

APPLICATION OF INTERNATIONAL
HUMANITARIAN AND HUMAN
RIGHTS LAW TO THE ARMED
CONFLICTS OF THE SUDAN:
COMPLEMENTARY OR
MUTUALLY EXCLUSIVE
REGIMES?

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Mohamed Abdelsalam Babiker

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Dedicated to the Memory of my Father

ACKNOWLEDGEMENTS

This book represents the culmination of the work started in January 1999 when I enrolled as a PhD student at the University of Nottingham, School of Law, and continued throughout my time as a Human Rights Officer in the United Nations Mission in Sudan (UNMIS) and a Legal Officer of the AU-Darfur Peace Agreement Implementation Team, Peace Secretariat. Of course, many developments have taken place since I submitted my PhD, perhaps most notably the referral of the Darfur situation to the ICC, the signing of the Comprehensive Peace Agreement (CPA) between the SPLM/A and the Government of the Sudan, the Darfur Peace Agreement (DPA) and the current presence of peace keeping Missions such as UNMIS and the African Mission in Sudan (AMIS). Those developments have been incorporated into the text, and this book provides an account of the legal position pertaining to the Sudan as at January 2007.

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I especially wish to thank my family for their unfailing and loving support and encouragement—my mother, sisters and brothers. Finally, I wish to thank my beloved wife and my little two sons who patiently cared for my well being throughout my difficulties and lightened the burdens of my solitude.

Finally, I acknowledge that my objectives in conducting this project are in part a personal matter. As a Sudanese, I am inevitably concerned by every intimate detail of my country's armed conflicts. Also, the privilege of being an international lawyer who has benefited from a rigorous academic legal discipline in the field of International Humanitarian Law and Human Rights Law obliges me to pursue this project for the benefit of future generations in the Sudan and humanity at large 'until man can learn to avoid applying the scourge of war to himself and to his fellows'.¹

¹ Draper, G., 'The Relationship between Human Rights Regime and the Law of Armed Conflict', 1 *Israel YHR* (1971), 31.

PREFACE

NO EXCUSE PERMITTED

Human Rights in Sudan have been violated throughout. Sudanese history is characterized by violence: colonisation; violent resistance against colonial rule; slavery; civil war between North and South Sudan following independence; military coups; insurgence in East Sudan; tribal and communal violence; insurgence, rape and ethnic cleansing in Darfur; national security laws depriving people from their civil rights; inhumane treatment of displaced people and the flight of numerous refugees. All these phenomena have marked the history of Sudan during the last one and a half century. Many violations took place before the international community as a whole had agreed upon rules regulating warfare, human rights principles and rules regulating the use of force in internal conflicts. However, after the adoption of such norms and values their violation continued in Sudan as if no agreement had been reached and despite the signing of many of these international charters and treaties by the Sudanese government.

Sudan is no exception. However, the number of victims of war and human rights violations is exceptionally high. The civil war between North and South Sudan has been the longest in Africa since decolonisation with the highest number of casualties. It lasted more than forty years and resulted in about two million deaths and five million refugees and displaced people. Due to the war South Sudan is the poorest region in Africa. Social and economic human rights have not been assured at all. The basic human needs of the people far from being met. The signing in 2005 of the Comprehensive Peace Agreement between North and South Sudan has brought an end to the war—though not to all violence—but so far poor people in South Sudan have not been able to grasp the fruits of peace : basic education, primary health care, water supply and sanitation, to name just a few of the essential needs, are fully inadequate.

In Darfur the prospects are even gloomier. The war in Darfur, which started in 2003, resulted in an estimated two hundred thousand people dead, another two hundred thousand refugees and two million displaced people. The people in the camps have no future: they can not return to their houses and villages, not only because most of these were destroyed, but also because they fear that they will be attacked again. Some call what has happened in Darfur genocide. The official position of the United Nations is that this is not the case, but that the mass human rights violations that have

happened and that still continue call for action. This position is based on the findings of the Cassese Commission in 2004. The Commission, invited by UN Secretary General Kofi Annan to report on human rights violations in Darfur, came to the conclusion that there had been no genocide, but that what had happened was ‘as bad as genocide’. The report followed a report by a group of experts of the Arab League, some months earlier, who in unmistakable words had reached the conclusion that mass beatings, mass rape, mass killings and mass violations had taken place.

Other violations are also taking place. Since the establishment of the Government of National Unity, a direct result of the Comprehensive Peace Agreement, Sudan has a new Constitution. The wordings of this Constitution are in line with principles of democracy and human rights. It is quite an admirable text, promising good governance, transparency, democracy and equal rights between people with a different faith and different ethnic backgrounds. The Declarations of Principles that result from peace talks with regard to conflicts in East Sudan and in Darfur and agreements between the National Congress Party—the core of the present regime—and other political parties reflect the same spirit. However, in reality hardly anything has changed. People are still being evicted from their land, without due process, if the authorities plan new structures or if they deem it necessary to protect economic interests. The press is not free. Judges are under political pressure. Critics of human rights violations risk being jailed, harassed and tortured. All this is possible because national security laws have not been brought into line with the new Constitution. It has not even been tried.

In my capacity as Special Representative of the Secretary General of the United Nations to Sudan from mid 2004 to end 2006 I have reported frequently and at length about violations of human rights in the country. It has had little effect. Reports have been noted. The Security Council has issued many statements and declarations, alongside with the United Nations Committee on Human Rights, but the Government has shown a fair degree of disrespect for such reports and statements. Instead it has accused the international community of distorting the truth, measuring with two standards, targeting Arabs and Muslims and disregarding human rights violations by rebel groups.

I have always admired the kindness and hospitality of Sudanese people. I have learned to marvel both the accomplishments of the Sudanese centuries ago and the resilience of the Sudanese nations during long periods of conflict. I am not the only one. Many scholars and regular Sudan watchers and also many recent visitors to Sudan share this admiration for the spirit of the Sudanese. Sudan is an age old civilization, older than most Western civilizations which claim the need to give human rights a first priority in society and in international relations. There are many cultural values in that old civilization which could form a strong basis for a policy in the present Sudanese society that gives a high priority to an equal or at least humane treatment of all people in that

society. The opposite is the case. I am struck by the dichotomy. Sudan is a cloven society, both eminently courteous and frightfully violent.

How to explain this dualistic character? The colonial past still plays a role. Sudan is a state with many nations, with different identities. Many people in Sudan do not, or not yet, feel a Sudanese identity. The Sudanese territory has been demarcated not by the Sudanese themselves, in a contest with neighbouring nations, but by the Europeans in the Conference of Berlin, at the end of the nineteenth century. For many Sudanese these national frontiers do not mean anything. Conflicts between nations within the Sudanese state, whether they are tribes or other communities otherwise, have been manifold. They still are. They are both economic and political, with weighty cultural dimensions, religious, ethnic or tribal. The fight to exist and for space to live and the struggle for resources such as land and water, necessary to survive, inevitably leads to conflict and violence.

Conflicts in societies such as the Sudanese are fights for existence and for survival or to keep a lifestyle far beyond sheer survival, but at the cost of life opportunities of others. That explains the excessiveness of the violence related to such conflicts. It is a continuous struggle for power, partly as an aim itself, partly as a vehicle to safeguard the continuity of a community, a tribe, a clan, a class.

Such fights easily lead to an attitude in which all people that belong to another community, tribe, clan or class, are seen as adversaries or even as potential or actual enemies. If that is the case no distinction is being made anymore between agitators and bystanders, between insurgents and the community to which they belong, between camel thieves and the people in the village where they are from, between combatants and civilians. In such fights genocidal postures or ethnic cleansing methods easily creep in.

Another explanation of the excessively violent character of these conflicts is the fact that Sudan is not yet a nation state where the authorities have a monopoly to use violence in their efforts to maintain law and order. Every group can use violence to reach its objectives. For centuries the Sudanese society has been able to curtail this with the help of traditional justice systems and customary law. However, this practice has weakened because the country has been affected by modernisation, which resulted in less respect for traditional authority. Moreover, the Sudanese regime has contributed to this erosion by resorting to violence for political reasons. Military coups, a disregard for democratic processes, reliance on institutions of national security and military intelligence that have become a state in the state, and—last but not least—the resort by the government to paramilitary groups and tribal militia to face a rebellion have

greatly contributed to a fast and general reliance on the gun by groups that feel threatened or seek to defend their interests.

The Government has a point when it says that rebels also violate principles of human rights and that this is underreported in the news about Sudan. Indeed, also the SPLA during the war between North and South and presently the SLA in Darfur have carried out atrocities. Some rebel commanders have become warlords and bandits. Jockeying for power between rebel leaders in Darfur is resulting in atrocities against villagers. Arab militia and the Janjaweed kill babies in retaliation for camel theft. When confronted with the insurgency in Darfur in 2003, the Government did not fully trust the army to withstand the rebels, because many soldiers came from Darfur. Instead the Government called upon the militia to fight them and provided them with arms. Since then the spirit is out of the bottle and it is sheer impossible to reverse this.

The result is overall impunity. Neither militia nor rebel movements respect human rights or the rule of law in general. The law is seen as an instrument in the hands of the power elite that is being contested. For this reason rebel leaders claim that the law does not have to be respected but rather be opposed and rejected, like the regime that owns the law. This inevitably weakens the respect for human rights law and humanitarian law as well. In fact, international humanitarian law is being violated by all parties. Humanitarian workers are being harassed because the relief assistance is supporting people who are considered to belong to the other party and therefore are the enemy themselves. The Janjaweed and other militia indiscriminately target civilians. Rebel leaders manipulate the situation on the ground by carrying out attacks on militia, knowing that the latter will retaliate by targeting villagers or the population in the camps. Of course, the rebels cry out against this, but they do so knowing that they themselves have jeopardised the security of the people they claim to represent. Care for people is a scarce commodity in Sudan, both amongst the leaders in Khartoum and amongst their militant adversaries.

Perhaps the Government cannot check all human rights violations anymore. The situation is quite chaotic and beyond full control by the authorities. However, the Government is fully responsible. They should be held accountable not only because formally they are the official regime in power, but also because the regime has not taken any initiative to protect the people. On the contrary, it has allowed attacks and even facilitated these. When in 2004 the United Mission came to Sudan we told the authorities: the protection of the people starts by not attacking them. It seemed to be a new message.

It is no wonder that people committed to aid the victims of the complex conflicts in this country get frustrated or even desperate. It seems as if all rights have been

superseded by might. Only power counts. However, the international community, which has endorsed human rights and humanitarian law, seems to be powerless against the perpetrators.

Frustration is justified. Desperation too? Or is there still room for the application of the concepts and values concerning human rights in the Sudan? To address this question Mohamed Babiker has written this book on the *Application of International and Human Rights Law to the Armed Conflicts in the Sudan*. In this study the author gives a comprehensive overview of international human rights law and international humanitarian law, two distinct yet complementary bodies of law concurrently applicable during armed conflict. He has throughout the book integrally applied the law to the Sudan's internal armed conflicts. He analyses issues such as applicability, complementarity, thresholds of armed conflict, internationalization and derogation with a clear focus on the conflicts in Sudan, to vividly illustrate the gaps within and between both fields of law in practice.

There are gaps indeed. Human rights law is always applicable. However, during situations of public emergencies, like civil wars, derogation from certain rights is permitted. Humanitarian law is only applicable during armed conflict. No derogations are permitted. However, when a State denies that internal disturbances have turned into an armed conflict, it will claim that humanitarian law is not applicable. So, a situation of public emergency can arise in which a government finds itself at liberty to derogate from human rights norms and also does not deem itself bound by humanitarian law, letting protection fall below the absolute minimum. It is clear that the Government of Sudan has operated in this legal vacuum. It has argued along this line in international meetings, where Sudan had been criticized. So far it has not been sanctioned.

The author's analysis of the Sudanese case is twofold. On the one hand he measures the conduct of warring parties in the Sudan against rules of international law. He comes to the conclusion that, despite the fact that both sets of rights and duties are applicable to the conflicts in the Sudan, the parties to these conflicts did not abide by the law, making civilians the ultimate victims of wars without rules.

Secondly, the author measures the rules of international human right law and international humanitarian law against the realities in practice, identifying strengths and weaknesses. He sketches the shortcomings and limitations of both areas of international law in a situation as that in the Sudan, with so many non-State armed groups. However, the author convincingly argues that, despite such shortcomings and limitations, there is room for a concurrent application of both legal regimes rather than relying on either one. Such an application may not solve all problems, but this

approach would help widening the scope of the applicable rules. Following this the author elaborates some legal means or principles for enhancing both regimes in internal conflicts.

Sudan has known a semi-permanent state of public emergency since 1983. The author justly questions the legality of the total disregard for human rights during that period. In particular he criticizes the way in which the Sudanese Government time and again has argued in favour of certain derogations from normally applicable human rights law. Thereby he questions both the proportionality of the derogations and the interpretation of the concept 'state of emergency' related to protracted crises such as those in the Sudan. In my view the author convincingly argues that any capacity to impose such derogations ought to be limited by the overall obligation of the State to apply high standards of protection of the population and to act accordingly.

As I have sketched above Sudan's (North South, East, and Darfur) complex conflicts provide an excellent case-study, because international law was put sorely to the test as violations of human rights and breaches of humanitarian law widely occurred and are still ongoing.

Human rights law is never more acutely important than during situations of armed conflict, as these are the times when violations widely occur. Yet it is in times of armed conflict that, also according to international law, derogation from human rights norms is allowed. But this is only the case to a certain extent. Although certain human rights treaties permit derogation from norms in the case of a public emergency threatening the nation, these derogations should be proportional and non-discriminatory. This is a general conclusion, valid for Sudan as well as for similar situations of armed conflict elsewhere.

How relevant is this legal treatise to policy-makers? As I wrote above, it can not be denied that tremendous atrocities have taken place and that the Government of Sudan bears a very heavy responsibility. That is what politicians say. This opinion has been confirmed by the Security Council, in a number of Resolutions. However, the Government of Sudan persists in denial and points into another direction. So far, it has been able to get away with all violations for which it bears responsibility.

A convincing legal essay like the study by Mohamed Babiker may not change the attitude of those in Sudan who are responsible for abhorrent human rights violations. In the short run it will not change the fate of the victims of these violations. For this political action is necessary, both within Sudan and by the international community. However, the findings and conclusions presented by Babiker can help convincing countries other than Sudan that effective action is necessary and warranted. In Sudan itself it can teach lawyers, public opinion makers and representatives of civil society

that the position taken by the Government towards its citizens is unacceptable. It can also function as a tool in the hands of international lawyers, including the International Criminal Court, seeking justice.

Jan Pronk

Special Representative of the Secretary General of the United Nations to Sudan from mid 2004 to end 2006

The Hague, April 2007

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TABLE OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AFP	Associated France Press
AJIL	American Journal of International Law
AMIS	African Mission in Sudan
Am. Un. L. Rev.	American University Law Review
Am. U.J. Int'l & Policy	American University Journal of International Law and Policy
AU	African Union
Brit. YBIL	British Yearbook of International Law
CERD	Committee on the Elimination of Racial Discrimination
CEWAC	Committee for the Elimination of Abduction of Women and Children
CPC	Criminal Procedure Code
CPMT:	Civilian Protection Monitoring Team
CRC	Convention on the Rights of the Child
Denver J. Int'l L. & Policy	Denver Journal of International Law and Policy
DHA	Department of Humanitarian Affairs
DPA	Darfur Peace Agreement
DUP	Democratic Unionist Party
EC	European Community
ECHR	European Convention on Human Rights
EHRH	European Human Rights Reports
Eur. Ct Hum. Rts.	European Court for Human Rights
Ga. J. Int'l. & Comp. L	Georgia Journal of International and Comparative Law
GA	General Assembly
GOS	Government of the Sudan
HAC	Humanitarian Aid Commission
Harvard Int. L. J.	Harvard International Law Journal
HRC	Human Rights Committee
HRL	Human Rights Law
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly

Table of Abbreviations

HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
Inter-Am. Ct. H.R	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IGAD	Intergovernmental Authority on Development
IHL	International Humanitarian Law
IHRR	International Human Rights Reports
ILA	International Law Association
ILM	International Law Material
IMU	International Monitoring Unit
IRRC	International Review of the Red Cross
Israel YBHR	Israel Yearbook of Human Rights
Israel YBIL	Israel Yearbook of International Law
JEM	Justice and Equality Movement
JMC	Joint Military Commission
LRA	Lord Resistance Army
MOU	Memorandum of Understanding
NDA	National Democratic Alliance
NIF	National Islamic Front
NYIL	Netherlands Yearbook of International Law
OAU	Organization of African Unity
ODS	Operation Death Sudan
OLS	Operation Lifeline Sudan
ONUSAL	United Nations Observer Mission in El Salvador
OSILS	Operation Save Innocent Lives Sudan
PDF	Popular Defence Forces
PLO	Palestinian Liberation Organization
PNC	Popular National Congress
POW	Prisoner of War
RCCNS	Revolutionary Command Council of the National Salvation
REP	Reports
RES	Resolution

SAF	Sudan Alliance Forces
SCP	Sudan Communist Party
SHRO	Sudan Human Rights Organization
SLM/A	Sudan Liberation Movement/ Army
SNA	Sudan National Alliance
SNP	Sudan National Party
SOAT	Sudan Organization Against Torture
SPAF	Sudan People's Armed Forces
SPDP	Sudan Federal Democratic Party
SPLM/A	Sudan Peoples' Liberation Army/ Movement
SSDF	South Sudan Democratic Front
SSDF	South Sudan Defence Forces
SSIM/A	South Sudan Independent Movement/ Army
SSUM/A	South Sudan Unity Movement/ Army
SWAPO	South-West Africa People's Organisation
TIAS	Treaties and International Agreements Series
UDHR	Universal Declaration on Human Rights
UDSF	United Democratic Salvation Front
UNHCHR	United Nations High Commission for Human Rights
UNICEF	United Nations Children's Fund
UNMIS	United Nations Mission in Sudan
UNOSOM	United Nations Operation in Somalia
UNTS	United Nations Treaty Series
USA	United States of America
Virginia JIL	Virginia Journal of International Law
VMT	Verification and Monitoring Team
Yale L.J.	Yale Law Journal
YB. Eur. Conv. Hum. Rts	Yearbook of the European Convention of Human Rights