

UNIVERSITY OF FORT HARE

FACULTY OF LAW

**THE EFFICACY OF THE UNITED NATIONS IN CONFLICT RESOLUTION:
A STUDY OF THE RESPONSE OF THE SECURITY COUNCIL TO THE
DARFUR CONFLICT IN THE SUDAN**

BY

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**A Dissertation Submitted to the Faculty of Law in Fulfilment of the
Requirements for the Degree of Master of Laws (LLM)**

SUPERVISED BY

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October, 2012

DECLARATION

I, Tambe Endoh Fabrice, hereby declare that this dissertation entitled: *The Efficacy of the United Nations in Conflict Resolution: A Study of the Response of the Security Council to the Darfur Conflict in The Sudan* is my original work and it has never been submitted to any other University or Tertiary Institution whatsoever. All the sources that I used or quoted have been indicated and acknowledged by means of complete references. This dissertation is hereby submitted in fulfilment of the requirements for the award of the Master of Laws (LLM) degree.

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ABSTRACT

After the First and Second World War, violent interstate and intrastate armed conflicts have befallen the global community. These conflicts have been accompanied by gross human rights violations and absolute disrespect for international humanitarian law. They also pose major threats to international and regional peace and security. The body charged with the responsibility of maintaining international peace and security is the United Nations. This study investigates the efficacy of the United Nations in conflict resolution and it sampled Darfur in the Sudan as a case study. Relevant literature was analysed by secondary method to determine the strength and weaknesses of the United Nations Security Council.

The reviewed literature gave two different conclusions on the question of whether or not genocide occurred in Darfur. Former US Secretary of State Collin Powel and the US State Department are of the opinion that genocide did occur in Darfur. Their determination however was not in line with the report put forth by the International Commission of Inquiry in Darfur. The latter suggests that only war crimes and Crimes against Humanity were committed in Darfur and, as such, they do not meet the criteria of the crime of genocide as prescribed in Article 2 of the Genocide Convention. The UN Security Council in turn adopted resolution 1593 to refer the situation to the International Criminal Court for further clarifications.

The current study however argued that the United Nations has not been and continues not to be effective in conflict resolution. Detailed analysis of literature shows that divisions within Security Council members have been a major hindrance to the smooth functioning of the Organization. The veto power bestowed upon the five permanent members of the Security Council has been an obstacle. The study suggests that the veto power should be shared among the 15 members of the Security Council or cease to exist. It also recommends that reparation as a form of compensation be provided to the victims of the Darfur conflict.

ACKNOWLEDGEMENT

I thank the almighty God for good health and the ability to complete this research. I wish to express my sincere gratitude to my supervisor Professor N.S. Rembe for his persistent and diligent effort in supervising this work. He has been a source of inspiration both morally and intellectually and I am grateful for his support during the difficult process of turning this study into a reality.

Special thanks go to my brother Mr. T.E. Julius for his fatherly role which constitutes a backbone to the success of this research. I also wish to express my sincere appreciation to Professor P.T. Tangwe and his wife, Mrs Tangwe, for their love, care, support and encouragement throughout my programme. I am not leaving out Mr. A. Isaiah and his wife Madam Anzah, who have been significant contributors to my educational career. I am indeed grateful to the Cameroonian community of the University of Fort Hare for their good company and guidance, which enabled me to overcome some of the academic and social challenges that I faced.

Most importantly, I wish to thank my parents, especially my deceased father for giving me the opportunity to see the world. Special thanks to all my sisters, uncles, nephews and nieces for their contribution and support in the realization of this research.

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples Right
ACHR	Inter-American Convention on Human Rights
ADS	Atrocities Documentation Survey
ADT	Atrocities Documentation Team
AIDS	Acquire Immune Deficiency Syndrome
AMIS	African Union Mission in Sudan
AU	African Union
AUCA	The Constitutive Act of the African Union
AUPSC	African Union's Peace and Security Council
AUPD	African Union High-Level Panel on Darfur
CAT	Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
CPA	Comprehensive Peace Agreement
CRC	Convention on the Rights of a Child
CFC	Cease Fire Commission in Darfur
DLF	Darfur Liberation Front
DPA	Darfur Peace Agreement
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights and Fundamental Freedoms
PE	Panel of Experts
EU	European Union
HIV	Human Immune Virus
HRWD	Human Rights Watch Darfur
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Right
ICERD	International Covenant on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICI	International Commission of Inquiry
ICID	International Commission of Inquiry in Darfur

ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IRC	International Rescue Committee
JEM	Justice Equity Movement
JIM	Joint Implementation Mechanism
NIF	National Islamic Front
NATO	North Atlantic Treaty Organization
NCP	National Congress Party
SLA	Sudan Liberation Army
SLM	Sudan Liberation Movement
SLM/A	Sudan Liberation Movement/Army
SOMA	Statute of Mission Agreement
SSCED	Special Criminal Court on the Event in Darfur
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations Organization
UNAMID	United Nations-African Mission in Darfur
UNAMIS	United Nations Advance-Mission in Sudan
UNCHR	United Nations Commission on Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous People
UNICEF	United Nation Children's Fund
UNMIS	United Nations Mission in Sudan
USA	United States of America

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Dedovic v. Kok et al: Judgement of the Amsterdam District Court, 6 July 2000.

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Constitutive Act of the African Union: Adopted in 2000 at the Lome Summit (Togo), entered into force in 2001.

Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51(1984)], entered in to force June 26, 1987.

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Convention on the Prevention and Punishment of the Crime of Genocide Adopted by General Assembly Resolution 260(III) A, on 9 December 1948 and entered into force on 12 January 1951.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968)

Convention on the Right of the Child adopted by UN General Assembly Resolution 44/25 of 20/11/1989 and entered into force on 2/09/1990.

International Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200(XXI) on 16/12/1966 and entered into force on 23/03/1976.

International Covenant on Economic, Social and Cultural Rights adopted by General Assembly resolution 2200A(XXI) of 16/12/1966, entry into force 3/01/1976.

International Covenant on the Elimination of All Forms of Racial Discrimination. Adopted on 21 December 1965 and entered into force on 4 January 1969.

Optional Protocol to the Convention on the Right of the child on the involvement of children in armed conflict. Doc. A/RES/54/263 of 25 May 2000 and entered into force on 12 February 2002.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Sudan is located in the Northern part of the African continent and has a total land mass of 2.5 million square kilometres, with an estimated population of about 39.15 million people.¹ Before the secession that established the South as an independent state from the North, Sudan was the largest country on the continent and hitherto was administered as a colony under the British mandate. From 1898 the United Kingdom (UK) and Egypt administered Sudan as an Anglo-Egyptian territory but North and South Sudan were administered as separate provinces of the condominium.² In the early 1920s, the British passed the Closed District Ordinances which stipulated that passports were required for travelling between the two zones. Permits were also required to conduct business from one zone to the other, and totally separate administrations prevailed.³ However, in 1946 the British administration reversed its policy and decided to integrate North and South Sudan under one government.⁴

The South Sudanese authorities were informed at the Juba Conference of 1947 that they will be governed in the future under a common administrative authority with the north.⁵ From 1948, 13 delegates nominated by the British authorities represented the South in the Sudan Legislative Assembly. Many Southerners felt betrayed by the British as they were largely excluded from the new government. To them, it was a strategy by the British aimed at protecting their interest as far as colonial legacy is concerned.⁶ They complained that the language of the new government was Arabic and they were under represented. Of the eight hundred positions vacated by the British in 1953, only

¹ Sudan Watch, May 2009. Population and size of the Republic of Sudan. Available at <http://sudanwatch.blogspot.com/2009/05/population-of-south-sudan-862-million.html>. Last access 2012/10/01.

² Holt P. and Daly M. 1976. The History of the Sudan: From the Coming of Islam to the present day. Weidenfeld and Nicolson, London. p.1.

³ *Ibid.*, p.178.

⁴ *Ibid.*

⁵ *Ibid.*, p.163.

⁶ *Ibid.*, p.154.

four were given to the Southerners. The political structure in the South was not as organized as that in the North and for this reason, political groupings and parties from the South were not represented at the various conferences that established the modern state of Sudan. As a result, many southerners did not consider Sudan to be a legitimate state.⁷

Although the Sudanese state was considered illegitimate by the Southerners, the Sudanese parliament unilaterally declared Sudan's independence on 1st January 1956.⁸ Subsequently, the Arab-led Khartoum government reneged on promises it had made to Southerners to create a federal system. This led to a mutiny led by Southern army officers and sparked off a civil war after independence in 1956.⁹ Besides the issues highlighted above, the Abyei region of Sudan is rich in natural mineral resources and has been a bone of contention between the North and South. It has also affected Darfur negatively as most of the rebel groups involved in the Darfur conflict, like the Sudan Liberation Movement (SLM) and the Justice and Equity Movement (JEM), also seek for a share in the wealth of the region.¹⁰

However, before the June 2011 referendum, the UN Secretary-General, Ban Ki-moon called for the Sudan to withdraw all police officers from the Abyei region of South Sudan.¹¹ Although the referendum resulted in the Republic of South Sudan, separating it from the North which remains the Republic of Sudan, political views expressed by the provinces in the North region have further captured more attention from the international community.¹² The quest for Arab domination is common in this area and, one among the leading regions that have fallen prey to this practice is Darfur.¹³ For a better

⁷ *Ibid.*

⁸ *Ibid.*, p.159.

⁹ *Ibid.*

¹⁰ Aljazeera.com, June 2012. Sudan to keep police in disputed Abeyi region. Admission comes after foreign ministry denied security presence in the region and UN calls for Sudan's withdrawal. Available at <http://www.aljazeera.com/news/africa/2012/06/2012531235523298231.html>.

¹¹ Press TV, May 2012. Ban Ki-moon calls on Sudan to withdraw forces from Abyei area. Available at <http://www.presstv.ir/detail/2012/05/13/240986/un-chief-urges-sudan-to-withdraw-troops/>.

¹² *Ibid.*

¹³ *Ibid.*

understanding of the dynamics involved in the Sudanese politics, it is important to digest the content of the Darfur conflict and this is explained in the following section.

Darfur is located in the western region of the Republic of Sudan and is approximately the size of France.¹⁴ It is divided into five ethnic zones which are North Darfur, South Darfur, West Darfur, Eastern Darfur and Central Darfur. It has an estimated population of about 5.6 million people who are predominantly Muslims.¹⁵ The most populated area is inhabited by non-Arabs in the Western Darfur states.¹⁶ Southern Darfur is inhabited by cattle and camel nomads. They are practically of Arab origin and speak Arabic. Northern Darfur is the home of camel nomads, a small minority of whom are Medial Arabs. For ease of reference, a map of Darfur is included overleaf.

Before the fall of the Darfur Sultanate in 1874, three dynasties ruled Darfur and these are the Daju, Tunjur and Keira.¹⁷ Although superiority and domination in Darfur favoured the Tunjur, ethnic and political evolutions later altered the course of history. This was evident by the suppression of the Tunjur by the Keira. The role in change-over led to what was described as 'an Arab of exalted lineage' whose coming to Darfur resulted directly in the later version of the traditions and indirectly to the establishment of the Keira dynasty.¹⁸

The domination of the Keira dynasty in Darfur saw the light of the 21st century as the Arabs later separated themselves from the Fur whom they considered to be black Africans.¹⁹ The objective of the Arabs was to transform the African Sahel, which lies between the Red Sea and the Atlantic Ocean, into a pure Arab region. This task seems most difficult to achieve as 70 percent of the total population in Darfur is black-

¹⁴ Robert O. 2006. *Genocide in Darfur: Investigating the atrocities in Sudan*. Routledge Taylor and Francis Group New York. p.3.

¹⁵ Darfur Population as of 2011 Census. Available at <http://exploredia.com/darfur-population-2011>

¹⁶ *Op. cit.*, note 14 above. Medial Arabs are camel nomads who go about with their cattles in search of pasture land and water.

¹⁷ Fahey R. And Spaulding J. 1974. *Kingdoms of the Sudan: Studies in African History*. Harper and Row Publishers Inc, USA. p.108

¹⁸ *Ibid.*

¹⁹ Gamal A. 2008. Why has Darfur's Indigenous Population Been Put at Risk?, *Peace Review: A Journal of Social Justice*. Routledge Publishers London, UK. p.160. Available at <http://dx.doi.org/10.1080/10402650802068051>.

Africans.²⁰The continuous competition for domination therefore sparked up a conflict that began in 2003.

²⁰ *Ibid.*

The conflict in Darfur has boosted ethnic tensions between farmers and herdsmen, Africans and Arabs, competing for pasture, agricultural land and water.²¹ Some of the victims of these conflicts are non-Arabs or the African tribal groups of Darfur, primarily the Fur, the Masaliet and the Zaghawa, but also, the Tunjur, the Birgrid and the Dajo.²² These inhabitants have long been politically and economically marginalized. In recent years, the government of the National Congress Party (NCP) dominated by members of the National Islamic Front (NIF) based in Khartoum refused to control increasing violent Arab Militia raids on African villages in Darfur. Increasing Competition between Arab and African tribal groups for scarce resources, especially agricultural and grazing land has led to advancing desertification in the Sahel region.²³ Although, the conflict seems to be tribal in nature, it is interconnected with governmental policies and political issues.

The African Union High-Level Panel on Darfur (AUPD) reports that the root causes of the Darfur conflict can be traced from a history of neglect of the Sudanese peripheries from the pre-colonial to the post-colonial era of the modern Sudanese state.²⁴ The conflict is a manifestation of Sudan's inequitable distribution of wealth and power, which the Panel describes as "Sudan's crisis in Darfur".²⁵ Annette mentioned that recently, the Sudanese government banned at least four foreign humanitarian agencies from working in the eastern region of the country.²⁶ In addition to the recent developments in the East,

²¹ *Op. cit.*, note 14 above. Quarrels over scarce resources became particularly acute during the great global drought of the 1980's that resulted in the desertification of northern and central Darfur, and increasing tension over water and grazing areas as the camel nomads moved south in search of both. p.10.

²² Reeves E, 2005. Genocide in Darfur-How the Horror Began. Available at <http://www.sudantribune.com/spip.php?article11445>

²³ *Ibid.*

²⁴ Report of the African Union High-Level Panel on Darfur. Peace and Security Council 207th meeting of the Heads of States and Government, 29 October 2009, Abuja, Nigeria. AU Doc. PSC/AHG/2(ccvii). para.281. p.79. Considering the Darfur crisis to be interconnected with governmental policies and political issues, the Panel suggests that the general political crisis in Sudan must be addressed and possibly resolved to obtain better results of peace and reconciliation in Darfur. In the Panel's view, the crisis in Darfur can trace its origin from the general political crisis facing Sudan.

²⁵ *Ibid.*

²⁶ Annette L. 2012. Khartoum's Pattern of Neglect Continues in Eastern Sudan as Government Expels Aid Group. Available at <http://enoughproject.org/blogs/Khartoum-pattern-neglect-continues-eastern-sudan-government-expels-aid-groups>

humanitarian access remains severely hampered in Darfur and has been completely blocked in South Kordofan and Blue Nile.²⁷

Representatives of over 20 Arab clans in Darfur wrote a document in September 1987 to Prime Minister Al-Sadig Al-Mahdi, and copied it to the State's Supreme Council and to different political parties. The following passage includes some of the points the document raised.²⁸

.....As Arabs we feel that we were deprived of the right of representation in the leadership of this region, and participation in the decision making and were reduced to a weightless majority—subjects and not citizens despite the fact that we represent the following:

- 1) 70 percent of the population of the region,*
- 2) 40 percent of the total of educated people including hundreds, who obtained Sudan School Certificate,*
- 3) 15 percent of the contribution to national income,*
- 4) 90 percent of the contribution to regional income,*
- 5) The lion's share contribution to the Sudanese army which we sacrifice for this nation and*
- 6) Represented by 14 members of the parliament.*

Honourable Prime Minister, all the evidence we have presented confirms the political, social and economic weights which these groups have on the region. We therefore request for at least 50 percent of the positions in the regional and central governments. We are afraid that continuous neglect of the Arab race from the participation might lead to something whose result will not be praised.

As a result of the regional and central governments not taking action against the ethnic discrimination, the Arabs of Darfur took a further step and formed an Arab Alliance, in

²⁷ *Ibid.*

²⁸ *Op. cit.*, note 19 above.

order to follow up with a series of demands with the central government and the NIF based in Khartoum.²⁹

On February 26, 2003, three hundred rebels calling themselves the Darfur Liberation Front (DLF) led by Abd al-Wahid Muhammad Ahmad Nur seized the town of Gulu.³⁰ The latter was a member of the Communist Party and the Sudan People Liberation Movement (SPLM), the political arm of the southern insurgency movement that seized the town of Gulu. This town is the capital of the Jabal Marra province in the state of Western Darfur. It is worth noting that the DLF became the Sudan Liberation Movement/Army (SLM/A) not long after the seizure of Gulu.³¹ Later, the Secretary-General of the SLM made a press statement on the political declaration of the movement.³² He stated:

Since the government in Khartoum has systematically adhered to the policies of marginalization, racial discrimination, exclusion, exploitation and divisiveness, the SLM has to meet its objectives. These objectives aim at achieving a united democratic Sudan practically based on self-determination, economic and political unity, the identification of religion and politics in their respective domain, dealing with ethnic cleansing, and stopping the use of Arab tribes by the Khartoum government to achieve its hegemonic devices that are detrimental both to Arabs and non-Arabs.

The Darfur conflict challenges international law and the responsibility to protect. In the outcome document of the High-Level Plenary Meeting of the General Assembly in September 2005, the responsibility of individual states to protect its citizens against

²⁹ *Ibid.*

³⁰ *Op. cit.*, note 14 above. Gulu capital is equipped with automatic weapons, mortars and technical Toyota trucks with mounted machine guns made famous in the Chadian war with Libya. They attacked scattered police and army post before retiring to their training camps in Jabal Marra. p.9.

³¹ *Ibid.*

³² Robert O. p.4

genocide, ethnic cleansing, war crimes and crimes against humanity was invoked.³³ The Darfur conflict reveals that these issues have not been addressed and the recorded number of deaths has been massive. The conflict has been described as genocide.³⁴

The responsibility to protect is not only a state's obligation, but it is also a general duty owed under international law in the resolution of conflicts. Among the public bodies involved in the development and acceptance of International Law, the United Nation (UN) is particularly important.³⁵ The international community, through the United Nations also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to achieve international peace.³⁶ In doing so, it should act in accordance with chapters VI and VIII of the Charter of the United Nations. This is to help protect populations from genocide, ethnic cleansing, war crimes and crimes against humanity.

The role of International Law has also been highlighted in the Charter of the United Nations. One of the purposes of the Organization is stated in Article 1(1) of the Charter and it is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace and to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

³³ Head of states and governments agree to the following text on the Responsibility to Protect in the outcome document of the High-Level Plenary Meeting of the General Assembly in September 2005, Para 138. Study note at <http://www.responsibilitytoprotect.org/index.php/component/content/article35>>.

³⁴ *Op. cit.*, note 14 above.

³⁵ Mallison T. and Mallison V. The Role of International Law in Achieving Justice and Peace in Palestine-Israel. Statement presented at the Human Rights Conference in Palestine (the world conference of Christians for Palestine, Geneva and Switzerland) on January 11-14 (1974) p.1 at <http://www.roleofInternationalLaw.com/>.

³⁶ *Op. cit.*, note 33 above. para 139.

The UN organ responsible for the maintenance of international peace and security is the Security Council. Article 24(1) of the UN Charter states:³⁷

In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibilities for the maintenance of international peace and security, and agree that in carrying out its duties under these responsibility the Security Council acts on their behalf.

Despite the role played by the UN Security Council, conflict in Darfur is still prevalent. It is alleged that the Sudanese government is in support of the so call *Janjaweed*. The government backed *Janjaweed* militias are derived from the Abala camel-herding nomads who migrated to Darfur from Chad and West Africa in the 1970s, and from Arab camel-herding tribes from north Darfur.³⁸ The *Janjaweed* are said to have established a tradition called the *Hambati* or ‘social bandits’ taken from among the Arab tribes. They are robbers and vagabonds rejected by their communities for breaching established traditions.³⁹

Other members of the *Janjaweed* are thought to be more professional criminals, including some allegedly released from prisons to join or lead the militia.⁴⁰ The International Commission of Inquiry on Darfur describes the *Janjaweed* in the Arabic context as “devils on horseback”.⁴¹ Building on the existing ethnic tensions, the government specifically armed the *Janjaweed* to bolster its military capability and turn a blind eye to the alleged reported looting and raping perpetrated by the *Janjaweed*.⁴² The

³⁷ Charter of the United Nations and Statute of the International Court of Justice. United Nations Department of public information’s 1997. The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organisation and it came into force on 24 October 1945.

³⁸ Donovan P. 2005. The nature of the Conflict in Sudan: A brief overview of the causes and conduct of conflict in Sudan. Peace and Governance Series No. 9, Occasional Paper No. 75. Africa institute of South Africa. p.7.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Reeves E, 2005. Report of the International Commission of Inquiry in Darfur to the UN Secretary-General, ICID report. IDEA Publishers, New York. para.100.

⁴² Donovan P., p.7

gross human rights violations perpetrated by the *Janjaweed* on innocent civilians in Darfur correlates with the government's assumed strategy aimed at clearing the land of potential rebel support and sustenance.⁴³

The Executive Director of Human Right Watch Africa Division states that "It's absurd to distinguish between the Sudanese government forces and the Militias, they are one".⁴⁴ It is therefore unfair to underestimate the Darfur conflict. Genocide encompasses not only the deliberate killing of members of a national, ethnic, racial or religious group, but also the deliberate infliction on the group condition of life calculated to bring about its physical destruction in whole or in part.⁴⁵ The latter is what has been witnessed in Darfur.

1.2 RESEARCH PROBLEM

The problem of popular uprising in and around the globe has become alarming. The Department of Peace and Conflict Research at the Uppsala University recorded a total of 226 armed conflicts between the years 1946-2002.⁴⁶ Of these, 116 were active in the period 1989-2002, among which 109 were intra-state armed conflict. In Africa, among the states trapped in this horror are DRC, Côte d'Ivoire, Rwanda, Libya and The Sudan. In Sudan, this horror is commonly known as the Darfur Conflict.

The conflict in Darfur started in February 2003, when the Sudan Liberation Army (SLA) attacked and captured the town of Gulu. Another attack was launched in March to recapture Gulu in a fierce fight that killed one hundred and ninety five government soldiers.⁴⁷ Fighting raged widely throughout Darfur. In late May, the Sudan Liberation Army (SLA) north of Kutum, destroyed a Sudanese battalion killing five hundred and

⁴³ *Ibid.*

⁴⁴ *Op. cit.*, note 14 above. In July 2004, Human Rights watch obtained confidential Sudanese government documents that directly implicate high-ranking government officials in a Policy of support for the *Janjaweed*.

⁴⁵ *Op. cit.* note 33 above. See also Article 2 of the United Nation Convention on the Prevention and Punishment of the Crime of Genocide 1948.

⁴⁶ Kelvin. P. 2006. *The Challenges of Conflict: International Law Response*. Martinus Nijhoff. Netherlands, p.2.

⁴⁷ Robert O. 2006. *Genocide in Darfur: Investigating the atrocities in the Sudan*. Routledge Taylor and Francis Group New York, p.9.

taking three hundred prisoners.⁴⁸ In mid-July, SLA attacked the town of Tine leaving two hundred and fifty soldiers dead.⁴⁹ Omer Stated that at least 400,000 people have been reportedly killed and more than 2.5 million civilians displaced.⁵⁰ Those displaced now live in displaced persons camps in Sudan or in refugee camps in neighbouring Chad. More than 3.5 million people - men, women and children - are completely reliant on international aid for survival.

The situation in Darfur evolved in the very eyes of the UN. More than 23 resolutions have been adopted by the Security Council since the crisis began.⁵¹ Despite this, the crisis has continued and the Security Council has failed to live up to its responsibility to protect the population of Darfur and help restore peace and security in Sudan and in the region as a whole.

By mid-July 2004, the UN and the Government of Sudan had established a high-level Joint Implementation Mechanism (JIM) to monitor events in Darfur.⁵² The JIM was co-chaired by the Sudan Minister of Foreign Affairs and the UN Secretary General's Special Representative.⁵³ Its purposes were to oversee the implementation of the terms of the joint communiqué between the Government of Sudan and the UN of 3rd July 2004. The communiqué imposed obligations on the Government of Sudan aimed at bringing an end to the conflict in Darfur.⁵⁴

Following closely after the establishment of the JIM, pressure from the international community resulted in the adoption of Security Council resolution 1556 on July 30th. The resolution demanded that the government of Sudan cease immediately all offensive military operations, disarm the *Janjaweed*, arrest their leaders and report back to the

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Omer Y. 2008. The Darfur Situation and the International Criminal Court: An Appraisal. *Journal of Politics and Law*. Vol.1, No.3. p.9.

⁵¹ John L. And David S. 2008. Irresolution: The United Nations Security Council on Darfur. p.1. Available at <http://www.enoughproject.org/publications/irresolutions>.

⁵² *Op. cit.*, note 15 above. p.19.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

Security Council in thirty days.⁵⁵ In response, the government of Sudan convened an all Darfur conference on August 11 and 12 calling for “harmony” and “peaceful coexistence” with much rhetoric and little action. It is no doubt that the conflict is still sustained despite this commitment.

On the 18th of September 2004, the Security Council adopted resolution 1564 stating that Sudan has not met with the conditions laid down in resolution 1556.⁵⁶ Paragraph 12 of this resolution calls for an immediate establishment of an International Commission of Inquiry (ICI) to investigate the situation in Darfur. This was the first time the UN had undertaken an investigation to determine whether genocide was being committed by a member state. On the 31st of March 2005 the Security Council voted in resolution 1593 to refer the situation in Darfur to the International Criminal Court (ICC). This was the first time that such a Security Council referral had occurred. While Security Council resolutions were being adopted in Darfur, the *Janjaweed* continued with their policy of ethnic cleansing. Because of the poor response by the Sudan government to address the situation in Darfur, resolution 1706 was adopted on August 31st 2006 to include Darfur in the Sudan mission. All resolutions mentioned above have not restored peace since the conflict in Darfur is still raging on.

1.3 RESEARCH QUESTIONS

From the above, the following questions address the research problem:

1. *Has the response of the Security Council to the crisis in Darfur been effective in restoring peace and stability in the region?*
2. *If not, what are the factors that militate against the efficacy of the measures adopted by various resolutions of the Security Council?*

1.4 OBJECTIVES OF THE STUDY

The aim of the study is to assess the effectiveness of the UN in conflict resolution. It has the following objectives:

⁵⁵ *Ibid.*, p.9.

⁵⁶ *Ibid.*, p.22.

1. To examine the role played by the UN in the maintenance of international peace, and in particular, the response of the Security Council to the Darfur conflict.
2. To review the weaknesses of the Security Council and make possible propositions for reform.
3. To explore possible remedies to redress the situation of victims of the Darfur conflict.

1.5 RATIONALE OF THE STUDY

The conflict in the Darfur region of Sudan is sustained by clashes between the Justice Equity Movement (JEM) and the SLM against the Government. The latter uses various methods including air bombardments and the *Janjaweed*.⁵⁷ In July 2003, JEM ambushed a *Janjaweed* column moving against the rebel held town of Tine on the border with Chad inflicting very heavy losses.⁵⁸ In January 2004, the JEM repulsed another attempt to take Tine, reportedly killing over a thousand government troops and militias.⁵⁹ Despite massive international demands to disarm the *Janjaweed*, on May 14th 2004 the Sudan's foreign minister, Mustafa Ismail, contemptuously refused to disarm the militias as long as weapons remain in the hands of rebel forces.⁶⁰ He stated that the *Janjaweed* were a spontaneous tribal response to rebels who are predominantly Zaghawa.⁶¹

Comparing the situation of Rwanda to that of Darfur, Annan declared:⁶²

If full humanitarian access is denied, the international community must be prepared to take swift and appropriate action. By 'action' in such situation I mean a continuum of steps which may include military actions. The international community cannot stand idle.

⁵⁷ Robert O. 2006. p.12.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p.17.

⁶¹ *Ibid.*

⁶² *Ibid.*, p.14.

His UN humanitarian coordinator in Sudan, Kapila who had also been with the UN in Rwanda during the genocide, argued that “the only difference between Rwanda and Darfur is the number involved, that is more than just a conflict, it is an organized attempt to do away with a group of people”.⁶³

Despite the commitment of the UN, the Darfur conflict still remains persistent. People are still dying and efforts by international organisations to put an end to this conflict have been counter-productive. This study therefore intends to look at the principal causes of the Darfur crisis. It will also analyse the factors that make the conflict intractable with the view of finding solutions. Lastly, it will serve as a contribution to the already existing materials put forth by legal researchers on the Darfur crisis.

1.6 LITERATURE REVIEW

The review of literature takes into consideration treaties, theories, and views of legal scholars and authors on the effectiveness of the UN in conflict resolution. It also considers questions posed by member states of the UN that challenge the competence of the Security Council in many conflict situations, e.g. the question raised by the validity of the Security Council resolution 748 (1992) on Libya.⁶⁴

Rupesinghe criticised the structure of the UN.⁶⁵ According to him, the idealism on which the League of Nations was formed was deliberately passed on during the formation of the UN. Unlike the League of Nations, the UN was built upon a bed-rock of *realpolitik* (practical politics) in which the needs and interests of the great powers could be accommodated. Because of this, treaties of great importance that could have brought permanent solutions to international conflicts and world politics were ignored. A good example is the *Nuclear non Proliferation Treaty*, adopted in 1968.⁶⁶ This treaty was to

⁶³ *Ibid.*

⁶⁴ Tolstoy L. 1973. *The Security Council: A Study in Adolescence*. Macmillan Publishers, New York. p.134.

⁶⁵ Bardo F. 1998. *The UN Security Council Reform and the Right of Veto: A constitutional perspective*. Maritinus Nijhoff, Netherlands. p.4

⁶⁶ The United State Institute of Peace Act 1984. Title XVII of the Defence Authorization Act of 1985, Public Law No. 98-525 (Oct. 19, 1984), 98 Stat. 2492, 2642, 22 U.S.C. 4601-4611, as amended. See also study notes at <http://www.usip.org>.

be regarded by the UN Security Council as a measure for the enforcement of international peace. The main aim of the treaty was to put to an end armed conflicts by the suppression of nuclear weapons. The treaty consists of three pillars;

- The permanent members of the UN Security Council, the United States of America, (US) United Kingdom (UK), France, Taiwan (now replaced by China), and the former USSR (presently known as the Soviet Union), who were the only powers/states possessing nuclear weapons at the time of the signing of the treaty and will not transfer nuclear technology to other states.
- Those already in possession of nuclear weapons will seek means to eliminate them with the goal to achieve peace.
- Non-nuclear weapon states will assist in pursuing peaceful use of nuclear technology with the aim of achieving scientific technology and economic development.

With respect to unfolding conflicts in recent times, it can be deduced that the treaty was not given due consideration by the UN Security Council as a measure for peace enforcement.

In July 1947, Egypt complained to the Security Council that British troops were maintained in Egyptian territory⁶⁷. This was against the will of the people and contrary to the principle of sovereign equality of the members of the UN. In justification Egypt said that the UK had occupied Sudan and endeavoured to impair the unity of the Nile Valley and if such was maintained, then it was possible to endanger the maintenance of international peace and security. Egypt, therefore, requested the Council to direct the total and immediate evacuation of British troops from Egypt, including Sudan, and to terminate the present administration in Sudan. In response, the UK representative stated that no proof had been provided to show that international peace and security had been threatened in any way, unless the Egyptian government contemplated

⁶⁷ Tolstoy L., p.1. The Anglo-Egyptian question of 1947 on disputes that raised the question of the council's right to decide on the validity of treaties and the whole complex of the problem of the distinction between the legal and political approaches to international disputes.

creating it. He added that, since both Egyptian demands concern the treaty of 1936, the one real issue before the Council was the validity of the treaty which had been freely concluded and was in no way inconsistent with the UN Charter.⁶⁸ Also, the Security Council was not entitled to override treaty rights. He denied that the UK had intended to sever Sudan from Egypt.

The Egyptian representative in turn maintained that the Council was not called on to pass judgement on the legal rights of the parties to the 1936 treaty. They wanted the Council to take account of the “bald political facts” with a view to the maintenance of international peace and security. The reluctance of members to get involved in this problem was revealed by their failure to approve any of the three draft resolutions that were submitted. The last draft which was put forward by China, recommended the resumption of negotiations and the submission by concerned parties of reports to the Council. The draft was rejected by 2 votes in favour, none against, eight abstentions with one member not participating. The matter was dropped, though the President of the Council ruled that it remained on the agenda because the Council had not decided to remove it. The above situation cast a lot of doubt on the discretionary authority of the Security Council on international disputes.

Smith and Jowell state that a discretionary authority must in general be exercised only by the authority to which it has been delegated.⁶⁹ It is a well-known principle of law that when a power has been conferred to a person in circumstances indicating that trust is being placed in his/her individual judgement and discretion, he/she must exercise that power. If he/she has been expressly empowered to delegate it to another, he/she cannot act otherwise. This applies to the delegation of all classes of powers, including the Security Council's power to decide on issues of conflict.

⁶⁸ *Ibid.*, p.134. By the term of the 1936 Treaty, the British military occupation of Egypt was replaced by an Anglo-Egyptian alliance. British forces in Egypt were to be reduced and withdraw to the Suez Canal zone, and the joint Anglo-Egyptian administration of the Sudan was to continue. But the treaty was signed under the shadow of Italy's annexation of Ethiopia and did not reflect the views of the younger generation of politically active Egyptians.

⁶⁹ Tolstoy L., p.134.

In the *Lockerbie* case, Judge Shahabuddeen comments that the question raised by Libya on the validity of the Security Council resolution 748(1992) was whether a decision of the Security Council overrides the legal interest of states.⁷⁰ If so, whether there are any limitations of the powers of the Council to characterise a situation as one, justifying taking a decision entailing such consequences. Are there any limits to the Council's power of appreciation in disputes concerning members of the UN? If there are any limits, what are those limits and what body other than the Security Council, is competent to say what those limits are?

In the critical words of Professor Richard Falk and in response to Libya's challenge, "there is lack of consistency in practice".⁷¹ Failure to articulate principal lines when a UN response is inappropriate and reliance on unrestricted mandate to coalition of states led by the United State (US) makes the Security Council to be perceived as an instrument for geopolitical initiative currently dominated by the US.

Former South African President, Thabo Mbeki lamented that Africans had lost faith in the world governing body.⁷² Western control over the UN has capacity to lead to powerful nations installing leaders they preferred and to running the continent. He stated:

There is weakened confidence of the Africans in this body. The task of UN peacekeepers in the Côte d'Ivoire was to maintain peace between the North, occupied by the rebels and the South by government. The UN was supposed to make sure that the peace agreement is signed, that the two sides don't clash and find a political solution. But what did the UN do? It opened the door for the rebels in the North to march into Abidjan and carry out operations there side-by-side with the UN forces. These are neutral peace keepers but they took sides. In Libya, the UN delegated its authority

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Sunday Times*, July 31st 2011. *Sunday Times*. Pretoria, South Africa. p.4.

to the North Atlantic Treaty Organisation (NATO), a military formation of some countries, not a global body accountable to the UN. We have UN acting in a manner which is promoting particular agendas.

Mbeki also criticised the Security Council and proposed its restructuring. He said:

The Security Council has not argued that the situation in Libya and Côte d'Ivoire constituted a threat to international peace and security, because they didn't. Yet they authorise the use of military force. The UN needs to be restructured in a way that it is representative of the people of the world. In the current situation, I doubt if some of the members on the Security Council with veto powers are interested to effect structural change which is urgent. They are contemptuous people and are certainly not in the mood in which they can entertain an African view about the fundamental restructuring of the UN.

He insisted that although the matter of Côte d'Ivoire was going to be resolved amicably, unnecessary force was used to produce a particular outcome which has created more problems for the Ivoirians.

Weber compares the Charter of the UN to the constitution of a state.⁷³ Just like there is a constitution governing the state, the UN Charter is a constitution governing the international community. Such a constitution must be guided by the principles of equality of all its members as stated in Article 2(1) of the Charter. It should act with fairness and respect in the light of state sovereignty. It should have no class distinctions and all members should enjoy equal privileges. His idea was in the same line to that of Karl Marx. According to the Marxist theory of class struggle,⁷⁴ where the community is divided into an upper and lower class, there will be a revolution. This means, if the members of the lower class are not well treated, they will rise against the upper class and if precautions are not taken, such a revolution will lead to conflict. Weber

⁷³ Tolstoy L., p.6.

⁷⁴ Karl Marx, The Marxist theory and Class Consciousness. Available at <http://www.marxist.org/reference/subject/philosophy/work/en/slaughte.htm>.

considered such revolution a product of capitalism. It applies not only to the state as a body, but also to the international community as well.

The situation that befell Darfur in 2003 is a practical example of what Weber defines as capitalism. From a comparative perspective, opinions put forth by legal activists from the international community suggest that a group of people in the Darfur region of the Sudan are being suppressed by the Sudanese Government. The situation in Darfur has been described by the former UN Secretary-General, Kofi Annan, as “ethnic cleansing;” by President George W. Bush as “an atrocity;” and by Mukesh Kapila, UN Humanitarian Coordinator for Sudan, as “the world’s greatest humanitarian crisis in the 21st century”.⁷⁵ It is a tragedy that the Sudanese state has attempted to transform Sudanese society into a “pure” Arab society, whose population should only be composed of those who trace their origins to core Arab countries particularly Saudi Arabia.⁷⁶

In addition to the views expressed above, the former US Secretary of State, Collin Powell, and the US State Department are of the opinion that the situation in Darfur constitutes genocide.⁷⁷ This determination, however, does not tie with the report of the International Commission of Inquiry on Darfur. The latter suggest that only war crimes and Crimes against Humanity were committed in Darfur, as such they do not meet the criteria of crimes of genocide as prescribed in Article 2 of the Genocide Convention.⁷⁸ On their part, the UN Security Council adopted resolution 1593 to refer the Darfur situation to the ICC for further clarifications regarding the violation of human rights perpetrated in the region.⁷⁹

From the above, one can conclude that the responsibility to protect and to provide humanitarian assistance has not been invoked in Darfur. Kofi Annan underscored the

⁷⁵ *Op. cit.*, note 19 above

⁷⁶ *Ibid.*

⁷⁷ Hassan A. 2010. Dimensions of the Darfur crisis and its consequences: An Arab perspective. African Security Review Journal. Volume 19, No.1. Routledge Taylor and Francis Group South Africa. p.20.

⁷⁸ Eric Reeves, 2005. Report of the International Commission of Inquiry in Darfur to the UN Secretary-General, ICID report. IDEA Publishers, New York. para.513.

⁷⁹ United Nation Security Council Resolution 1593 of 31/03/2005, Doc: SC/8351. United Nations Department of Public Information, News and Media Division New York.

need for all states to embrace such a principle as the basis for collective action against genocide, war crimes, ethnic cleansing and crimes against humanity.⁸⁰ The UN General Assembly widely acknowledges the importance of the 'responsibility to protect' as a state obligation.⁸¹ It emphasizes that the individual state bears the primary responsibility to protect its populations from serious human rights violations that could possibly result in any of the crimes mentioned above. However, when the state fails to protect its populations, the international community may assume such a responsibility. Nonetheless, in relation to Darfur, it is evident that the responsibility to protect and to provide humanitarian assistance has not been invoked.

In reference to the African Union, The Constitutive Act of the African Union (AUCA) provides that the Union shall function with the right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.⁸² The UN Security Council resolution 1674 also reiterates the provisions of paragraph 139 of the 2005 World Outcome Document which mandates the international community, through the United Nations, to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the UN Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁸³

Although the provisions quoted above provide the basis for which the international community may take actions against Sudan, the UN being the supreme body charged with this responsibility has not been able to reverse the situation in Darfur. Focusing on the future of the UN Security Council, Tolstoy states that, "to sail into the future is even more than to sail the ocean. There is nothing there. The future will be what men (sic)

⁸⁰ Evans G. From Humanitarian Intervention to Responsibility to Protect. p.707 Available at http://www.fh-muenter.de/humanitaere-hilfe/downloads/Evans_-_Responsibility_To_Protect.pdf

⁸¹ Head of States Agreement (2005). The Outcome Document of the High Level plenary meeting. para.139 Available at <http://www.responsibilitytoprotect.org>.

⁸² Constitutive Act of the African Union: Adopted in 2000 at the Lome Summit (Togo), entered into force in 2001. Para.4(h).

⁸³ United Nation Security Council Resolution 1674 of 28 April 2006, Doc: SC/8710. United Nations Department of Public Information, News and Media Division: New York.

and circumstances make it".⁸⁴ Commenting on this issue, President Robert Mugabe said:⁸⁵

The vision that we must present for a future United Nations should not be one filled with vague concepts that provides an opportunity for those states that seek to interfere in the internal affairs of other states. Concepts such as humanitarian intervention and the responsibility to protect need careful scrutiny in order to test the motives of their proponents.

Indeed, the Darfur crisis may camouflage other motives which have made it a protracted conflict and the efforts of the Security Council and the African Union less successful.

1.7 ASSUMPTIONS OF THE STUDY

In this study, the following assumptions have been made:

- The UN has good intentions to properly handle issues of conflict resolution.
- The Veto power bestowed upon the permanent members is an obstacle to the smooth functioning of the UN Security Council in Sudan.
- UN Security Council resolutions have not restored peace in the Darfur region of The Sudan.

1.8 DEFINITION OF CONCEPTS

Conflict: The term *conflict* usually refers to a condition in which one identifiable group of human beings (whether tribal, ethnic, linguistic, cultural, religion, socioeconomic, political, or other) is engaged in conscious opposition to one or more other identifiable human groups because of interests that force them to pursue incompatible goals.⁸⁶ Coser defines *conflict* as a "struggle over value and claims to scarce status, power, and resources in which the aims of the opponents are to neutralize, injure, or eliminate their

⁸⁴ Tolstoy L., p.1.

⁸⁵ *Op. cit.*, note 80 above.

⁸⁶ James E. and Robert L. 2001. *Contending Theories of International Relations: A Comprehensive Survey*. Longman Inc., New York. p.189.

rivals”.⁸⁷ In the context of this study, conflict will refer to the continuous opposition by the different rebel factions of Darfur against the Sudanese government and its allied *Janjaweed* militias.

Conflict Resolution: It is a wide range of methods for addressing sources of conflicts whether at the inter-personal level or, between states. It is also a means of resolving a given conflict or of continuing it in less destructive forms than, say, armed conflict. Processes of conflict resolutions generally include negotiation, mediation, arbitration, judicial settlement, diplomacy and creative peace building⁸⁸.

The term “Conflict Resolution” is sometimes used interchangeable with the term “dispute resolution” or “alternative dispute resolution”. The process of arbitration, litigation and formal complaint processes through an ombudsperson are parts of dispute resolution and therefore they are also part of conflict resolution. The concept of conflict resolution can also encompass the use of non-violent methods such as civil resistance by a party to a conflict. It is a means of pursuing goals on grounds that such means are more likely than armed struggle to lead to effective resolution of the conflict.

1.9 DELIMITATION OF THE STUDY

This study is limited to the response of the UN Security Council in the Darfur crisis from the period 2003-2012. The Darfur conflict started in 2003 and the violence is still on-going.

1.10 METHODOLOGY

The researcher used qualitative methods to conduct the research. Data was collected from secondary sources like text books, journals, newspapers, and the internet. The research method was limited to secondary sources due to the impossibility of the researcher having to travel to Darfur to interview or administer questionnaires to the actors involved in the conflict. Data was analysed using qualitative methods such as

⁸⁷ *Ibid.*

⁸⁸ John B., 1990. Conflict: Resolution and prevention. St. Martin’s Press Inc, New York, USA. p.3.

descriptive, interpretative and inferential analysis, taking into consideration the various themes raised in the background information and literature review.

1.11 ETHICAL CONSIDERATIONS

Due to the use of secondary method of data collection, the researcher encountered no pertinent ethical issues. Rather, the researcher conforms to the University of Fort Hare policy on research which prohibits all forms of research misconduct, falsification, fabrication, or plagiarism. He also avoided misinterpretation of credentials in proposing, performing, reviewing or reporting research. Lastly, he acknowledged all assistance and collaboration of others or sources from which information was borrowed.

1.12 LIMITATIONS OF THE STUDY

The study is on a fluid and on-going conflict, therefore the conclusions and recommendations can only be tentative. Lack of insufficient resources to interview the actors involved narrowed the scope of the research. Data collection was limited to secondary sources, reducing the research information. Finally, financial constraints hampered access to recently published books and articles relevant to the case study.

To properly manage the limitations of this study, the researcher limited data collection to secondary sources. Since data collection was limited to secondary sources, the researcher encountered less financial difficulties. Nevertheless, the researcher received financial aid from the University of Fort Hare in the form of students supervisor linked bursary. This helped to facilitate the research since he was able to visit other libraries to acquire more information. The researcher also utilized the inter-library loan service to obtain information that was not available at the University of Fort Hare Library.

1.13 CHAPTER PRESENTATION

This work will be presented in five chapters.

Chapter One contains the background of study in relation to the Darfur conflict. It also contains the research objectives, the assumptions to which the research is based, the

literature review, the method of data collection, limitation of study and the presentation of the research.

Chapter Two discusses the Darfur conflict, the different crimes committed and the victims affected. It also took in to consideration the various instances of human rights abuses. The chapter concludes by giving an appraisal of the facts.

Chapter Three discusses different resolutions adopted by the Security Council relating to Darfur and their implementation. As a body vested with a global mandate for maintaining peace and security, these factors will not only be limited to the Darfur conflict, but may be relevant and applicable to other conflicts as well.

Chapter Four explores possible remedies to victims of the Darfur conflict.

Chapter Five contains a conclusion and recommendations drawn from the study.

CHAPTER TWO

INVESTIGATING ALLEGED CRIMES COMMITTED IN THE DARFUR CONFLICT

2.1 INTRODUCTION

This chapter discusses the different crimes that are alleged to have been committed in Darfur. It also determines whether acts of genocide have actually materialized in the Darfur conflict. This will be done by analyzing the facts and making legal appraisals. With regards to the Darfur conflict, the only body responsible for the maintenance of international peace and security is the United Nations Organization (UN). Under Article 39 of the Charter of the UN, the Security Council is empowered to determine the existence of any threat to the peace, breach of the peace, or act of aggression of a member state and decide what measures it shall take to redress the situation. The Security Council, acting under Chapter VII of the Charter adopted resolution 1564 on the 18th of September 2004 which re-iterated that Sudan did not fulfilled its obligation under resolution 1556 to disarm the *Janjaweed*.⁸⁹

The resolution requested the Secretary-General of the UN to establish an International Commission of Inquiry on Darfur (ICID), to investigate reports of violations of human rights and humanitarian law by all parties, and to determine whether acts of genocide had occurred in Darfur for which the perpetrators could be held accountable. The ICID noted that War Crimes and Crimes against humanity had indeed occurred and recommended that the UN Security Council refer the situation to the International Criminal Court (ICC).⁹⁰ Although war crimes and crimes against humanity are said to have occurred in Darfur, the ICID concluded that there was no intention to commit genocide.⁹¹ The ICID report argues that the Sudanese Government did not pursue a policy to commit 'genocide' therefore; there was no specific intention to qualify the

⁸⁹ Robert O. p.19.

⁹⁰ Eric Reeves, 2005. Report of the International Commission of Inquiry in Darfur to the UN Secretary-General, ICID report. IDEA Publishers, New York. para.517. The International Commission of Inquiry in Darfur is an independent commission established by UN Security Council resolution 1564 to investigate reports of Human Right violations in Darfur.

⁹¹ *Ibid.* para. 513.

criteria prescribed under Article 2 of the Genocide Convention.⁹² To provide an understanding of this ambivalent position, the section that follows will throw more light on the facts raised by the ICID report.

2.2 WAR CRIMES AND CRIMES AGAINST HUMANITY

War crimes are said to be crimes committed during hostilities that violate the laws or customs of war and inflict death or serious injury to non-combatants.⁹³ Women often suffer the most through sexual violence and other forms of human enslavement that fall within the context of war crimes.

According to Article 8 of the Rome Statute, the term “War Crimes” means grave breaches of the Geneva Convention of 12 August 1949. Committing any one of the acts prescribed by Article 8(2) (a) of the Statute of the ICC and other serious violations of the laws and customs applicable during international armed conflicts also constitute “War Crimes”. In the case of an armed conflict not of an international character, it will be serious violations of Article 3 common to the four Geneva Conventions as prescribed by Article 8(2) (c) of the ICC Rome Statute and it also constitutes “War Crimes”.

War crimes occurred in Sri Lanka during its final 2009 offensive against the Tamil Tiger rebels, in Germany during the Nazi period; and also in Bosnia during the Balkans conflict of the 1990s.⁹⁴ Most recently however, Darfur tops the table and the conflict seems to have gained much attention from the international community. Comparing the situation of Darfur, to that which obtained in Nazi Germany, Glueck states that “both are practical examples of situations where ordinary people get involved in highly organized as well as financially rewarding crimes, including War Crimes.”⁹⁵ Among the few international bodies put in place to try War Crimes, the International Criminal Tribunal

⁹² *Ibid.*

⁹³ Askin K. 1997. War crimes against women: Prosecution in International War Crime Tribunals. Martinus Nijhoff, The Netherlands. p.5-6.

⁹⁴ Lobbied R. 2011. Sri Lankan abuses. The Sunday Morning Herald available at <<http://www.news.smh.com.au/breaking-news-national/rudd-lobbied-on-sri-lanka>>

⁹⁵ Hagan and Richmond. 2009. Darfur and the crime of genocide: The crime of crimes. Cambridge University Press New York. p.53.

for the Former Yugoslavia (ICTY) is particularly important. The provisions of Article 3 of the Statute of the ICTY governs violations of the laws and customs of war. It states:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;*
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;*
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;*
- (e) plunder of public or private property.*

This provision mainly regulates the behaviour of combatants in times of war. It directs that during war times, combatants should differentiate between combatants and the civilian population by the absolute respect for International Humanitarian Law.

In as much as war crimes are being dealt with under statutory provisions, Crimes against humanity have also been given consideration.⁹⁶ Arbour states that crimes against humanity are widespread and systematic attacks on civilians during war periods. Hwang argues that crimes against humanity must not necessarily be committed only in time of war, as provided for in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.⁹⁷ The Convention therefore, explicitly states the principle that crimes against humanity do not require a nexus with armed conflict. Article 1 of this convention provides that: “[n]o statutory

⁹⁶ Rome statute of the International Criminal Court. Document A/CONF.183/9 of 17 July 1998. The Statute entered into force on 1 July 2002.

⁹⁷ Hwang P. 1998. Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court. Fordham International Law Journal, Volume 22, Issue 2. p.462.

limitation shall apply to war crimes.... [and] [c]rimes against humanity whether committed in time of war or in time of peace”.⁹⁸ In the *Prosecutor v. Tadic* case, the trial chamber stated that: “Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character”.⁹⁹

In the case of *Prosecutor v. Kupreskic et.al*, the trial chamber stressed that the persecution of an act as a crime against humanity is an offence belonging to the same *genus* as genocide. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics as well as of persecution, on account of their political affiliation.¹⁰⁰ The Genocide Convention affirms that: “The Contracting Parties agree that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”.¹⁰¹ It follows that crimes against humanity, just like genocide, can be committed in times of war or peace, provided there is evidence of widespread and systematic attack directed to any civilian population.

It is worth noting that there is no separate convention governing crimes against humanity, unlike the Convention on Genocide. However, it is covered by Article 5(1) of the Statute of the ICC, and it is further elaborated in Article 6.¹⁰² Article 5 provides that the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community which are: crimes of Genocide; crimes against humanity; war crimes and the crime of aggression.

⁹⁸ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) [hereinafter Convention on Statutory Limitations].

⁹⁹ Case No. IT-94-1-T. 7 May 1997. para.227.

¹⁰⁰ *Prosecutor v. Kupreskic et al.* ICTY Trial Chamber Judgement of 14 January 2000. Case No. IT-95-16-T. para.636.

¹⁰¹ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN General Assembly Resolution 260(III) A on 9/12/1948 and entered into force on 12/01/1951. Art.1.

¹⁰² Hagan and Richmond. 2009. *Darfur and the crime of genocide: The crime of crimes*. Cambridge University press New York. p.31.

Before putting in place the Statute of the ICC, crimes against humanity were dealt with by the Statute of the International Criminal Tribunal for Rwanda (ICTR) and, the statute applied only to the situation in Rwanda.¹⁰³ Article 3 of ICTR provides that the tribunal shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The crimes enumerated therein include: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds and other inhuman acts. Such crimes are punishable under Article 6(c) of the Nuremberg Charter and are referred to as “Crimes against humanity”. The provisions of Article 3 of the ICTY and Article 6(c) of the Nuremberg Charter concur that Crimes against humanity are punishable under international law.

In the case of *Prosecutor v. Erdemovic*, the appellant was charged for War crimes and Crimes against humanity.¹⁰⁴ He pleaded duress as a justification for his actions. The court held that the plea was not sufficient enough to justify his participation in the execution of approximately 1,200 unarmed civilian Muslim men at the Branjevo farm near the town of Pilica in eastern Bosnia on 16th July 1995. He was found guilty of the alleged crimes and sentence to 10 years imprisonment.

As a matter of universal application, the UN has had for a long time problems with a particular body that could try cases of human rights abuses like War crimes and Crimes against humanity. The Statute of the International Court of Justice (ICJ) lacks a provision on War crimes and Crimes against humanity. This is because the Court does not have criminal jurisdiction. Moreover, Article 34(1) of the Statute of the ICJ makes it clear that “only states may be parties in cases before the Court”. Except for state

¹⁰³ Statute of the International Criminal Tribunal for the prosecution of persons responsible for Genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994.

¹⁰⁴ Judgement of the International Criminal Tribunal for the former Yugoslavia. Case No.IT-96-22-A of 7th October 1997.

parties, the court cannot therefore try individuals for crimes committed in times of peace or war.

On the 25th of May 1993, the UN Security Council adopted the Statute of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991.¹⁰⁵ Article 5 of the statute stipulates that:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds; and

(i) other inhuman acts.

The jurisdiction of this tribunal was limited to crimes committed only in the territory of the Former Yugoslavia since 1991. The UN Security Council further adopted resolution 955 on the 8th of November 1994 to establish the Statute of the International Tribunal for Rwanda, for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens responsible for such acts committed in neighbouring states.¹⁰⁶ Article 3 of the Statute is in *pari materiae* with Article 5 of the statute of the ICTY quoted above.

¹⁰⁵ U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

¹⁰⁶ *Op. cit.*, note 104 above.

With the International Tribunal for Rwanda, the prosecution was limited to crimes committed in the territory of Rwanda and those committed in neighboring states by Rwandan citizens between January and December of 1994. On 1st of July 2002, the Rome Statute of the ICC came into force.¹⁰⁷ Article 5(1) of the Statute provides that, “the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole”. Article 13 further provides that the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 provided the matter is brought before the Court:

1. By a state party to the Statute referring to the Prosecutor *proprio motu*;
2. By the Security Council referring the case to the Prosecutor acting under Chapter VII of the Charter of the UN;
3. Through an investigation initiated by the Prosecutor of the Court.

It is worth noting that the ICC can only deal with cases after the 1st of July 2002 because the Court has jurisdiction only with respect to crimes committed after the entry into force of the ICC Statute. Article 11(2) of the ICC Statute provides that:

If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.

The ICID believes that the ICC is a good way of bringing alleged perpetrators of human rights violations in Sudan to justice, but though, it made recommendations on a host of other measures pertaining to the establishment of a compensation commission to provide reparations for victims; strengthening judicial independence in Sudan; creation of a truth and reconciliation commission; exercise of universal jurisdiction by other states...etc.¹⁰⁸ Article 7 of the Statute of the ICC provides Crimes against humanity

¹⁰⁷ *Op. cit.*, note 97 above.

¹⁰⁸ *Ibid.*, para. 590.

while Article 13 mentioned above prescribes three ways through which a matter can be brought before the Court.

There have been reports of violence and abuses of international humanitarian law that resulted in War Crimes and Crimes against humanity being committed in Rwanda and Bosnia.¹⁰⁹ The violence that erupted in Darfur in 2003 can be placed in the-same category with the above mentioned cases.¹¹⁰ In order to justify this assertion, the researcher will in the next section determine if such acts were actually committed in the Darfur conflict.

2.2.1 Indiscriminate Attack on Civilian Populations

There have been numerous reports alleging that there have been indiscriminate attacks on civilian populations from as early as 2003. According to the account by Ambassador Baba Gana Kingibile, Special Representative of the AU mission in Darfur:¹¹¹

On 28 September 2005,... some reportedly 400 Janjaweed Arab militias on camels and horseback went on the rampage in Aru Sharo, Acho, and Gozmena villages in West Darfur. Our reports also indicate that.... on the actual day of the attack, Government of Sudan helicopter gunships were observed overhead. This apparent coordinated land and air assault gives credence to the repeated claim by the rebel movements of collusion between the Government of Sudan forces and the Janjaweed/Arab militia. This incident, which was confirmed not only by our investigators but also by workers of humanitarian agencies and nongovernmental organizations in the area, took a heavy toll resulting in 32 people killed, 4 injured and 7 missing, and about 80 houses/shelters looted and set ablaze.

¹⁰⁹ Oprah W. 2006. Survivors' Stories from Genocide in Bosnia, Rwanda and Darfur. para.2. Available at <http://www.oprah.com/oprahsbookclub/modern-Day-Genocide-Survivors-Stories-from-Bosnia-Rwanda-Darfur>.

¹¹⁰ Human Rights Watch Darfur, 2011. Sudan: New Attacks on Civilians in Darfur. Available at <http://www.hrw.org/news/2011/01/08/sudan-new-attack-civilians-darfur>

¹¹¹ Quoted by Reeves. 2008. Sudan resumes Civilians destruction in West Darfur-Sudan Tribune. Available at <http://www.Sudantribune.com/Sudan-resumes-civilian-destruction,26048>

The report further confirms that there has been a marked increase in attacks on and destruction of camps for displaced persons since the Khartoum regime settled on its “new strategy for Darfur”.

Another report by the ICID presented the government of Sudan and *Janjaweed* militias as being responsible for serious violations of international humanitarian law and human rights law amounting to crimes under international law.¹¹² In particular, the ICID found that government forces and militias conducted indiscriminate attack including killing of civilians, torture, and enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced disappearance throughout Darfur. The ICID was particularly alarmed that such attacks continued during the course of its mandate, and therefore considered that there was need to take action urgently to end these violations.¹¹³

Reports from ICID and HRWD show that the attacks in Darfur were widespread and systematic. This is a principal characteristic of Crimes against humanity. Article 48 of the Protocol I Additional to the Geneva Conventions 1977 (AP1) states:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

This provision is in line with Protocol II Additional to the Geneva Conventions 1977. Article 13(2) which deals with the protection of the civilian population provide that:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give

¹¹² ICID Report., para.9.

¹¹³ ICID Report., para.11.

effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited.

3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

The whole essence of Article 48 of Additional Protocol I and Article 13(2) of Additional Protocol II to the Geneva Convention is to differentiate civilian populations from combatants during war time. This is an important justification for Crimes against humanity.

Once the attack on the civilian population is widespread and systematic, it will amount to Crimes against humanity. Similarly, it will constitute Crimes against humanity where the systematic and widespread attack was known by the defendant who fails to redress the situation for personal reasons. In the case of *Prosecutor v. Tadic*, the ICTY Appeals Chamber upheld the decision of paragraph 659 of the trial chamber's judgment which states:¹¹⁴

Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his (sic) act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him (sic) liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his (sic) act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

¹¹⁴ Judgement of the International Criminal Tribunal for the Former Yugoslavia. Case No. IT-94-1-A of 15 July 1999.

If perpetrators' attack results in any of the conditions stipulated under Article 7 of the ICC Statute, the attack will automatically amount to a Crime against humanity. Article 8(2)(c) of the ICC statute further concludes that in the case of an armed conflict not of an international character "War Crimes" means:

Serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause.

With regards to article 8(2) of the ICC Statute, and in relation to Article 3 common to the four Geneva conventions of 1949, the treaty that establishes the ICC Statute becomes a 'norm generating treaty' by virtue of customary international law. The Statute therefore binds state parties, including states that are not parties to it, with respect to the provisions elaborating war crimes.

2.2.2 Killing of Civilians

Since the outbreak of hostilities in 2003, the killing of civilians in Darfur by the Sudanese forces has been consistent. In 2008, Omer stated that at least 400,000 people have been reported killed and more than 2.5 million civilians displaced.¹¹⁵ There have been numerous reports of the killing of civilians such as those made by the ICID.¹¹⁶ The latter documented some rebel attacks and verified witness testimonies thorough investigations in the field. For instance, ICID investigated a Justice and Equity Movement (JEM) attack on the town of Kulbus, West Darfur, on the 4th of October 2003, and on the 25th and 26th of December 2003.¹¹⁷ During the first attack in Kulbus, 42 soldiers and 17 civilians including one child were killed. The ICID's forensic experts have been able to verify that some of the military were buried in the trenches which

¹¹⁵ Omer Y. 2008. The Darfur situation and the ICC: An appraisal. Journal of Politics and Law Vol.1, No.3. p.1.

¹¹⁶ ICID Report., para.286.

¹¹⁷ *Ibid.*

existed around the military camp, and all civilians were buried in multiple graves in the town cemetery. In a second attack on the 25th and 26th of December, 28 Government soldiers were killed, as well as four male civilians.¹¹⁸

These incidences were preceded by an attack described to the ICID by some eyewitnesses, where members of the nomadic Rezeigat tribe were attacked while in the Kulbus area by members of the Sudan Liberation Army (SLA) and JEM. The attackers killed forty eight persons, including women and children, and stole property and livestock from the market and then destroyed it. The victims were buried many days after the attack in areas surrounding Kulbus.¹¹⁹

Hagan states that in an attack by the *Janjaweed*, they shouted the familiar refrain, “Nuba, Nuba, out, out” (slaves, slaves, out, out).¹²⁰ During the attack, about 500 troops were involved. The reporter said he escaped uninjured and hid nearby where he saw his fleeing uncle shot and beaten to death. He returned to the village in the evening after the attack and found his home burned and his village completely destroyed. He did not know how many persons the attackers killed, but when he was hiding outside the village, he saw four children killed. The Masalit respondent described the following events involving Dawai, one of the *Janjaweed* commanders:

*They gathered five Sheikhs/imams in the village and demanded to know where is Tora Bora (Tora Bora is local jargon for rebels). The Sheikhs said they don't know such things. The Janjaweed tied their hands behind their backs, piled straw around them, and poured kerosene on the straw. Hamid Dawai said, “where is Tora Bora, you are Tora Bora.” Then Dawai lit the straw and burned them all to death.*¹²¹

¹¹⁸ *Ibid.*

¹¹⁹ ICID Report, para.287.

¹²⁰ Hagan and Richmond. 2009. Darfur and the crime of genocide: The rolling genocide. Cambridge University Press, New York. p.145.

¹²¹ *Ibid.*

Recorded cases of civilian killings in Darfur and some recent reports show that the killing process is still continuing. The Human Rights Watch report actually found out that Sudan forces are still killing people in Darfur.¹²² On the 25th of March 2010, one internally displaced person was killed and 21 people arrested in the market of Zamzam camp by the Sudanese forces. An eyewitness said “the unrest in this camp has been a regular phenomenon causing the people to live in fear”.¹²³

Life is a free gift of nature inherently possessed by all human beings. The right to life has been covered by many treaties. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. The Universal Declaration of Human Rights also echoes the right under Article 3, while Article 4 of the African Charter on Human and Peoples’ Rights states: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.

With respect to international humanitarian law, killing of civilians not taking active part in hostilities in a non-international armed conflict is a contravention of Article 3 common to the Geneva Conventions.¹²⁴ A systematic killing of civilians is prohibited also by customary international law rules as codified in Article 4(2)(a) of Additional Protocol II of the Geneva Convention and is criminalized as a War crime or Crimes against humanity. Murder has a discriminatory dimension when committed on political grounds. The killing of civilians in Darfur as stated above is widespread and systematic, as such, Article 7(2)(g) of the ICC statute provides that acts of persecution may constitute crimes against humanity and can be prosecuted as such.

¹²² Human Rights Watch Report Darfur, 2011. UN Department of Public Information. Available at <http://www.un.org/en/unpress/index-asp>.

¹²³ *Ibid.*

¹²⁴ Article 3 common to the four Geneva Conventions provides that the killing of civilians not taking active part in an arm conflict will be punishable by international law.

2.2.3 Attack on Villages and Destruction of Private Property

The conflict in Darfur was followed by serious attack on villages and the destruction of private property. Reports from documentary sources and other interveners highlighted above have shown that the government forces and its *Janjaweed* militias are solely responsible for such atrocities. An eye witness in the Atrocities Documentation Survey (ADS) identified Hamid Dawai as the leader of the attack on Terbeba and reported seeing thirty-six bodies, five more than the Human Rights Watch report.¹²⁵ He recalled:

“At 7.am on the 15th of February 2004, my village was attacked by a mixed force of Janjaweed militia and government soldiers commanded by Hamid Dawai. I saw Dawai giving orders to both groups as I ran past him. I knew Dawai as a friend of my family”.

The respondent also reported that, the soldiers were shouting “kill the Nuba”. He added that the *Janjaweed* took about twenty-two girls between the ages of 12 and 15. They released all but one who died after two days. The girls had all been raped. The respondent escaped during the attack. Though shot in the leg, he ran, and after watching the eleven-hour attack from about 200 meters away, he returned to Terbeba in the late afternoon.¹²⁶ He went back to the village at about 5.pm after the soldiers had left. His leg wound was not serious enough to prevent him from walking. He saw 36 bodies including that of his neighbour who had been tied both hands and feet and thrown into a burning house. The bodies were scattered everywhere. He found that his house had been burnt to the ground and his whole village was destroyed.

Another respondent, an African villager, was fortunate to see the actions of the *Janjaweed* from a distance. He stated that:

The first time I saw Musa Hilal, a government soldier was a Tuesday, in the market. Musa Hilal said he was sent by the government of Sudan and he

¹²⁵ Hagan and Richmond., p.132.

¹²⁶ *Ibid.*

*told the people that, “we are going to kill all blacks in this area”, and that if you kill people, no one will persecute you. Also if you burn homes and buildings, nobody will question you. He continues to say that “the animals you find are yours but if you find a big machine gun, it belongs to the government. We will clear the land until the desert begins”.*¹²⁷

Musa Hilal spoke Arabic which the respondent understands. For fear of being captured, the villager took off from where he was hiding to return after the attack. He further said:

I went back and nothing was there [Respondent begins to cry.] I looked under everything and I looked for my family and for my house, I didn't find [them]. I had five children with their mother who were gone. Until now, I don't know what happened to them. May be they were in the fire I don't know. He ended crying again.

The ICID report explained the case of Adwa when it investigated attacks by government armed forces and *Janjaweed* on the village of Adwa in south Darfur.¹²⁸ The village was totally destroyed with dangerous weapons used by the *Janjaweed*. In the course of the attack, 100 persons were injured, 20 to 30 dead bodies lying on the ground and almost every property destroyed. In another attack launched in the village of Anka, eyewitnesses said that before the *Janjaweed* entered the village, the Government armed forces bombed the area around the village with Antonov aircraft.¹²⁹ One aircraft circled the village while the other one bombed. The first one was coloured white and had a black underside, while the second was completely white. The bombing lasted for about two hours, during which time, 20 to 35 bombs were dropped around the outskirts of the village. A hospital building was hit during the bombardment. It also affected vegetation, life stocks, water tanks and other sources of livelihood.¹³⁰

¹²⁷ *Ibid.*, p.130-132.

¹²⁸ ICID Report., para. 253.

¹²⁹ ICID Report., para. 251.

¹³⁰ *Ibid.*

According to Rebecca, 500 drawings by children who escaped the violence across the border to Chad are to be submitted to the ICC as proof of war crimes by Sudanese forces.¹³¹ The drawings depict Sudanese tanks, planes and helicopters launching coordinated attacks by the Arab *Janjaweed* militia against Darfuris, while the latter defended themselves with bows and arrows. The children's graphic images include the bombing of civilians and children, homes being set on fire as villages are destroyed, beheadings and victims lying in pools of blood, women chained together being led away. Many of the children involved in the graphic drawings don't have brothers or fathers. The drawings which should depict playgrounds or farm yard instead show helicopter gun attacks, tanks bearing the Sudanese flag and soldiers wearing the uniform of the Sudanese army alongside vehicles with machine guns driven by *Janjaweed* militias.¹³²

Jeremy argues that the children's graphics/drawings evidence has been tested. After the 2004 tsunami, children in Sri Lanka and Indonesia were encouraged to draw what had happened.¹³³ Their images showed them caught in the flood, arms raised, transfixed as the wave bore down. Some clung to trees as televisions, fridges and bodies floated by in what marked the end of their world. Yet, the intense colours and graphic imagery sent a message - we have survived.

Kathleen, a child psychologist in the UK who has worked with traumatised children said that:¹³⁴

I have used art therapy all my life as a form of communication. It is a brilliant way for them to get their feelings down and to get rid of feelings. Children may be able to draw tanks and guns even though they are unable to speak

¹³¹ Rebecca T. 2007. Can Children's drawings be used as evidence of War Crimes? Available at <http://www.guardian.co.uk/artanddesign/artblog/2007/aug/03/canchildrensdrawingbeused>.

¹³² *Ibid.*

¹³³ Jeremy L. 2007. Article draws out anguish of traumatised youngsters. The Independent Health News Journal. p.1.

¹³⁴ *Ibid.*

about them. Once it is on paper, it is real and can be dealt with. While still in their head, they can't express it.

She also explains that children can be good witnesses because of their curiosity; as such they spend time to observe properly unlike adults who are always busy with many things. One can always determine what they feel from the size of object in their drawing e.g. if a tank fills the picture, for that child it is the most massive fear.

There have been, and there still are, numerous attacks on villages in the Darfur region. While the international community focused on South Sudan's referendum, the situation in Darfur sharply deteriorated. Bekelele said:¹³⁵ "we are seeing a return to past patterns of violence, with both government and rebel forces targeting civilians and committing other abuses." He continued to explain that on January 25, 2011, the Sudanese government air and ground forces fought rebel troops in and around the town of Tabit, North Darfur.¹³⁶ The fighting reportedly destroyed eight villages and caused thousands of civilians to flee the area.

At Tabit, and in other clashes in Darfur since early December 2010, both government and rebel forces carried out targeted attacks on civilian populations, based on their ethnic affiliations. The fighting caused civilian deaths and injuries, destruction and looting of civilian property, and mass displacement of tens of thousands of people who fled to displaced persons camps and safe havens.

The attack on villages and destruction of private properties is a practice contrary to the rules of international law. As stated above, human rights law and international humanitarian law are relevant to the protection of civilians in armed conflict. International law prohibits any attack deliberately directed at civilians, that is, persons that do not take a direct part in armed hostilities. International law also prohibits

¹³⁵ *Op. cit.*, note 111 above. Daniel Bekele, Africa Director at Human Rights watch said president Bashir and the people of Sudan should be congratulated for holding a peaceful referendum on Southern secession but that the smooth process does not exonerate Sudan's leaders for ongoing abuses in Darfur. Concerned governments should urgently and forcefully press both Khartoum and rebel movements to end their abuses of civilians in Darfur, create humanitarian access to affected areas, and ensure accountability for War crimes.

¹³⁶ *Ibid.*

indiscriminate attacks on civilians, that is, any attack on areas or places where both civilians and combatants may be found, which is not directed at a specific military objective, or the use of methods or means of combat which cannot be directed at a specific military object. Parties to the conflict therefore must at all times distinguish civilians from those taking a direct part in the hostilities, as well as differentiate civilian objects from military object. Deliberate attacks on civilian objects are prohibited. The notion of 'civilian objects' embraces all objects (houses, private dwellings, orchards, schools, shelters, hospitals, churches, mosques, synagogues, museums, works of art, and so on) that do not serve, nor are used for, military purposes.

Articles 3 of the 4 Geneva Conventions forbids destruction of civilian property. Likewise, Article 8(2)(b)(v) of the ICC Statute provides that War Crimes means "Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives". Article 11(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR) further states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right.

The above attacks were totally discriminatory in nature, conducted in a wide spread and systematic manner. In the *Tadic* case, judge Shahabuddeen stated that such acts directed to civilian populations in a discriminatory manner amount to the crime of persecution, which is a crime against humanity.¹³⁷

2.2.4 Rape and Other Sexual Offences

There have been many documentary sources reporting the issue of rape in Darfur. Reeves and Kristof describe the Darfur conflict as racially driven, especially on the issue

¹³⁷ Case No. IT-94-1-A of 15 July 1999.

of rape.¹³⁸ Kristof views the case of Halima, one of seven women recently captured and raped by *Janjaweed* militias outside a displacement camp. Halima testified that in the course of their actions the rapists were saying,¹³⁹ “You blacks are not humans. We can do anything we want to you. You cannot leave here”. She said three men raped her, beat her and stole her clothes. Another of the seven who were caught, Aziza Yakub, confirmed Halima’s story and added that the *Janjaweed* told her while raping her: “You blacks are like monkeys. You are not humans.”

The ICC prosecutor’s brief also included eyewitness reports of the separation of males and females during attacks, with young women singled out for continuous brutal rapes.¹⁴⁰ The respondent identified Kushayb as a participant in those rapes:

According to the witness, immediately after the attack, the Janjaweed and members of the armed forces rounded up civilians and divided them into two groups: boys and women. After arriving at the military garrison, the young women were stripped naked and raped. The activity continued for nearly a week and led to the death of at least three young women.

There has been more evidence gathered by different researchers depicting the nature of rape in Darfur. Tinsley gathered evidence of the systematic rape of black women when they left the refugee camp to gather firewood.¹⁴¹ She said rape was being used as a weapon of war, with victims being told: “I want to dilute your blood”. A second genocide was happening since many of the victims (women) were developing HIV/AIDS and could not get drugs to treat the disease. Sexual slavery is punishable under the Rome Statute of the ICC as a Crime against humanity.¹⁴²

¹³⁸ Hagan and Richmond, p.109.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, p.149.

¹⁴¹ *Op. cit.*, note 132 above.

¹⁴² Art. 7(1)(g), Rome Statute of the International Criminal Court.

The ICID report continues to state that various sources reported widespread rape and other serious forms of violence committed against women and girls in all the three states of Darfur.¹⁴³ According to these sources, the rape of individual victims was often multiple, that is, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases women were reportedly raped in public, and in other incidents, women were further berated and called “slaves” or “Tora Bora.” In general, the findings of the Commission confirmed the above reported patterns. However, the Commission considers that it is likely that many cases went unreported due to the sensitivity of the issue and the stigma associated with rape. On their part, the authorities failed to address the allegations of rape adequately or effectively.¹⁴⁴

Just like the other offences, the prohibition of rape and other sexual offences are enshrined in many documents to which Sudan is a party such as the International Covenant on Civil and Political Rights (ICCPR),¹⁴⁵ the Convention on the Rights of the Child (CRC),¹⁴⁶ the African Charter on Human and Peoples’ Rights (ACHPR).¹⁴⁷ The Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography is also instructive to this regard.¹⁴⁸ This is in *pari materiae* with Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.¹⁴⁹

Humiliating and degrading treatments are forbidden by the ICC statute. War Crimes for the purpose of the statute include “committing outrages upon personal dignity, in

¹⁴³ ICID Report., para. 333.

¹⁴⁴ ICID Report., para. 336.

¹⁴⁵ International Covenant on Civil and Political Rights adopted by UN General Assembly Resolution 2200(XXI) on 16/12/1996 and entered into force on 23/03/1976. Art. 7.

¹⁴⁶ Convention on the Right of the Child adopted by UN General Assembly Resolution 44/25 of 20/11/1989 and entered into force on 2/09/1990. Art. 37 and 34(a).

¹⁴⁷ African Charter on Human and Peoples’ Rights, adopted on 27/06/1981, entered into force 21/10/1986. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I. L. M. 58(1982), Art. 5.

¹⁴⁸ Optional Protocol to the Convention on the Right of the child on the sale of children, child prostitution and child pornography. Adopted and open for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 and entered into force on 18 January 2002. Art.1.

¹⁴⁹ Optional Protocol to the Convention on the Right of the child on the involvement of children in armed conflict. Adopted and open for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 and entered into force on 12 February 2002. Art.4(1)(2).

particular humiliating and degrading treatment”.¹⁵⁰ The Geneva Convention provides that in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply effective measures against outrages upon personal dignity, in particular humiliating and degrading treatment.¹⁵¹

Rape may be characterise and prosecuted as a War Crime in the Darfur conflict. Under the ICC statute, it is a Crime against humanity.¹⁵² It may also constitute genocide. In the trial chamber in the Rwandan case of *Akayesu*, the tribunal recognized the vulnerability of women and held that rape was part of genocide and “one of the worst ways of inflicting bodily and mental harm”, as well as “an integral part of the process of destruction”.¹⁵³ The Genocide Convention states that, “measures intended to prevent births within the group” and more generally “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” constitutes genocide.¹⁵⁴ The court in *Akayesu* case explicitly understood that these intentional measures and deliberate conditions included sexual violence.¹⁵⁵

2.2.5 Torture, Cruel, Inhuman or Degrading Treatment

According to the ICID report in Darfur, torture, cruel inhuman or degrading treatment or punishment was wide spread and systematic. The ICID report explains that incidences of torture and inhuman and degrading treatment of civilians in Darfur have been reported by several organizations.¹⁵⁶ Rape, burning and beating, stripping women of their clothes, verbal abuse and humiliation of civilians are reported to have occurred frequently during attacks by the *Janjaweed* and Government forces. Cruel and inhuman methods of killings, such as two cases of killing by crucifixion were reported by one

¹⁵⁰ Rome Statute of the International Criminal Court. Art. 8(2)(c)(II).

¹⁵¹ The Fourth Geneva Convention, signed on 12/08/1949 and entered into force 21/10/1950. Code No: U.N.T.S. No. 973, Vol.75. Art. 3(1)(c) and 7(1). See also the protection of human dignity under Article 4(2)(e) of additional protocol II to the Geneva Convention of 1949.

¹⁵² Hagan and Richmond, 2009.p.53.

¹⁵³ *Ibid.*, p.183.

¹⁵⁴ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN General Assembly Resolution 260(III) A on 9/12/1948 and entered into force on 12/01/1951. Art. 2.

¹⁵⁵ Hagan and Richmond, 2009.p.53.

¹⁵⁶ ICID Report. para. 362.

organization.¹⁵⁷ Acts of torture and cruel, inhuman and degrading treatment of civilians placed under forced confinement by *Janjaweed* and Government forces following attacks on villages were also reported.¹⁵⁸

The ICID report also mentions that some organizations reported cases of torture of individuals arrested in connection with the conflict in Darfur during their detention by officials of the National Intelligence and Security Services.¹⁵⁹ It was also reported that physical and mental suffering was systematically inflicted on the detainees as punishment for their suspected affiliation with or support of rebels, and with the purpose of obtaining information or confessions.

One villager from Sheikh reported that seven villages were attacked on a particular day. This villager escaped the attack on his village but the attackers shot his brother on the back and he died.¹⁶⁰ The *Janjaweed* later stopped the villager on the road to Chad. They took him to the Sojo military camp in Foro Burunga, and this was the start of the worst part of his ordeal which he described thus:

They threw us on the ground at the camp and tied us to a tree. The chief of the camp came to us. He shaved my head with his knife. He cut my scalp and there was blood everywhere. I was left tied to the tree until 10pm. Other men then came and untied us. They tied our wrists to our ankles in front and then threaded a stick under our knees. They then pulled us to a tree with a rope tied to the stick. I swung upside down. Four military men then beat me with sticks. This went on for one to two hours. The same thing happened every day for seven days.

The torture continued for several more days after this. They interrogated him about being a leader, and what he knew of other leaders. They eventually released him, and he escape to Chad with his mother. The only sense he could make of the ordeal was

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, para. 363.

¹⁵⁹ *Ibid.*

¹⁶⁰ Hagan and Richmond, p.151.

this observation: “The military accused me of being in the Darfur militia, but I was not. I was only a villager.”¹⁶¹

Numerous international and regional human rights instruments prohibit the use of torture. Article 2 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) is to the effect that:¹⁶²

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

The Universal Declaration on Human Rights provides that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁶³ The ICCPR states:¹⁶⁴

No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subject without his free consent to medical or scientific experimentation.

In the *Prosecutor v. Furundziya* the accused was charged with torture and outrages upon personal dignity, including rape.¹⁶⁵ The ICTY trial chamber

¹⁶¹ *Ibid.*

¹⁶² Art. 2.

¹⁶³ Art. 5.

¹⁶⁴ Art. 7.

¹⁶⁵ *Prosecutor v. Furundziya*, ICTY trial chamber judgement of 10 December 1998. Case No. IT-95-17/I-T. para.190.

recognized that torture and rape do not only result in the infringement of the right to human dignity but also frustrate the sole purpose of existence.¹⁶⁶

In the Darfur conflict, torture has been carried out on a massive scale and on a widespread and systematic manner. This occurred both during the attack on civilians and also in detention camps under the authority of the National Security and intelligence service.¹⁶⁷ According to the ICC statute, the occurrence of torture may constitute a crime against humanity. Also, the extent and the discriminatory nature of the attack constitute a crime against humanity within the jurisdiction of the ICC.¹⁶⁸

2.2.6 Unlawful Confinement, Detention and Enforced Disappearances

The Commission of Inquiry in Darfur recorded cases of abductions, unlawful confinement and detention of civilians occurring during and after attacks by the *Janjaweed* or Government forces, as well as the rebels. In its report, the Commission explained that abduction of women by *Janjaweed* was also found to be part of some of the incidents of attacks investigated by the Commission in areas like Tawila, North Darfur, Mallaga, Mangarsa and Kanjew in West Darfur.¹⁶⁹ Those who escaped or were eventually released were able to relate the enforced confinement, sexual slavery, rape and torture that they had to suffer. As a general pattern, women were forcibly taken from their villages and kept at *Janjaweed* camps for a period of time, sometimes as long as three months before they were either released or managed to escape captivity.

The most serious cases of enforced disappearances involved the disappearance of civilians by security and intelligence apparatus, both civil and military.¹⁷⁰ The Commission received credible information that several individuals were taken away by military intelligence or security operators. While some of these individuals subsequently returned, many remain unaccounted for. Those who did return have given credible testimony of the presence of many of those missing in unofficial and secret places of

¹⁶⁶ *Ibid.*, para. 183.

¹⁶⁷ ICID Report., para. 369.

¹⁶⁸ Art. 7(1)(f) and (h) and 7(2)(e).

¹⁶⁹ ICID Report., para. 397.

¹⁷⁰ ICID Report., para. 399.

detention maintained by the security apparatus in different locations in the Darfur region. In one case, in March 2004, during a joint attack by the *Janjaweed* and Government armed forces on several villages around Deleij in the Wadi Saleh area of West Darfur, 300 people were seized and taken away by Government forces. Almost half of these persons are still missing and many are feared to have been killed.¹⁷¹

The ICC prosecutor's brief also includes accounts of frequent torture in Mukjar during this period. It states that:¹⁷²

The witness knew about a mass detention at the police station. He had been arrested by members of the armed forces and military/Janjaweed shortly after his arrival in Mukuja. He was being held by members of the armed force in a room with about sixty other men. All of these men were restrained in different ways. They had been repeatedly beaten, called "Tora Bora" and deprived of food.

Illegal arrests and detention of individuals appears to be a common practice in operations by the state security, in the Darfur conflict. The Commission met with persons held in secret detention.¹⁷³ These detainees included students, lawyers and traders. In many of these and other cases, their families were unaware of their arrest or of their whereabouts. Amongst them was a 15 years old boy who had been arrested in Nyala, North Darfur, in November 2004, when he was returning home from work. His family did not know of his arrest or of his whereabouts. The boy who was epileptic had not received any medical help since his detention. All of the detainees were held incommunicado. Except for the case mentioned above, all had been detained for more than three months, and in one case for almost a year, without any charge. They had never been presented before a court of law, nor allowed to see a lawyer.

¹⁷¹ ICID Report., para. 400.

¹⁷² Hagan and Richmond, p.148.

¹⁷³ ICID Report., para. 401.

There are many international human rights instruments governing the prohibition of unlawful confinement and detention. The Universal Declaration of Human Rights (UDHR) states: “No one shall be subjected to arbitrary arrest, detention or exile”.¹⁷⁴ The right to liberty and security of person is protected by Article 9 of the ICCPR. This Article is to be read in conjunction with the other rights recognized in the Covenant, particularly the prohibition of torture contained in Articles 7 and 10 which enunciate the basic standard of humane treatment and respect for the dignity of all persons deprived of their liberty. Any deprivation of liberty must not be arbitrary: it must be based on grounds and procedures established by law, the reasons for the detention must be given, recourse to the court must be available, as well as compensation in the case of a breach. These provisions apply even when detention is used for reasons of public security.

With regards to the ICID report, abduction of persons during attacks by the *Janjaweed* and their detention in camps operated by the *Janjaweed* with the support and complicity of the Government armed forces, amounts to gross violations of human rights.¹⁷⁵ However, the Commission did not find any evidence that these were widespread or systematic in order to constitute a crime against humanity.¹⁷⁶ Nevertheless, detainees were subjected to gross acts of violence against their personal life and integrity. They were tortured or subjected to cruel, humiliating and degrading treatment. The acts were committed as a part of, and were directly linked to, the armed conflict. Such acts were considered by the Commission to be serious violations of Article 3 common to the Geneva Conventions to which Sudan is a party. The Commission concluded that the acts constituted war crimes for which the Government of Sudan could be held accountable.¹⁷⁷

2.2.7 Plunder, Pillaging and Looting

The Commission noted that the majority of witnesses it examined provided very similar accounts of systematic and widespread looting and plunder of property of civilians by

¹⁷⁴ Art. 9.

¹⁷⁵ ICID Report., para. 412.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

the *Janjaweed*, in particular during periods of attacks.¹⁷⁸ These reports refer to witness accounts about Arabs or *Janjaweed* who attack villagers, often with the support of Government troops. Looting itself is generally ascribed only to the *Janjaweed*, Arab or unspecified “men in uniform”, while there were no incidents of looting clearly reported to have been committed by Government forces alone. The majority of the reported incidents involved the looting of cattle, food and other private property and occurred during attacks on villages which often involve the killing of civilians and the destruction of the villages themselves. The looting of the property of Internally Displaced Persons (IDPs) in places to which they have been displaced has also been recorded and it involved the looting of plastic sheeting, food and other household items by *Janjaweed*.

A particular pattern recorded by the Commission was the fact that the interviewed IDPs and refugees placed great emphasis on the crime of looting. They stated that the *Janjaweed* had taken everything that these persons owned, including all goods necessary to sustain life in the difficult conditions that obtain in Darfur.¹⁷⁹ The IDPs and refugees often had compiled detailed lists of the items looted which were presented to the Commission.

Apart from the ICID report, Human Rights Watch was informed by a Khor Abeche resident that he saw government soldiers looting the town's market and beating civilians with sticks.¹⁸⁰ Among the victims was the man's wife, who sustained injuries to her head, as well as many other women and children. He said that on the 11th of December 2010, he saw soldiers shooting into populated areas with mounted machine guns, injuring more than a dozen civilians and killing two.¹⁸¹

The ICID report makes it clear that under customary international law, the crime of plunder or pillage is a war crime.¹⁸² It is the dishonest appropriation of property belonging to another person in the course of an internal or international armed conflict

¹⁷⁸ *Ibid.*, para. 380.

¹⁷⁹ *Ibid.*, para. 385.

¹⁸⁰ *Op. cit.*, note 111 above.

¹⁸¹ *Ibid.*

¹⁸² ICID Report., para. 390.

with the intention of permanently depriving the owner the enjoyment of that property. The report further affirms that the pillage of villages and the appropriation of livestock, crops, household goods and other personal belongings of the inhabitants by the Government forces or the militias under their control undoubtedly amounted to war crime.¹⁸³

Pillage is prohibited by the Geneva Convention.¹⁸⁴ Article 2(c) of the Genocide Convention provides that genocide means “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”. In the case of the destruction of villages, the Commission found that pillaging was conducted on a systematic and widespread basis mainly against African tribes, and was discriminatory and calculated to bring about destruction of livelihoods and the means of survival of the affected populations. Hence, it constituted a form of persecution as a crime against humanity.

2.2.8 Recruitment of Children under the Age of 15

The ICID report shows that JEM and the SLA recruited children as soldiers.¹⁸⁵ Although children were recruited as soldiers, there was indication that these are forced recruitments. These children have been seen in uniforms and carrying weapons in and around rebel camps. The Commission throughout their investigation confirmed the presence of child soldiers in areas of conflict.¹⁸⁶

A UN report cited the Sudanese police, including the *Janjaweed*, government-aligned and Darfur rebel groups JEM and SLA, as recruiting or using child soldiers.¹⁸⁷ The UN report also cited recruitment or the use of child soldiers by Chadian rebel forces operating inside Sudan. Darfur rebel groups also recruited child soldiers in the Sudan refugee camps in Chad.

¹⁸³ *Ibid.*, para. 391.

¹⁸⁴ The Fourth Geneva Convention Signed on 12/08/1949 and entered into force 21/10/1950. Code no: U.N.T.S. No. 973, Vol.75. Art. 33.

¹⁸⁵ ICID Report., para. 415.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Op. cit.*, note 112 above.

The JEM also used child soldiers as part of the May 10 2008 attack in the Omdurman suburb of Khartoum. Government authorities detained 89 children in connection with the attack. Most were sent to detention facility for children after having been initially held along with adults for several days.¹⁸⁸ UN officials defined the condition in the separate facility as good. However, some children were not sent to a separate facility but detained with adults. Ninety-nine of the children were pardoned and released; four were tried, acquitted and released; five had on-going trials and remain detained; and one, who was given a death sentence, was going through an appeal process.¹⁸⁹

Although different sources justify the use of child soldiers in Darfur, both groups denied having used children as armed combatants.¹⁹⁰ The SLA leadership does not deny that children live in some of their camps, but deny that they are either child soldiers or taken any part in armed hostilities. According to the SLA, these children were orphaned as a result of the conflict and the SLA takes care of them.¹⁹¹ However, the Commission did not find this explanation convincing enough to justify why children should be kept in military instead of refugee camps. As stated above, different sources have confirmed that the children were in uniform and carried weapons.

The use of child soldiers, especially in the case of Darfur, has received serious attention from the international community. The Optional Protocol to the Convention on the Rights of the Child prohibits the recruitment of children under the age of 18 to be used as soldiers.¹⁹² The ICID report states that an international customary rule has evolved on this matter to the effect that it is prohibited to use children under 15 in armed hostilities.¹⁹³ Sudan has also ratified International Labour Organisation Convention (No. 182) the Prohibition and Immediate Action for the Elimination of the Worst Forms of

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ ICID Report., para. 416.

¹⁹¹ *Ibid.*

¹⁹² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed Conflict, adopted by UN General Assembly Resolution A/RES/54/263 of 25/05/2000 and entered into force 12/02/2002. Art. 2.

¹⁹³ ICID Report. para. 417.

Child Labour, which prohibits the “forced or compulsory recruitment of children for use in armed conflict”. The Convention defines children as all persons under the age of 18. The ICID report concludes that under this provision,¹⁹⁴

The Parties shall refrain from recruiting children as soldiers or combatants, consistent with the African Charter on the Rights and Welfare of Children, the Convention on the Rights of the Child (CRC) and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.

According to The Statute of the ICC, war crimes mean other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.¹⁹⁵ This includes conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. In the *Prosecutor v. Thomas Lubanga* case, the Trial Chamber held that the prosecution proved beyond reasonable doubt that Thomas Lubanga was guilty of the crimes of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities.¹⁹⁶ The Chamber also noted that those acts fell within the framework of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute. Subsequently the Court Unanimously sentenced the accused to 14 years imprisonment.

Article 4(3)(c) of Additional Protocol II to the Geneva Convention provides that children shall be provided with the care and assistance they require, and in particular, children who have not attained the age of fifteen years shall neither be recruited in the armed forces nor armed groups nor allowed to take part in hostilities. Article 38(3) of the CRC further provides that:

¹⁹⁴ *Ibid.*

¹⁹⁵ Art. 8(2)(e).

¹⁹⁶ *Prosecutor v. Thomas Lubanga*. International Criminal Court Judgement of 14 March 2012. Summary of the “Judgement pursuant to Article 74 of the Statute”. Case No. ICC-01/04-01/06. para.42.

State parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.

From the above statements, the state bears the primary responsibility for the protection of the rights of children below the age of 15 against recruitment as soldiers or combatants in the face of internal armed conflicts. Furthermore, organizations and groups involved in the conflict also have the responsibility to ensure that children below the age of 15 years are not used for the purposes of hostilities. In the case of Darfur, the Sudanese Government and the rebel groups reluctantly ignored their responsibilities since most of the soldiers and victims of the conflict seems to be children below the age of 15.

2.3 THE ROLE OF CUSTOMARY INTERNATIONAL LAW

In the *Barcelona Traction* case, the ICJ stated:

*... In particular, an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concerns of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations erga omnes.*¹⁹⁷

Both conventional and customary international law contain a category of higher norms, also known as *peremptory norms* or norms of *jus cogens* which are essential for the functioning of the international community, and therefore their breach entails serious

¹⁹⁷ *Case concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain) Second Phase.* 1970 ICJ3, at 33. See also the Vienna Convention on the Law of Treaties Art 53 and 64.

consequences.¹⁹⁸ These for example, include rules prohibiting slavery, genocide, colonialism, torture, apartheid, international wars of aggression, and the body of laws codified under international humanitarian law. With respect to the latter, a number of states refer in their military manuals international humanitarian law as relevant to internal armed conflict. The German Manual for example states that:¹⁹⁹

In a non-international armed conflict each party shall be bound to apply as a minimum, the fundamental humanitarian provisions of international law embodied in the four 1949 Geneva Conventions (common Article 3), the 1954 Cultural Property Convention (Article 19) and the 1977 Additional Protocol II. German Soldiers, like their Allies are required to comply with rules of international humanitarian law in the conduct of military operations in all armed conflicts, however such conflicts are characterised.

The UK Manual also set out what the British Government considers to be “Certain principles of customary international law which are applicable to internal conflicts”.²⁰⁰ Other states have adopted the same approach in respect of rules of international humanitarian law. Before the adoption in 1968 of the General Assembly resolution 2444 affirming a set of principles to be complied with in any armed conflict,²⁰¹ the US representative stated in the Third Committee that the principles proclaimed “constituted a reaffirmation of existing laws”.²⁰² In the same vein in 1987, the US Deputy Legal Advisor to the State Department stated that “the basic core of Protocol II is, of course, reflected in common Article 3 of the 1949 Geneva Conventions and therefore is, and

¹⁹⁸ *Ibid.* A State may be internationally liable for breach of such a norm, irrespective of its origin. Some of the rules are derivative from customary international law, but others have found expression in conventions, which in turn became norm generating.

¹⁹⁹ The German Manual of Humanitarian Law in Armed Conflict, Federal Ministry of Defence of the Federal Republic of Germany, VR II 3 August 1992. pg.24, para.211.

²⁰⁰ The British Manual of the Law of the Armed Conflict, UK Ministry of Defence, Oxford, Oxford University Press, 2004. p.384-398, para.15.1.

²⁰¹ United Nations General Assembly Resolution 2444 of 19/12/1968. Doc A/72/18 (1968).

²⁰² United Nations GAOR, 3rd committee, 23rd Session, 1634th Meeting., UN Doc. A/C.3/Sr. 1634 (1968). p.2.

should be, part of general accepted customary law.²⁰³ This precisely includes prohibitions on violations towards persons taking no active part in hostilities, hostage-taking, degrading treatment and punishment without due process.

A fundamental rule on the distinction between combatants and civilians and the protection of civilians, especially against violence to life and person, in particular murder, is laid down in common Article 3 of the 1949 Geneva Conventions. Also, a similar provision has been set out in paragraph 15 of the 2004 British Manual on the Law of Armed Conflict.

In a report made pursuant to paragraph 5 of the UN Security Council resolution 837 of 1993 on the investigation into the 5 June 1993 attack on UN Forces in Somalia, the UN Secretary-General noted that:²⁰⁴

The [Geneva] Conventions were designated to cover inter-state wars and large-scale civil wars. But the principles they embody have a wider scope. Plainly, as part of contemporary international customary law, they are applicable wherever political ends are sought through military means. No principle is more central to humanitarian law of armed conflict than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organisations deliberately target civilians or otherwise demonstrate a wanton indifference to the protection of non-combatants.

The report of the Inter-American Commission on the human rights situation in Colombia issued in 1999 also states that international humanitarian law prohibits:²⁰⁵

²⁰³ Martin P. *et al.* 1987. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions. *American International Law Review*. Volume 2, Issue 2. p.430. Available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1660&context=auilr&sei-redir=>>

²⁰⁴ UN Doc. S/26351, 24 August 1993.

²⁰⁵ Report on the Human Rights Situation in Colombia, Doc. OAS/Ser. L/V/II. 102. Doc. 9 rev. 1, 26 February 1999, para. 40.

The launching of attacks against the civilian population and requires the parties taking part in an armed conflict, at all times, to make a distinction between members of the civilian population and parties actively taking part in hostilities and direct attacks only against the latter and, inferentially, other legitimate military objectives.

A similar provision has also been reaffirmed by the Government of Sudan and the rebel movements. The Humanitarian Cease Fire Agreement on the conflict in Darfur states that, each party undertakes to “refrain from any violence or any other abuse on civilian population”.²⁰⁶ The Protocol on the Improvement of the Humanitarian Situation in Darfur also provides that, the parties undertake “to take all steps required to prevent all attacks, threats, intimidation and any other form of violence against civilians by any party or group, including the *Janjaweed* and other militias”.²⁰⁷

The two agreements above suggest that the parties involved in the Darfur conflict considered common Article 3 of the Geneva Conventions as binding upon them and by the implication of customary international law they ought to face legal sanctions. The statute of the ICJ provides that:²⁰⁸

- 1) *The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
 - a) *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
 - b) *international custom, as evidence of a general practice accepted as law;*
 - c) *the general principles of law recognized by civilized nations;*

²⁰⁶ Humanitarian Cease Fire Agreement in Darfur, entered into force on 8 April 2004. Art. 2.

²⁰⁷ Protocol on the Involvement of the Humanitarian Situation in Darfur, entered into force on 9 November 2004. Art.2(1).

²⁰⁸ Statute of the International Court of Justice. Signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organisation and came into force on 24 October 1945. United Nations, New York. Art.38. The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part. The main objective of the Statute is to organize the composition and the functioning of the Court.

d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Sudan is therefore bound to respect the rules that prohibit the violation of customary international law including the international bombing of civilians, the rule prohibiting attacks on non-military objects and the rule regarding precautions required when attacking military objects.

The above justification has also been affirmed under case law. In the *Tadic* Case, the ICTY stated that deliberate attacks on civilians are prohibited by customary international law.²⁰⁹ In its *Advisory Opinion on Legality of the Threat of Use of Nuclear Weapons*, the ICJ also held that “States must never make civilians the object of attack”.²¹⁰ The general rule was restated and specified in Article 51(2) of Additional Protocol I of 1977, where it was provided “The civilian as such, as well as individual civilians, shall not be the object of attack. Acts or a threat of violence, the primary purpose of which is to spread terror among the civilian population is prohibited”. This is *pari materiae* to Article 13(2) of Additional Protocol II of 1977 and Article 8(2)(e)(i) of the Rome Statute of the ICC.

Indiscriminate attacks on civilians, even if there are few armed elements among the latter, are therefore prohibited, and this rule is deemed to be part of customary law. It has also been codified as restated in Article 13 of Additional Protocol II which is regarded as a provision codifying Customary International law.

In the *Prosecutor v. Tadic* case, the ICTY Trial Chamber held that “It is clear that the targeted population [of a crime against humanity] must be predominantly civilian in nature. The presence of some non-civilian elements in the midst does not change the

²⁰⁹ *Op. cit.*, note 115 above. Paras.100-102.

²¹⁰ The International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) 43 ILM 1009. para.78.

character of the population.²¹¹ In a press release pertaining to the conflict in Lebanon in 1983, the International Committee of the Red Cross (ICRC) also emphasised that “the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people.”²¹²

Attacks directed to unarmed civilians and/or the obstruction of units or vehicles involved in humanitarian assistance undertaken by the UN is prohibited; it falls under the protection given to civilian objects under the international law of armed conflict. The UN Security Council resolution 1502 is instructive in this regard.²¹³ This provision is *pari materiae* with Article 8(2)(e)(iii) of the ICC Statute and Article 4(b) of the Statute of the Special Court for Sierra Leone. The British Manual of the Law of Armed Conflict concludes that, dwellings and other installations that are used only by civilian population should not be the object of military operations.²¹⁴

Sudan should bear responsibility and take precautions in order to minimise incidental loss and damage that may result from attacks. Each party to a conflict must do everything feasible to ensure that targets are military objects and the means or methods of combat would minimise loss of civilians. The military Manual of Benin provides that:²¹⁵

Precautions must be taken in choice of weapons and methods of combat in order to avoid civilian losses and damages to civilian objects. The direction and the moment of an attack must be chosen so as to reduce civilian losses and damages to civilian objects as much as possible.

²¹¹ *Prosecutor v, Tadic*, Case No. IT-94-1, Trial Chamber 7 May 1996. para.638.

²¹² International Committee of the Red Cross, Press release No. 1474, Geneva, 4 November 1983.

²¹³ United Nations Security Council Resolution 1502 of 26/8/2003. Press Release SC/7856. United Nations, New York. para.3

²¹⁴ *Op. cit.*, note 201 above. Paras.16.9 and 15.9.1.

²¹⁵ The Benin Military Manual of 1995, Practice relating to Rule 17. Choice of means and Method of Warfare. Available at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_bj_rule17

Sudan also has an obligation to ensure that attacking military objectives and the resultant incidental loss to civilians is disproportionate to the military gain anticipated. In *Prosecutor v. Zoran Kupreskic et al*, the ICTY Trial chamber held that:²¹⁶

Even if it can be proved that the Muslim population of Amici [a village in Bosnia and Herzegovina] was not entirely civilian but comprise some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality.

The Rome Statute prohibits destruction and devastation not justified by military necessity.²¹⁷ This is also contained in Article 23(g) of the Hague Regulations of 1907 which states that “to destroy or seize the enemy’s property is prohibited, unless such destruction or seizure is imperatively demanded by the necessities of wars”. Article 50 of Geneva Convention I; Article 51 of Geneva Convention II; Article 147 of Geneva Convention IV; and Article 51(1) of Additional Protocol I also provide for the prohibition of extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

Article 14 of Additional Protocol II, which is also stated in paragraph 15 of the 2004 British Manual on the Law of Armed Conflict, provides that the right to life is a non-derogable human right. Violence to the life and person of civilians is prohibited, whatever method is adopted to achieve it. It follows that the destruction of crops, foodstuffs, and water sources, to such an extent that starvation is likely to follow is prohibited.

Attacks on works and installations containing dangerous forces are prohibited by Article 15 of Additional Protocol II to the Geneva Convention of 1949 while Article 16 of the same Protocol protects cultural objects and places of worship. Article 8(2)(e)(viii) of the ICC Statute and Article 17 of Additional Protocol II prohibits forcible transfer of civilians.

²¹⁶ *Prosecutor v. Kupreskic et al*. ICTY Trial Chamber Judgement of 14 January 2000. Case No. IT-95-16-T. para.859.

²¹⁷ Rome Statute of the ICC. Art.8(2)(e)(xii).

The customary international humanitarian law regime governing conflicts not of an international character extends protection from acts of murder, torture and other acts prohibited by common Article 3 and these cover:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely, without any adverse distinction, founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Sudan has an obligation under common Article 3(2) of the 1949 Geneva Conventions to protect the wounded and the sick. The enlistment of children under the age of 15 years into armed forces or groups has been prohibited by two treaty rules. These are Article 8(2)(e)(vii) of the ICC Statute and Article 4(c) of the Statute of the Special Court for Sierra Leone. Article 38 of the CRC and the Protocol to the Convention on the Right of a Child on the Involvement of Children in Armed Conflict considers the minimum age of persons directly taking part in an armed conflict to be 18 years.

After looking at the relevant rules applicable to the Darfur conflict, it is worth noting that to a larger extent the Sudanese Government was prepared to regard some general principles as binding. These are rules contained in the two Additional Protocols of 1977 although formally Sudan is not a state party to these Protocols. The principles contained in the Protocols on the Establishment of Humanitarian Assistance in Darfur, signed on 8th April 2004 by the Government of Sudan with the Sudan Liberation Army and the JEM provides that:²¹⁸

The concept and execution of the humanitarian assistance in Darfur will conform to the international principles with a view to guarantee that it will be credible, transparent, inclusive and notably: the 1949 Geneva Convention and its two 1977 Additional Protocols, the 1948 Universal Declaration on Human Rights, the 1966 International Convention on

²¹⁸ Protocol on the Establishment of Humanitarian Assistance in Darfur of 8th April 2004.

Civil and Public Rights, the 1951 Geneva Convention on Refugees, the Guiding Principles on Internal Displacement (Deng Principles) and the provisions of General Assembly Resolution 46/182.

Article 8(a) of the Statute of Mission Agreement (SOMA) on the Establishment and Management of the Cease Fire Commission (CFC) in the Darfur region entered between the Government of Sudan and the AU of 4th June 2004 is also important. It provides that:

The African Union shall ensure that the CFC conducts its operation in the Sudan with full respect for principles and rules of international conventions applicable to the conduct of military and diplomatic personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed Conflict and the Vienna Convention on Diplomatic Relations of 18 April 1961.

Article 9 of SOMA concludes that:

The CFC and the Sudan shall therefore ensure that members of the respective military and civilian personnel are fully acquainted with the principles and rules of the above mentioned international instruments.

Considering the points raised above, one can assume that entry into the above agreements by parties to a conflict indicates acceptance of rules applicable to the conduct of internal hostilities, and, in particular, the principle that civilians must not be targets of attacks. Thus, in the light of this, the contracting parties intended to comply with various international humanitarian treaties, including the two Protocols additional to the Geneva Convention, even though the Protocols *per se* are not binding *qua* treaties on the Government of Sudan. Sudan should respect the rules which prohibit bombing of civilians, those prohibiting attacks on non-military object and the rule regarding precautions required when attacking military object.

2.4 DARFUR AND THE GENOCIDE CONVENTION

Diverse opinions exist as to whether the crimes committed in Darfur amount to genocide. The ICID report states they are crimes against humanity and war crimes, while former US Secretary of State, Collin Powell, and the US State Department state that the crimes amount to genocide.²¹⁹ Genocide has previously been committed in places like Rwanda and Bosnia.²²⁰ Genocide, according to the ICC Statute, means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:²²¹

- (a) *Killing members of the group;*
- (b) *Causing serious bodily or mental harm to members of the group;*
- (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) *Imposing measures intended to prevent births within the group;*
- (e) *Forcibly transferring children of the group to another group.*

This provision is in *pari materia* with Article 2 of the Genocide Convention. Both provisions make it clear that “intention” is the principal element for the crime of genocide to materialise. The Genocide Convention further provides that genocide, whether committed in time of peace or in time of war, is a crime under international law which states undertake to prevent and to punish.²²² In the case of *Prosecutor v. Kayishema and Ruzindana*, the ICTR Trial Chamber held that the crime of genocide is considered as part of customary international law and is punishable whether committed in international or internal armed conflict.²²³ Similarly, in the case of *Prosecutor v. Rutanganda*, the ICTR Trial Chamber stated that the Genocide Convention is

²¹⁹ Hassan A. 2010. Dimensions of the Darfur crisis and its consequences: An Arab perspective. African Security Review Journal. Volume 19, No.1. Routledge Taylor and Francis Group South Africa. p.20.

²²⁰ Judgement of the International Court of Justice. Case 91 of 26 February 2007. para.53.

²²¹ Art. 6.

²²² Art. 1.

²²³ Case No. ICTR-96-1-A of 1 June 2001. para.88.

undeniably considered part of customary international law.²²⁴ The ICTR Trial Chamber's decision in both cases falls within the context of Article 1 of the Genocide Convention. Sudan is a party to the Genocide Convention and if it has committed acts of genocide, it is in breach of its international legal obligations and therefore internationally responsible for its unlawful conduct.

Article 2 of the Genocide Convention lists four groups to be protected in the case of an internal or international armed conflict. They include national, racial, ethnic, and religious groups. In the context of Rwanda, the Tutsis who suffered a great deal against the Hutus fall under ethnic group, which the ICTR trial chamber further defined as a group of members, who speak the same ethnic language or come from the same ethnic origin.²²⁵ In Darfur, the Fur, Masalit and the Zaghawa qualify as "ethnic groups" and fit in within the interpretation of Article 2 of the Genocide Convention. Darfur itself is made up of ethnic groups consisting of black Africans and Arabs.

After identifying black Africans as among the ethnic groups in Darfur, it is necessary to find out if they were subjected to the acts prescribed above in Article 2(a)-(e) of the Genocide Convention. The ICID report states that some elements of war crimes and crimes against humanity occurred in Darfur but the essential part of genocide which is 'the intention to commit the act' was missing.²²⁶

2.4.1 Intent to commit genocide in the Darfur Conflict

In September 2004 the US Secretary of State, Collin Powell, testified before the US Congress on the conflict in Darfur. He confirmed that evidence obtained from investigations indicates that the Sudan troops and the affiliated *Janjaweed* militia had committed atrocities against non-Arab tribes in the region, including murder and robbery.²²⁷ Powell added that the US State Department concluded that the atrocities

²²⁴ Case No. ICTR-96-03-T of 6 December 1999. para. 46.

²²⁵ Case No. ICTR-96-4-T of 2 September 1998. para.92.

²²⁶ ICID Report. Para 640.

²²⁷ Hassan A. p.26.

constituted ethnic cleansing in Darfur for which the Sudan government and its allies among the Arab tribes in Darfur were responsible.

Powell's testimony reflected an inclination to criticise the Sudanese government and to hold it solely accountable for the events that unfolded in Darfur. In January 2005, the US administration came out in support of the findings of an international commission of inquiry and accused Sudan's judicial system of deficiency, non-transparency, and inability to deal with crimes committed in Darfur.²²⁸ On their part, the Security Council subsequently referred the file on the Darfur crimes to the ICC for further clarifications.²²⁹

2.4.2 The Term 'Genocide'

Although there are examples of mass violence directed against identifiable groups dating back to antiquity, "genocide" as a term and a concept is of a recent origin. Lemkin, a Jewish lawyer coined the word and introduced it in 1944.²³⁰ He derived it from the Greek word "geno" for tribe or nation and the Latin word "cide" which means killing. By genocide Lemkin meant "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves".²³¹

Genocide was mentioned in paragraph 8 of the 1945 Nuremberg indictment as a description of war crimes committed by the defendants being tried before the International Military Tribunal.²³² In 1946, the General Assembly of the UN adopted resolution 96 that described genocide as "a denial of the right of existence of entire human groups" and affirmed that genocide is a crime under international law.²³³ Resolution 96 further set in motion the process that resulted in the adoption of the

²²⁸ Fowler J. 2006. *Genocide in Darfur: Investigating the Atrocities in the Sudan*. Routledge Taylor and Francis Group New York. p. 128.

²²⁹ United Nation Security Council Resolution 1593 of 31/03/2005, Press Release: SC/8351. United Nations, New York. para. 1

²³⁰ Fowler J. 2006. p. 128.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

Genocide Convention on December 9, 1984. Article 1 of the latter Convention makes it clear that genocide is punishable under international law.

The heart of the substantive portion of the Genocide Convention is Article 2. Here genocide is defined as a matter of international law and the two essential components of the definition are the “*actus reus*” (the physical act) and the “*mens rea*” (the intention).²³⁴ It follows that an act will amount to genocide only where there is a physical act and also a requisite ‘state of mind’ to commit such an act. The acts that constitute genocide are clearly stated under Article 2 of the Genocide Convention.

2.4.3 Requirement of Intention

The required ‘state of mind’ that distinguishes genocide from any other crime is the “intention to destroy in whole or in part, a national, ethnic, racial or religious group as such”.²³⁵ Thus, merely intending to commit the physical act is not enough. The perpetrators must also have a “specific” or “special” intent to destroy a protected group in whole or in part. In the case of *Prosecutor v. Musema*, the ICTR Appeal Chamber held that genocide required proof of intent to destroy in whole or in part a national, racial, ethnic or religious group.²³⁶

The Genocide Convention provided the framework within which the US Secretary of State, Collin Powell, and the US government, considered in mid-2004 whether genocide had occurred in Darfur.²³⁷ Applying the legal definition in Article 2 to the facts gathered by the Atrocities Documentation Team (ADT) and from other sources, it was concluded that genocide was committed in Darfur and that the government of Sudan and its militia allies, the so call *Janjaweed*, were responsible.²³⁸

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ Case No. ICTR-96-13-A of 27th January 2000. Para. 166.

²³⁷ Fowler J. p. 130.

²³⁸ *Ibid.*

In announcing his determination, Secretary Powell pointed to murder, rape and other physical violence committed against members of the non-Arab ethnic groups.²³⁹ This violence corresponded with the acts specified in Article 2 (a) and (b) of the Genocide Convention, namely, killing members of a group and causing serious bodily or mental harm to them. He also pointed out to the destruction of food and other means of survival of the targeted groups. In addition, he mentioned obstruction by the Sudanese government of the humanitarian assistance that the victims needed in order to survive. This conduct inflicted a large number of deaths on the targeted population in addition to those who perished from direct violence. It corresponded with the requirement in Article 2(c) of the Genocide Convention, namely, deliberately inflicting conditions of life calculated to bring about a group's physical destruction in whole or in part.²⁴⁰

With respect to the "intention to destroy" required by Article 2 of the Genocide Convention, Secretary Powell concluded that 'intent' could be inferred from the Sudanese Government's deliberate conduct.²⁴¹ Inferring intent from conduct in the absence of direct evidence is widely accepted practice. The ICTR, for example, listed a number of circumstances that are relevant to determining "intent to destroy", many of which are present in the case of Darfur.²⁴² Some of these circumstances are: "The general context of the preparation of the culpable acts systematically directed against the same group"; "the scale of atrocities committed"; "the general nature" of the atrocities; deliberately and systematically targeting members of some groups but not others; attacks on "the foundation of the group"; "the use of derogatory language towards members of the targeted group"; "the systematic manner of killing"; and "the relative proportionate scale of the actual or attempted destruction of a group".²⁴³

In the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, the International Court of Justice (ICJ) applied the Genocide Convention.²⁴⁴ The Court concluded that

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² Prosecutor v. Akayesu. Case No. ICTR-96-4-T of 2 September 1998. para.136.

²⁴³ *Ibid.*

²⁴⁴ Judgement of the International Court of Justice. Case 91 of 26 February 2007, para.291.

the acts committed at Srebrenica fall within Article 2 (a) and (b) of the Convention and were committed with the specific intent to destroy in part the group of the Muslims in Bosnia and Herzegovina and as such; they were acts of genocide committed by the Bosnian Serb forces in and around Srebrenica at the time of the conflict.

Although the finding of the Court that Serbia was neither directly responsible for Srebrenica genocide nor complicit in it was not unanimous, it went on to rule that Serbia had committed a breach of the Genocide Convention by failing to prevent the atrocities at Srebrenica, for not cooperating with the ICTY in punishing the perpetrators of the genocide in particular, and for violating its obligation to comply with the provisional measures ordered by the Court. However, the Vice-President of Court dissented on the grounds that “Serbia’s involvement as a principal actor or accomplice in the genocide that took place in Srebrenica is supported by massive and compelling evidence”.²⁴⁵

In this regard, Secretary Powell’s testimony to the Senate Foreign Relations Committee emphasized that the scale and scope of the murder and rape of the civilians as well as the actions of the Sudanese military and its militia allies were “a coordinated effort, not just random violence”.²⁴⁶ Powell noted Khartoum’s failure to cease and desist from the attacks on the non-Arab groups and its continued obstruction of humanitarian aid even after having been repeatedly put on notice by other governments and the UN.

Invoking Article 8 of the Genocide Convention, Secretary Powell called upon the UN to undertake its own investigation.²⁴⁷ Thus, the only specific outcome of the genocide determination is the UN Security Council resolution 1564, which requested that the Secretary-General appoint an International Commission of Inquiry to look into whether acts of genocide had in fact occurred and to identify perpetrators of violations of international humanitarian and human rights law. While awaiting the Commission’s report, the Council decided “to remain seized with the matter”.²⁴⁸

²⁴⁵ *Ibid.*

²⁴⁶ Fowler J. p. 131.

²⁴⁷ *Ibid.*, p. 132.

²⁴⁸ *Ibid.*

At the end of January 2005, the Commission issued its report, which documented the Sudanese Government's role in organizing, arming and training the *Janjaweed* militia.²⁴⁹ The report laid down the responsibility for serious violations of international humanitarian and human rights law at the hands of the government and its allies, which had a pronounced ethnic dimension. Addressing the particular terms of the Genocide Convention, the Commission noted that its investigation collected substantial and reliable materials, which tend to show the occurrence of systematic killing of civilians belonging to particular tribes. There was also evidence of large-scale actions that caused serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part. These actions, for example, include the systematic destruction of villages and crops, expelling villagers from their homes and looting their cattle.²⁵⁰

Although the Commission believed that this evidence could establish the physical act enumerated in Article 2(a) to (c) of the Genocide Convention, it explicitly "concluded that the Government of Sudan had not pursued a policy of genocide" based on the absence of the required "intent to destroy".²⁵¹ The Commission acknowledged that the scale of the atrocities and racially motivated statements by the perpetrators indicated genocide intent, but asserted that "other more indicative elements" pointed out to a lack of such intent. The Commission identified three elements that are "more indicative" which are elaborated below.²⁵²

First, in some unspecified number of villages, the attackers "refrained from exterminating the whole population". As proof, the Commission referred to one village in which the government commissioner and the leader of the Arab militias executed about 227 people out of 1200 who were captured after the attack. Apparently, fifteen of the

²⁴⁹ ICID Report., para. 507.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*, para. 518.

²⁵² *Ibid.*, para. 513.

executed were on a written list brought by the perpetrators. Seven were village leaders and two hundred and five were accused of being rebels. The Commission's reference to the fact that the perpetrators did not exterminate the whole population is puzzling.²⁵³ The plain language of the Convention includes an intention to destroy a group "in whole" or "in part". The Commission itself had explained that international case law establishes that the intent to destroy a group "in part" requires the intention to destroy a "considerable number of individuals" or a substantial part, but not necessarily a "very important part of the group".²⁵⁴

In this particular instance, the Commission failed to offer any reason why 227 out of 1200 villages is neither a considerable number of individuals nor a substantial 'part' of the sample, especially when the community leadership was particularly targeted.²⁵⁵ At a face value the perpetrators reported assertion that the 227 murdered villagers were rebels, led the Commission to distinguish between "the intent to destroy an ethnic group as such" and "the intent to murder all those men they considered to be rebels". Yet, the Commission had previously included a number of quotes in which the perpetrators used ethnic identity, racial epithets and terms like 'Tora Bora' interchangeably.²⁵⁶ The Commission based its decision on lack of intention. Their findings led them to conclude that the intent was not to wipe out the population but to punish, to remove support for the rebels, and to instill fear in anyone who might want to support the rebels. It happened that much of the rebels' support base was the black African population.

The whole point of the government's campaign against the civilian population of the non-Arab ethnic groups relied on equating ethnicity with rebellion, rendering it nonsensical to distinguish 'intent to destroy' those ethnic groups from 'intent to murder' rebels. The targets were by the Sudanese Government's apparent definition, one and the same.²⁵⁷

²⁵³ Fowler J., p.132.

²⁵⁴ ICID Report., para. 492.

²⁵⁵ Fowler J., p. 132.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

The second element cited by the Commission as indicating a lack of genocidal intent is that the Sudanese Government collected survivors of destroyed villages in camps for internally displaced persons (IDPs).²⁵⁸ Here, it generally allows humanitarian organizations to help the population by providing food, clean water, medicine and logistical assistance. This begs the question of whether the direct violence (i.e. murdering and raping) was of sufficient scale to evince the intent to destroy the targeted groups “in part”, even though there are survivors who are not murdered outright.²⁵⁹ The Commission offered no rationale why these elements will be more indicative of intent than the scale and systematic nature of direct violence. It also skirts the issue of government obstacles to humanitarian aid, which were reduced but not eliminated only as a result of concerted international pressure in mid-2004. It also did not pay attention to the continuous attacks against those who venture out of the camps in search of essentials of life such as firewood, water and food.²⁶⁰

The third element identified by the Commission is that an unspecified number of villages with a mixed ethnic composition had not been attacked at the time the Commission was undertaking its investigation. Fowler argues that it is difficult to know what to make of this assertion as the Commission makes no effort to contextualize it.²⁶¹ For example, it does not quantify the number of untouched villages in relation to the number of villages destroyed, or the relationship between the number of inhabitants of such villages to the number of civilians who were subject to murder, rape or displacement. More importantly, previously unharmed villages were attacked and destroyed at the time that the Commission was researching and writing its report and such attacks are still ongoing in the Darfur.²⁶²

The Commission’s final paragraph regarding intent is perhaps the most difficult to define.²⁶³ It recounts a single anecdote from “a reliable source” in which one man was

²⁵⁸ ICID Report., para. 515.

²⁵⁹ Fowler J., p. 132.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Op. cit.*, note 111 above.

²⁶³ ICID Report., para. 517.

not killed when attackers took two hundred camels from him. The ICID report explains that the man's younger brother resisted the theft of his own camel and was shot dead.²⁶⁴ The Commission concluded that "in this instance the special intent to kill a member of a group to destroy the group as such was lacking, the murder being only motivated by the desire to appropriate cattle belonging to the inhabitants of the village".

Perhaps, the requisite intent may indeed have been missing in one instance, but the relationship of that one instance to the overall situation in which pillaging and destruction appears to have been directed to bring about the destruction of the livelihoods and means of survival of the targeted population remains unclear.

2.4.4 Comparing the Evidence

Although Secretary Powell and the Commission operated from a largely similar factual base, they reached diametrically opposite conclusions on the question of genocide. One explanation for this may be an issue that neither addressed explicitly the weight of evidence necessary to reach a conclusion. In these circumstances, how much evidence of genocidal intent, in terms of quantity and credibility, is necessary relative to evidence of lack of intent?²⁶⁵

The Commission hinted that it was applying an extremely high standard in assessing the evidence.²⁶⁶ Courts and other bodies charged with establishing whether genocide has occurred must, however, be very careful in the determination of subjective intent.²⁶⁷ It then quoted with approval the ICTY for the proposition that "convictions for genocide can be entered only where intent has been unequivocally established".²⁶⁸ In essence, the Commission adopted for itself the standard that intent must be shown "beyond reasonable doubt" the weight of evidence necessary to convict an individual in a criminal trial as stated in Article 66(3) of the Statute of the ICC. This is the most exacting

²⁶⁴ *Ibid.*, para. 517.

²⁶⁵ Fowler J., p. 134.

²⁶⁶ ICID Report., para. 503.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

burden imaginable, an understandable burden for a prosecutor to bear when a court is deciding the life or liberty of an individual.

Viewed in the context of this burden of proof, the Commission's analysis of the issue of intent to commit genocide is less mysterious. The three elements it cited, though not particularly compelling, do cast some doubts as to the existence of a genocidal intent on the part of the Sudanese Government. One might well conclude that the evidence of genocidal intent that is adduced in the Commission's report, though quite strong, does not establish such intent "beyond reasonable doubt".

However, the Commission was not acting in accordance with its duty.²⁶⁹ The Commission was not a court of law, nor was it adjudicating the fate of individual defendants. The liberty of an accused defendant did not turn on its decision. To the contrary, the Commission was only called upon to make a threshold finding on the basis of which the UN Security Council would decide to take additional action, including referring the situation to the ICC for a full-fledged criminal investigation.

A careful examination of the Statute of the ICC reveals that the Commission's erred in applying "beyond reasonable doubt" standards. The Statute contemplates several stages through which a case precedes, each stage requiring that a separate weight of evidence be met. When a situation is referred to the ICC, the prosecutor is required to initiate an investigation unless "there is no reasonable base to proceed" as stated in Article 36 of the Statute. Having conducted an investigation, the prosecutor may seek an arrest warrant if he/she can establish "reasonable grounds to believe that the person committed a crime within the jurisdiction of the court".²⁷⁰ The court is next called up to confirm the charges, which it will do if the prosecutor offers "sufficient evidence to establish substantial grounds to believe that the person committed the crime

²⁶⁹ Fowler J., p. 135.

²⁷⁰ Art. 59, Rome Statute of the ICC.

charged”.²⁷¹ Finally, an individual can only be convicted if the court is “convinced of the guilt of the accused beyond reasonable doubt”.²⁷²

In Fowler’s argument, between “no reasonable bases to proceed” and “beyond reasonable doubt” lies a continuum in which the required weight of evidence steadily and appropriately mounts as the process moves forward. To eliminate this continuum, Fowler proposed that it requires a prosecutor to establish guilt beyond reasonable doubt otherwise a condition of launching an investigation would be inappropriate.²⁷³ Yet, that is the standard of proof apparently applied by the Commission, in spite of the fact that its investigation was prefatory to any judicial action. The Commission’s application of this standard is all the more erroneous in the light of the constraints placed upon it by the amount of time available as well as the continued commission of the very crime it was supposed to investigate. It was not conceivable to reach a conclusion “beyond reasonable doubt” on an issue as complex and problematic as genocidal intent.

Secretary Powell did not articulate what weight of evidence he looked for in making his determination. However, the tenor of his analysis, which emphasizes the necessarily limited nature of the Atrocities Documentation Team (ADT) investigations and other available information, suggests that he was in essence asserting a reasonable basis for concluding that the Sudanese Government and its *Janjaweed* allies had committed genocide.²⁷⁴

²⁷¹ *Ibid.* , Art. 61.

²⁷² *Ibid.* , Art. 66(3).

²⁷³ Fowler J., p. 135.

²⁷⁴ *Ibid.*

CHAPTER THREE

THE RESPONSE OF THE UN SECURITY COUNCIL TO THE DARFUR CONFLICT

3.1 INTRODUCTION

Close to a decade, human rights and humanitarian organizations have been calling on the international community to fulfil its responsibility to protect the victims of brutal killings, rape and other atrocities committed in the Darfur region of Sudan.²⁷⁵ The UN as the principal body tasked with the maintenance of international peace and security responded to this call by employing certain measures in conformity with its mandate and international law. The UN organ vested with the mandate for maintaining international peace and security is the Security Council.²⁷⁶

In the case of a conflict of an internal or international nature, Article 41 of the UN Charter empowers the Security Council to take necessary measures not involving the use of armed force, in order to maintain peace and stability.²⁷⁷ For such measures to be taken, Article 39 of the UN Charter provides that, there must have been a threat to the peace, breach of the peace or act of aggression.²⁷⁸ Where such measures provided for in Article 41 are, or prove to be inadequate, the Security Council may take further actions as stipulated under Article 42 of the Charter to remedy the situation.²⁷⁹ Acting under Chapter VII of the UN Charter, the Security Council has adopted a series of resolutions to address the Darfur situation since the outbreak of the conflict in Darfur in 2003. It is therefore important to find out if these resolutions have had any effect in ameliorating the situation in Darfur.

²⁷⁵ Colum L. 2009. Sudan's 'Coordinated' Genocide in Darfur is Over, U.S. Envoy Says. Washington D.C. Available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/17/AR2009061703491.html>

²⁷⁶ Charter of the United Nations and Statute of the International Court of Justice. Department of Public Information United Nations. New York 10017. Art.24.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

3.2 UN SECURITY COUNCIL RESOLUTIONS AND THEIR IMPACT ON THE DARFUR CONFLICT

The UN Charter prohibits the use of force and spells out explicitly the circumstances under which it can be used. In this regard, the role of the Security Council becomes of paramount importance.²⁸⁰ The International Commission on Intervention and State Sovereignty reported that the Security Council is the only organ competent to authorise interventions with respect to conflicts around the world.²⁸¹ Among others, the Darfur conflict has been dealt with by the Security Council through a series of resolutions outlined below. For the purpose of this research, the focus will be on the main resolutions that aimed to restore peace and stability in the Darfur region. However, other resolutions adopted for the purpose of extending the mandate of peace operators will also be mentioned in order to have a balanced over-view of the general situation.

3.2.1 UN Security Council Resolution 1556

In its 5015th meeting, the UN Security Council adopted resolution 1556 (2004) by 13 votes in favor and non against, with 2 abstention (China and Pakistan). The Council demanded that the Government of Sudan disarm the *janjaweed* militias, apprehend and bring to justice its leaders and their associates who had incited and carried out violations of human rights and international humanitarian law, as well as other atrocities in the Darfur region. The resolution further requested the Secretary General to report back in 30 days on the progress made.²⁸² The Council called on the government of Sudan to fulfill immediately all the commitments made in the joint communiqué issued by itself and the Secretary-General on 3rd of July 2004, including particularly, and in cooperation with the UN, advancing the independent investigation of violations of human rights and international humanitarian law, establish credible security conditions for the protection of civilian population and humanitarian actors, and resume political

²⁸⁰ Report of the International Commission on Intervention and State Sovereignty: The Responsibility to Protect. The International Development Research Centre, Ottawa, 2001. p.49.

²⁸¹ *Ibid.*

²⁸² United Nation Security Council Resolution 1556 of 30/07/2004, Press Release: SC/8160. United Nations, New York. para.7.

talks with dissident groups from Darfur, specifically the JEM and SLM/A.²⁸³ With respect to this commitment, the Council decided that:

All states would take the necessary measures to prevent the sale or supply to all non-governmental entities and individuals, including the Janjaweed, operating in North Darfur, South Darfur and West Darfur by their national or from their territories or using their flag vessels or aircraft or arms and related materials of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts, for the aforementioned, whether or not originating in their territories.

The Council urged the parties to the N'Djamena Ceasefire Agreement to conclude a political agreement without delay, and noted with regret the failure of senior rebel leaders to participate in the 15 July talks in Addis Ababa, Ethiopia. It called for renewed talks under the leadership of the African Union and its chief mediator, Hamid Algabid, to reach a political solution to the conflict in Darfur. In addition, the Council strongly urged rebel groups to respect the ceasefire, end the violence immediately and act in a positive and constructive manner to end the conflict.²⁸⁴ In response to the adoption of the text, the representative of the Sudan said:²⁸⁵

[Some] 4,812 police officers had been deployed in Darfur and 200 members of the Janjaweed militias had been arrested. Some of them had been sentenced to death. The Government had dispatched a high-level delegation to negotiate without preconditions, but the talks had collapsed, because the rebels had insisted on preconditions. When the Government had signed the joint communiqué, it had not thought that it would be used to punish the Sudan, regardless of whether it had implemented its commitments. The Government

²⁸³ *Ibid.*, para.1.

²⁸⁴ Statement by Security Council representatives, explanatory notes, Security Council Resolution 1556 of 30/07/2004, Doc: SC/8160. United Nations, New York.

²⁸⁵ Statement by representative of the Sudan, explanatory notes, Security Council Resolution 1556 of 30/07/2004, Press Release: SC/8160. United Nations, New York.

was fully aware that some activists in the United States administration had worked to foster the rebellion.

The delegate stated that the consultations on the resolution had revealed division in the Council between those members that wished to allow adequate time for the African Union's efforts and those insisting on adopting the resolution irrespective of the decision taken by African leaders. To the latter group, the resolution had become an end in itself because it had been determined in the United States Congress before it was discussed in the Council. The Congress decided that genocide and ethnic cleansing were taking place in Darfur, contrary to the judgement of the African Union Summit. While the resolution claimed to support the efforts of the African Union (AU), it hijacked the issue of Darfur from the AU and the nuances of the situation on the ground had not been taken into account. At the time when the AU was seeking a solution to the problem, the Council had acted in haste to undermine the position of the Government.²⁸⁶

From the above analysis, Security Council members shared different opinions on the issue of imposing sanctions against the Sudanese Government. According to Zygar,²⁸⁷ some important reasons for the adoption of resolution 1556 were the fact that Washington wanted to impose an oil embargo on the Sudan which would prevent it from selling its oil. Although Secretary of State, Mr. Powell, immediately took the issue to the UN, it has since emerged that Washington's determination was by no means shared by all of the UN Security Council members. Whereas the US was willing to impose sanctions against Sudan, the United Kingdom and Australia even raised the possibility of armed intervention, but Russia, China and Pakistan staunchly opposed any actions against Sudan.²⁸⁸ This lost opportunity might have led to humanitarian intervention, putting pressure on the Sudanese Government to end the devastation taking place in the Darfur region of Sudan.²⁸⁹ As a result of these diverse opinions between the

²⁸⁶ *Ibid.*, para.13.

²⁸⁷ Zygar M. 2004. Behind the UN Security Council Resolution: Chinese, Russia and India Oil Interest in the Sudan. Available at <http://www.globalresearch.ca/index.php?context=va&aid=612>

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

Security Council members and the AU, the former had to establish an independent commission to investigate the issue of genocide in Darfur.

3.2.2 UN Security Council Resolution 1564

In this resolution, the Security Council expressed dissatisfaction and concern that the Government of Sudan had not fully met its obligations to protect civilians. It declared that should Sudan fail to comply fully with resolution 1556 as stated above or cooperate with the expansion and extension of the African Union monitoring presence in Darfur, the Council would consider taking additional measures, including sanctions against the Sudanese Government.²⁹⁰ Acting under Chapter VII of the UN Charter in adopting resolution 1564, the Council also requested the Secretary-General to establish an international commission of inquiry which would immediately investigate reports of human rights violations in Darfur and determine whether acts of genocide had occurred there. The resolution was actually adopted by a vote of 11 in favour, none against, with four abstentions (Algeria, China, Pakistan and Russian Federation).

Under resolution 1556, the Sudanese Government was expected to show proof that security was ensured in Darfur, and immediately implement its commitments under the Joint Communiqué it had issued together with the United Nations on 3rd July.²⁹¹ The Government was also called upon to disarm the *Janjaweed* militia, as well as apprehend and bring to justice those who had carried out human rights violations and other atrocities.

Kofi Annan noted that it was the first time in the Council's history that it had been seized under Article 8 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.²⁹² Article 8 of this instrument allows parties to the treaty to "call upon the

²⁹⁰ United Nation Security Council Resolution 1564 of 18/09/2004, Press Release: SC/8191. United Nations, New York. para.1.

²⁹¹ United Nation Security Council Resolution 1556 of 30/07/2004, Press Release: SC/8160. United Nations, New York. para.1.

²⁹² Statement by UN Secretary General, explanatory notes, Security Council Resolution 1564 of 18/09/2004, Press Release: SC/8191. United Nations, New York.

competent organs of the United Nations" to take action under the Charter in order to prevent and suppress acts of genocide.²⁹³

With regard to the Secretary-General's point of view, the representative of the United States said that;²⁹⁴ "the Council adopted resolution 1564 because the Sudanese Government had failed to fully comply with resolution 1556". Many delegations noted that although the Government had met some of its obligations, this was not done voluntarily, but after great reluctance and long delays, and under significant pressure from the international community. The crisis in Darfur was referred to as "uniquely grave", and constituted the largest humanitarian disaster in the world. Over 2.2 million people had been victimized in one way or another by the actions of the Sudanese Government.²⁹⁵ Independent observers noted that the tactics, which included killing of non-combatants and even young children and babies, were more akin to the ethnic cleansing used in the Yugoslavia wars and warned that the region's remoteness meant that hundreds of thousands of people were effectively cut off from aid.²⁹⁶

On its part, the AU had formed a ceasefire commission. In August 2004, the AU sent 150 Rwandan troops to protect the ceasefire monitors. It, however, became apparent that the 150 troops would not be enough for the operation and 150 Nigerian troops were added, however, this did not result in any positive impact.²⁹⁷ These were some of the reasons that led to the adoption of resolution 1564. The Germany representative was of the view that the resolution sought to achieve the cooperation of the Sudanese Government with an expanded AU monitoring presence, in order to support the Union's role in resolving the crisis.²⁹⁸ He insisted that the Council should keep the developments

²⁹³ Convention on the Prevention and Punishment of the Crime of Genocide Adopted by Resolution 260(III) A, of the United Nations General Assembly on 9 December 1948 and entered into force on 12 January 1951

²⁹⁴ United Nation Security Council Resolution 1564 of 18/09/2004, Doc: SC/8191. United Nations, New York. para.5.

²⁹⁵ *Ibid.* para.6.

²⁹⁶ BBC News, 24 May 2004. "Tactics of the Darfur Genocide". Available at <http://news.bbc.co.uk/2/hi/africa/8533097.stm>.

²⁹⁷ The chairperson of the African Union raises concerns over the violations of the Ceasefire Agreement. Press release No. 32/2004 available at <http://www.african-union.org/news-events>

²⁹⁸ United Nation Security Council Resolution 1564 of 18/09/2004, Press Release: SC/8191. United Nations, New York. para.7.

in the Sudan under close scrutiny and towards this end, the Secretary-General should report on the situation at the end of the month. The goal was to save lives and hold all parties to their obligations, and therefore the Council must be prepared to do what best served that goal.

Representatives of the countries that abstained in the adoption of resolution 1564, however, expressed reservations about the text. The representative of the Russian Federation, for example, insisted that the threat of sanctions was far from the best method to ensure compliance which should instead be sought through diplomatic means.²⁹⁹ Others added that the resolution did not sufficiently take into account the efforts of the Government to allow in humanitarian relief and to cooperate with the United Nations.³⁰⁰ On the other hand, the Sudanese representative said his Government had shown that it had honoured its commitments but wondered why some delegations insisted on punishing his Government despite its cooperation.³⁰¹

In November 2004, the Government of the Sudan and the SPLM/A, signed a Memorandum of Understanding in the presence of the Security Council in Nairobi, promising to reach a comprehensive peace agreement before the end of the year.³⁰² The Council declared its strong support for those efforts and reiterated its readiness to establish a United Nations peace support mission to help implement such an agreement. At the conclusion of its two-day session in Nairobi, the Council unanimously adopted resolution 1574 (2004) by which it extended the mandate of the advance mission already operating in the Sudan till 10 March 2005. The Council also demanded that the Government and rebel forces immediately cease all attacks, refrain from forcible relocation of civilians and cooperate with humanitarian relief efforts in

²⁹⁹ United Nation Security Council Resolution 1564 of 18/09/2004, Press Release: SC/8191. United Nations, New York. para.9.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*, para.10.

³⁰² United Nation Security Council Resolution 1574 of 19/11/2004, Press Release: SC/8249. United Nations, New York. para.1.

accordance with earlier agreements. The Council indicated that it would monitor compliance and take action against any party that failed to fulfil its commitments.³⁰³

In March 2005 the Security Council unanimously adopted resolution 1585. The resolution supported and extended the United Nations Advance Mission in Sudan (UNAMIS) until 17 March 2005. The mission was established by resolution 1547 of 11 June 2004, for an initial period of three months.³⁰⁴

3.2.3 UN Security Council Resolution 1590

In Resolution 1590 adopted during its 5151st session of the Council, the latter established, for an initial period of six months, the United Nations Mission in Sudan (UNMIS). The latter consisted of up to 10,000 military personnel and an appropriate civilian component, including up to 715 civilian police personnel.³⁰⁵

The Council decided, among others, that the mandate of UNMIS will support the implementation of the Comprehensive Peace Agreement (CPA) signed by the Government and rebel forces.³⁰⁶ The Mission was also tasked with facilitating the voluntary return of refugees and displaced persons, providing demining assistance, and contributing towards international efforts to protect and promote human rights in the Sudan. The Council also decided that UNMIS will be delegated the authority to take the necessary action in the areas of deployment of its forces to protect United Nations personnel, ensuring their security and freedom of movement, protecting civilians under imminent threat of physical violence.

Under the resolution, the Council underscored the immediate need to rapidly increase the number of human rights monitors in Darfur.³⁰⁷ It urged the Secretary-General and

³⁰³ *Ibid.*, para.2.

³⁰⁴ United Nation Security Council Resolution 1585 of 10/03/2005, Press Release: S/RES/1585. United Nations, New York., para.1.

³⁰⁵ United Nation Security Council Resolution 1590 of 24/03/2005, Press Release: SC/8343. United Nations, New York. para.1.

³⁰⁶ *Ibid.*, para.4.

³⁰⁷ *Ibid.*

the High Commissioner for Human Rights to accelerate the deployment of human rights monitors in Darfur and augment their numbers and also speed up the formation of civilian monitoring protection teams.³⁰⁸ In addition, the Council emphasized that there can be no military solution to the conflict in Darfur. It called on the Government of the Sudan and the rebel groups, particularly the JEM and the SLM/A, to resume the Abuja talks speedily without preconditions and negotiate in good faith in order to reach an agreement.³⁰⁹

The Council also requested the Secretary-General to report to it, within 30 days, on how UNMIS can reinforce the effort to foster peace in Darfur and also liaise with the African Union to identify ways on how to utilize UNMIS's resources.³¹⁰ The Council further requested the Secretary-General to keep the Council regularly informed of progress made in implementing the CPA, respect for the ceasefire, the implementation of the mandate of UNMIS, as well as report to it on a monthly basis on the situation in Darfur.³¹¹

3.2.4 UN Security Council Resolution 1591

At its 5153rd meeting, the Security Council adopted resolution 1591 to establish a committee to monitor sanctions imposed on Sudan, including travel bans, assets freezes and ban on weapons.³¹² It request the Secretary-General, in consultation with the Committee, to appoint for a period of six months, within 30 days of adoption of the resolution, a Panel of three Experts (PE) based in Ethiopia which will travel regularly to El-Fasher and other locations in Sudan, and operate under the direction of the Committee.³¹³ By the terms of the resolution, the Council strongly deplored the failure of the Government of Sudan, rebel forces and all other armed groups in Darfur to comply

³⁰⁸ *Ibid.*, para.17.

³⁰⁹ *Ibid.*, para.7.

³¹⁰ *Ibid.*, para.5.

³¹¹ *Ibid.*, para.11.

³¹² United Nation Security Council Resolution 1591 of 29 March 2005. Doc. S/RES/1591/(2005). United Nations, New York. para. 3.

³¹³ *Ibid.*

fully with their commitments and the demands of the Council referred to in its previous resolutions.³¹⁴

The Council also condemned the continued violations of the N'djamena Ceasefire Agreement and the Abuja Protocols, including air strikes by the Government in December 2004 and January 2005 and rebel attacks on Darfur villages in January 2005.³¹⁵ It noted also, the failure of the Government of Sudan to disarm the *Janjaweed* militia, apprehend and bring to justice its leaders and their associates who have carried out violations of human rights and international humanitarian law and other atrocities in Darfur. The Council requested that all parties take immediate steps to fulfil all their commitments to respect the N'djamena Ceasefire Agreement and the Abuja Protocols, to facilitate humanitarian assistance, and to cooperate fully with the African Union Mission.³¹⁶

Emphasizing that there can be no military solution to the Darfur conflict, the Council called upon the Government of Sudan and the rebel groups, particularly the JEM and the SLM/A to resume the Abuja talks without preconditions and to negotiate in good faith in order to speedily reach agreement.³¹⁷ In doing so, it urged the parties to the CPA to play an active and constructive role in support of the Abuja talks and also take immediate steps to support a peaceful settlement to the conflict in Darfur.

The Council reiterates that in the event that the parties failed to fulfil their commitments and demands as outlined in paragraphs 1 and 6 of the Resolution, and the situation in Darfur continues to deteriorate, it would consider further measures as provided for in Article 41 of the Charter of the United Nations.³¹⁸ It further decided to remain seized with the matter.³¹⁹

³¹⁴ *Ibid.*, para. 1.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, para. 2.

³¹⁸ *Ibid.*, para. 8.

³¹⁹ *Ibid.*, para. 9.

3.2.5 UN Security Council Resolution 1593

Due to lack of full compliance on previous resolutions by parties on the Darfur conflict, the Council decided to refer the situation to the International Criminal Court (ICC).³²⁰ The resolution was adopted by 11 votes in favour, non against and 4 abstentions (Algeria, Brazil, China, and United States).³²¹ By resolution 1593 (2005), the Council decided also that the Government of the Sudan and all other parties to the conflict in Darfur would cooperate fully with the Court and the Prosecutor, providing the Court with any necessary assistance.³²² The Council Invited the Court and the African Union to discuss practical arrangements that would facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity.³²³

The Council encouraged the Court, in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur.³²⁴ It also emphasized the need to promote healing and reconciliation, as well as the creation of institutions involving all sectors of the Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace.³²⁵

The Council decided that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the ICC shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized

³²⁰ United Nation Security Council Resolution 1593 of 31/03/2005, Press Release: SC/8351. United Nations, New York. para. 1

³²¹ Statement by Security Council representatives, explanatory notes, Security Council Resolution 1593 of 31/03/2005, Press Release: SC/8351. United Nations, New York. para.2.

³²² *Ibid.*

³²³ United Nation Security Council Resolution 1593 of 31/03/2005, Press Release: SC/8351. United Nations, New York. para.3.

³²⁴ *Ibid.*, para. 4.

³²⁵ *Ibid.*, para. 5.

by the Council or the African Union. However, it made exceptions where such exclusive jurisdiction has been expressly waived by that contributing State.³²⁶

The Council further adopted Resolution 1627 in September 2005 by a vote of 15-0-0 to extend the mandate of the United Nations Mission in Sudan (UNMIS) for six months.³²⁷ The opening statements by members of the Council indicated that the mandate was extended on grounds that there were further abuses committed against the civilian population in Darfur. Based on this, the Council adopted Resolution 1651 in December 2005 to extend the mandate of the PE (established under resolution 1591) to assist the committee in monitoring sanctions against violation of human right in the Darfur region until March 29 2006.³²⁸ This was the last Security Council resolution adopted in 2005 in which the Council stressed its commitment to peace in Sudan, the implementation of the CPA, and the end of the violations in Darfur region.³²⁹

The Council further extended the mandate of the PE in Darfur until September 29, 2006 in resolution 1665 (2006).³³⁰ In acknowledging the extension, the Council stressed its commitment to peace, the implementation of a CPA and the end of violations of human rights in the region. The Council observed that the situation in the Darfur constituted a threat to international peace and security in the region.

3.2.6 UN Security Council Resolution 1672

In this resolution, the Council expressed its dissatisfaction with implementation of previously adopted resolutions and decided to impose travel restrictions and financial sanctions on four Sudanese individual's detailed in resolution 1591.³³¹ The Council

³²⁶ *Ibid.*, para.6.

³²⁷ United Nation Security Council Resolution 1672 of 23/09/2005, Press Release: SC/8700. United Nations, New York.

³²⁸ United Nation Security Council Resolution 1651 of 21/12/2005, Doc: S/RES/1651. United Nations, New York.

³²⁹ *Ibid.*, para.2.

³³⁰ United Nation Security Council Resolution 1665 of 29/03/2006, Press Release: SC/8678. United Nations, New York.

³³¹ United Nation Security Council Resolution 1672 of 25/04/2006, Press Release: SC/8700. United Nations, New York. para.1. the Council identified the individuals as Major General Gaffar Mohamed Elhassan, Commander of the Western Military Region for the Sudanese Air Force; Sheikh Musa Hilal, Paramount Chief of the Jalul Tribe in North

decided, among other things, that all States should take the necessary measures to prevent the entry into or transit through their territories of all persons designated by a Committee established under the resolution.³³² The Resolution provided further that states would freeze all funds, financial assets and economic resources on their territories that were owned or controlled by those individuals, by persons acting on their behalf or at their direction, or assets that were held by entities owned or controlled by the designated persons. All States were called upon to ensure that no funds, financial assets or economic resources were made available by their nationals or by any persons within their territories to or for the benefit of such persons or entities.³³³

However, the measures contained in the resolution would not apply where the Committee determined that such travel was justified on the ground of humanitarian need, including religious obligation, or where the Committee concluded that an exemption would otherwise further the objectives of the Council's resolutions for the creation of peace and stability in the Sudan or in the region as a whole.³³⁴

In addition, the freeze would not apply to funds, assets and financial resources that had been determined by relevant States to be necessary for basic expenses, including payment for food, rent or mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges, or for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services. The freeze of assets would also not apply where such assets had been determined to be necessary for extraordinary expenses. However, such determination had to be notified by the relevant States to the Committee and approved by it.³³⁵

Darfur; Adam Yacub Shant, Sudanese Liberation Army Commander; and Gabril Abdul Kareem Badri, National Movement for Reform and Development Field Commander.

³³² United Nation Security Council Resolution 1672 of 25/04/2006, Press Release: SC/8700. United Nations, New York. para.3.

³³³ *Ibid.*

³³⁴ *Ibid.*, para.4.

³³⁵ *Ibid.*, para.5.

The delegate of Russia stated that he was guided by positions frequently set out in the Council that violations of international norms, including international humanitarian law, should not go unpunished, and therefore he would not support sanctions against the four Sudanese named in the resolution. He viewed the adoption of the resolution as likely to have a negative impact on concluding a peace agreement in a timely manner, and this would not promote the efforts of the international community to promote peace in the Sudan. In the Sudanese context and in broader terms, the implementation of sanctions should be closely linked with the task of assisting and facilitating the resolution of the conflict and of ensuring regional stability. Similarly Qatar, which abstained, felt that it was important not to exert influence on the investigations to be carried out by the Prosecutor of the International Criminal Court, and given the positive report of Special Envoy and the positive developments in the Abuja process, it was not appropriate to adopt the resolution until the end of the process.³³⁶

In the same vein, China stated that she had always been careful regarding the adoption of sanctions in the Council because past experience showed that sanctions could not bring about the expected results and often victimized the civilian population.³³⁷ More importantly, he stated that China as well as other members of the Council, including African members, had repeatedly expressed concerns about the timing of the resolution. He reasoned that African Union-led peace talks were at a crucial juncture and the Council must assist the African Union in bringing the Abuja talks to a conclusion.

The President of the Council supported the role of the African Union Mission in Sudan (AMIS) in stabilizing the situation in Darfur, and in bringing to justice those responsible for serious violations of international humanitarian law.³³⁸ The proper settlement of the Darfur problem would impact on the North-South peace process, as well as on Chad, the Central African Republic and the sub region as a whole.

³³⁶ *Ibid.*, para.12.

³³⁷ *Ibid.*, para.13.

³³⁸ *Ibid.*, para.15.

On its part the US representative believed that the vote constituted a first step by the Security Council in fulfilling its responsibilities, and it demonstrated that the Council was serious in its efforts to restore peace and security. Far from interfering in the peace process, the resolution would strengthen the process. He regretted that although its adoption was not unanimous, it would not deter the Council from fulfilling its responsibilities.³³⁹

3.2.7 UN Security Council Resolution 1679

In endorsing the decision of the African Union Peace and Security Council on the need for concrete steps to effect the transition in Darfur from the African Union Mission in the Sudan (AMIS) to a United Nations operation, the Security Council called for the deployment of a joint African Union and United Nations technical assessment mission in Sudan by unanimously adopting resolution 1679 on 16 May 2006.³⁴⁰

It is worth noting that the government of the Sudan had signed an accord in May with factions of the SLA calling for the disarmament of the *Janjaweed* militias, and for the rebel forces to disband and to be incorporated into the army.³⁴¹ However, the agreement was rejected by two other smaller groups, the JEM and a rival faction of the SLA.³⁴²

In terms of resolution 1679, the Council called on the African Union to agree with the Organization, as well as regional and international bodies and Member States, on the requirements necessary to strengthen the capacity of AMIS to enforce the security arrangements of the Darfur Peace Agreement, with a view to a follow-up on United Nations operation in the region of western Sudan.³⁴³ The Council stressed that the Secretary-General should consult jointly with the African Union, in close and continuing

³³⁹ *Ibid.*, para.14.

³⁴⁰ United Nation Security Council Resolution 1679 of 16/05/2006, Press Release: SC/8721.

³⁴¹ Aljazeera.Net, 6 May 2006. "Main points of the deal" available at <http://english.aljazeera.net/NR/exeres/685364B5-AF39-47C0-A479-031FB50C5C63.htm>.

³⁴² Kessler, Glenn and Emily, 2006. "Sudan Main Rebel Group Sign Peace Deal". The Washington Post, Washington DC. para.1.

³⁴³ United Nation Security Council Resolution 1679 of 16/05/2006, Press Release: SC/8721. United Nations, New York. para.2.

consultation with the Council and the parties to the 5th May Peace Agreement, including the Government of National Unity, on decisions concerning the transition to a United Nations operation. The Secretary-General was called upon to submit to the Council within a week of the assessment mission's return, recommendations on all relevant aspects of such an operation.³⁴⁴

The Council also urged those parties that had not signed the Darfur Peace Agreement to do so without delay, and to avoid acting in any way that would impede its implementation. In addition, the Council expressed its intention to consider taking strong and effective measures, such as a travel ban and assets freeze, against any individual or group violating or attempting to block the implementation of the Darfur Peace Agreement.³⁴⁵

The representative of Russia stated that in the light of the African Union's position as enshrined in the communiqué of its Peace and Security Council, his delegation supported resolution 1679 which endorses the efforts of the African Union to achieve peace in Darfur.³⁴⁶ However, in his view the resolution did not change the character of the Council's decision on the Sudan, and did not predetermine the mandate of a future United Nations peacekeeping presence in Darfur. That presence would be established in the light of all appropriate factors, of the conditions obtaining in Darfur and the Sudan as a whole. Further, steps to establish a peacekeeping presence should be agreed with the Government of the Sudan.

China viewed the signing of the Darfur Peace Agreement (DPA) as a turning point to the Sudanese peace process. China welcomed the convening by the African Union's Peace and Security Council (AUPSC) of a ministerial meeting to discuss follow-up action. Among the matters viewed as of greatest urgency were: urging the parties outside the Peace Agreement to sign it; responding swiftly to the African Union's request; and requesting all parties in the Sudan to honour their commitments and carry out their

³⁴⁴ *Ibid.*, para.3.

³⁴⁵ *Ibid.*, para.4.

³⁴⁶ *Ibid.*, para.5.

agreements comprehensively and faithfully.³⁴⁷ However, China still had reservations about invoking Chapter VII of the Charter on the ground that resolution 1679 (2006) was clearly not consistent with Chapter VII. On the basis of its political support for the African Union and in order to create the conditions necessary for the speedy implementation of the resolution China, did not press its objection on the understanding that it should not be construed as constituting a premise for the Security Council's future discussion or adoption of resolutions on Sudan. China made it clear that deploying a UN peacekeeping operation in Darfur would require the agreement and cooperation of the Sudanese Government, this being a basic requirement and precondition for all peacekeeping operations.³⁴⁸

There was renewed fighting in July and August 2006 with international aid organizations considering leaving due to attacks against their personnel. The International Rescue Committee (IRC) also reported that hundreds of women had been raped and assaulted around the Kalma IDP camp in the previous weeks. The report stated that the *Janjaweed* used rape to cause women to be humiliated and ostracised.³⁴⁹ On August 25th, Frazer warned that the region faced a security crisis unless the proposed UN peacekeeping force was deployed.³⁵⁰ With regard to the situation on the ground, Kofi Annan called for the deployment of 18,600 international peacekeepers composed of African and Asian troops to replace the AU force (AMIS).³⁵¹

3.2.8 UN Security Council Resolution 1706

The Security Council adopted resolution 1706 on 31st August 2006 to expand the mandate of UNMIS, and to include its deployment to Darfur in order to support the early

³⁴⁷ *Ibid.*, para.6.

³⁴⁸ United Nation Security Council Resolution 1679 of 16/05/2006, Press Release: SC/8721. United Nations, New York. para.7. See also statement by Qatar. para.8.

³⁴⁹ Amnesty International, 2006. 'No one to help them': Rape extends from Darfur into eastern Chad. Available at <http://www.cfr.org/sudan/ai-no-one-help-them-rape-extends-darfur-into-eastern-chad/p12408>

³⁵⁰ *Ibid.* Frazer is the Head of the US State Bureau of African Affairs.

³⁵¹ BBC News, 2 August 2006. "Will Peace Return to Darfur". Available at <http://news.bbc.co.uk/2/hi/africa/8533097.stm>.

and effective implementation of the Darfur Peace Agreement.³⁵² The resolution was adopted by 12 votes in favour and none against, with 3 abstentions (China, Qatar, and the Russian Federation). The Council invited the consent of the Sudanese Government of National Unity for that deployment, and called on Member States to ensure an expeditious deployment. It requested the Secretary-General of the UN to arrange the rapid deployment of additional capabilities to enable UNMIS to deploy in Darfur.³⁵³ The Council acted under Chapter VII of the UN Charter authorizing UNMIS to use all necessary means as it deemed fit and within its capabilities in order to:³⁵⁴

Protect United Nations personnel, facilities, installations and equipments to ensure the security and freedom of movement of United Nations personnel, humanitarian workers, assessment and evaluation commission personnel;

prevent disruption of the implementation of the Darfur Peace Agreement by armed groups, without prejudice to the responsibility of the Government of the Sudan;

protect civilians under threat of physical violence and;

seize or collect arms or related material whose presence in Darfur was in violation of the Agreements and the measures imposed by resolution 1556, and to dispose of such arms and related material as appropriate.

The Council established that the mandate of UNMIS would be, among others, to support the implementation of the Darfur Peace Agreement and the N'djamena Agreement on Humanitarian Cease-fire on the Conflict in Darfur.³⁵⁵ Based on this mandate, members concluded that UNMIS would be strengthened by an addition of up to 17,300 military personnel and by an appropriate civilian component including up to

³⁵² United Nation Security Council Resolution 1706 of 31/08/2006, Press Release: SC/8831. United Nations, New York. para.1.

³⁵³ *Ibid.*, para.2.

³⁵⁴ *Ibid.*, para.12.

³⁵⁵ *Ibid.*, para.8.

3,300 civilian police personnel divided into 16 Police sub-units. It expressed its determination to keep the Mission's strength and structure under regular review, taking into account the evolution of the situation on the ground.³⁵⁶

Further, the Council requested the Secretary-General to consult jointly with the African Union, in close and continuing consultation with the parties to the Darfur Peace Agreement, including the Government of National Unity, on a plan and timetable for a transition from the African Mission in the Sudan to a United Nations operation in Darfur.³⁵⁷ It is worth noting that the resolution was co-sponsored by Argentina, Denmark, France, Ghana, Greece, Slovakia, the United Kingdom, United Republic of Tanzania and the United States.³⁵⁸ The actions of member states to co-sponsor Resolution 1706 conform to the provisions of the UN Charter.³⁵⁹ This demonstrates how Council members are committed towards finding a permanent solution to the Darfur conflict.

In a statement after the vote, the representative of the United Kingdom said that the tragedy in Darfur had gone on for too long and the transition to a United Nations operation was the only viable solution to the crisis.³⁶⁰ Based on conversations with Council members, even those states that had abstained, did not fundamentally disagree with the substance of the text but only the timing.³⁶¹ The United Nations force remained the only vehicle to bring peace and stability to Darfur. She added that the Sudanese plan would be a military solution imposed by one of the parties to the conflict, in violation of the Peace Agreement itself. The resolution sent a clear message from the Council regarding the need for a well-equipped third party to ensure the protection of civilians.³⁶² The Council, however, did not minimize the importance of seeking the

³⁵⁶ *Ibid.*, para.3.

³⁵⁷ United Nation Security Council Resolution 1706 of 31/08/2006, Press Release: SC/8831. United Nations, New York. para.7.

³⁵⁸ *Ibid.*, para.8.

³⁵⁹ Charter of the United Nations. Art.2(5).

³⁶⁰ United Nation Security Council Resolution 1706 of 31/08/2006, Press Release: SC/8831. United Nations, New York. para.8.

³⁶¹ *Ibid.*, para.10.

³⁶² *Ibid.*

consent of the Sudanese government which bore the primary responsibility to protect its own citizens. The Council rather appealed to the Government in the strongest possible terms to allow the United Nations to provide assistance. The Council decided that it wished to help the Sudan and not to threaten it; to assist, and not undermine the country.³⁶³

The representative of the United States stressed the imperative need to stop the violence in Darfur, since every day of delay only extenuated the genocide.³⁶⁴ The strong Council resolution offered the best hope to end the tragedy in Darfur, and it was important to secure its immediate and full implementation. The United States expected the full cooperation and support of the Government of the Sudan for the new United Nations force.

With the mandate of UNMIS expiring on 24 September 2006, the Security Council unanimously voted to extend it until 8 October, with the intention to renew it for further periods.³⁶⁵ The Council reiterated in the strongest terms the need for all parties to the conflict in Darfur to end the violence and atrocities in that region which continued to pose a threat to international peace and security.³⁶⁶ It also expressed its grave concern over the continued deterioration of the humanitarian situation in Darfur. It noted, in particular, the adverse impact of restrictions on the movement and material of UNMIS and on the Mission's ability to perform its mandate effectively.³⁶⁷ The Council also reaffirmed its commitment to the Sudan's sovereignty, unity, independence and territorial integrity, and to the cause of peace.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*, para.11.

³⁶⁵ United Nation Security Council Resolution 1709 of 22/09/2006, Press Release: SC/8838. United Nations, New York. para.1.

³⁶⁶ *Ibid.*, para.2.

³⁶⁷ *Ibid.*, para.3.

As the Council continued the search for peace in Darfur, it adopted a resolution emphasising the need for the implementation of the CPA.³⁶⁸ It also extended the mandate of an expert panel monitoring sanctions against violations of human rights in the Darfur region until September 29, 2007 and requested the Secretary-General to add another expert to the team.³⁶⁹ The Council further adopted resolution 1714 to extend the mandate of the UNMIS until 30 April 2007 with the intention to extend it further beyond that date.³⁷⁰

3.2.9 UN Security Council Resolution 1755

The Security Council extended the mandate of the UNMIS until 31 October 2007 by unanimously adopting resolution 1755, which requested the Secretary-General to urgently appoint a new Special Representative for that country.³⁷¹ The Council also called on the parties to the CPA to accelerate progress on implementing all their commitments, in particular, to carry out the establishment of Joint Integrated Units and other aspects of the security sector reforms.³⁷² The Council Called upon the parties to the CPA, the DPA, the N'Djamena Humanitarian Ceasefire Agreement, the Eastern Sudan Peace Agreement and the communiqué of 28 March 2007 to respect their commitments and implement fully all aspects of those agreements without delay.³⁷³ In addition, it called on those parties that had not signed the Darfur Peace Agreement to do so without delay and not to act in any way that would impede its implementation.³⁷⁴

Explaining his position prior to the adoption of the text, the representative of Qatar stated that the Sudan had taken many positive steps in partnership with the United Nations and the African Union.³⁷⁵ All that was needed now was assistance based on

³⁶⁸ United Nation Security Council Resolution 1713 of 29/09/2006, Doc: S/RES/1713. United Nations, New York. para.1.

³⁶⁹ *Ibid.*, para.2.

³⁷⁰ United Nation Security Council Resolution 1714 of 06/10/2006, Press Release: SC/8848. United Nations, New York.

³⁷¹ United Nation Security Council Resolution 1755 of 30/04/2007, Press Release: SC/9008. United Nations, New York. para.1.

³⁷² *Ibid.*, para.3.

³⁷³ *Ibid.*, para.4.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*, para.5.

encouragement and mutual respect in order to preserve and build on what had been achieved, and protect it from any negative impact.

3.2.10 UN Security Council Resolution 1769

In an attempt to quell the violence in Sudan's western Darfur region, the Security Council unanimously voted in resolution 1769 to authorize the deployment of a 26,000-strong joint force of United Nations-African Mission in Darfur (UNAMID).³⁷⁶ Under this resolution, the 15-member body would have up to 19,555 military personnel, including 360 military observers and liaison officers; a civilian component of up to 3,772, international police; and 19 special police units with up to 2,660 officers.³⁷⁷ Acting under Chapter VII of the UN Charter, the Council authorized UNAMID to take the necessary action to support the implementation of the Darfur Peace Agreement, as well as to protect its personnel and civilians "without prejudice to the responsibility of the Government of Sudan".³⁷⁸

Resolution 1769 called on UN Member States to make troop contributions within 30 days of its adoption and on UNAMID to establish operational capabilities by October 2007.³⁷⁹ It also called for the force to take command of the region from the 7,000-strong African Union Mission in Sudan (AMIS) by the end of the year, at the latest. The Council urged the Sudanese Government and all rebel groups to negotiate a permanent political settlement to the dispute in Darfur, and demanded that those parties fulfil their international obligations under relevant agreements and Council resolutions. The Secretary-General of the UN stated that Member States must provide every support in order to meet the resolution's ambitious goals and that additional troop must be committed, support systems put in place, and command structures established as time

³⁷⁶ Statement by Security Council Representatives, explanatory notes, Security Council Resolution 1769 of 31/07/2007, Doc: SC/9089. United Nations, New York.

³⁷⁷ *Ibid.*, para.2.

³⁷⁸ *Ibid.*, para.3.

³⁷⁹ United Nation Security Council Resolution 1769 of 31/07/2007, Press Release: SC/9089. United Nations, New York. para.4.

was not on their side.³⁸⁰ He emphasized that the unequivocal support of the Government of Sudan was equally fundamental, including that of the rebel movements. Such support was also crucial in paving the way for negotiations and, ultimately, a peace agreement.³⁸¹

Members of the Security Council welcomed the resolution, warning that it was only the first step in an arduous process, the ultimate goal of which was ending the suffering in Darfur and securing a lasting peace.³⁸² Most speakers also enjoined the parties, particularly the Government of Sudan, to cooperate fully with the deployment and to pursue a sincere path to a negotiated peace.

The United States warned that failure to cooperate would have both unilateral and multilateral consequences while China emphasized that pressuring Sudan was not the goal of the resolution.³⁸³ The Observer for the African Union also welcomed the Council's action stating that the resolution would strengthen the already strong ties between the regional organization and the United Nations.³⁸⁴

On 27 October 2007, peace talks were held in Libya involving factions of all the rebel groups in the Darfur conflict.³⁸⁵ On 30th November 2007, it was announced that Darfur's rebel movements had united into two large groups and were ready to negotiate in an orderly structure with the government.³⁸⁶ Despite this commitment, a fresh Sudanese offensive by government soldiers and Arab militiamen against Darfur rebels trapped thousands of refugees along the Chadian border.³⁸⁷ This was followed by another attack

³⁸⁰ Statement by Security Council Representatives, explanatory notes, Security Council Resolution 1769 of 31/07/2007, Press Release: SC/9089. United Nations, New York.

³⁸¹ *Ibid.*, para.8.

³⁸² *Ibid.*, para.9.

³⁸³ *Ibid.*, para.10.

³⁸⁴ *Ibid.*

³⁸⁵ BBC News, 29 October 2007. "Struggle to Salvage Darfur Talks". Available at <http://news.bbc.co.uk/2/hi/africa/7066792.stm>.

³⁸⁶ CNN News, 10 May 2008. "Darfur Fighting". Available at <http://edition.cnn.com/2008/WORLD/africa/05/10/darfur.fighting.ap/index.htm>.

³⁸⁷ *Ibid.*

on 10 May 2008 where Sudanese government soldiers and Darfur rebels clashed in the city of Omdurman over the control of military headquarters.³⁸⁸

In February 2010, the Sudanese government and the JEM signed a ceasefire agreement with a tentative agreement to pursue further peace. Based on the talks, the JEM hoped to gain most, including semi-autonomy, compared to South Sudan at that time.³⁸⁹ However, talks between the two parties became fragile by accusations that the Sudanese army resumed air strike raids against a village, violating the February agreement.³⁹⁰ Following the accusations levied against the government, the JEM promised to boycott further negotiations keeping the peace process unstable.³⁹¹

It can be concluded that it is not enough for the Council to rely solely on the previously adopted resolutions. Much still needs to be done since the violence is still on-going and the Council will therefore have to adopt future resolutions for the maintenance of peace and stability in the Darfur region of the Sudan.

3.3 AN APPRAISAL OF THE SECURITY COUNCIL'S RESPONSE

Despite the arms embargo imposed on Sudan by resolution 1556, resolution 1769 reiterated that continuous attacks on civilians, wide spread violence and sexual abuses were still going on in Darfur.³⁹² The Council emphasized the need to bring to justice the perpetrators of such crimes and urged the Government of Sudan to do so.³⁹³ Due to the Sudanese Government ineffective response, the Council further adopted resolution 1841 on the 15th of October 2008 to extend the mandate of the arms embargo.³⁹⁴

³⁸⁸ *Ibid.*

³⁸⁹ BBC News, 23 February 2010. "Will Peace return to Darfur". Available at <http://news.bbc.co.uk/2/hi/africa/8659037.stm>.

³⁹⁰ BBC News, 4 May 2010. "Jem Darfur rebels snub Sudan peace talks over 'attacks'". Available at <http://news.bbc.co.uk/2/hi/africa/8659037.stm>.

³⁹¹ *Ibid.*

³⁹² United Nation Security Council Resolution 1769 of 31/07/2007, Press Release: SC/9089. United Nations, New York. para.13.

³⁹³ *Ibid.*

³⁹⁴ United Nation Security Council Resolution 1841 of 15/10/2008, Press Release: SC/9474. United Nations, New York.

Notwithstanding these measures, recent reports still give a negative picture about the situation on the ground.³⁹⁵

Radio Dabanga, the only media outlet that routinely provides uncensored information from Darfur in recent months painted a disturbing picture of reports of civilians fleeing the government's aerial bombardments in the Jebel Marra area.³⁹⁶ It was masked by the massacre of at least 49 civilians at a market in Tabra, North Darfur; government restriction of aid agencies; access to Kalma-one of the largest displacement camps in Darfur; government obstruction of United Nation Children's Fund (UNICEF) reporting on child malnutrition rates in Darfur; and continuing sexual violence and fatal clashes among Arab fighters.³⁹⁷ Rebecca's findings also reveals that the Sudanese government routinely deny foreign journalists access to the conflict-ridden region of Darfur, and Sudan-based media are subject to government censorship.³⁹⁸

Resolution 1935 (2010) extended the mandate of UNAMID until 31 July 2011 with an authorized military strength of plus 19,555 police and civilian personnel.³⁹⁹ It also requested UNAMID to develop, with the United Nations country team, a strategy to fully achieve its objective of protecting civilians and ensuring access to them by humanitarian workers.⁴⁰⁰ It stressed the importance of setting realistic targets against which the mission's progress could be measured. The Council urged all parties involved in the conflict to comply with their obligations under human rights and international humanitarian law, and to commit themselves to a sustained and permanent ceasefire.⁴⁰¹

The Council also urged all parties, including all rebel factions, to engage fully in the ongoing peace talks under the African Union-United Nations Joint Chief Mediator, with a view of reaching a comprehensive agreement that would bring a durable peace to the

³⁹⁵ *Op. cit.*, note 26 above.

³⁹⁶ Rebecca H. 2010. Conflict Displaced Peoples and Refugees. The Washington Post, Washington DC. Para.9.

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*, para.3.

³⁹⁹ United Nation Security Council Resolution 1935 of 30/07/2010, Doc: SC/9997. United Nations, New York. para.1.

⁴⁰⁰ *Ibid.*, para.4.

⁴⁰¹ *Ibid.*, para.8.

region. It reaffirmed the importance of promoting the political process for Darfur, led by the African Union and the United Nations. This underlined the need for systematic and sustained engagement by all Darfur stakeholders in creating an environment conducive to peace and security “through constructive and open dialogue”.⁴⁰²

In an attempt to respond to the Council’s plea, leaders of the rebel movements issued a joint statement on January 29 2011, affirming their commitment to the Doha negotiation. The Sudanese government failed to attend the session, but later agreed to return to the Doha peace forum with a view to completing a new peace agreement by the end of the month.⁴⁰³ However, on February 25 2011, the leaders of the rebel movements announced that they rejected the peace document proposed by the mediators in Doha.⁴⁰⁴ One of the rebel leaders, Ahmed Hussein Adam, mentioned beforehand that the peace process in Doha has been turned to a tribune for political manipulations in a way that presents President Omar Al Bashir as a peace lover seeking to resolve the Darfur conflict peacefully.⁴⁰⁵ He argued that despite Khartoum’s manipulative tactics, she did not desist from the military option and also did not want to deal with the root causes of the conflict. Rather, she simply sought to absorb the rebels within the regime of the National Congress Party.⁴⁰⁶

The Doha Peace plan was said to have been undermined by the AU partly because of the issues raised above.⁴⁰⁷ The plan was therefore stalled until July 2011 when the government came to a mutual understanding with the rebels. The Doha Agreement was finally signed on July 14 2011 between the government of Sudan and the leaders of the SLM and JEM.⁴⁰⁸ Although the agreement went through successfully, the JEM expressed reservation about the implementation of the peace plan.

⁴⁰² *Ibid.*, para.5.

⁴⁰³ Sudan Tribune 2011. Sudan and the LJM rebels Sign a Darfur Peace agreement in Doha. Available at <http://www.sudantribune.com/Sudan-and-LJM-rebels-sign-a-Darfur,39539>

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Sudan Tribune, 2010. African Union undermined Darfur Peace Process-rebels. Available at <http://www.sudantribune.com/spip.php?article34991>

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Op. cit.*, note 404 above.

Despite the Doha peace agreement, recent findings shows that attacks and killing of civilians in Darfur is still widespread. UNAMID reported that on April 20 (2012) a team of 32 officers had been on a routine patrol just before mid-day near Sisi displaced camp when they were attacked by men armed with AK-47 rifles.⁴⁰⁹ The group was returning to their base in Mourne, which is about 70 kilometres southeast of El Geneina. The attack came as local officials said that on April 18 Darfur rebels killed 11 soldiers from the Central African Republic (CAR) on the Sudanese side of the international border, who were part of a three way Chad-Sudan-CAR border force.⁴¹⁰

From the above analysis, there is an indication that the Security Council lacks a defined mechanism to properly handle the issue of human rights violations in Darfur as the violence is still on-going. In its previous resolution 1769, the Council had recognised that if good policies and proper targeting mechanisms are not put in place, the on-going violence in Darfur might further affect the rest of Sudan.⁴¹¹ Cedric confirms that the fighting in the Darfur region has affected the entire Republic of the Sudan, making it very unstable and difficult to govern as a state.⁴¹²

The conflict in Darfur is still raging on since a permanent solution has not been found by the Security Council. Arms restrictions have not been complied with as the violence is still going on; a cease fire agreement failed; and a DPA has not been reached. With the prevailing situation, one can conclude that the response of the Security Council has not been effective as far as Darfur is concerned. As such, the Security Council is still searching for resolutions that would bring peace to Darfur.

Of the most recent is resolution 2035 of 17 February 2012 that seeks to extend until 17 February 2013 the mandate of the Panel of Experts, originally appointed pursuant to resolution 1591; it requests the Secretary-General to take the necessary administrative

⁴⁰⁹ Sudan Tribune 2012. UN-AU peacekeepers attacked in Darfur, 4 wounded. Available at <http://www.sudantribune.com/UN-AU-peacekeepers-attacked-in,42353>

⁴¹⁰ *Ibid.*

⁴¹¹ United Nation Security Council Resolution 1769 of 31/07/2007, Doc: SC/9089. United Nations, New York. para.16.

⁴¹² Cedric G. 2011. South Sudan: A Difficult Birth. The Washington Post, Washington D.C. para. 3.

measures, including basing arrangements, as expeditiously as possible.⁴¹³ By unanimously adopting resolution 2035, the Council acknowledged the creation of two additional states in Darfur on 11 January 2012, and confirmed that all previous references to North, South and West Darfur shall apply to all the territory of Darfur, including the new states of Eastern and Central Darfur.⁴¹⁴ It required the Panel of Experts to provide monthly updates to the Committee regarding its activities, including obstacles encountered to the fulfilment of its mandate, as well as violations of the sanctions.⁴¹⁵

The Council reiterated that some individuals affiliated with the Government of Sudan and armed groups in Darfur have continued to commit violence against civilians.⁴¹⁶ In this regard, it requested the Panel of Experts to coordinate its activities as appropriate with the operations of the UNAMID and with international efforts to promote the political process in Darfur.⁴¹⁷ This process will also be helpful in its interim and final progress reports towards reducing violations by all parties of the measures imposed by resolution 1556 and resolution 1591.⁴¹⁸ It will also accelerate progress towards removing impediments to the political process, threats to stability in Darfur and the region, violations of international humanitarian and human rights law and other atrocities. Some of these atrocities include sexual and gender-based violence and other violations of the above-mentioned resolutions, providing the Committee with information on the individuals and entities that meet the listing criteria in paragraph 3 (c) of resolution 1591.⁴¹⁹

Paragraph 3(c) of resolution 1591 provides that those individuals, as designated by the Committee established by subparagraph (a) of the latter, and based on the information provided by Member States, are those who impede the peace process in Darfur. By

⁴¹³ United Nation Security Council Resolution 2035 of 17/02/2012, Doc: S/RES/2035/(2012). United Nations, New York. para.1.

⁴¹⁴ *Ibid.*, para.2.

⁴¹⁵ *Ibid.*, para.6.

⁴¹⁶ *Ibid.*, para.9.

⁴¹⁷ *Ibid.*, para.8.

⁴¹⁸ *Ibid.* para.7 and 8 of resolution 1556 and para.7 of resolution 1591.

⁴¹⁹ *Ibid.*

means of their actions, they constitute a threat to stability in Darfur and the region. They also commit violations of international humanitarian and human rights law including other atrocities that violate the measures implemented by Member States in resolution 1556 (2004).

The Council requested the Panel of Experts to continue to investigate the role of armed, military, and political groups in attacks against UNAMID personnel in Darfur. In the view of the Council, individuals and entities who plan, sponsor or participate in such attacks constitute a threat to stability of Darfur and may therefore meet the designation criteria provided for in paragraph 3 (c) of resolution 1591.⁴²⁰

However, the efficacy of the Council's operation in Darfur remains questionable. The voting pattern adopted by Council members in some of the previous resolutions was not uniform. Furthermore, most of the resolutions were not voted for unanimously. A good example is resolution 1593 which referred the Darfur situation to the ICC.⁴²¹ The resolution was adopted by 11 votes in favour, non against, with 4 abstentions (Algeria, Brazil, China, and United States). At a time when the Council was seeking for a legal solution to the Darfur conflict, some of its members, including those vested with the veto power acted in a manner that undermined the credibility of its authority. The Council otherwise acted as an opposition to its decision and by way of inference, this division as reflected in the voting pattern proves that voting in the Security Council is informed and driven by self-interest and not necessarily by the need to resolve the conflict.

⁴²⁰ *Ibid.* para.10.

⁴²¹ *Op. cit.* , note 322 above. para.2.

CHAPTER FOUR

REMEDIES FOR THE VICTIMS OF THE DARFUR CONFLICT

4.1 INTRODUCTION

This chapter seeks to address human rights violations in Darfur by redressing the situation of the victims of the conflict. The emergence of human rights under international law has changed the traditional view on state responsibility, which focused on wrongful conduct of the state and not individuals. Responsibility to protect is not geared only to the state but also to individuals involved, and if guilty they have the duty to pay reparations.⁴²² However, the provision of the Rome Statute provides that the Court shall be the primary vehicle for the enforcement of human rights and international humanitarian law with respect to reparations.⁴²³ Reparation therefore is the basis upon which remedies can be made available to victims of armed conflicts.

4.2 THE FOCUS ON REPARATION

After armed conflicts or repression, societies are often confronted by legacies of systematic or widespread human rights violations whose perpetrators remain unaccountable and victims un-redressed.⁴²⁴ In post conflict societies, political leaders and civil society organizations have used transitional justice mechanisms to pursue justice, establish peace, and promote reconciliation. These mechanisms have included criminal prosecution, truth commissions, and reparations programs.⁴²⁵ In some cases, communities established measures of remembrance, such as memorials, and attempts at reconciliation. Among these transitional justice mechanisms, reparations programs are arguably the most focused on the rights and welfare of victims and survivors.⁴²⁶

⁴²² Shelton D. 2000. Remedies in International Law. Oxford University Press, Oxford. p.1.

⁴²³ Rome statute of the International Criminal Court. A/CONF.183/9 of 17 July 1998. Art.75(1).

⁴²⁴ The Rabat Report: The Concept and Challenges of Collective Reparation. International Centre for Transitional Justice, New York. p.9.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

Shelton confirms that reparation, public apologies and other mechanisms of transitional justice are the new mantras of the post-cold war era.⁴²⁷ Their fundamental purpose is to foster reconciliation in societies that have experienced massive human rights violation and to promote reform, the ultimate aim being the removal of tension.⁴²⁸ The primary function of justice is rectification of the wrong perpetrated against the victims. Compensation can only provide something equivalent in value to that which is lost whereas restitution restores that which is taken.⁴²⁹ Monetary compensation is thus quite central to this process and Grotius observed, “Money is the common measure of valuable things”.⁴³⁰ Thus, the most cardinal goal of the process of reparation is the “re-humanisation” of the victims and restoration of their psychological and social functions, including re-integration and rehabilitation.⁴³¹

4.3 JUSTIFICATION FOR REPARATION UNDER INTERNATIONAL LAW

The right to some form of remedy for the violation of human rights has been recognised by most legal systems in the world as extremely important, especially for victims.⁴³² The UN Declaration on the Rights of Indigenous People (UNDRIP), for example recognizes that: “indigenous people are equal to all other people,” “indigenous people, in the exercise of their rights, should be free from discrimination of any kind”. By virtue of their existence as human beings, they are entitled to all human benefits. Any breach of their rights will demand reparation as a remedy.⁴³³ In the *Chorzow Factory (Germany v. Poland)* case the Permanent Court of International Justice held that:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to

⁴²⁷ Shelton D. 1999. p.137.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² Preliminary Statement: The UN Declaration on the Right of Indigenous People and International Reparation. April 2012. Available at <http://internationalreparation.worldpress.com/>

⁴³³ *Ibid.*

*apply a convention and there is no necessity for this to be stated in the convention itself.*⁴³⁴

It is therefore an international law principle that the international human rights and humanitarian law systems are the bed-rocks upon which remedies are made available to victims of armed conflicts in the form of reparation.⁴³⁵ For the purposes of clarification, it is important to digest the basis for remedies under these two legal systems.

4.3.1 International Human Rights Law

Remedies for human rights violations are provided for in a number of international human rights instruments. The UDHR provides that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him(sic) by the constitution or by law”.⁴³⁶ This provision is *pari materiae* with Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) which also provided for remedying human rights violations. The process of reparation is also regarded as an important form of remedy and has been given due consideration by some legal documents as a way of compensation to victims of arm conflict. The International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD) provides that:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his (sic) human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and

⁴³⁴ *Case concerning Chorzow Factory (Germany v Poland)* PCIJ, Ser. A No.9, 1927, para 55 at 21.

⁴³⁵ Preliminary Statement: The UN Declaration on the Right of Indigenous People and International Reparation. April 2012. Available at <http://internationalreparation.worldpress.com/>

⁴³⁶ The Universal Declaration on Human Rights adopted by the UN Human Rights Commission on 10/12/1948 and entered into force on 18/07/1978. Art.8.

*adequate reparation or satisfaction for any damage suffered as a result of such discrimination.*⁴³⁷

The Basic Principles and Guidelines on the Right to a Remedy make a distinction between 5 forms of reparations which include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴³⁸ The provisions of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) are to the effect that each state party shall ensure in its legal system that the victims of an act of torture obtain redress and an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his/her dependants shall be entitled to compensation.⁴³⁹

4.3.2 Regional Instrument for the Right of Reparation

While Article 25 of American Convention on Human Rights (ACHR) establishes the basic principles of redress for victims of violation of human rights, Articles 63(1) and 68 give the most extensive provisions for redressing victims of human rights abuses by prescribing various forms of remedies.⁴⁴⁰ In the benchmark case of *Velasquez v. Honduras*, the Inter-American Court of Human Rights stressed that the enforcement of reparation to victims of human rights violations should not be subject to modification, suspension or limitation at the domestic level.⁴⁴¹ The Court further clarified the general principles regarding reparation as follows:

It is a principle of international law, which jurisprudence has considered even a general concept of law, that every violation of an international

⁴³⁷ Art.6, International Convention on the Elimination of All Forms of Racial Discrimination. Adopted by the General Assembly resolution 2106(XX) of 21 December 1965 and entered into force on 4 January 1969.

⁴³⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Adopted by General Assembly Resolution 60/147 of 16 December 2005. Art.18.

⁴³⁹ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51(1984)], entered in to force June 26, 1987. Art.14.

⁴⁴⁰ American Convention on Human Rights (Pact of San Jose). Adopted on 22/11/1969 and came into force on 18/07/1978.

⁴⁴¹ Judgement of June 26, 1989, Inter American Court of Human Rights. OAS/Ser.L/V/III.17,Doc.13. p.290.

*obligation which results in harm created a duty to make adequate reparation.*⁴⁴²

The African Charter on Human and Peoples' Rights provides for a peoples' right to compensation in the event of dispossession of their wealth and resources. "In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation".⁴⁴³ The European system also provides reparation for victims' of human right violations. Article 5(5) of the European Convention on Human Rights and fundamental freedom (ECHR) provides that "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation".⁴⁴⁴ A good example to measure whether the above principles are adhered to is the Darfur situation.

4.3.3 International Humanitarian Law

In the context of international humanitarian law, the need to recognize the right of the victim is informed by the belief that human persons have inviolable rights even during armed conflict.⁴⁴⁵ Abi-Saab expresses the view that the rationale of international humanitarian law is to go beyond the interstate levels of states and [to reach] for the level of the real beneficiaries of humanitarian protection, i.e. individuals and group of individuals.⁴⁴⁶ The victim's right to a remedy in the first place is dependent on his or her right under international law being violated.⁴⁴⁷ It is a secondary right which is derived from a primary substantive right that has been infringed.⁴⁴⁸ Nevertheless, there is a world of difference between recognising the existence of such a right and enforcing such a right through a claim. States have so far been unwilling to entitle explicitly and in

⁴⁴² *Ibid.*

⁴⁴³ African Charter on Human and Peoples' Rights, adopted on 27/06/1981, entered into force 21/10/1986. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I. L. M. 58(1982). Art.21(2).

⁴⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedom. CETS No.005. Adopted and open for Signature on 4/11/1950 and came into force on 3/09/1953.

⁴⁴⁵ Zegveld L.2003. "Remedies for Victims of Violations of International Human Rights Law". 85 International Review of the Red Cross 851 at 497. p.502.

⁴⁴⁶ Abi-Saab G. 2000. "The Specificities of Humanitarian Law". 94 American Journal of International Law 2 at 243.

⁴⁴⁷ *Op. cit.*, note 445 above. p.503.

⁴⁴⁸ *Ibid.*

general, victims of violations of international humanitarian law claiming reparation.⁴⁴⁹ In the case of *Gouriet v. Union of Post Office Workers* the House of Lords acknowledged that, “a right without a remedy is no right at all”.⁴⁵⁰ Thus, there is a need to afford this remedy to victims of international crimes.

The interests of victims of human rights violations have been recognized by the General Assembly resolution 60/147.⁴⁵¹ This resolution established the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law. Principle 8 and 10 provides that states must afford appropriate remedies to victims of violations of international humanitarian law, including access to justice.⁴⁵² According to principle 11, the content of this right include access to justice, reparation for human suffering and access to factual information concerning violations.⁴⁵³ These UN Principles have been backed up by other initiatives. For example, the Hague Agenda for Peace and Justice for the 21st century defined the implementation of international law as a dominating theme and recommended that:

*The Hague Appeal will advocate changes in the development and implementation of the laws in both fields (international humanitarian law and human rights law), in order to close critical gaps in protection and to harmonise these vital areas in international law.*⁴⁵⁴

Articles 7 and 8 common to the four Geneva conventions of 1949 clearly affirms the rights granted to protected persons. An investigation into these conventions demonstrated that a number of rules refer explicitly to concept such as “right”,

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Gouriet v. Union of Post Office Workers*. House of Lords Judgement on Appeal, [1978] AC 435.

⁴⁵¹ *Op. cit.*, note 438 above.

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ Recommendation 13, the Agenda for Peace, UN Doc. A/54/98. Available at <[http://scholar.google.com/scholar?hl=en&lr=&q=Recommendation+13⁰/02c+the+Agenda+for+peace⁰/02c+UN+Doc.+A⁰/02F54⁰/02F98&btnG=Search](http://scholar.google.com/scholar?hl=en&lr=&q=Recommendation+13%20the+Agenda+for+peace%20UN+Doc.+A%202F54%202F98&btnG=Search)>

“entitlement” or “benefit”. Additional Protocol II to the Geneva Conventions presupposes the existence of such rights.⁴⁵⁵

Case law also provides for an inference that the Law of The Hague also bestows individuals with rights to reparation. In the case of *Dedovic v. Kok et al*, the Amsterdam District Court (Netherlands), implicitly recognised the idea of individual rights in the field of international humanitarian law.⁴⁵⁶ However, there are hurdles for the realisation of remedies for victims of war crimes provided by international criminal tribunals.⁴⁵⁷ The key emphasis on these tribunals has been on panel sanctions, and focus on victims and their remedies has been restricted.⁴⁵⁸ Nevertheless, some degree of attention has been given to victims and their remedies. In Resolution 827 of 1993 that adopted the Statute of the ICTY, the UN Security Council decided that:

*The work of the Tribunal shall be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law.*⁴⁵⁹

Both the ICTY and ICTR statutes, and the Rules of Procedure and Evidence of the Special Court for Sierra Leone provide for the restitution of property or the proceeds thereof to victims and in this context, a trial chamber may determine the rightful owner of the property at issue.⁴⁶⁰ The Rules of Procedure and Evidence of the Special Court for

⁴⁵⁵ Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol II), 7/12/1978. Art. 6(2).

⁴⁵⁶ Judgement of the Amsterdam District Court, 6 July 2000, para. 5.5.22. The appellant sought to invoke alleged violations of Additional Protocol I to the Geneva Convention, Art. 52, which establishes rules on the protection of civilian objects during NATO’s bombing of the Federal Republic of Yugoslavia as a premise for compensation against members of the Dutch Government. However, the Court rejected the claim due to the fact that, in its view, such violations had not occurred. But while limiting the right to invoke the rules to who personally were the victims of violations of international humanitarian law, the court recognised the possibility of deriving individual rights from international humanitarian law rules.

⁴⁵⁷ Zegveld L. *Op. cit.*, note 445 above. p.503.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ United Nation Security Council Resolution 827 of 25/05/1993 adopting the Statute of the International Criminal Tribunal for the Former Yugoslavia. Doc. S/RES/827 (1993).

⁴⁶⁰ *Ibid.*

Sierra Leone embody a similar provision. Rule 105 on compensation to victims states that:

The Registrar shall transmit to the competent authorities of the states concerned the judgment finding the accused guilty of a crime which has caused injury to a victim.

Pursuant to the relevant national legislation, a victim or person claiming through him may bring an action in a national court or other competent body to obtain compensation.

For the purposes of a claim made under sub-rule (b), the judgment of Special Court shall be final and binding as to the criminal responsibility of the convicted person for such injury.

From this analysis, it can be concluded that the victims of human right violations depend on the availability of national remedies. In the absence of a national court with the power and the will to award reparations, victims are left without a legal recourse. Thus, the UN Principles on the Right to a Remedy aim to fill this existing domestic gap. Principles 4 and 5 deal with violations of international humanitarian law that constitute crimes under international law. The establishment of the ICC was aimed at achieving similar goals.⁴⁶¹ Thus, concerned by lack of attention given to victims by ICTY and ICTR statutes, the Statute of the ICC contains more possibilities of redress. Article 75(1)(2) of the Statute of the ICC stipulates that:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and

⁴⁶¹ Zegveld L. *Op. cit.*, note 445 above.

extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

*2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.*⁴⁶²

The ICC Statute goes further to explain that a Trust Fund shall be established by a decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.⁴⁶³ It also remarks that nothing contained in it shall be interpreted as prejudicing the rights of victims under national or international law.⁴⁶⁴ Thus, the Rome Statute goes beyond the treatment of victims under the ICTY and ICTR statutes, as it gives the victim *locus standi* on his or her own. This argument therefore seeks to justify reparation as a remedy under international law.

4.4 REPARATIONS FOR DARFUR AND THE NEED FOR A COMPENSATION COMMISSION

The International Commission of Inquiry on Darfur proposed to the UN Security Council to establish a Compensation Commission which would complement the ICC.⁴⁶⁵ States are therefore obliged not only to act against the perpetrators but also to cater for the interests of victims.⁴⁶⁶ The main focus of the Commission would be to redress the rights of victims of heinous violations committed in Darfur, and also hold accountable those accused of violations.

The necessity for reparations to victims of crimes perpetrated in Darfur is reaffirmed by the gravity of damage engendered by the armed conflict.⁴⁶⁷ It must therefore be necessary to determine whether or not the perpetrators of these international crimes

⁴⁶² Rome statute of the International Criminal Court. Art.75(1)(2).

⁴⁶³ *Ibid.*, Art.79(1).

⁴⁶⁴ *Ibid.*, Art.75(6).

⁴⁶⁵ ICID Report. para.590.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*, para.591.

have been identified.⁴⁶⁸ The need to afford reparation to the victims is predicated on pragmatic and moral grounds, as well as on legal grounds.⁴⁶⁹ It recognises that although the perpetrators may continue to enjoy impunity, the global community may not ignore the plight of the victims.⁴⁷⁰ It should at least lessen their suffering by ensuring that the Sudanese Government makes reparation to the victims.

4.5 THE EFFICACY OF THE REPARATION REGIME

Khartoum's stubborn refusal to compromise by handing over to the ICC the alleged perpetrators of international crimes in Darfur, means that many victims will not have the benefit of seeing their attackers held accountable by a court of law. To seek remedies from the international criminal jurisdiction seems to be very slow or bureaucratic. Professor Williamson argues that the international criminal jurisdictions are "giants without legs and arms".⁴⁷¹ This seems to be true because without cooperation of the state concerned, the only other source of support for the giant is the international community.

In respect of the situation in Darfur, there are four active cases.⁴⁷² In *The Prosecutor v. Abdallah et al*, on 7 March 2011 Pre-Trial Chamber I confirmed charges of war crimes in connection with an attack on an African Union mission, sending the case to trial.⁴⁷³ Arrest warrants remain outstanding in *The Prosecutor v. Ahmad Muhammad et al*; *Prosecutor v. Omar Hassan Ahmad Al Bashi*;r as well as *The Prosecutor v. Abdel Raheem Muhammed Hussien*.⁴⁷⁴

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*, para.592.

⁴⁷⁰ *Ibid.* While a Compensation Commission does not amount to Mechanisms for bringing the perpetrators of human rights violations to account, its establishment would be important for redressing the right of the victims of violations in Darfur.

⁴⁷¹ Williamson C. 2006. Justice empowered or Justice hampered: The International Criminal Court in Darfur. African Security Review Journal. Routledge Taylor and Francis group (Pretoria) South Africa. p.26.

⁴⁷² Report of the International Criminal Court to the United Nations for 2010/11. Summary of Sixty-Sixth Session, Item 75 of the provisional agenda. UN Doc. A/66/309 of 19/08/2011. p.3.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

In accordance with Security Council resolution 1593 (2005), the Prosecutor presented his twelfth and thirteenth reports to the Council on 9 December 2010 and 8 June 2011, on the status of the investigation into the situation in Darfur.⁴⁷⁵ He highlighted lack of cooperation by the Sudanese Government, the continuation of the alleged crimes and the need to execute the outstanding arrest warrants.⁴⁷⁶ The end goal being to stop human rights violations in Darfur. It is important therefore to provide national remedies like the establishment of a compensation commission. The setting up of truth commission and the stigmatisation of the perpetrators are regarded as making amends to the victims of atrocities.⁴⁷⁷

With respect to Darfur, reparations will be the price of the country's return to peace and stability. Alongside political issues, there are also societal dimensions which concern the Darfur victims. There are some victims who may feel that reparation money cannot make good what is irreparable and cannot be acceptable because it is blood money for the departed.⁴⁷⁸ Others may consider, on the contrary, that the suffering caused by the conflict must result in some form of reparation, even if it can never bring back the years that have been lost.⁴⁷⁹ An illustrative example of this is the case of South African victims of apartheid. The Truth Commission was based on a transaction: the perpetrators were granted amnesty, and the victims of apartheid atrocities received reparations in exchange.⁴⁸⁰ However, besides individual attitudes of the victims, the entire society should also be taken into account.⁴⁸¹

A 1998 survey reveals that most South Africans felt that the Truth Commission had failed to achieve reconciliation between black and white communities.⁴⁸² Most believed

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Hazan P. 2006. "Measuring the impact of punishment and forgiveness: A frame work for evaluating transitional justice" 88 *International Review of the Red Cross* 861 at 44.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ Alfonsin R. 2002. Argentina's first elected president after the collapse of the military regime cited in Olson L. "mechanisms complimenting prosecution. 84 *International Review of the Red Cross* 845 at 173.

⁴⁸² Storey P. 1997. *A different kind of Justice: Truth and Reconciliation in South Africa*. The Christian Century. Chicago, United States of America. p.3.

that justice was a prerequisite for reconciliation rather than an alternative to it. There was also a perception that the Truth Commission was weighted in favour of the perpetrators of human rights abuses and therefore, there was unhappiness of amnesty being granted for human rights abuses committed by the apartheid government.⁴⁸³ On the part of the apartheid government, former president F.W. de Klerk appeared before the Commission and reiterated his apology for the suffering caused by apartheid. He pleaded for forgiveness and reconciliation which he viewed as desirable for the achievement of a democratic South Africa.⁴⁸⁴ In a special report, the BBC described such criticisms as stemming from a "basic misunderstanding" about the Truth Commission's mandate which was to uncover the truth about past abuses, using amnesty as a mechanism, rather than to punish past crimes.⁴⁸⁵

With regards to the Darfur conflict, the fundamental issue is the nature of this ethico-political transaction: how acceptable are its terms?⁴⁸⁶ This question thus concerns not only the victims but all societies in the Darfur region. The government of Indonesia established a compensation project to the victims of human rights violation in Indonesia on condition that they forgave the alleged aggressors.⁴⁸⁷ The transaction which placed the victims in a morally shocking position activated a feeling that they were selling their conscience and therefore it was later abandoned.

In the final analysis, it can be noted that the acceptability of the terms of the ethico-financial transaction in Darfur will depend on the choices made by the society including the victims. Reparation payment will either bring tension into the process of societal normalisation or will contribute to it depending on how they are interpreted.

To find an equitable solution to the Darfur situation, the AUPD suggest that the complex question of accountability, arising from the conflict, should not be left to Darfurians alone

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Alfonsin R. 2002. Argentina's first elected president after the collapse of the military regime cited in Olson L. "mechanisms complimenting prosecution. 84 *International Review of the Red Cross* 845 at 173.

⁴⁸⁷ *Ibid.*

to grapple with. These issues should engage all Sudanese, who are legitimate stakeholders in the justice and reconciliation discussion on Darfur, since the matter has national, legal and political significance.⁴⁸⁸ In the light of this, it must be noted that justice, accountability, reconciliation and healing are inter-link and inter-dependent and must be looked at broadly. Consequently, the solution in this area must necessarily be holistic, and given the range of measures that will be required, they should also be procedurally integrated into a workable system.⁴⁸⁹

In addition, and of great significance to the process of negotiation, a number of measures have been suggested by the AUPD.⁴⁹⁰ One among them is a comprehensive, independent and integrated national criminal justice process, which shall include investigations and re-invigoration of all aspects of the Special Criminal court on the Events in Darfur (SSCED) as the principal forum for delivering criminal justice for crimes relating to the conflict in Darfur. The other suggestion is a Hybrid Criminal Court, which will exercise original and appellate jurisdiction over individuals, who appear to bear particular responsibilities for the gravest crimes committed during the conflict in Darfur, and to be consulted by judges of Sudanese and other nationalities.

⁴⁸⁸ *Op. cit.*, note 24 above. para.199. p.49.

⁴⁸⁹ *Ibid*

⁴⁹⁰ *Ibid.*, para.320. p. 88-89.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter presents a summary of the study and a conclusion. It commences by digesting the content of the research, taking into consideration the research problem and the aim of the study. This is followed by a conclusion and recommendations to redress the situation of victims of the Darfur conflict. The researcher examined legal documents alongside human rights violations in the report of the International Commission of Inquiry on Darfur, 2005. The report provided relevant contributions upon which the conclusion is based.

5.2 RESEARCH SUMMARY

The study sought to determine the efficacy of the UN in the resolution of conflicts. It sampled Darfur in Sudan as a case study. Relevant literature was reviewed to determine whether the crime of genocide actually occurred in Darfur. The researcher obtained two different conclusions. The first conclusion by Secretary Powell affirmed that genocide had occurred in Darfur, but the second conclusion by the International Commission of Inquiry was of the opinion that although war crimes and Crimes against Humanity occurred, they do not amount to the crime of Genocide. The Commission insisted that the crimes committed in Darfur do not meet the specific requirement of 'intent' prescribed by Article 2 of the Genocide Convention.

The researcher however, argued that the International Commission of Inquiry in Darfur never took into consideration all the elements of genocide at the time of their investigation. According to the ICC Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.⁴⁹¹ Such acts include: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on a group conditions of life

⁴⁹¹ Art.6.

calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group. This provision is *pari materiae* with Article 2 of the Genocide Convention. Article 1 of the latter convention provides that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

In the *Prosecutor v. Omar Al Bashir*, the majority of the judges at the Pre-Trial Chamber made the following findings that:⁴⁹²

1) *President Al Bashir acted with discriminatory intent against members of the Fur, Masalit and Zaghawa groups;*

2) *President Al Bashir made public statements that provide evidence for his responsibility for war crimes and crimes against humanity that were a core component of the Government of Sudan counterinsurgency campaign;*

3) *President Al Bashir and other high ranking Sudanese political and military leaders shared a common plan to carry out this counter-insurgency campaign. In this regard, a core component of the Government of Sudan counter-insurgency campaign was the unlawful, discriminatory and systematic attack on the part of the civilian population of Darfur belonging largely to the Fur, Masalit and Zaghawa groups. They were perceived by the Government of Sudan as being close to groups, such as the SLM/A, the JEM and other armed groups opposing the Government in the on-going conflict in Darfur.*⁴⁹³

⁴⁹² *Prosecutor v. Omar Al Bashir*. International Criminal Court Judgement of 6 July 2009. Case No. ICC-02/05-01/09 OA. para.59.

⁴⁹³ *Ibid.*

From the above evidence and many other facts raised by the majority of judges in Pre-Trial Chamber, the Prosecution submitted that Pre-Trial Chamber amply supported reasonable grounds from which to infer that President Al Bashir acted with genocide intent.⁴⁹⁴ The Prosecution urged the Appeal Chamber to rest their decision on the basis of the evidence put forth by the Pre-Trial Chamber on the confirmation of charges of genocide against President Al Bashir.

Drawing from Secretary Powell's determination of genocide in chapter Two, chapter three continues to determine whether the UN response through the adoption of a series of resolutions by the Security Council had been effective. The researcher is of the opinion that the response was not effective since the conflict is still on-going and, recent resolutions are still being adopted to increase the number of expert monitors in the region. In chapter Four, an attempt was made to explore possible remedies to victims of the Darfur conflict. The researcher focused on reparation through a compensation commission as an effective remedy proposed by the ICID. The justification for this form of remedy is provided for under international human rights law and International Humanitarian Law. Chapter Five provides conclusions and the way forward on how to address the plight of the victims of the Darfur conflict.

The prevailing view on the nature of the conflict in Darfur revolves around the concept of war between ethnic African farmers and nomadic Arab tribes over access to water and pasture. In this conflict, the rebels represent the African tribes against the Arab tribes. The Arab tribes are supported by the Sudanese government and its militia, the *Janjaweed*. Added to this is the view that a member of the Security Council China, who receives about two-third of the Sudanese oil, does not seem to exert any real pressure on Khartoum to stop the violation of human rights in the region.⁴⁹⁵

⁴⁹⁴ *Ibid.*, para.62.

⁴⁹⁵ Hassan A., p.30.

This study reveals that divisions within Security Council members have been a major obstacle to the implementation of the DPA to stop the abuse of human rights in Darfur. This loophole in the organ is informed by a lack of political will by some members to vote in the adoption of certain resolutions, e.g., resolution 1706 and, a lack of military capacity by the Council as expressed in resolution 1679. In the case of the latter resolution, while the US favoured the imposition of a full-bodied comprehensive sanction against the Sudanese government to halt human rights abuses and protect civilians in Darfur, China and Russia insisted on respecting the sovereignty of the Sudan as enshrined in Article 2(7) of the Charter of the UN. As such, Sudan bears the primary responsibility, as the territorial state, to protect civilians under imminent danger of human rights abuses but, fails to do so. This obligation is contained in Article 2(2) of the Charter of the UN and also in other international treaties to which Sudan is a party. Since Sudan failed to fulfil its obligation, the responsibility fell on the international community, particularly the Security Council which is mandated, in terms of Article 24 of the Charter to maintain international peace and security. Although this responsibility shifted to the international community, the UN through the Security Council failed to discharge its duties under the Charter effectively as the abuse of human rights are still on-going in Darfur.

The study suggested that the current composition of the five permanent members of the UN Security Council is not in accordance with the provisions of the UN Charter. These provisions include the principles of equal rights as envisaged under Article 1(2), sovereign equality of states envisaged by Article 2(1) and equitable geographical representation in accordance with Article 23(1) of the UN Charter. The UN Security-Council should be a body representative of the broader membership of the world community, particularly of the less developed and developing countries. The equal distribution of seats in the Council should therefore reflect the four major regions of the globe which are: Africa, America, Europe and Asia. Most importantly, Africa should at least get one of the permanent seats in the Security Council. This will not only enhance the legitimacy of the Security Council among UN member states, but will also make the accountability and democratic nature of the organ more visible.

Besides the UN, the response of the ICC to the conflict in Darfur has not been effective. The UN Security Council adopted resolution 1593 to refer the Darfur conflict to the ICC for the purposes of bringing the alleged perpetrators of human rights violations to justice. This study revealed that, arrest warrants are still outstanding for two major cases including *The Prosecutor v. Omar Al Bashir*. One can therefore argue that because Sudan is not a party to the Rome Statute, it becomes even more difficult for the Sudanese government to fully cooperate with the ICC. This makes the whole situation more complicated as the ICC seems to be the last resort.

The Darfur crisis is tied to both internal and external parties. The domination of the west over global affairs and the functioning of the International Criminal Justice system have affected the smooth functioning of both the UN and the ICC. However, if foreign forces continue to work towards achieving their own political agendas, national forces should respond by promoting national over private issues and emphasising the importance of a unified Sudan instead of raising ethnic and regional claims. The supreme aim for all should be unity within diversity.

5.3 CONCLUSION

From the preceding chapters, it is evident that genocide occurred in Darfur, but the international community has not acted with sufficient rigour to end it. The international community is still not able to reverse it and prevent a major famine from killing hundreds of thousands of people in the region. Protecting civilian populations and getting them the much needed humanitarian assistance must be first priority. The UN, AU, USA and European Union (EU) need to do much more to get the ceasefire commission in operation, increase the number of monitors in Darfur and open up access to IDPs and other parts of the populations in need.⁴⁹⁶ Disarming the *Janjaweed* is obviously a priority and an essential part of this process.⁴⁹⁷

⁴⁹⁶ Donovan P. 2005. The Nature of the conflict in Sudan: A brief overview of the causes and conduct of conflict in Sudan. Peace and Governance Series No.9, Occasional Paper No.75. African Institute of South Africa. p.16.

⁴⁹⁷ *Ibid.*

In exploring the nature of the conflict in Sudan, the government of Sudan should be held accountable for causing the conflict, for being the main protagonist behind the massive human rights abuses, and for orchestrating the genocide. Pressure needs to come from a concerted international community against the government of Sudan in an effort to find a lasting political solution to the conflict. Above all, the international community must act swiftly under the “responsibility to protect” principle to save the people dying in Darfur.

5.4 RECOMMENDATIONS

- The UN Security Council as the ultimate guarantor of the DPA should make clear to all parties that it is fully committed to the accord and will take whatever steps that are necessary to see that the DPA is fully implemented. All 15 Security Council members should therefore work towards reaching a shared understanding and communication on how to achieve peace and security in Sudan.
- The UN Security Council should explore the alternatives of establishing a Hybrid Court in Sudan as proposed by the AUPD and the exercise of universal jurisdiction by other states as proposed by the ICID.
- The AU/UN Hybrid Operation in Darfur should be fully supported and resourced in order to ensure that its mandate is effectively met. Punitive measures should be considered by the international community against armed groups which attack AU and UN peacekeepers.
- Regional actors should focus not only on Juba and Khartoum, but should acknowledge that Sudan’s border areas are a matter of critical strategic importance especially Abyei, Southern Kordofan and Southern Blue Nile. These targeted areas should also be of major concern to the international community.
- Humanitarian agencies should be given the necessary funds to alleviate the sufferings of the civilians; programs should be implemented as soon as possible to rehabilitate communities that have survived the evil campaign of torture, rape and murder.

- The ICC must be given all necessary support by the Sudanese government although they are not parties to the Rome Statute. This will ease the functioning of the Court in order to bring the perpetrators of human rights violations in Darfur accountable.
- The exit strategy for Darfur and some areas of Sudan requires judicial reform and security, particularly structural reforms of the police, army and other national forces. At the same time, it requires political and economic reforms as well as the support and cooperation of the international community and the African Union, particularly the Arab and Muslim states in Africa who are often faced with ethnic clashes.
- There should be substantial restructuring and reform at the UN Security Council so that the veto power is extended beyond the five permanent members of the council or abolished. Such reforms should mirror the new realities of the world today.

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