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**Humanitarian Intervention and State Sovereignty:
Case Study of Darfur**

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Executive Summary

Title: Humanitarian Intervention and State Sovereignty: Case Study of Darfur

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Thesis: This is a critical analysis of international law on humanitarian intervention through the case study of Darfur, Sudan. International law has recently evolved to authorize humanitarian intervention to save lives over the sovereignty of a state. The humanitarian intervention framework is within the International Commission on Intervention and State Sovereignty. States are content to work within the United Nations/African Union mission hybrid for the humanitarian crisis in Darfur, Sudan because of state interest. The law is no longer the barrier to humanitarian intervention.

Discussion: International law experienced a "realist" moment during the military intervention in Kosovo. NATO intervened outside the United Nations structure and without an imminent threat to state survival. The sole reason was to save lives although NATO member states varied on formal justification for intervention. During the same time, the United Nations mission to Rwanda failed to prevent genocide. In 2001, a legal framework, recognizing the evolution of international law in humanitarian intervention, creates the process and requirements for states to intervene to save lives. In 2003, Arab militias with Sudanese planes engaged in acts of genocide in Darfur. In 2008, over two million displaced civilians remain in camps on or near the Chad border and the Arab militias continue to kill civilians with impunity. The new legal framework has not prevented the suffering in Darfur. The law alone will not prevent humanitarian suffering.

Conclusion: The United States military needs to understand the evolution of the legal framework for humanitarian intervention; and how to work within it or know the repercussions for working outside it when our state interests change.

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Preface

The following thesis is a result of the author's desire to understand if international law is a primary obstacle to humanitarian intervention in Darfur, Sudan. With the creation of a new framework, the International Commission on Intervention and State Sovereignty (ICISS) argues international law has evolved to create not only authorization for humanitarian intervention but also creates a responsibility for states to intervene to save lives beyond state lines. If in fact the law has evolved, why is the process not working to save the lives of non-combatants in Darfur? The ICISS framework assumes incorrectly that human lives alone are vital interests to states. What the law authorizes is subservient to the vital interests of the state. This thesis would not have been possible without LtCol B.J. Payne, Dr. Eric Shibuya, Dr. Paul Gelpi, and my mentor Dr. Pauletta Otis.

INTRODUCTION

In the 20th century, international law was the perceived hurdle to humanitarian intervention. The international legal debate frames state sovereignty against humanitarian intervention. Within this legal framework, civilians are unprotected from atrocities that remain inside state territorial lines. States could conduct acts of genocide against their own population with impunity. After the intervention in Kosovo and the genocide in Rwanda, international law evolved to allow humanitarian intervention. The international legal debate shifted from state sovereignty against humanitarian intervention to a "Responsibility to Protect".

The United States declared the atrocities in Darfur, Sudan to be genocide in 2004. Four years later, there is still no protection of civilians and over a two million displaced civilians remains in camps. Where the law has changed there is still a requirement for state interest. Until the genocide in Darfur is a vital state interest, the United States and other western countries will not intervene regardless of what international law authorizes or prevents.

If the only limitation on humanitarian intervention in Darfur is the perception that the genocide is not a United States vital interest, the United States military should be prepared for the view to change. With the creation of Africa Command, the United States military is beginning to view the continent of Africa with more interest. The United States military needs to be able to articulate capabilities and limitations viewed through the prism of state interest outside and within international and regional organizations. The United States military will be more effective if its leaders understand the evolution of the legal framework of humanitarian intervention. Specifically, the military must understand the framework to work within it or know the repercussions for working outside it.

The International Commission on the Intervention and State Sovereignty (ICISS) frames the law and its processes within the "The Responsibility to Protect." Written in the aftermath of Kosovo and Rwanda, where the law and the United Nations was ineffective, perverted, and/or unused, the framework creates clarity and acknowledges the legal evolution. "We want no more Rwandas, and we believe that the adoption of the proposals in our report is the best way of ensuring that."¹ ICISS published the report in December 2001 to answer "the question of when, if ever, it is appropriate for states to take coercive - and in particular military - action, against another state for the purpose of protecting people at risk in that other state."² The framework reflects the evolution in international law without a corresponding evolution in why states intervene.

EVOLUTION OF INTERNATIONAL LAW ON HUMANITARIAN INTERVENTION

State Sovereignty versus Humanitarian Intervention

The state is the primary actor in the international realm. The debate often frames state sovereignty as the hurdle to humanitarian intervention.

The doctrine of state sovereignty has a pedigree that goes back more than 350 years. At its birth, it was a recipe for peace, the crucial articulation of a principle that would allow the catastrophic religious wars of 17th-century Europe to come to an end. In the Treaties of Westphalia (1648), European princes agreed that each ruler would determine the law - including, most importantly at that time, the establishment of religion - within his or her own domain and that no other power could legitimately interfere with the chosen internal order. In an ironic turnabout, this formula for ending the devastation of the Thirty Years' War came to be used, centuries later, as a shield permitting such devastation to continue as long as it remained 'hidden' *within* national borders.³

In the 20th century, the United Nations Charter canonized state's primacy in the United Nations Charter Article 2.1, "The Organization is based on the principle of the sovereign equality of all its Members."⁴

The Senate considered Sudan's sovereignty in a hearing before the Committee on Foreign Relations on *The Current Situation in Sudan and the Prospects for Peace* on 9 September 2004.

Senator Joseph R. Biden (Delaware) wanted clarification from Secretary of State Colin Powell regarding the need for Sudan's consent to make a stronger mandate to protect civilians in Darfur.

Senator Biden began:

I think the American people and a lot of our colleagues, as well, are confused about how much we're attempting to do to save thousands, and maybe tens of thousands of lives over time, relates to the need to have the approval of Khartoum [Sudan's capital]. Right now, the AU [African Union] is in there in limited numbers as an observer with no mandate and no authority to protect civilians, but to observe and report. Secretary POWELL. Sudan is a sovereign country with a government, and what they have agreed to, and what they have cooperated in, is the deployment of a monitoring group, and protection force for the monitoring group so the monitoring group can do its work. Now there's an effort to expand that significantly. The Sudanese have said, you know, you can't just come into our country as a peacekeeping force and as an intervention force totally indifferent to the sovereignty of the nation and the sovereignty of the government. And what the African Union is doing now is working with the Government of Sudan and working with others to determine how large a group should go in, and what should they be called, and what will mission be?⁵

Historically, the international principle of non-intervention attached to make state sovereignty inviolable. "This view essentially treats sovereignty and nonintervention as forming 'two sides of the same coin,' thus relegating intervention as its 'conceptual opposite.'"⁶ The principle of non-intervention is well found in the UN Charter and applies to states and the UN itself, Articles 2.4 and 2.7 respectively. "All members shall refrain in international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..."⁷ In order for humanitarian intervention to occur over the objection of the state, the primacy of the state in the international realm must necessarily degrade.

Human Rights Law

As the principles of state sovereignty and non-intervention are contained in the UN Charter so is "promoting and encouraging respect for human rights."⁸ The UN embraces the contradiction "[i]n its dual commitment to international peace and fundamental human rights, the UN Charter appears to reflect a contradictory commitment to the exclusive sovereignty of the state and international protection of human rights."⁹ The growth of human rights law within the framework of the UN Charter and treaty law in the Post Cold War era increased the debate. The legal foundations of human rights law rest within the Charter itself and such treaties on treatment of civilians in combat, genocide, and torture. "Indeed the evolution of human rights law and thinking over the last 40 years has been marked by the development and acceptance of universal standards of human rights, even if procedures to hold governments accountable for such violations have not yet been accepted. As early as 1948, the Genocide Convention showed that the international community recognised that the international community had a responsibility to act to prevent genocide."¹⁰

At the same time as the expansion of human rights in international law, intervention by states and the members acting within UN structure increased. "A more activist Security Council in the post-Cold War period defined a number of complex emergencies as threats to international peace and security under Chapter VII, Article 39 of the UN Charter. It thereby gave legal cover to the insertion of humanitarian assistance even without the consent of the government authority of the state in question, and therefore made internally displaced people accessible to international humanitarian relief efforts."¹¹ Before Kosovo, states' legal justification/legitimacy intertwined the classicist theories of self-defense and UN Security Council (UNSC) approval even when humanitarian reasons existed. States cited refugees flowing across borders and the destabilization of borders. In the case of Kosovo, these justifications made a mockery of the

legitimate and lawful use of force for self-defense. There was no direct or threat of imminent attack to the other states. At the same time, the UNSC was unable to reach consensus (Russia threatened a veto because of long standing relationship with Serbia). In the face of horrible regional violence, where current UN resolutions were not working, the regional organization, North Atlantic Treaty Organization (NATO), decided to intervene. NATO's military intervention was without UNSC authorization. Members of NATO disagreed on the legal basis of the military intervention.

Legal jurists argue that the intervention by NATO in Kosovo for humanitarian reasons is a "realist" moment, where the law changes to reflect a new accepted norm. Senator Joseph Biden acknowledged the evolution of international law on sovereignty and humanitarian intervention, specifically citing historical interventions in the Senate Hearing on Darfur.

It's not precisely analogous, but we went through a similar thing with Milosevic and Kosovo, not Bosnia, and this notion of sovereignty, that we could not-notwithstanding the fact that he was fully engaging in genocide, we could not move in Kosovo without this is early on-without the consent, in effect of the Government of Belgrade. This is different, I acknowledge. But the fundamental concern I have here is, as we and our friends in the Security Council and our European friends-work out the new rules of the road of the 21st century, it seems to me-and I'm not asking you to respond, but it's something I'd like to have some time with you about at sometime-there seems to me a desperate need for us to come up with new rules of the road, internationally, to have some legitimate recognition that there's other circumstances in which a nation forfeits its sovereignty, short of going to war. I'd respectfully suggest we should consider the notion-I don't mean what our specific action would be, what precise action we would take-but it seems to me that, as a practical matter, and as a matter of international law, when a nation engages in genocide within borders, cooperates with it, they forfeit sovereignty. I'd respectfully suggest we should be debating whether or not Khartoum has forfeited sovereignty under the traditional 20th century notion of what outside interests and countries are able to do within territory, based on this doctrine of sovereignty. That's way beyond this, I know...¹²

Responsibility to Protect New Rules of the Road

Senator Joseph Biden's "new rules of the road of the 21st-century" are in ICISS-framework. Significantly, ICISS shifts the debate from pitting sovereignty against humanitarian intervention to the "Responsibility to Protect". "The traditional language of the sovereignty-intervention debate – in terms of 'the right of humanitarian intervention' or the 'right to intervene' – is unhelpful [...] the Commission is of the view that the debate about intervention for human protection purposes should focus not on 'the right to intervene' but on the 'responsibility to protect.'"¹³ The Commission averts the juxtaposition in the creation of two basic principles. "State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."¹⁴

Legal scholars that claim the ICISS framework is not fully accepted still recognize that the law now authorizes military intervention for humanitarian assistance in cases like Darfur even if it means working outside the United Nations. "It may be premature to claim that a new legal norm in support of humanitarian intervention in exceptional cases has emerged in any clear or uncontested way, but elements of a normative consensus may be developing gradually. In a situation like Rwanda – or Darfur, Sudan – a collective humanitarian intervention by a regional organization or group of states may well enjoy wide legitimacy in the absence of effective action by the Security Council."¹⁵ Assuming the ICISS framework is the new consensus is provides an internationally recognized framework to study the humanitarian crisis in Darfur.

ICISS FRAMEWORK AND DARFUR

The ICISS framework under the Responsibility to Protect provides six criteria for military intervention for humanitarian reasons. "While there is no universally accepted single list, in the Commission's judgement all the relevant decision making criteria can be succinctly summarized under the following six headings: *right authority, just cause, right intention, last resort, proportional means and reasonable prospects.*"¹⁶ This paper analyzes the case study of the humanitarian crisis in Darfur, Sudan using the six criteria.

The first will be the threshold criteria of **Just Cause** followed by **Right Intention, Last Resort, Proportional Means and Reasonable Prospects** labeled by ICISS as the "**Precautionary Principles**". The ICISS framers borrowed substantially from Just War theory to create safeguards against states masking unlawful aggression as humanitarian intervention. "[T]here are four other substantial conditions that have to be met at the outset: **right intention, last resort, proportional means, and reasonable prospects.** When both these and the threshold 'just cause' principle are taken together, to jointly shape the policy decisions of both the Security Council and member states, the Commission believes that they will strictly limit the use of coercive military force for human protection purposes."¹⁷ Each of the four conditions seeks to restrain unlawful aggression as an ulterior motive. As legal realists, the first precautionary principle understands states might have interests other than fighting human suffering. To that end, the framework recommends multilateral operations, with specific guidance from states within the region. Finally, the element of **Right Authority**, "who can authorize a military intervention."¹⁸ Unfortunately, the law has evolved faster than international reality. The UN and the member states are failing to protect the victims in Darfur, Sudan. Where the law allows for humanitarian intervention over sovereignty, states still will only

intervene when vital interests are at stake or conditions within the state allow for use of force knowing vital interests are not at stake.

Just Cause

"In the Commission's view, military intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert: *large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.* If either or both of these conditions are satisfied, it is our view that the "just cause" component of the decision to intervene is amply satisfied."¹⁹ There is no consensus for Darfur on the death toll numbers and the intent behind the killings/characterization of deaths.

"The number of victims is definitely not a key factor in deciding if large-scale killings constitute a genocide or not. However, numbers are relevant in themselves (the magnitude of what the targeted group has suffered) and secondly because of real or potential impact on world opinion."²⁰ The difficulty with numbers is determining the criteria: when to start counting, who gets counted, and who is counting.

The first serious mortality survey was carried out by personnel from the French NGO Medecins Sans Frontieres (MSF) between April and June 2004 in four IDP camp sites (Zalingei, Mornay, Niertiti and El-Geneina) which together sheltered 215,400 people... with an estimate of violent deaths in the pre-camp period of these IDPs' lives: people's answers indicated that about 5% of number had been killed before they were able to reach (relative) safety. If we add to these deaths those caused by disease, lack of food and water on the way, and exhaustion, we arrive at a Crude Mortality Rate (CMR) of 7.56 per 10,000 a day... Counting on 'only' four months of attacks and flight, we can estimate the numbers of deaths at around 150,000 for the whole 'war-affected' population up to June 2004."²¹ The death toll estimate is low. In a prepared statement Senator Biden states, "According to a leading Washington NGO, as many as 400,000 people have been killed as a result of the hostilities. Countless women have been raped, and

continue to be the victim of sexual violence. Two million people are still displaced from houses.²²

The United States and the UN disagree on the intent behind the deaths. The disagreement is over the labels: genocide, ethnic cleansing, or crimes against humanity. "As for the most prominent user of the word 'genocide' in connection with Darfur, the former US Secretary of State Colin Powell seems to have based himself on the December 1948 definition of the world when he said on 9 September 2004 that in his opinion Darfur was a genocide."²³ The UN's "report apparently wrote that there was 'not sufficient evidence to indicate that Khartoum had a state policy intended to exterminate a particular racial or ethnic group', a definition that moved away from December 1948, but which in itself is acceptable."²⁴ Where there is no consensus on the characterization, there is characterization on just cause for intervention. Deputy Secretary of State Robert B. Zoellick answered questions on the outcome of two disparate characterizations in Darfur before Senate Hearing on 28 September 2005 "To be fair to the U.N., finding on January 25 was that this was no less serious and heinous than genocide. What this deals with is a different view in terms of the Genocide Convention of 1947 and 1948. So again, crimes against humanity, which they found, is what we used in Nuremberg trials... We all agree what happened was outrageous. It was heinous. We believe it is genocide. They believe it is crimes against humanity. We have to stop it. We have to get it turned around and fixed."²⁵

The Precautionary Principles

Right Intention

"Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned."²⁶ In Darfur, the first governmental organization response was from the regional

organization, African Union, with the consent of the government of Sudan. Currently, the UNSC passed Resolution 1769 unanimously on 31 July 2007, "It determined that the situation in Darfur constitutes a threat to peace, and authorized the deployment of a United Nations-African Union Mission in Darfur (UNAMID) under Chapter VII of the U.N. Charter."²⁷ Ironically, if member states had interests other than saving lives, they would be more willing to intervene.

Alternatively, as in the case of Darfur, China's interest in preventing intervention to keep the oil flowing and retaining the status quo for the Sudanese Government. "China purchases two-thirds of Sudan's oil exports and sells weapons to the Sudanese government."²⁸

Last Resort

Although not intended, the precautionary principle of last resort is ineffective against the speed of war and is therefore at odds with the main intent of the ICISS framework, prevention before humanitarian disasters occur. In 2003, the international focus in Sudan was on the civil war between the north and the south, not the western area of Darfur. The international community was slow to recognize Sudan's "counterinsurgency" techniques against the tribes of Darfur. The world realized the scope and breadth of the atrocities only after the majority of the mass killings and civilian displacement were complete. The international goal of prevention necessarily focused on the current humanitarian need: safeguard the remaining civilians, return the displaced civilians to homes, disarm the militias, and hold war criminals accountable. "Last resort: Military intervention can only be justified when every non-military option for prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded."²⁹ Four years have passed since United States declared the atrocities of Darfur genocide. Full deployment of the joint UNAMID force will not occur until mid 2008. President Bush spoke on Darfur after reports on recent "military and militia attacks on Darfur in [late January 2008] that killed at least 150 people and displaced more

than 12,000, and burned towns to the ground. 'I must confess, I'm a little frustrated by how slow things are moving,' Bush said, 'And yet we will support efforts to find forces necessary to make a robust contribution to save lives.'³⁰

Proportional Means

The ICISS framers define "Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective."³¹ For Darfur intervention, reality shapes proportional means more than the minimum necessary to achieve humanitarian objectives. Member state interest drives willingness to contribute financially, expert training, troops, equipment, or transportation not the reality of scale, duration, and intensity of the military intervention. The wealthier member states are more willing to give money than troops and equipment. "It is estimated that UNAMID will cost roughly \$2.5 billion a year, in addition to start-up costs. U.N. member states will fund the mission through the U.N. assessment scale. The United States will contribute 27.1% of the total costs."³²

The UNSC resolution emphasizes the makeup of the troops, "*Recalling* the Addis Ababa Agreement that the Hybrid operation should have a predominantly African character and the troops should, as far as possible, be sourced from African countries."³³ The rationale for keeping the troop makeup African is unstated in the resolution. This particular provision seems to be a direct response from the information campaign by the Government of Sudan.

A multilateral UN response to the ethnic-cleansing campaigns of the apocalyptic horsemen of Darfur and the escalation of the rebel counterattack that victimized thousands of civilians was deflected by Khartoum's timely appropriation of the slogan 'African Solutions for African Problems.' This freed UN Security Council members from having to make decisions to halt the violence to avert a tragedy similar to what had taken place in Rwanda a decade earlier. It also ensured that Khartoum's actions would be scrutinized by friendly peers at the newly

reconstituted African Union. This particular spin even found its way into popular African discourse, portraying the tragedy of Darfur as an 'opportunity...to build on the global concern...[and a] test...to defend African sovereignty in the face of America's global 'war on terror'.³⁴

The Senate hearings on Darfur are silent on United States contributions outside the ongoing financial, training, and NATO transportation provided to get AU troops. What Deputy Secretary Zoellick mentions in his opening statement is, "It is also an opportunity to demonstrate the African Union's ability to deal with African problems [...] It also has a structure to try to deal with some of these security issues. It establishes among African countries 'a right to intervene in international or regional conflicts.' So this is an important precedent for Africans dealing with African problems."³⁵

There is a direct correlation of the means with the prospects for success of the military operation. The United States and other wealthy member states have not offered troops and Africa is left to deal with African problems posed as legitimacy. When questioned about AU capability, Deputy Secretary Zoellick responded not with American troops or even NATO troops but beefing up AU forces, equipment, and diplomatic pressure:

I think for people to eventually go home, Senator, it is going to require a peace accord, which is not just AU military forces. It is going to require the disbanding of the Janjaweed (Government of Sudan supported militia), which is not just a question of the AU going into military action. What I am trying to suggest here is that it is important for the AU to be able to have the additional capability, the weaponry, the words and mandate, but to see that action outside, loosely speaking, the larger diplomatic and political context, I think runs a risk of misleading about what can reasonably be accomplished here.³⁶

Reasonable Prospects

In adding reasonable prospects as to the precautionary principles, specific objectives must be outlined and be achievable. "Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction."³⁷ On 7

January, the Sudanese military attacked the initial UNAMID supply convoy. "It also gave the U.N.-backed force a humiliating defeat during the critical first weeks of its mission in Darfur.... U.N. leaders have warned of the risk of failure from entering the Darfur conflict without adequate resources to repel an attack. But requests for vital equipment – including 24 transport and attack helicopters – have gone unanswered."³⁸

Right Authority

The ICISS framework rests firmly on the UN Charter. "There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes."³⁹ Only two articles in the UN Charter expressly authorize the use of force over state sovereignty, Articles 42 and 51. Article 51 preserves the right of the state to use force in self-defense against an armed attack. The security of a state is a vital interest, where threatened, the use of force is permitted. The ICISS framers shape the analysis for intervention from security interests to purely humanitarian grounds for intervention. "This [Article 51] is unlikely to have application to the military intervention situations with which this report is concerned."⁴⁰ Under Article 42 of the UN Charter, the UNSC is authorized to use military force, "it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."⁴¹

Currently, the UN provides legitimacy to uses of force by its members. The UN is beholden to members' willingness to contribute forces to UN missions.

The authority of the UN is underpinned not by coercive power, but by its role as the applicator of legitimacy. The concept of legitimacy acts as the connecting link between the exercise of authority and the recourse to power. Attempts to enforce authority can only be made by legitimate agents of that authority. Collective intervention blessed by the UN is regarded as legitimate because it is

duly authorized by a representative international body; unilateral intervention is seen as illegitimate because self-interested.⁴²

In the event of humanitarian crisis may reach the level of the Just Cause threshold, the next step within the ICISS framework is receiving authorization for military intervention. "Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter."⁴³

In 2003, the Government of Sudan was engaged in international and regionally lead peace talks for the North/South conflict. Darfur rebels seized the opportunity to join the international stakes for a share of the wealth and independence by stepping up attacks on police stations and government posts.

The coordinated attacks by the two movements revealed the inadequacy of the government militarily, hence the decision to rely primarily on the Janjaweed, reinforced by helicopter gunships and bombers from the national air force. In Khartoum's calculation, the stakes in Darfur were higher not just because of the high number of soldiers serving in the national army from the region, but also because of the potential implications of the rebellion for the stability of the central government.⁴⁴

In 2004, with slow realization of the atrocities and pressure from NGOs, the UN began to act.

The atrocities in Darfur competed with other state interests. The UNSC first action was to monitor only.

Joint Implementation Mechanism (JIM) to monitor events in Darfur, but the major powers in the Security Council resisted demands for a robust military action to protect civilians and guarantee the unimpeded supply of humanitarian relief. Needing government cooperation to reach an agreement in Naivasha [Kenya], Western countries were reluctant to push for more forceful measures that they did not have the political will to muster. With armed forces ensnared in Afghanistan and Iraq, the United States and Great Britain were reluctant to be perceived as threatening to invade another Muslim country.⁴⁵

The reality of low state interest further fractioned by state resources directed to other state interests slows the intervention in Darfur.

A non-UNSC member state (a nonvoting member dependent on current rotation cycle) with a vital interest in Darfur could only pressure the UNSC faster and larger humanitarian intervention. The states with the most vital interest, the bordering states, have the least capability to prevent the genocide and the least power within the UN. The ICISS framework provides alternatives if the UNSC rejects a proposal or fails to act in a reasonable time. "[C]onsideration of the matter by the General Assembly in Emergency Special Session under the 'Uniting for Peace' procedure; and action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to seeking subsequent authorization from the Security Council."⁴⁶ Further, the ICISS framers understanding the damage to UN credibility allow "concerned states" to intervene. "[A] military intervention is undertaken by an ad hoc coalition or individual state which does fully observe and respect all the criteria we have identified, and if that intervention is carried through successfully – and is seen by world public opinion to have been carried through successfully – then this may have enduringly serious consequences for the stature and credibility of the UN itself."⁴⁷ Without vital state interests in Darfur, most UN member states are content remaining within the slow moving UN/AU hybrid solution.

The ICISS framework also contemplates the veto power of the Permanent Members of the UNSC. The Commissioners suggest the creation of a "code of conduct" where a Permanent Member would abstain their veto for the greater good of humanitarian intervention. Importantly, the framework acknowledges this would never occur over state interest. "The Permanent Five members of the Security Council should agree not apply veto power, in matters where vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention

for human protection purposes for which there is otherwise majority support.”⁴⁸ Although not formally accepted, the United States followed this policy in an attempt to hold war criminals accountable for actions in Darfur.

Darfur resurfaced in the international conscience in early March 2005 in the context of deep divisions between the United States and its Western allies over a proposal for the International Criminal Court (ICC) to probe alleged war crimes in Darfur. The UN Commission on Darfur ‘strongly’ recommended referring the proposal to the ICC in The Hague, which is mandated to try cases involving war crimes and genocide, but the United States, which has remained opposed to the creation of the ICC, instead proposed a separate UN war crimes tribunal in Tanzania to handle the crimes in Darfur. In a compromise, the United States abstained from a Security Council resolution that referred fifty-one names to the ICC for formal investigation of allegations of atrocities against unarmed civilians in Darfur.⁴⁹

Unfortunately, the Government of Sudan continues not to cooperate with the ICC’s investigation or requirement to turnover alleged war criminals. The ICC’s efforts are failing to deter further Arab militia attacks against civilians. The Government of Sudan is unwilling to cooperative by failing to hand over alleged violators and are directly flouting the court of world opinion by promoting the worst offenders. “Sudanese President Omar Hasan al-Bashir has promoted Musa Hilal, a suspected leader of the Arab Janjaweed militia that is accused of some of the gravest human rights violations in the battered Darfur region... It tells the Arabs, ‘We will not abandon you to the ICC’... [I]t also signals a willingness to stand up to the United States and other international pressure.”⁵⁰

VITAL INTEREST IN DARFUR

China

The state with the most significant vital interest in Darfur is China. China has significant power as one of the five Permanent Members of the UNSC. China’s vital interest is the continued relationship with the Government of Sudan to maintain oil export agreements. Both

the Sudanese and Chinese governments are wary of interdependence. "Sudanese officials are also trying to deflect criticism of government's relationship with China, which buys two-thirds of Sudan's oil exports, sells it weapons and invests in its economy, and provides political cover for Khartoum in the U.N. Security Council."⁵¹ The largest concern is that China is a UNSC Permanent member with a vital interest in preventing the humanitarian intervention to stop the attacks on the civilians and return the displaced civilians to homes in order to keep the current government in power to maintain the flow of oil.

China is responding to the international pressure that has increased with the 2008 Olympics in Beijing. China's diplomatic efforts are in favor of the current UN/AU hybrid intervention. "China strenuously defended its close ties to Sudan on Friday, touting its efforts to resolve Darfur's humanitarian crisis in its latest and most vigorous attempt to refute critics trying to link the issue to this summer's Olympic Games. China's special envoy for Darfur, Liu Guijin, said Chinese army engineers had already improved water supply and other infrastructure in the troubled Sudanese region ahead of the planned arrival of 26,000 United Nations and African Union peacekeepers. He said China was united with the West in seeking an end to the fighting between rebels and government troops and allied militiamen that has killed at least 200,000 people and displaced 2.2 million since 2003. While China's ties to the Khartoum regime have long drawn scrutiny, they have taken on additional sensitivity amid a campaign by politicians and rights advocates to spur Beijing into action by threatening to tarnish the Games' image. Beijing says it rejects all such efforts, but Liu's repeated trips to the region and high public profile appear to indicate the pressure is gaining a response."⁵²

China's active participation within the UN/AU hybrid mission legitimizes effort to work within a system that is slow and currently ineffective. "Chinese army engineers had made substantial progress in digging wells and making other preparations for the arrival of a hybrid U.N.-African Union peacekeeping force in Darfur."⁵³ By working within the hybrid mission, China can focus failures of the mission vice their ability to influence the Government of Sudan unilaterally based on their strong economic connections. "The mission has been delayed by an array of technical and political issues. Liu said the biggest obstacle was the lack of helicopters to

facilitate the deployment of troops. So far, China is the only non-African country with peacekeeping forces on the ground in Darfur.”⁵⁴

United States

General James Jones testified before the Senate Hearing Committee on Darfur as the Supreme Allied Commander Europe.⁵⁵ In ten pages of his testimony, General Jones never mentions genocide or the number of deaths in Darfur. General Jones focuses on American interests of Theater Security Cooperation, Trans-Sahara Counterterrorism Initiative, and meeting national security goals. General Jones understands the UN/African Union mission in Darfur and the limited response of NATO. He describes NATO’s transformation of capabilities to meet the new threats within the use of the regional organizations, not unilaterally. “I believe that NATO’s interest in Africa is still quite embryonic.”⁵⁶ General Jones acknowledges that one explanation of the growth of interest in Africa, particularly in Sudan, is China’s influence.

CONCLUSION

Stephen Gent, a political scientist, applies the “free rider theory” to explain why even where there is consensus on an issue states fail to act.

Ending genocide, Gent argues in a study to be published in the *Journal of Politics*, is the ultimate good. Everyone opposes genocide, even if they themselves do nothing to halt it. The free rider problem suggests there will be an incentive for each country to sit back and hope someone else expends blood and treasure to stop the killings. When countries have intervened to end political repression, Gent finds, there are usually private benefits attached – the U.S. invasion of Iraq, for example, was not primarily meant to help repressed Iraqis, but to buy America protection against terrorism and a strategic foothold in the Middle East.⁵⁷

The theory explains why the smaller countries with less means are intervening in Darfur.

“Small countries do step up to the plate – when the problem is at doorstep, African nations, not major powers, are the ones now sending in peacekeepers to halt the killings in Darfur.”⁵⁸ In Darfur, the benefit of receiving international good will is not reason enough to intervene. The

receipt of international good will does not outweigh the costs associated with intervention in Darfur. This theory shatters the 20th century theory of international law and state intervention for humanitarian reasons.

The evolution of the legal framework for intervention is not enough. States must have an interest to intervene. The fundamental flaw with the framework is its failure to recognize this current reality. Without state interest, the UN will continually be ineffectual in humanitarian intervention. "For the UN to function effectively as a law-enforcing collective security organization, states must renounce the unilateral use of force for national purposes. But the corollary, not always as readily accepted, is that states should be willing to use force on behalf of, as directed by, and for the goals of the UN."⁵⁹ Therefore, until, states are willing to use force outside state interest, the framework is just part of the equation for military intervention.

United States military officers must understand the evolution in international law and the vital interest for effective military intervention. General Jones recognizes the growing strategic importance of Africa. This means it will be more likely that the United States military will deploy to the continent. With the new legal framework, the only hurdle to military intervention for humanitarian reasons is the recognition of a vital interest. The military must understand the vital interest and the repercussions from working within or outside the legal framework. Currently, the United States does not perceive the atrocities of Darfur as a vital interest. The United States is working within the legal framework as a member of the UNSC to authorize the UN/AU hybrid mission and continually financially support it.

Notes

¹ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), VIII.

² ICISS, VII.

³ Kathleen Newland, Erin Patrick, and Monette Zard, *No Refuge: The Challenge of Internal Displacement* (New York and Geneva: United Nations, 2003), 35.

⁴ *Charter of the United Nations and Statute of the International Court of Justice* (New York: United Nations, 1945), 6.

⁵ Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Eight Congress, Second Session, September 9, 2004, *The Current Situation in Sudan and the Prospects for Peace* (Washington, D.C.: US. Government Printing Office, 2005), 37 - 38.

⁶ Victoria Tin-bor Hui, "Problematizing Sovereignty" in *International Intervention in the Post-Cold War World: Moral Responsibility and Power Politics*, ed. Michael C. Davis (Armonk: M.E. Sharpe, Inc., 2004), 85.

⁷ *Charter of the United Nations and Statute of the International Court of Justice*, 6.

⁸ *Charter of the United Nations and Statute of the International Court of Justice*, 5.

⁹ Michael C. Davis, "The Emerging World Order: State Sovereignty and Humanitarian Intervention" in *International Intervention in the Post-Cold War World: Moral Responsibility and Power Politics*, ed. Michael C. Davis (Armonk: M.E. Sharpe, Inc., 2004), 9.

¹⁰ Comfort Ero and Suzanne Long, "Intervention: a New Role for the United Nations?" in *Some Corner of a Foreign Field: Intervention and World Order*, ed. Roger Williamson (New York: St. Martin's Press, Inc., 1998), 128.

¹¹ Newland, 41.

¹² Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Eight Congress, Second Session, September 9, 2004, *The Current Situation in Sudan and the Prospects for Peace* (Washington, D.C.: U.S. Government Printing Office, 2005), 38.

¹³ ICISS, 16 - 17.

¹⁴ ICISS, 8.

¹⁵ Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (New York: Cambridge University Press, 2006), 38 - 39.

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- ¹⁶ ICISS, 32.
- ¹⁷ ICISS, 35.
- ¹⁸ ICISS, 32.
- ¹⁹ ICISS, 32.
- ²⁰ Gerard Prunier, *Darfur: The Ambiguous Genocide* (Ithaca: Cornell University Press, 2007), 148.
- ²¹ Prunier, 149 – 150.
- ²² Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Ninth Congress, First Session, September 28, 2005, *Darfur Revisited: The International Response* (Washington, D.C.: U.S. Government Printing Office, 2007), 14.
- ²³ Prunier, 157.
- ²⁴ Prunier, 157 - 158.
- ²⁵ Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Ninth Congress, First Session, September 28, 2005, *Darfur Revisited: The International Response* (Washington, D.C.: U.S. Government Printing Office, 2007), 26.
- ²⁶ ICISS, XII.
- ²⁷ United Nations Security Council Resolution, 1769 (2007).
- ²⁸ Maureen Fan, "China Reacts Defensively to Spielberg Resignation, Director Left Olympics Role Over Darfur," *Washington Post*, 14 February 2008, sec A .
- ²⁹ ICISS, XII.
- ³⁰ Peter Baker, "Bush Heads for Africa to Push Peace, Lobby for Expanded Relief Programs", *Washington Post*, 14 February 2008, sec A .
- ³¹ ICISS, XII.
- ³² Save Darfur, *Darfur Update*. October 2007.
http://www.savedarfur.org/newsroom/policypapers/september_briefing_paper_the_genocide_in_darfur/
- ³³ United Nations Security Council Resolution, 1769 (2007).
- ³⁴ Ruth Iyob and Gilbert M. Khadiagala, *Sudan: The Elusive Quest for Peace* (Boulder: Lynne Rienner Publishers, Inc., 2006), 171 -172.

³⁵ Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Ninth Congress, First Session, September 28, 2005, *Darfur Revisited: The International Response* (Washington, D.C.: U.S. Government Printing Office, 2007), 7.

³⁶ Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Ninth Congress, First Session, September 28, 2005, *Darfur Revisited: The International Response* (Washington, D.C.: U.S. Government Printing Office, 2007), 31 - 32.

³⁷ ICISS, XII.

³⁸ Colum Lynch, "Attack Seen as a Setback for the U.N. in Darfur", *Washington Post*, 11 January 2008, sec A.

³⁹ ICISS, XII.

⁴⁰ ICISS, 47.

⁴¹ *Charter of the United Nations and Statute of the International Court of Justice* (New York: United Nations, 1945), 28.

⁴² ICISS, 48.

⁴³ ICISS, XII.

⁴⁴ Ruth Iyob and Gilbert M. Khadiagala, *Sudan: The Elusive Quest for Peace* (Boulder: Lynne Rienner Publishers, Inc., 2006), 151.

⁴⁵ Iyob, 153 - 154.

⁴⁶ ICISS, XIII.

⁴⁷ ICISS, 55.

⁴⁸ ICISS, XIII.

⁴⁹ Iyob, 155 - 156.

⁵⁰ Nora Bustany, "Sudan Names Janjaweed Figure as Top Advisor, *Washington Post*, January 23, 2008, sec A14.

⁵¹ Christopher Bodeen, "China Darfur Envoy Defends Policy, *World Wire*, March 7, 2008.

⁵² Christopher Bodeen, "China Darfur Envoy Defends Policy, *World Wire*, March 7, 2008.

⁵³ Bodeen.

⁵⁴ Bodeen.

⁵⁵ Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Ninth Congress, First Session, September 28, 2005, *Darfur Revisited: The International Response* (Washington, D.C.: U.S. Government Printing Office, 2007), 34 - 45.

⁵⁶ Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Ninth Congress, First Session, September 28, 2005, *Darfur Revisited: The International Response* (Washington, D.C.: U.S. Government Printing Office, 2007), 38.

⁵⁷ Shankar Vendatam, "Department of Human Behavior, Hoping Someone Else Fixes Everyone's Problem, *Washington Post*, October 22, 2007.

⁵⁸ Vendatam.

⁵⁹ ICISS, 49.

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