, a short-term effect on the course of the conflict and the extent of the fighting. While the first part of 2005 saw somewhat diminished fighting and an improved humanitarian access situation, fighting began in earnest again by September. Attacks on civilians increased, creating more displacement and decreased humanitarian access, particularly in West Darfur where NGOs were forced to withdraw and humanitarian organisations were only able to

⁵¹ Warren Hoge, 'U.N. Votes to Send Any Sudan War Crime Suspects to World Court,' *The New York Times*, 1 April 2005.

⁵² 'Court probes Sudan "war crimes,"' *BBC News*, 5 June 2005, <http://news.bbc.co.uk/1/hi/world/africa/4612005.stm> (accessed 19 November 2008).

reach 45% of the population.⁵³ The tribalism discourse continued. Robert Zoellick, US Deputy Secretary of State, said in November 2005 “It’s a tribal war, that has been exacerbated by other conditions, and frankly, I don’t think foreign forces ought to get themselves in the middle of a tribal war of Sudanese.”⁵⁴ This would, on the one hand, appear to be a repudiation of previous government statements labelling the situation genocide. However, it was perfectly consistent with the second part of the genocide discussion found in the US and elsewhere – an attempt to preclude any military involvement. Further, given that his remarks were made in Khartoum, his comment would also be a way to placate the Sudanese government, an important ally in the ‘war on terror’.

In addition to government, and government-sponsored *janjaweed* attacks, infighting occurred between an increasingly fractious rebel movement. The SLA split into two, more or less ethnically-based groups, and the JEM had previously spawned a splinter group, the National Movement for Reform and Development. These groups made various alliances with each other and fought each other at times (sometimes as result of government manipulation). The conflict spread to Chad as refugees fled to Chad, Chad hosted Darfurian rebel groups, and Sudan hosted Chadian rebels groups which aimed to overthrow President Idriss Deby.⁵⁵

Avoiding Responsibilities: Peacekeeping with No Peace to Keep

As the fighting continued and it became obvious that the ICC referral was having little effect on its intended targets, and that the AU, whose peacekeeping mission (African Union Mission in Sudan – AMIS) had grown to 7,000, was not up to the job of imposing peace in Darfur or ensuring the terms of various cease-fires which had been signed,⁵⁶ there was renewed focus on a UN peacekeeping force with a more robust mandate and greater resources than the AU to stop the fighting.

A partial recognition of the inadequacy of AMIS came in January 2006, and again in March 2006, when the AU voted, in principle, to transfer its operations

⁵³ International Crisis Group, *To Save Darfur*, p. 2.

⁵⁴ Quoted in *Ibid.*, p. 4.

⁵⁵ *Ibid.*, pp. 5, 7–13.

⁵⁶ An indicator of its weakness vis-à-vis Khartoum is that its 25 helicopters were based at government airfields which closed at dark. *Ibid.* p. 16. For a further critique of AMIS, see Eric Reeves, ‘Genocide Without End? The Destruction of Darfur,’ *Dissent*, Summer 2007, <http://www.dissentmagazine.org/article/?article=856>, accessed 21 October 2008.

to a UN peacekeeping operation under pressure from Western countries. In the following months it reaffirmed this decision, and set a deadline of 30 September to end the AMIS mandate and transfer to a UN peacekeeping operation,⁵⁷ although, this transfer did not take place.

In the meantime, new peace talks were occurring in Abuja, sponsored by the AU. A deadline of 30 April was set for an agreement. A peace deal – the Darfur Peace Agreement (DPA) – was finally signed on 5 May 2006 between Khartoum and one group of rebels. The peace agreement began to fall apart almost as soon as it was signed. Rebel groups which did not sign continued attacks, and the government never seriously reigned in its own attacks, launching a new offensive against the non-signatory rebel groups in August. Pressure continued to mount for a UN force, and as a way to derail such proposals, Khartoum put forth a proposal to use its own forces to stop the killing.⁵⁸ Given that it was responsible for much of the violence, this was not taken seriously.⁵⁹ Finally, on 31 August, the Security Council passed a resolution, sponsored by the US and UK, extending the mandate of UNMIS, which was created to monitor the North-South peace agreement, to Darfur to help implement the DPA, thus taking over from AMIS. Resolution 1706 referred to the R2P provisions in the 2005 World Summit outcome document. It also invoked Chapter VII and used the term ‘all necessary means’ to provide for the ability for UNMIS to use force to, among things, ‘protect civilians under the threat of physical violence’. Yet, the resolution also indicated that the consent of the government would be required, something which Khartoum has been reluctant to provide. Thus, to the extent the Security Council was kowtowing to the government, it was not in fact living up to the ultimate responsibility to protect, even in cases of government nonconsent, which it recognised in the second paragraph of the resolution. It also stated that the force in Darfur should have a ‘strong African participation and character,’ another concession to Khartoum, which did not want non-African troops on its soil.

Yet, the US continued its rhetoric of support for a UN mission in Darfur. On 20 September, President Bush criticised Khartoum for impeding the UN force and stated that ‘If the Sudanese government does not approve this

⁵⁷ UNSC, *Report of the Secretary-General on Darfur*, S/20006/591, 28 July 2006.

⁵⁸ UNSC, ‘Letter dated 17 August from the Secretary-General addressed to the President of the Security Council’, S/2006/665, 17 August 2006.

⁵⁹ Kofi Annan stated that ‘the document does not indicate a willingness on the part of the Government of Sudan to agree to a transition to a United Nations operation in Darfur.’ UNSC, ‘Letter dated 10 August from the Secretary-General addressed to the President of the Security Council’, S/2006/645, 14 August 2006.

peacekeeping force quickly, the United Nations must act. Your lives and the credibility of the United Nations is at stake'.⁶⁰ However, Bush did not specify exactly what the UN should do if Sudan did not accept UN peacekeepers in Darfur, and any attempt to impose a force in Darfur without Khartoum's approval would almost assuredly be vetoed by China and Russia. Yet, by calling on the United Nations to act, Bush burnished the US' R2P credentials while diverting attention from the fact that the UN is made up of states and that the US plays a very big role in determining what the UN decides to do. He shifted the responsibility from individual states to an amorphous international community, as personified by the UN. Domestic political forces with a normative agenda and the international 'never again' norm created pressure for Bush to react in some way, although not to the extent the promoters of the norms might prefer. UNMIS never deployed in Darfur, a result of the opposition of Khartoum to having non-AU troops in Darfur, which it knew it could not control in the same way as it had with AMIS, and the unwillingness of the Security Council to stand up to the government. By giving Khartoum a veto over the deployment of UN troops in Darfur, the international community ensured that it would not have to actually carry out its purported responsibilities under the R2P norm.

Inching Towards Responsibility?

The rest of 2006 and the first half of 2007 saw continued intransigence on the part of Khartoum in the face of attempts by the US and other countries to get a UN force into Darfur. A compromise in the form of a hybrid UN-AU force was proposed and initially accepted in principle by Khartoum in November 2006,⁶¹ although continued resistance by the government meant that the United Nations Force in Darfur (UNAMID) was not officially created by the Security Council until 31 July 2007 with resolution 1769 – 11 months after passing resolution 1706. This resolution affirmed previous support for R2P while authorising UNAMID under Chapter VII to, among other things, 'protect civilians, without prejudice to the responsibility of the Government of Sudan'. Thus, it recognised that Sudan was not fulfilling its responsibilities and so the international community was stepping in to fulfil them instead.

⁶⁰ United States, White House, 'President Bush Addresses United Nations General Assembly', 19 September 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060919-4.html>, accessed 30 November 2007.

⁶¹ Robert F. Worth, 'Sudan Says It Will Accept U.N.-African Peace Force in Darfur', *The New York Times*, 17 November 2006.

This resolution was followed by several months of torturous negotiations with the Sudanese government which called into question the Security Council's full acceptance of R2P. In the weeks following the resolution, the killing in Darfur increased, although with a somewhat different character. In addition to government-supported attacks, and the fighting among some rebel groups, some of the 'Arab' groups began engaging in tribal fighting to divide the spoils of war.⁶² This was further evidence that there was, in fact, no peace to keep in Darfur as the UN prepared to insert 26,000 peacekeeping troops into Darfur. An attack on AU peacekeepers by rebels which killed 10 AU soldiers also highlighted the chaotic situation in Darfur.⁶³

As the months wore on, Khartoum (as well as the AU, to a certain extent)⁶⁴ balked at allowing non-African troops to deploy in Darfur. It also failed to approve UNAMID's list of troop contributions, failed to allocate necessary land for UNAMID bases, asked for unacceptable provisions in the status of forces agreement, and refused permission for night flights by UNAMID. All of these had the effect of delaying the deployment of necessary elements of UNAMID and put restrictions on UNAMID's ability to do its job, essentially giving Khartoum a de facto veto over the force.⁶⁵ The response from the international community was tepid at best. Twenty-four helicopters necessary for the mission were not forthcoming from member states.⁶⁶ The UN took over from the African Union on 31 December 2007, with a troop strength of about 9,000 soldiers (just over 1/3 of the approved strength of 26,000, and only 2,000 more than AMIS) and still no helicopters, which are crucial for troop transport and other duties related to protecting civilians.⁶⁷

⁶² Jeffrey Gettleman, 'Chaos in Darfur on Rise as Arabs Fight With Arabs', *The New York Times*, 3 September 2007; Human Rights Watch, *Darfur 2007: Chaos by Design*, September 2007, <http://www.hrw.org/en/reports/2007/09/19/darfur-2007-chaos-design/> (accessed 19 November 2008).

⁶³ Jeffrey Gettleman, 'Darfur Rebels Kill 10 in Peace Force', *The New York Times*, 1 October 2007.

⁶⁴ Evelyn Leopold, 'UN, AU Differ on Composition of Darfur Peace Force', *Reuters*, 21 September 2007, <http://www.alertnet.org/thenews/newsdesk/N20317947.htm>, accessed 19 November 2008.

⁶⁵ *UNAMID Deployment on the Brink: The Road to Security in Darfur Blocked by Government Obstruction*, Joint NGO Report, December 2007, <http://www.humanrightsfirst.info/pdf/071221-ij-UNAMID-joint-report.pdf>, accessed 19 November 2008.

⁶⁶ Claudia Parsons, 'U.N. Urgently Seeking Helicopters for Darfur Force', *Reuters*, 21 October 2007, posted on the JUSTWATCH-L e-mail list, 22 October 2007.

⁶⁷ 'U.N. Force Takes Control in Darfur', *The New York Times* (Associated Press), 31 December 2007.

More than nine months on, UNAMID deployment had only reached 10,000, and continued to be affected by a lack of resources like helicopters. Further, as Secretary-General Ban Ki-moon noted, the situation was getting more dangerous, with attacks on UN and other international personnel, and nine peacekeepers being killed in three months. The lack of full deployment, as well as an apparent ability to adequately respond to the situation on the ground, indicated a continuing lack of will to directly address the security situation in Darfur.⁶⁸

At the same time, however, another aspect of the triumvirate of international responses to contemporary conflict was gaining in prominence again, as were potential conflicts. In April 2007 the ICC issued its first arrest warrants in Darfur – for Sudanese minister of State for Humanitarian Affairs Ahmad Haroun and *janjaweed* leader Ali Kushayb. The government refused to turn these people over to the ICC. Instead, it indicated that it was undertaking its own investigations of war crimes in Darfur (although this did not include these two).⁶⁹ It is obvious that the government was not serious about such proceedings and this was just a cynical ploy to avoid further pressure. Yet, it also indicates that it was feeling vulnerable in the face of international pressure, and may have been one contributing factor to its eventual agreement to the deployment of UNAMID.⁷⁰ The pressure increased significantly in July 2008 when the Prosecutor for the ICC, Luis Moreno-Ocampo, asked the ICC pre-trial chamber to issue an arrest warrant for President Bashir.⁷¹ This set off a fierce debate about the effect this might have on efforts to end the conflict (as well as the North-South peace accord). Some argued that this action would further entrench the Sudanese government, making it even more reluctant to stop the killing in Darfur.⁷² It might also embolden the rebels. The Justice and

⁶⁸ 'UN Chief Sees Obstacles to Helping Darfur, Somalia', *Associated Press* (7 October 2008), posted on the JUSTWATCH e-mail list, 8 October 2008. As of July 2009, 18 months after UNAMID began deployment, the helicopters still had not arrived, nor had the required troops – there were hopes that UNAMID might reach full troop strength by the end of the year – a full two years after its initial deployment. Andrew Heavens, 'Darfur peacekeepers still waiting for helicopters: UN', *Reuters* 12 July 2009, <http://www.alertnet.org/thenews/newsdesk/LC165469.htm>, accessed 15 July 2009.

⁶⁹ *Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593* (2005), <http://www.iccnw.org/documents/7thUNSCversionnttoUN29may.pdf>, accessed 14 October 2008.

⁷⁰ Alaa Shahine, 'Sudan says no evidence against ICC Darfur suspect', *Reuters*, 3 May 2007, posted on the JUSTWATCH-L e-mail list, 3 May 2007.

⁷¹ Colum Lynch and Nora Boustany, 'Sudan Leader To Be Charged With Genocide', *Washington Post*, 11 July 2008.

⁷² Julie Flint and Alex de Waal, 'This Prosecution Will Endanger the People We Wish to Defend in Sudan', *The Observer*, 13 July 2008, posted on the JUSTWATCH-L e-mail list, 13 July 2008, <http://www.guardian.co.uk/world/2008/jul/13/sudan.humanrights>.

Equality Movement said that given the genocide charges it would ‘not negotiate with a war criminal’.⁷³ There were also concerns that this might imperil the humanitarian mission, making it even more dangerous for humanitarian organisations to deliver assistance, as well as for the UNAMID peacekeepers.⁷⁴ Others argued that this was an important step to demonstrate that there was no impunity for those who commit atrocities, including heads of state, and that it could put further pressure on the government to stop the killing. The Security Council could indefinitely delay the prosecution, thus providing an incentive to the government.⁷⁵ The government obviously felt some pressure, given that its immediate reaction was to revive the previously mentioned investigations into Darfur, a thinly veiled attempt to avoid international scrutiny.⁷⁶

The response from the international community was ambiguous. The African Union and the Arab League called on the Security Council to suspend proceedings against Bashir. Russia suggested, too, that this might be the most appropriate course of action.⁷⁷ The Non-Aligned Movement argued that going after Bashir “could be conducive to greater destabilization with far-reaching consequences for the country and the region.”⁷⁸ President Thabo Mbeki of South Africa indicated that he was against prosecuting Bashir for fear of interfering with the peace process.⁷⁹ In addition, South Africa, Libya, China and Russia lobbied to have the proceedings against Bashir set aside in the context of negotiations to renew the mandate of UNAMID in July 2008.⁸⁰ Perhaps

⁷³ Marlise Simons, Lydia Polgreen and Jeffrey Gettleman, ‘Arrest Is Sought of Sudan Leader in Genocide Case’, *The New York Times*, 15 July 2008. Roberto Belloni makes a similar argument with respect to expectations by rebel groups for intervention on their behalf. Roberto Belloni, ‘The Tragedy of Darfur and the Limits of the “Responsibility to Protect”’, *Ethnopolitics*, 5/4: 327–346 (2006).

⁷⁴ Colum Lynch, ‘Indictment of Sudanese Leader Seen as Threat to Peacekeepers’, *Washington Post*, 20 July 2008.

⁷⁵ Steve Bloomfield, ‘African Union: Suspend Sudan Genocide Charge’, *The Independent*, 15 July 2008; John Norris, David Sullivan, and John Prendergast, *The Merits of Justice*, Enough Project, July 2008, http://www.enoughproject.org/files/reports/ICC_report_071408.pdf, accessed 15 October 2008.

⁷⁶ Thijs Bouwknecht, ‘Sudan to revive Darfur Court’, *Radio Netherlands Worldwide*, 25 July 2008, <http://www.rnw.nl/internationaljustice/icc/Sudan/080725-SCCED>, accessed 15 October 2008.

⁷⁷ Louis Charbonneau, ‘UN may want to suspend ICC action on Bashir – Russia’, *Reuters*, 22 July 2008, posted on the JUSTWATCH-L e-mail list, 24 July 2008.

⁷⁸ ‘U.N. Council Set to Renew Darfur Peacekeeping Mandate’, *Reuters*, 31 July 2008, posted on the JUSTWATCH-L e-mail list, 31 July 2008.

⁷⁹ ‘Charging Sudan’s Beshir Would Wreck Darfur Peace: Mbeki’, *Agence France Presse*, 26 July 2008, posted on the JUSTWATCH-L e-mail list, 27 July 2008.

⁸⁰ ‘UN split over Darfur Peace Force’, *BBC News*, 29 July 2008, available at <http://news.bbc.co.uk/1/hi/world/africa/7530501.stm>, accessed 29 July 2008.

the most intriguing response came from the United States. While it is not surprising that European and other associated countries would support the ICC actions and resist an attempt to tie it into the status of UNAMID, given their long-standing support for the ICC⁸¹, it is more curious that the US, which abstained on the vote to renew UNAMID's mandate, has been much more outspoken in supporting the ICC investigation. According to Alejandro Wolff, the deputy US ambassador to the UN, "The U.S. abstained in the vote because language added to the resolution would send the wrong message to Sudanese President Bashir and undermine efforts to bring him and others to justice."⁸²

That this pressure affected Sudanese calculations can be seen in its arrest of *janjaweed* leader Ali Kushayb. Sudanese law does not cover genocide, crimes against humanity or war crimes, and it seems clear that this was an attempt to appear to be cooperating with the ICC and head off attempts to go after Bashir.⁸³ This attempt failed when, on 4 March 2009, the ICC issued an arrest warrant for Bashir.⁸⁴ Given the controversy this has generated, it is unclear exactly what effect this will have in the long-run,⁸⁵ and whether Bashir will ever be brought to justice.

At the time of writing, the international community is inching towards responsibility, although the question is which responsibility – and to what

⁸¹ France declared that it would veto any Security Council resolution which suspended ICC actions against Bashir, and the United Kingdom said that it would not support such a suspension. Both countries have left open the possibility of suspending the investigation, but have provided unclear conditions for this to happen. 'France will veto any resolution deferring Sudan president indictment: Official', *Sudan Tribune*, 19 September 2008, posted on the JUSTWATCH-L e-mail list, 19 September 2008; 'British official denies plans to freeze ICC indictment of Sudan's Bashir', *Sudan Tribune*, 19 September 2008, posted on the JUSTWATCH-L e-mail list, 19 September 2008; Julian Borger, 'Khartoum conundrum', *The Guardian*, 16 October 2008, <http://www.guardian.co.uk/world/2008/oct/16/sudan-unitednations>, accessed 16 October 2008.

⁸² 'U.N. Votes to Extend Mission in Darfur', *CNN*, 1 August 2008, <http://edition.cnn.com/2008/WORLD/africa/07/31/un.darfur/index.html>, accessed 15 October 2008).

⁸³ 'Darfur militia leader in custody', *BBC News*, 13 October 2008, <http://news.bbc.co.uk/1/hi/world/africa/7666921.stm>, accessed 16 October 2008; Jeffrey Gettleman, 'Sudan Arrests Militia Chief Facing Trial', *The New York Times*, 14 October 2008.

⁸⁴ Marlise Simons and Neil MacFarquhar, 'Court Issues Arrest Warrant for Sudan's Leader', *The New York Times*, 5 March 2009.

⁸⁵ In the short run, the effects have been negative as Bashir expelled 13 international aid groups in retaliation, thus highlighting the potential for on the ground conflicts between humanitarianism and international criminal justice. 'Joint Darfur aid warning issued', *BBC News*, 24 March 2009, <http://news.bbc.co.uk/1/hi/world/africa/7962595.stm>, visited 9 April 2009; Christopher Fournier, 'Punishment or Aid', *The New York Times*, 28 March 2009.

extent it entails a sense of responsibility or imposed responsibility. For certainly there is a reluctance to engage in the responsibility to protect on the part of many of the main players on the international scene, and there is a reluctance to fully support the responsibility to prosecute by many of the world's leaders.⁸⁶ What does this tell us about the complicated interactions between the three responsibilities? The following section will briefly map the situation in Darfur onto the framework set out earlier in this article.

Mapping Darfur

To return to the theoretical discussion above, how can we conceptualise the international response to Darfur? As Figure 1 indicates, all four ordering logics can be observed in the international response, corresponding to four stages of international engagement with Darfur. The first stage corresponds roughly to the beginning of the conflict in early 2003 to the beginning of 2004. During this phase, the US and other major international actors had little direct interest in Darfur. They had broader interests in Sudan – the peace deal and Khartoum's cooperation in the 'war on terror'. The only normative pressure came in the form of viewing the conflict in Darfur as a humanitarian disaster. Thus, we see a clear situation where states were able to focus on their interests and use humanitarian aid (and very little of that) to manage the situation.

During the second stage, running from roughly early 2004 to early 2005, we see the continuing focus on perceived state interests – ensuring the peace deal was successful and the 'war on terror'. However, during this period there was increased international pressure as the chattering classes started going beyond the simplistic tribalism explanation and humanitarian disaster description to identify Darfur as genocide. Further, in the US, domestic pressure groups,⁸⁷ including the usual suspects – human rights organisations and other

⁸⁶ Indeed, even as the ICC has indicted rebel leaders for war crimes in relation to an attack on African Union peacekeepers – and seen one rebel leader give himself up to the ICC – it has come under intense pressure and criticism, in particular from many African states. Marlise Simons, 'Darfuri Rebel Commander to face War Crimes Charges', *The New York Times*, 18 May 2009; Colum Lynch, 'International Court Under Unusual Fire,' *Washington Post*, 30 June 2009.

⁸⁷ It should be noted that the situation in Darfur, in conjunction with the new normative language of R2P, has led to the development of one of the most developed and visible civil society movements since the anti-nuclear movement. This has included single-focus NGOs like the Save Darfur Coalition, <http://www.savedarfur.org> and The Darfur Consortium, <http://www.darfur-consortium.org/>. The Genocide Intervention Network, <http://genocideintervention.net/> and its student wing STAND, <http://www.standnow.org/>, and Enough, <http://www.enoughproject.org/>,

	2003 Beginning of the Crisis	2004 Publicity	2005 – 2007 Evolving Responsibilities	2007 – Present Justice to R2P and Back Again
Type of Logic Ordering	Constraining	Concurrent	Constitutive	Argumentation
Direction of Logic Ordering	<p>LoC: Peace Deal ‘War on Terror’</p> <p>↓</p> <p>LoAp: Feed</p>	<p>LoAp: International Publicity (Protect) → Domestic (Evangelicals) →</p> <p>LoC: Peace Deal → ‘War on Terror’ →</p>	<p>LoAp: Protect Prosecute</p> <p>↓ ↓</p> <p>LoC: Avoid Intervention</p>	<p>LoAr: Protect → Prosecute ←</p> <p>↓ ↓ ↓</p> <p>LoC: Avoid Do Not Peace Intervention Make Situation Worse</p>

Figure 1: Ordering International Behaviour in Darfur

LoAp: Logic of Appropriateness

LoC: Logic of Consequences

LoAr: Logic of Arguing

left-leaning entities – as well as Evangelical Christians, became more vocal. Thus, general international pressure arising out of normative concerns (humanitarianism transforming into ‘never again’), as well as significant domestic concern meant that the major international actors were under much more normative pressure to do something. Thus, these concurrent pressures led to the US identifying Darfur as genocide (logic of appropriateness) while stating the caveat that this did not mean that it actually had to take action to stop the killing (logic of consequences). There was thus responsibility on the part of the international community, but not necessarily a responsibility to protect.

In the third stage, running essentially from early 2005 to 2007, we can identify the shift to a logic of appropriateness-dominated environment. The identification of genocide and war crimes eventually led to increased pressure to respond, although there were two parallel pressures in this regard. The first came from the ‘never again’/evolving R2P norm to ‘do something’ to stop the international crimes. Having little interest in actually doing something substantial (i.e. some sort of military intervention/peacekeeping), the major powers were happy to support an ineffectual African Union peacekeeping effort which had no peace to keep and made little difference on the ground. The second pressure came from the nascent, although increasingly robust, international justice regime with the new ICC at its core. Although maintaining implacable hostility to the ICC, the US was forced by the overwhelming pressure to succumb and send Darfur to the ICC. This also, however, had the side benefit of releasing, at least for a time, the pressure to intervene. Thus,

founded by the Center for American Progress and the International Crisis Group, are focused more broadly on stopping genocide around the world. Justice for Darfur, <http://www.justice4darfur.org/> aims to support the ICC in bringing cases in Darfur.

international expectations (logic of appropriateness) constituted the decision-making environment in which the US (and other countries) made their calculations.

It became obvious that potential prosecutions by the ICC were not deterring the violence being carried out in Darfur and the peacekeeping force from the African Union did not have the ability to stop the killing. The creation of UNAMID reflected the continuing evolution of the decision-making environment for states and provides further support for the constitutive nature of international norms. The officially recognised (however weakly) responsibility to protect norm may, at least in this situation, have asserted itself beyond the responsibility to prosecute norm. Thus neither the initial recourse to humanitarianism, nor the recourse to the ICC, proved enough to divert the international expectation that the international community will protect those in need of protection. Yet, UNAMID has been beset with difficulties in deployment including acquiring enough troop commitments from states and resistance from Khartoum to non-African troops. And, given the acquiescence to Khartoum on many matters, it is far from a full expression of R2P. Further, the debate over the prosecution of Bashir indicates ambiguity and the real conflicts which might emerge between the various responsibilities. A large portion of the world has indicated its uncomfortableness with charging a sitting head of state with international crimes. This reflects a feeling among some heads of state that they might also be vulnerable to such actions if the Bashir prosecution goes forward. In addition, there are real concerns that such a prosecution could derail the search for peace in Darfur and endanger both civilians and peacekeepers even more. The same concerns were evident with regard to the indictment of Milosevic by the ICTY, although he found himself out of office only a year later and eventually before the ICTY in The Hague. Thus, normative expectations continue in this fourth phase to constitute the decision-making environment of powerful states. Yet, the apparent escalation up the hierarchy of responses to the crisis seems to have plateaued, with different approaches vying to win the argument.

It is not necessarily an either/or situation. The Balkans saw peacekeeping, with some R2P-like peace enforcement, alongside ICTY indictments. A similar situation is likely to continue in Darfur. It is possible that the Bashir arrest warrant could endanger UNAMID, humanitarian assistance (as has happened), and efforts to bring peace to Darfur. Yet, it is also likely that continued impunity will impede long-term peace and stability in the region. The international community is likely in for a continued period of argument over which normative prescriptions will work best for resolving Darfur – and work best for the states making such decisions – in the current argumentation stage.

Conclusion

It is more than six years since the Darfur crisis began in earnest. People are still being killed and displaced.⁸⁸ This would seem to indicate forcefully that states are firmly embedded in the logic of consequences. The big powers see little to gain from doing much to directly address the conflict, and potentially something to lose. Yet, there does seem to have been a shift in the basis on which states are making decisions *vis-à-vis* Darfur. Humanitarianism – the ‘responsibility to feed’ norm – initially allowed states a way to avoid real engagement. Yet, as the conflict has progressed, and the international uproar has grown louder, this was no longer enough. Referring Darfur to the ICC again allowed states to escape any real immediate action. However, the fact that the ‘world’s sole remaining superpower,’ which was adamantly against doing anything which might support the ICC, agreed to an action which conflicted with its stated core interests and policies, indicates the normative force of the responsibility to prosecute norm. This may not help the people in Darfur right now, but it could indicate a strengthening of the international criminal justice regime. Finally, the fact that the Western powers are now being forced to deal with Darfur in at least a slightly more forceful way may also indicate that the responsibility to protect is gaining a little power, if agonisingly slowly. The tension between these two normative frameworks is likely to continue, while the ability for humanitarianism to deflect these other two norms has decreased as the conflict has progressed.

⁸⁸ Although at a slower rate. ‘Darfur is Now a “Low-Intensity Conflict”: UN’, *Reuters*, 27 April 2009, posted on the JUSTWATCH e-mail list, 28 April 2009.