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**'Outlaws on Camelback':
State and individual responsibility for serious
violations of international law in Darfur**

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Overview

This policy research paper brief is based on a seminar launch presentation of the paper bearing the title, by Dr. Alhagi Marong.

The complex humanitarian emergency since the upsurge in the conflict in 2003 has served to bring to the fore practical difficulties in the operationalisation of the "responsibility to protect". It has focused attention on the whole question of civilian protection and state sovereignty, not only in terms of international options, but also the tensions between state and individual responsibility for serious violations of international law. In the paper bearing the title of this policy research paper brief, Dr. Alhagi Marong makes a number of cogent arguments on Sudan's international responsibility for violations of international law committed by its military forces, as well as the civilian *Janjaweed* militia, formed, organised, funded and armed by the government to support its war against the

Darfur rebels. The paper further argues that Sudan's state responsibility is neither inconsistent with, nor does it detract from the individual responsibility of senior members of the Sudanese government, the Sudanese armed forces, and militia leaders. It concludes by arguing that to challenge impunity for the violations committed in Darfur, both state and individual responsibility must be vigorously pursued, and that the international community must support the ongoing work of the International Criminal Court to investigate and prosecute all those bearing responsibility for the heinous crimes committed in that region since 2003. The paper (ISS Paper 136, April 2007) is available at:

[http://www.issafrica.org/index.php?link_id=3
&slink_id=4647&link_type=12&slink_type=12&tmpl_id=3](http://www.issafrica.org/index.php?link_id=3&slink_id=4647&link_type=12&slink_type=12&tmpl_id=3)

In 2003, the Sudanese army and militia forces jointly attacked the village of Deleig, in the Wadi Saleh region of Darfur. All the unarmed civilian men of the village were rounded up. Prior to this attack, several other villages in Wadi Saleh had been attacked and unarmed civilian men arrested; the women were told that their men would be 'taken' to Deleig. Two weeks later, when women from the villages surrounding Deleig arrived in that town, they discovered that the arrested men had all been killed; their corpses were strewn on the streets of Deleig and in the surrounding mountain region.

In January 2004, a combined force of Sudanese army and Janjaweed militia reportedly attacked the village of Surra, in Southern Darfur. During the attack, the Janjaweed were said to be wearing uniforms similar to those usually worn by the Army; they were also armed with rifles and machine guns suspected to have been supplied by the army. The combined force invaded the homes of the villagers and killed every able-bodied man they encountered. They also summarily executed a group of ten men found hiding among women in a village mosque. As if this were not enough, the army and Janjaweed asked the women to produce their male children; all the poor, innocent boys that were discovered were also killed in cold blood.

In February 2004 the Sudanese army received information that some thirty rebels belonging to the Sudan Peoples' Liberation Movement/Army were present in the village of Anka, Northern Darfur. In response, the Sudanese Air Force embarked upon a two-hour bombing campaign around the village during which a local hospital was destroyed. After the aerial bombardment, an army infantry detachment supported by about 500 mounted *Janjaweed* militia, attacked the village killing at least 15 civilians and wounding eight others. After the killing spree, the troops looted everything from bedding, to clothing and livestock. They then proceeded to burn down the village.

It is clear from the above examples, (and I hope from the paper itself) that I intend to focus my presentation on the actions of the Sudanese government, its officials, and their allied Janjaweed militia. However, this does not mean that I have failed to recognise the fact that serious violations of international law were committed by all sides to the Darfur conflict, including the two rebel movements, the Sudanese Peoples Liberation Movement/Army (SPLM/A), and the Justice and Equality Movement (JEM). I have however focussed on the government and its supporters because the primary responsibility for the protection of the civilian population in Darfur lies with the government. Violation (or deliberate non-compliance) with this obligation, and the failure to investigate alleged violations in my view, implicate the international legal responsibility of Sudan as a State. In addition, individual perpetrators of serious international crimes could incur personal responsibility at international law. It is for this reason that the paper is entitled 'State and Individual responsibility...'

I wish to suggest that the three examples show a systematic pattern of collaboration between the Sudanese army and Janjaweed militia; they lend credence to the allegation that not only does the government of Sudan provide material, financial and operational support to the armed militia, it is primarily responsible for its creation and for sustaining the environment of impunity in which the militia operates. Similarly, the attacks illustrate clear and distinct violations of international humanitarian law.

At the level of general principle, it is clear that the attacks in Darfur violate the principle of distinction; parties to an armed conflict are required to make a choice between legitimate military targets such as soldiers and military

installations on the one hand, and on the other hand. unarmed civilians, those no longer taking part in hostilities, as well as civilian property and infrastructure. Indeed, I wish to suggest that the Sudanese government has in a deliberate and outright manner opted to violate the principle of distinction. Sudan's Minister of Defence in 2004 is on record to have said that once the government receives information that there were rebels within a certain village, "it is no longer a civilian locality, it becomes a military target". Arguably, this policy position could amount to collective punishment.

Sudan has also violated the principle of proportionality. This requires that in the conduct of military operations, Parties must only resort to the use of such force as is necessary or required to achieve legitimate military objectives. I suggest, humbly, that attacking villages with Antonov airplanes, arresting and summarily executing unarmed civilians including children, amounts to excessive and unlawful use of force.

In addition to these general principles, I wish to suggest that the Sudanese army and Janjaweed militia have committed a large number of distinct violations of international humanitarian law. The core of modern international humanitarian law is contained in the four Geneva Conventions of 1949, together with the two Additional Protocols of 1977. As a party to these treaties, Sudan is bound by the humane treatment provisions contained in the Geneva Conventions. In particular, Common Article 3 prohibits the killing of defenceless civilians or captured members of enemy forces, mutilation, cruel treatment, torture, hostage taking, humiliating and degrading treatment, as well as summary executions or trials conducted without judicial guarantees of fairness. The Fourth Geneva Convention, which emphasises civilian protection during armed conflicts, is of particular relevance to the Sudan context. In addition, the grave breaches provision of the Convention prohibits wilful killing, torture, inhuman or degrading treatment of protected persons, the taking of hostages, as well as the unlawful, extensive or wanton destruction or appropriation of property not justified by military necessity.

Apart from war crimes under the Geneva Conventions and their Additional Protocols, customary international law also recognises a wide range of crimes against humanity that could be committed either in war or peacetime. Crimes against humanity are those crimes such as murder, extermination, deportation, persecution, rape, and other inhumane acts committed in the context of a widespread or systematic attack on a civilian population. It is sufficient that the attack is either widespread or systematic; it need not be both. According to the jurisprudence of the ad hoc Tribunals, "widespread" refers to the scale of the attack and the multiplicity of victims; "systematic" reflects the organized nature of the attack, excludes acts of random violence or opportunistic crime, and does not require a policy or plan. In order to ground individual responsibility for crimes against humanity, it must be shown that the accused was aware of the attack on the civilian population, that his acts comprised part of that attack,

and that he intended to commit the specific underlying offence. State responsibility for crimes against humanity exists when the crimes are committed by *de jure* organs of the state such as its military forces or *de facto* agents such as militia men and groups operating under the control and supervision of the state.

Similarly, Sudan has an international obligation to prevent the crime of genocide. This obligation derives both from Sudan's status as a party to the Genocide Convention of 1948, as well as the customary and *jus cogens* nature of the prohibition against genocide. Under the Convention and the now well-developed judicial opinion on the question, Genocide is the intentional killing or causing of serious bodily or mental harm to persons based on their membership of a specific national, ethnical, racial, or religious group, with the intention of destroying that group in whole or in part. It ranks among the most serious crimes known to humankind. Some have called it the 'crime of crimes.' While the underlying acts such as killing or serious bodily or mental harm are similar for genocide and crimes against humanity, what distinguishes the former is the specific genocidal intent (*dolus specialis*) which requires that the genocidal act must be carried out with the objective of causing the physical destruction of the protected group.

I am aware that the International Commission of Inquiry on Darfur has stated that there is inadequate evidence upon which to conclude that genocide was committed in Darfur; the Commission suggested that the final determination of this question must be left to a court of law. I am also aware of the fact that in the Indictments issued against Ahmad Harun and Ali Kushyab, the ICC Prosecutor has not charged genocide. However, in view of the specific and deliberate targeting of the black African population of Darfur, I can only hope that in its further investigations, the ICC will look more closely at the genocide option. Even a single charge of genocide against a senior government or military leader will serve as a test case, and afford the ICC Trial Chamber the opportunity to assess the evidence in a judicial context, and make judicial findings about whether or not genocide was committed in Darfur. At a minimum, I suggest that this manner of proceeding is owed to the hundreds of thousands of victims who have perished over the past four years of conflict in Darfur.

Having argued that serious violations of international humanitarian and human rights law were committed in Darfur especially by government forces and their allied Janjaweed militia, I must now address the means by which international law invokes accountability. I argue that as the territorial state within which these crimes occurred, it is consistent with Sudan's responsibility to protect civilians that it must take steps not only to prevent such attacks, but to also investigate and punish those suspected of committing crimes. It seems to me that Sudan has failed in this responsibility. The Government of Sudan's attempt to set up a Special Criminal Court to try Darfur-related crimes, is viewed in many quarters (a

view which I share) as an attempt to defeat the complementary jurisdiction of the ICC. Many of you would recall that Sudan announced the setting-up of this Court a day after the ICC Prosecutor announced that he would launch investigations into allegations of serious crimes committed in Darfur. In my humble submission, the fact that only minor crimes such as theft of sheep or other livestock have been prosecuted in this court, and that no senior member of the army, government, or Janjaweed has been indicted, shows that the Special Criminal Court speaks more to Sudan's unwillingness or inability to prosecute the serious crimes committed in Darfur, rather than its commitment to ensuring individual accountability. The establishment of the SCC should under no circumstances be a reason for the ICC to defer to Sudan's primary competence in respect of these crimes. I wish to submit that it is not far-fetched to suggest that by setting up the SCC, Sudan either intends to protect certain key perpetrators from accountability or to defeat ICC jurisdiction by a series of sham trials.

I also wish to suggest that in view of the serious nature of the crimes committed in Darfur, they satisfy the threshold of offences that offend collective human conscience, or are of concern to the international community as a whole. As such, all states have an interest in ensuring that Sudan does not continue to violate these basic humanitarian norms and standards. Sudan's obligations in this respect are therefore owed to all members of the international community; they are what lawyers call obligations *erga omnes*. However, while international law creates a theoretical possibility that Sudan's state responsibility for the Darfur crimes could be invoked by any state, in practice, States are reluctant to invoke other States' responsibilities unless their own material interests are adversely affected. In the absence of such extra-territorial effects, we are unlikely to see any state directly invoke Sudan's state responsibility.

In addition to Sudan's state responsibility, I also wish to suggest that individual members of the Sudanese government and armed forces, as well as the Janjaweed militia could be tried for their role in the crimes committed in Darfur. In this respect, it is important to note that the ICC has already initiated criminal proceedings against two people for war crimes and crimes against humanity committed in Darfur. The first person, Ahmed Haroun, is currently Sudan's Minister for Humanitarian Affairs. He is believed to have participated in official meetings in Darfur where he incited Janjaweed militia and armed forces to attack specific ethnic groups. Haroun faces 51 counts of war crimes and crimes against humanity before the ICC. A warrant for his arrest has been issued by the ICC pre-Trial Chamber on 27 April 2007, but it is still outstanding. The second person, Ali Koshayb, is a leader of the Janjaweed militia. He is alleged to be one of the key leaders responsible for attacks on villages around Mukjar, Garsila, and Deleig in 2003 to 2004. You may recall that the summary execution of unarmed civilian men in Deleig in 2003, is one of the examples I cited at the beginning of this presentation. Ali Koshayb also faces a 51-count Indictment before the ICC

and a warrant for his arrest is outstanding. Ali Kushyab is believed to be in custody in Sudan.

It is noteworthy that in June this year, one of the biggest obstacles to civilian protection in Darfur was removed. Sudan agreed to the deployment of a hybrid African Union/United Nations peace-keeping force. This is important to put an end to the attacks on civilians, ensure the delivery of humanitarian and relief aid to thousands of internally displaced civilians, and to resettle previously displaced populations back to their communities and livelihoods. However, in order for this to happen, Sudan must give full and unrestricted access to members of the hybrid force, disarm and demobilise the Janjaweed, and cease its ongoing offensives against civilians. In terms of accountability, Sudan must fully cooperate with the ICC by arresting and surrendering Harun and Kushyab. It must also promote an atmosphere for the preservation of forensic and documentary evidence for use by the ICC. Moreover, in collaboration with the ICC, Sudan must ensure that witnesses are protected from harassment, intimidation and threats to themselves or their family. Finally, the international community, especially the United Nations, United States, and China must continue to exert more multilateral and bilateral pressure on the Khartoum regime to desist from its offensives in Darfur, allow the restoration of peace and normalcy for civilian populations, and end impunity for perpetrators of gross violations of international humanitarian and human rights law. I suggest that anything short of these measures would be an endorsement of impunity and provide further impetus to Africa's enduring complex emergencies.

About the Author

Dr. Alhagi Marong is a Legal Officer at the Chambers Support Section of the United Nations International Criminal Tribunal for Rwanda (UN-ICTR), Arusha, Tanzania. Before joining the UN, Alhagi worked as Co-Director for Africa at the Environmental Law Institute in Washington D.C., taught international law at the American University of Armenia and served as Senior State Counsel at the Ministry of Justice in The Gambia. He has consulted for the Law Reform Commission of The Gambia and the UN Food and Agriculture Organisation, and attended professional development courses at Jesus College, Cambridge University, and the International Development Law Institute (now Organisation) in Rome, Italy. Mr. Marong holds a LL.B (Hons.) and B.L from the University of Sierra-Leone, and LL.M, D.C.L. degrees from McGill University in Canada.