Ensuring a Responsibility to Protect:
Lessons from Darfur

by Anonymous*

During his tenure, former UN Secretary-General Kofi Annan stressed time and again that the principle of state sovereignty cannot be used as a shield for human rights abuses.[1] Over time, lawyers, diplomats, elected officials, and civil societies have influenced the legal and moral foundations of the traditional concept of State sovereignty, seeking to foreclose this legal defense for domestic violations. Indeed it is now generally accepted that the United Nations Security Council (Security Council) can authorize forceful humanitarian intervention under its Chapter VII powers when it determines that widespread domestic human rights abuses are a threat to international peace and security.[2]

Within this context, the "Responsibility to Protect" doctrine (commonly referred to as R2P) emerged as a means to locate an appropriate legal balance between state sovereignty and human rights. Only recently formulated, the R2P doctrine seeks to ensure that states respond to the human needs of people within their territory or under their control, and to codify international responsibility to protect a state's citizens in the event the state fails to fulfill its domestic obligations. In doing so, the R2P doctrine makes considerable contributions to defining state responsibilities under both human rights and international law.

This article provides a brief but crucial discussion of the R2P doctrine, its application to the conflict in Darfur, and suggestions for strengthening its implementation. As legally correct and morally compelling as humanitarian intervention is under the R2P doctrine, the ongoing crisis in Darfur demonstrates that state sovereignty can still trump human rights with little resulting consequence for the offending state. Darfur is one of the first situations where the media and diplomatic communities have invoked R2P, yet the subsequent actions and threats made pursuant to this doctrine have been largely ignored and rebuked by the Sudanese government. This first test of R2P reveals that the responsibility to protect remains an embryonic doctrine that is by no means self-executing and, at present, lacks the dexterity to overcome real world politics. But the R2P doctrine should not be seen as a failure. Like much of contemporary international law it needs time to evolve to achieve its maximum potential. Diplomats and politicians must learn how to use the doctrine, work towards its realization, and recognize the benefits it can produce in terms of conflict prevention and stability.

The Responsibility to Protect

The Responsibility to Protect doctrine emerged primarily from two reports. The first was issued in 2001 by the International Commission on Intervention and State Sovereignty (ICISS), entitled *The Responsibility to Protect*.[3] The Commission authored the report in response to concerns raised over humanitarian interventions in the 1990s.[4] The second report was commissioned by the UN in 2004 and authored by a high-level panel. Entitled, *A More Secure World: Our Shared Responsibility*,[5] it spoke of fashioning a "collective security" that guards people, regardless of their location, against poverty, infectious diseases, environmental degradation, inter-State conflict, internal conflict, terrorism, transnational organized crime, and nuclear, radiological, chemical, and biological weapons. The two reports joined the company of previous proposals that outlined parameters for humanitarian intervention pursuant to Security Council authorization or unilateral state action.[6]

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Members of the Ambororo tribe in south Darfur awaiting transport and resettlement in the Blue Nile State

Significantly, R2P reflects the ongoing transformation of traditional international law norms by enabling international law to address a moral imperative regardless of international borders. Traditionally, international law only regulated interstate interaction, preserving a state's sovereignty over domestic affairs. Increasingly, however, international law places greater responsibility on states with respect to the rights of citizens and even those outside a state's territory and control.

The two reports go so far as to claim that "the responsibility to protect" is "emerging" as a principle of customary international law.[7] The UN report urges the five permanent Security Council members not to use their veto powers against proposed humanitarian intervention[8] and endorses "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law [where] sovereign Governments have proved powerless or unwilling to pre-

vent."[9] The ICISS report uses similar language when describing humanitarian interventions.[10]

Genocide, the two reports make clear, is not the only situation that merits humanitarian intervention. This is in keeping with previous instances where the Security Council authorized humanitarian intervention and corrects the common misconception that humanitarian intervention should only occur if there is genocide. An expert on Africa at the Royal Institute of International Affairs (RIIA) in London correctly noted in early 2005 that over-emphasis on labeling the conflict in Darfur as genocide has "distracted from taking measures to actually stop the fighting."[11]

R2P also attempts to ease the concern that emerged after NATO's 1999 unilateral humanitarian intervention in Kosovo, which lacked Security Council authorization. The ICISS and UN reports stressed that the Council is the best place to deal with issues of international peace and security, and therefore holds the responsibility of authorizing humanitarian intervention. Neither report advocates the establishment of a right of unilateral humanitarian intervention,[12] reserving intervention as a last resort when "the

cally categorized as an option of last resort; thus, the doctrine seeks to ensure that a given situation never escalates to a point at which this would be required. Recognizing this, the ICISS report provides separate sections on the "Responsibility to Prevent," the "Responsibility to React," and the "Responsibility to Re-build."[17]

The Doctrine's Failure in Darfur

The ongoing crisis in Darfur represented the first test of the R2P doctrine. While many worked towards its application, the continuation of violence in Darfur reveals the extent of the doctrine's weaknesses.

The international community's failure to solve the Darfur crisis is rooted in the age-old dilemma that plagues international law and, by consequence, the R2P doctrine: How do you ensure that renegade states follow the rules? The traditional tactic of "naming and shaming" used by Human Rights Watch, Amnesty International, and the UN special procedures, among others, has proved to be largely ineffective to persuade Sudan to end its abuses. Sudan has ignored many of the strong-arm (albeit hollow) threats

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prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded."[13] R2P provides safeguards to ensure that the primary objective of a unilateral intervention is based on humanitarian concerns. The ICISS report lists specific operational principles that aim to hold the intervening force responsible. These include: ensuring the force has a clear and unambiguous mandate at all times; identifying a clear and unequivocal chain of command; appropriating adequate resources for its mandate; defining precise rules of engagement that fit the operational concept and adhere to fundamental principles of international humanitarian law; and maximizing coordination with humanitarian organizations.[14] Both reports agree that proportional means should be used such that "the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective,"[15] and that an intervention should have a reasonable chance of success and not be likely to worsen the situation.[16]

Finally, it is important to note that the R2P doctrine is not simply about humanitarian intervention, but also conflict-prevention and response. Indeed, humanitarian intervention is specifi-

of individual states such as the United States and the United Kingdom. In this author's view, both the UN's and Member States' failure to act on their threats has demonstrated to Sudan's government in Khartoum that it may do as it pleases without consequence. In early February 2007, the U.S. revealed plans to block increased financial transactions of Sudanese citizens and companies if Sudan continues to resist UN peacekeepers from entering Darfur. Whether or not the U.S. will follow through on this threat is yet to be seen. Punitive measures and other strategies implemented by the international community and individual states (e.g., Security Council resolutions calling for disarming militia, referral of the Darfur crisis to the ICC, targeted sanctions, and divestment campaigns) have also not tipped the scale in favor of the Darfuris. The list of actions taken by the UN is long but they have not yet hit their target.

The international community and individual states have largely failed to find an effective mix of consequences and incentives to alter this equation. In simplest terms, the advantages for Sudan to continue the war outweigh the disadvantages. Khartoum does what it pleases and claims its sovereign right to do so. Khartoum launched numerous major offensives against civilians

after the Darfur Peace Agreement was signed in May 2006, and has repeatedly derailed plans for a UN peacekeeping force in Darfur. Among other things, Khartoum continued to arm militias responsible for mass death, destruction, and displacement and reneged on its numerous promises to disarm them; it expelled the Special Representative of the Secretary-General Jan Pronk from Sudan in October 2006; it has violated the UN-Sudan Status of Forces Agreement (SOFA), especially relating to the freedom of movement of UN Mission in Sudan (UNMIS) personnel;[18] and it repeatedly lied about the capacity of its justice system to deal with war crimes while rejecting the Security Council's referral of the Darfur crisis to the International Criminal Court.

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The Sudanese government's acquiescence to the deployment of African Union (AU) peacekeepers appeared to be one of its most tangible steps towards ending the conflict. But the effectiveness of the AU's troops continues to be undermined by a weak civilian protection mandate and a lack of resources. In many locations the troops are not welcomed by the displaced population, who regard them as failing in their task to protect civilians and as too closely aligned with the Sudanese government. There was hope that a new peace deal signed in May 2006 would bring the conflict to a close. But this pitted rebels who supported the deal against rebels who did not sign on, giving the government a claim of legitimacy to attack the non-signatories as well as civilians.

Other initiatives the government has taken to deflect international criticism include setting up special courts and investigative committees to deal with conflict-related crimes, and establishing three State Committees to focus on violence against women and girls. These initiatives have proven to be mere window dressing. In late 2006 the government informed the ICC's Office of the Prosecutor that 14 individuals had been arrested for violations of international humanitarian law and human rights abuses.[19] Though the details of these cases are not known to the author, prior to this statement it was not apparent that the special or regular courts had addressed cases of command responsibility or that anyone involved in the large scale attacks that defined the Darfur conflict had been convicted. The investigatory committees have stressed the inter-tribal dimensions of the conflict and have largely ignored the role of the state. Sexual violence persists in Darfur, and two of the three sexual violence committees have not operated for much of their existence. Overall, these committees have not led to criminal prosecutions.

STRENGTHENING THE RESPONSIBILITY TO PROTECT IN DARFUR

The failure of R2P in Darfur is, in this author's view, not due to inherent shortcomings in the doctrine. It is the product of states and intergovernmental organizations failing to implement the doctrine effectively. R2P's strong legal framework offers numerous options for states to deter serious human rights abuses abroad. Moreover, what were traditionally seen as political decisions — such as one country pressuring another country to end atrocities — are conceptualized by the doctrine as affirmative legal responsibilities.

As demonstrated by the ongoing Darfur crisis, finding the right pressure points to deter atrocities is paramount to the successful implementation of the R2P doctrine. It is also necessary that the means used to halt and deter these atrocities (be it peacekeepers, targeted sanctions, or ICC referrals) have international support and investment. To ensure this, any humanitarian mission must be based on factual, credible information and, in the case of peacekeepers and applied sanctions, be subject to strong and transparent oversight mechanisms to maintain credibility. The R2P doctrine takes many of these factors into account. It requires, for example, peacekeepers to abide by international humanitarian law and calls on the five permanent Security Council powers to refrain from using their veto when humanitarian intervention is deemed appropriate.

To effectively apply the R2P doctrine to the Darfur crisis, there must be a ratcheting up of targeted and tangible consequences for individuals and institutions responsible for the Darfur crisis. The ICC process and the sanctions committee represent positive first steps. UN Member States must enforce the outcomes of these processes, as required by their Security Council resolutions, and endorse other useful strategies. Additionally, states need to seriously pursue new inroads to place pressure on Sudan. It was a positive sign that African states recently brushed aside Sudan's bid for the presidency of the January 2007 AU Summit, instead choosing Ghana. This should be matched with increased pressure on third-party countries and institutions that have influence over Sudan, such as China or the Arab League.[20] In keeping with the R2P doctrine, the aim here would be to motivate states which, while possessing capacity to solve threats to international peace and security, have not yet taken sufficient action. One of the most important steps to ending the conflict is for the international community to identify how to break the dependant relationship between the Sudanese government and the militias. Right now that relationship is largely based on the government providing guns, money, land, and profit gained from raids to impoverished com-

munities in exchange for their participation in military operations and general instability.

As noted above, another weakness of the R2P doctrine is that the tools currently available to give the doctrine teeth (Chapters VI and VII on peacekeepers, targeted sanctions, ceasefire commission reports, ICC prosecutions, and international condemnation) are vulnerable to ill-willed manipulation of information and propaganda that make solutions look like problems. Khartoum has, with some success, portrayed UN peacekeepers as Western occupiers, claimed that the Western media and UN officials have exaggerated the Darfur crisis, and attempted to make troop-contributing countries more reluctant to send troops, claiming that Darfur would become their "graveyard."[21]

This vulnerability to politicization puts the legitimacy of the R2P doctrine (which must rely on those tools) at jeopardy. It is therefore critical to ensure that accurate information is actively and strategically disseminated to the media, policy makers, ceasefire commissions, and relevant UN institutions and mechanisms. Additionally, the international community must ensure there are ways to determine if large-scale loss of life, genocide, or other benchmarks for intervention are in fact occurring. It seems appropriate that national and international human rights workers and humanitarian workers should play a key role here, since these actors usually have access to more credible information. The advantages of gathering information in this fashion must be balanced against any potential drawbacks, including endangering civilians and peacekeepers or risking the success of other projects (i.e., if a humanitarian organization responsible for caring for 40,000 people is likely to be expelled for issuing a public statement about an isolated incident of abuse, then such action should not be recommended). In the absence of other reliable information-gathering mechanisms, the UN must work to fill the gap. The Security Council performed this function when it established an international commission of inquiry into the Darfur crisis, which was largely responsible for convincing the Council to refer the crisis to the ICC in 2005. Today, there are more than 40 UN human rights officers working in Darfur.

Related to the issue of gathering and disseminating quality information is determining where discussions about the international community's response to a humanitarian crisis should begin. The ICISS and UN reports both recognize that the Security Council must be involved in any decision regarding humanitarian intervention. Yet broader discussions concerning human rights abuses and the implementation of R2P can occur in different venues at the same time. The Human Rights Council, as the UN's premier human rights body, should also play a key role. When the Human Rights Council held a special session on Darfur from December 12–13, 2006, it adopted a resolution for a high-level mission to investigate the crisis and report back to the next session of the Human Rights Council, which will take place from March 12 to April 5, 2007. Provided it receives government consent to visit, the mission's findings and recommendations, as well as the follow-up response of states, may be critical to Darfuris and to the credibility of the Council as a whole.

Depoliticizing R2P mechanisms requires that the UN be held accountable for its actions, display political transparency, and widely disseminate accurate information about its intentions and goals in Sudan. But this is not an easy task. As noted, Sudan offi-cials called into question both the intention and composition of a potential UN peacekeeping force. In media statements and speeches, Sudanese state officials portrayed peacekeepers as tools for regime change and Western occupation. Yet the UN has maintained over and over that a UN peacekeeping force in Darfur would only arrive with Sudan's consent, and it seems under current conditions that any UN peacekeeping force would be composed largely of troops from non-western countries. Challenging the government's propaganda is a feasible approach at the international level and with some sectors of the educated public in Sudan. The thousands of uneducated proxy fighters and soldiers who are fighting the Darfur war for the government are, however, more easily convinced by their government and state media than by competing information campaigns. Moreover, the UN puts itself into a difficult political position if it starts informing the public about the composition of a UN peacekeeping force that Sudan has not authorized and is adamantly against.

The success of the R2P doctrine will ultimately be based on UN member states identifying and supporting the correct pressure points and incentives to end humanitarian and human rights crises. These must provide both short-term remedies and sustainable peace. As revealed by the conflict in Darfur, states and intergovernmental bodies that endorse the R2P doctrine are falling short of their commitments when they rely time and again on hollow threats that have little or no impact. Moreover, the R2P doctrine will greatly benefit from mechanisms that can provide credible and strong analytical information. Reliable information gathered by civil society, national and international NGOs, UN human rights officers, and other UN agencies is mandatory for the legitimization of any international response. Finally, these international responses must be transparent, subject to oversight, and free from politicization and propaganda to the best of their ability.

Conclusion

When states place their national sovereign rights above human rights, experts correctly point out that the two are not mutually exclusive and, in fact, that human rights are both legal responsibilities binding on sovereigns and are in states' best interest. Sudan has not embraced this stance and still regards human rights and human rights activists as threats to its national security and stability.

The R2P doctrine critically contributes to the legitimacy of the UN in addressing widespread and systematic human rights abuses. Yet as this paper argues, the doctrine is still developing and reflects a consensus that exists more in principle than in practice. As both R2P reports indicate, the doctrine's status as customary international norm has not crystallized, though it may be emerging as such. There are multiple and significant reasons for this slow progress. What is especially critical at this moment, both for Darfur and for the R2P doctrine, is for states to recognize their fundamental responsibilities to respond to atrocities outside their territory. In the case of Darfur, hollow threats are chipping away at the fragile legitimacy of the R2P doctrine. Especially at a time when forceful UN humanitarian intervention is very difficult to mobilize, what is needed is new thinking about how to pressure obstinate governments through effective diplomacy and UN sanctions. *HRB*

ENDNOTES: Lessons from Darfur

1 UN Secretary-General, Press Release, "Terrorism is Global Threat, Says Secretary-General, but Measures Against it Must Not be Used to Justify Human Rights Violations," SG/SM/8518 (November 21, 2002), http://www.un.org/News/Press/docs/2002/SGSM8518.doc.htm.

2 United Nations, *A More Secure World: Our Shared Responsibility*, Report of Secretary General's High-level Panel on Threats, Challenges and Change, paras 12 and 81 (December 2004) *available at* http://www.un.org/secureworld/.

3 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, XII (December 2001) *available at* http://www.iciss.ca/menu-en.asp.

4 Consider the North Atlantic Treaty Organization's ("NATO") unilateral intervention in Kosovo in 1999; the UN sanctioned intervention in Somalia in 1992–1993; and international inaction towards Rwanda and Srebrenica in 1994 and 1995, respectively.

5 United Nations, *A More Secure World, supra* note 2.

6 *See* Jane Stromseth, "Rethinking Humanitarian Intervention," 232, 262-263, in J.L. Holzgrefe and Robert Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press 2003); Independent International Commission on Kosovo, *Kosovo Report*, 2000; Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen 1999); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 European J. of Intl. L. 27 (1999).

7 ICISS, *The Responsibility to Protect, supra* note 3, para 2.24; UN, *A More Secure World, supra* note 2, para 203.

8 ICISS, *The Responsibility to Protect, supra* note 3, para 6.21; UN, *A More Secure World, supra* note 2, para 256.

9 UN, *A More Secure World, supra* note 2, para 203.

10 ICISS, *The Responsibility to Protect, supra* note 3, at XII. As the report concludes, intervention is justified where there is (a) large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or (b) large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

11 Opheera McDoom, "UN mistaken in failing to find genocide-Darfur rebels," *Reuters*, 1 February 2005, *available at* http://www.alertnet.org/thenews/newsdesk/L01718071.htm. From a legal standpoint, genocide is often hard to determine. One must prove that an alleged perpetrator had the "intent" of wiping out, in part or in whole, a national, racial, ethnic or religious group. *See Convention on the Prevention and Punishment of the Crime of Genocide*, Art. 2. In the case of Darfur, where thousands have died, experts who participated in an International Commission of Inquiry on Darfur concluded that genocide was not occurring because the element of intent was not present. *See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, at 4 (January 25, 2005). Indeed it could be counterproductive for states and the public to make humanitarian interventions contingent upon a determination of genocide per se. Image a case where thousands of people have perished but there is no evidence of genocide, and thus states do not have an obligation to intervene.

12 ICISS, *The Responsibility to Protect, supra* note 3, at XII; UN, A More Secure World, supra note 2, paras. 191 and 192.

13 ICISS, *The Responsibility to Protect, supra* note 3, at para 207(c).

14 *Id.* at XIII.

15 *Id.* at XII.

16 UN, *A More Secure World, supra* note 2, at para 207(e).

17 Significantly, the R2P doctrine also emphasizes the critical relationship between poverty and violence. Speaking to this issue, then Secretary-General Kofi Annan noted that "Extreme poverty and infectious diseases are threats in themselves, but they also create environments which make more likely the emergence of other threats, including civil conflict. If we are to succeed in better protecting the security of our citizens, it is essential that due attention and necessary resources be devoted to achieving the [UN] Millennium Development Goals." UN, *A More Secure World*, para 7, *supra* note 2. Sudan is a prime example where lack of development and entrenched poverty drew people in the east, west, and south of the country to take up arms against the government. What is especially deplorable about the Darfur situation is that Khartoum, the Sudanese capital, is currently experiencing an economic boom, yet there are no real signs that this new wealth is being distributed to Darfur to help settle a conflict that largely erupted out of lack of resources and development.

18 On 19 January 2007 in Nyala, Darfur, Sudanese authorities raided a gathering at an INGO compound, arrested 20 humanitarian aid workers, UN staff, and African Union workers and subjected several of them to serious physical abuse.

19 *Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council pursuant to SECURITY COUNCIL RESOLUTION 1593 (2005)*, 14 December 2006, *available at* http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html.

20 As this article was being finalized, media sources reported that the U.S. presidential envoy for Sudan Andrew Natsios met with China officials in January 2007 and requested China's assistance in pressuring the Sudanese government to end the conflict in Darfur. *See Reuters*, "US asks China to exert pressure on Sudan" (January 12, 2007).

21 *See* Anne Penketh, *Independent* (London), "Sudan blocks UN troops in fear Darfur could become a 'graveyard'" (March 11, 2006); *Sudan Tribune*, "Sudan's Bashir reiterates Darfur would be UN troops 'graveyard'" (July 29, 2006); and *Sudan Tribune*, "UN force would risk Hezbollah-like resistance – Sudan's Bashir" (August 15, 2006).