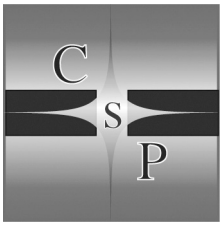
# Failed and Failing States

# Failed and Failing States:
# The Challenges to African Reconstruction

Edited by

Muna Ndulo and Margaret Grieco

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# Preface

# Failed and Failing States: The Challenges to African Reconstruction

A collapsed state, according to William Zartman, is a 'situation where the structure, authority (legitimate power), law and political order have fallen apart and must be reconstituted in some form, old or new'. The former Secretary-General of the United Nations, Boutros Boutros Ghali, described the situation prevailing in a failed state as 'a feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, but its assets are destroyed or looted'. In a collapsed state the regime finally wears out its ability to satisfy the demands of the various groups in society, fails to govern and to keep the state together. The collapse is marked by the loss of control over political and economic space. A collapsed state can no longer perform its basic security and development functions and has no effective control over its territory and borders.

State collapse is one of the major threats to peace, stability, and economic development in Sub-Saharan Africa today. As Christopher Clapham observes, while we must not over-generalize, in Sub-Sahara Africa there are a '… distressingly large number of states in which acceptable political formulae have not been developed, and that remain vulnerable to collapse, or have actually collapsed'. The states are not only unable to develop a stable political system but lack administrative capacity to govern effectively and to ignite sustainable economic development. The weakness of the African state was most obvious in the periphery of state systems. Thus, while the core of the state, typically centred on the capital, weakens through mismanagement and political failure, pressure from the periphery forces on the centre causes state collapse. The consequences of failed states include conflicts, war, and refugees. The effects, as is the case with Darfur, often spill over into neighboring states.

Since 1956 Sudan has experienced civil wars with only brief intervals of relative peace. More than two and a half million people have been killed and many more displaced in the continuous war between successive governments of the north and peoples of the south. Darfurians took up arms against the

Sudanese government in 2003 accusing it of decades of discrimination and neglect. The Sudanese government is accused of retaliating by unleashing a militia group, the janjaweed, against the people of Darfur. The United Nations has labeled the situation as the greatest humanitarian crisis of the modern era.

Major challenges confront efforts to avoid collapsed states drawing other countries into a wider conflict and to create structures and favorable conditions to lead to national reconciliation and the reconstruction of a state that has collapsed.

The Cornell Institute for African Development called a symposium entitled 'Failed and Failing States in Africa: Lessons from Darfur and Beyond' to address these critical issues at the Institute for African Development, Cornell University, 18–19 April 2008. Key contributions at the symposium are brought together in this volume. Taken together these essays represent a significant discussion on the challenges presented by the presence of failing states within Africa.

Muna Ndulo and Margaret Grieco
Institute for African Development, Cornell University

# Chapter One

# What Really Works in Preventing and Rebuilding Failed States: Nation Building, Conflict and Civil Society

Sarah Cohen Wood

## Introduction

Investment in the relationship between local government structures and the role of civil society organizations should not be overlooked or minimized in assessing the path to nation building, reconstruction after civil war, or stabilization after regional and systemic conflict. In order to assist the development of state-society relationships, it is important for international agencies and interventions to anticipate and adapt to environments in which both national and local needs are contributing to sustained hostilities. It is imperative to integrate interventions that focus on service delivery at the local level and those that contribute to strengthening governance functions at the national level in order to create stabilization and assist in reconstruction of conflict affected countries. The absence of state-led basic service delivery is not overcome by creating parallel structures through civil society. While service delivery through local non-governmental organizations (NGOs) and civil society organizations is often prioritized for international actors, it is important to note the existing traumatized nature of the environments and the 'fend-for-yourself' mentality that can lead to further competition and violence between social groups. International aid, distributed through various mechanisms, can serve to worsen these pre-existing divisions within the society or create new cleavages. Additionally, regional, ethnic and religious disparities can become politically sensitive, creating greater risks that services are delivered along party or ethnic lines. Similarly, when support for national-level governments is diverted, due to the belief that it takes too long to implement aid through state mechanisms, repressive actions are often taken by the state towards civil society, as evidenced in Nepal, Sudan, Ethiopia, Angola, Burma, the Democratic Republic of Congo (DRC) and Burundi.

## A New Nation-building Paradigm

Currently we are using such terms as stabilization, reconstruction and conflict to further describe the conditions and symptom of fragile states. Current efforts to address the diverse range of nation-building needs and priorities in fragile or failed states contexts have in the past and the present been frustrated by a lack of coordination, tensions between short- and long-term priorities and funding mechanisms that place significant restrictions on budget allocation, distribution and reporting mechanisms for development funds. However, the manner in which development agencies implement these projects in these contexts is undergoing a sea change, both within the United States government (USG) and abroad with our partners. A new paradigm that can be termed 'diplomatic development' is emerging. Defined as a broader nation-building strategy, this new paradigm aims to link the various sectors and actors involved in foreign assistance, specifically in fragile and failed state contexts, to more effectively stabilize or contribute to the reconstruction of conflict affected states.

There is also something that is relevant to this discussion which is that the most recent National Security Strategy emphasizes the 3Ds, or the interdependent relationship between *defence*, *development* and *diplomacy*. In the last several years there has been an approach to build the coordination capacity between the State Department, Department of Defence, USAID and other USG partners to build better implementation systems that allow planning to be shared and a common approach to the problem to be developed even across mixed methods. But coordination without implementation is not helpful for nations emerging from decades of protracted conflict or for countries on the brink of war. In Africa a considerable amount of the continent may be considered fragile based on regional needs, nascent peace agreements and warring economies built upon access to key resources.

Conflict prevention is not altruistic, and state conflicts bleed into regional wars and effectively destabilize vast areas of the continent through proxy wars between nations. These proxy wars breed instability on many levels and it is the citizenship of these countries that feed militia groups, rebel movements as well as African Union Peacekeeping forces and UN peacekeepers. These same populations are also the citizens reintegrated back into communities after years of war into ministries, local governments or back into civil society groups. Currently the vision to align development, defence and diplomacy needs capacity building for increased coordination and a shared sense that this approach will lead to less state failure. The National Security Strategy promotes the closer alignment of defence, development and diplomacy and

these efforts can be seen in Iraq and Afghanistan where all three Agencies are promoting approaches that are not purely kinetic, but instead seek to find ways to engage civil society in securing stability.

But it is in the implementation of this partnership where coordination and planning fall short. In some settings this shortfall may lead not only to a failure to understand the complexities of fragility, but may even fuel greater regional conflict or more entrenched proxy wars between governments vying for international recognition. One can say that in Africa this combination of the 3Ds has existed for decades and based on funding, capacity and political will one may or may not trump the other. Consider this for a moment:

- In Darfur, South Sudan, northern Uganda, Eastern Chad there is conflict over resources as well as a perception of economic and political neglect for the needs for essential services. Many factional groups or 'rebel groups' often see their conflict with the government as just based on their need. Yet the governments in some of these countries label these groups 'terrorist organizations' or define their actions as terrorism to increase the support for military solutions.
- In these same areas, governments may use militia groups to suppress cross border conflicts as a proxy security force. These same forces prey on citizens when salaries are not paid and these 'security forces' become a further reason for these populations to mistrust their governments. Some of these settings become by virtue of conflict protracted humanitarian environments (Darfur, northern Uganda, eastern Chad, and eastern DRC etc.).
- These humanitarian segments of the country become elements of instability that further disconnect citizens from the perception that their government can provide for them. This disconnect leads to often more extreme isolation between warring factions and the governments that are themselves a part of the same nation.

## Civil Society, Fragile States and Fragility: Defining Intervention

A failed or fragile state is a country where citizens have lost faith in their government and the government is *unwilling or unable* to provide for their needs. In these situations civil society is as much at the centre as the government. Many international engagements be them diplomatic or development focus on governance without emphasizing the importance of

civil society. The definitions and classification of a state as fragile provides some understanding of the complexities of these settings, but not enough about the character and history of the collapse of this relationship. Ultimately these distinctions and definitions concerning fragility do little to help us identify the appropriate interventions, partnerships and engagements with these nations and countries. They are often just artificial distinctions that mean little in reality on the ground. In some cases this distinction has been detrimental to the US engagement abroad and has only alienated us from the citizens and systems that support nation building and strong and responsive governments. There are some examples of this in the current development of counter-insurgency and counter terrorism strategies that target segments of the population as spoilers, but do not have a strategy for strengthening civil society or building the capacity of the state. When discussing a more unified approach to nation building, it is important to explore and analyse the existing relationships between the government and members of civil society within the community in order to determine the primary actors as well as the spoilers (or in some settings insurgents or extremist in others rebel groups or militias).

Many current definitions of civil society remain amorphous, ambiguous and confusing. However, in this analysis, civil society is defined as citizens, local and international NGOs and social movements that function within the society. In failed states, the government is often incapacitated and civil society may be filling the governance gaps. Civil society in these contexts is often weakened, traumatized and the concept of citizenship non-existent. Understanding the character of these actors and how service provision is implemented within the society is important when undertaking development and capacity-building activities. Civil society is not just NGOs and local associations. Civil society entails a set of interests, often quite disparate, that cut across a society's main identity groups. These interests are expected to be in principle more or less independent of both the state, political parties and other political movements within the society. NGOs and associations are part of civil society only if they act together with citizen, corporate and autonomous institutions to engender the peaceful pursuit of a variety of societal interests, and do so in ways that help to counterbalance any particular partisan force that seeks to dominate.

## Focusing on Relationships: Society and the State

When discussing a more unified approach to nation building, it is important to explore and analyse the existing relationships between the government and

members of civil society at the national, local and community level in order to determine the primary actors. Many current definitions of civil society remain amorphous and do not define clearly the relationships between warring parties, political groups, and citizenry. In fragile states, reconstruction and stabilization settings, and in post-conflict environments the government is often incapacitated and aspects of civil society may be filling governance gaps. Specific groups may be acting as security forces wither at a local or a regional level, and services that were once the realm of the government are now being bartered within society as a result of a weakened government framework and structure. Civil society in these contexts is often weakened, traumatized and the concept of citizenship almost nonexistent. Instead there may be a clan, party, class, or ethnic group affiliation that trumps a perception of a national identity. Understanding how services are perceived and provided is critical for capacity building activities, governance activities, and for coordination in the field to mitigate conflict.

Within post-conflict environments, four broad types of relationships between the state and civil society exist: 1) tenuous; 2) hopeful; 3) nascent; and 4) evolving. Each when looked at as a typology is useful in coordination and implementation of planning.

*Tenuous relationships* are often found in protracted post-conflict environments or highly repressive states with regional conflict dimensions. In such contexts, a relationship exists between civil society and the state which is characterized by decentralization, weakness and deep mistrust between national institutions and local government structures. Angola, Burundi, Rwanda, Nepal, Ethiopia and the Philippines are cases that display historically weak institutions and mistrustful citizen interaction with local and national governments. Such pervasive mistrust within the society will inevitably affect interactions with international actors at all levels of society.

*Hopeful relationships* are characterized by improved dynamics between civil society and the state as evidenced by positive expectations and a population that is willing to place a degree of hope in their leadership. South Sudan is an instructive example of a hopeful relationship in which the Comprehensive Peace Agreement triggered an improved level of expectation and confidence in the national government. However, in many cases where hopeful relationships are present, citizens place unrealistic expectations upon a newly formed or struggling leadership. Consequently, international actors should be cognizant that the existence of a hopeful relationship provides a window of opportunity for the design and implementation of relevant projects to strengthen the government and engage the citizenry.

*Nascent relationships* are exemplified by authoritarian regimes that are undergoing the transition to a new democracy. Often characterized by citizens with very limited interaction with or experience in governance, advocacy or civil society groups, these relationships can be marked by the lack of recognition of a functioning state. Consequently, international interventions should focus on achieving successful decentralization and the establishment of the basic machinery of a democratic state. In these environments, the program design of donor projects would be vastly different from those in places like South Sudan.

*Evolving relationships* are exhibited in cases such as Afghanistan, Tajikistan or Sierra Leone where citizens have to negotiate space between the state and other powerful entities such as warlords or alternative power structures that are in contention with state elements. Often these various entities are folded into the state following a peace settlement. Recognition of this reconfiguration of the state to include previously contentious elements is very important as it determines the manner in which local provincial governments, civil society and local institutions are constructed. These reconfigurations impact the manner in which citizens build associations and social networks and determine the amount of social capital available for alignment between different interest groups.

## Civil Society, Essential Services, Government and Conflict

The absence of state-led basic service delivery is not simply overcome by creating parallel structures through civil society. While service delivery through local NGOs and civil society organizations is often prioritized by international actors, it is important to note the existing traumatized nature of the environments and the relationships that exist between civil society groups and their weakened government. International aid, distributed through various mechanisms, can serve to worsen these pre-existing divisions within the society or create new cleavages. Additionally, regional, ethnic and religious disparities can become politically sensitive, creating greater risks that services are delivered along party or ethnic lines. Many humanitarian settings turn into this as services poor in and populations become more disenfranchised from the state. In Darfur this is more than evident in the relationship between internally displaced persons (IDP) camp residents and 'rebel groups' who are often embedded in the camps through family members. Similarly, when support for national-level governments is diverted, due to the belief that it takes too long to implement aid through state mechanisms, repressive actions

are often taken by the state towards civil society, as evidenced in Nepal, Sudan, Ethiopia, Angola and Burundi. Sometimes it is the state itself that further weakens its own nation building by providing harsh and stringent controls on the delivery of service by local and indigenous groups.

It is imperative to integrate interventions that focus on service delivery at the local level and those that contribute to strengthening governance functions at the national level in order to develop an effective, country-level strategy. These interventions also need to monitor their impact on these societies through regular, in-depth monitoring and polling with local groups and populations to assess the wider implications for civil society development. Support for NGOs has been a main focus among major donors for many years. Besides contracting international NGOs as distributors of humanitarian aid, donors have looked to international and country-based NGOs to carry out an increasing number of roles in pursuit of development, democratization and conflict management. Among others, these tasks have included:

- assisting the government in providing social and other services;
- mobilizing social demands to put public pressure on government to be more responsive to public needs;
- monitoring the state and playing watchdog with regards to human rights and corruption;
- convening issue-specific dialogues between disputing leaders or groups; and
- working at the grassroots level in order to foster inter-group reconciliation through sectoral projects and mediated conflict resolution.

In some countries, local NGOs also have been funded to mount 'people power' campaigns. As in the recent colour revolution, these campaigns are aimed at opening up political regimes to opposition parties and ousting leaders who were holding on to power through irregular methods. In some countries opposition is brutally marginalized through an effective campaign using civil society groups too closely affiliated with the state, as is evidenced in Ethiopia, Zimbabwe and in Rwanda as well. Viewed more broadly, all these programs supporting NGO activities and capacity-building are seen as ways to foster the progressive emergence of a broad civil society, one that both supplements the state in providing for public needs and makes governments more responsive to their populations.

In sum, NGOs form part of the larger policy agenda of the United States, the European Union and the United Nations to promote democratization through a more active citizenry that participates in social and political

processes. This aid has been provided in part because it was thought that these many activities would add up to the kind of civil society that is needed to counterbalance the state, as well as to promote greater popular participation in government and social life. Civil society groups provide an entry point for engagement in situations where governments themselves are seen to be untrustworthy partners. Thus, an underlying rationale for boosting NGO capacity is premised on the desire for government accountability achieved through bottom-up, participatory and grassroots processes. But this can also work against the concept of nation building and lead into fragility through popular politics and civil society engagement such as we saw in the West Bank and Gaza with Hamas and in Lebanon with Hezbollah. There are also parts of this emerging in Nepal and on the positive side perhaps the Sudan People's Liberation Movement (SPLM) in South Sudan emerging from the bush as guerilla fighters and leading into positions in the new Sudan in ministries and within the Civil Service.

## State-building: The Need for a Comprehensive Approach

The *modus operandi* of intervention in these 'fragile' countries has changed. Recognizing that a different approach is required when working with fragile, weak and failed states, development practitioners and programmes are now focused on very basic state- and nation-building tasks. The developmental objective in such cases is the construction of effective bureaucratic capacity and institutional infrastructures that may in turn effectively channel development assistance. This change in emphasis also necessitates a multi-sectoral, holistic and comprehensive strategy. Agencies from various fields including development, defence, security sector reform, democratization and others, need to develop coherent approaches together and foster interagency coordination. Such interagency coordination is taking root in the US system and in the UK, which are both emphasizing intergovernmental coordination including deeper multilateral cooperation.

To do the comprehensive, integrated, cross-sectoral work that is called for in fragile or failed states, efforts are now being made in Washington to coordinate the several kinds of agencies that are engaged in development, diplomacy, security sector reform, institution-building and peacekeeping**.** Ironically, within the Washington community, it is often NGOs and private think tanks that are taking the lead in sponsoring and facilitating discussion forums to foster intergovernmental as well as NGO coordination.

In the conversation about failed states and policy, NGOs no longer seem to have a place at the table. The question that arises, therefore, is the particular place that NGO support and civil society promotion occupy, given the current preoccupation with how to prevent and rebuild failed states.

So let us ask ourselves where people fit into the concept of a nation being built from fragments.

1) Does civil society promotion have any compelling use in settings of state failure and post-conflict recovery? How do we work more effectively with local organizations and indigenous groups already fractured from a weakened or predatory state?
2) What are the different roles to be fulfilled by civil society and NGOs in different stages of conflict and under differing regimes? What goals and priorities need to be set for the differing environments across a spectrum of societies?
3) Finally, how do we actually implement the appropriate roles for NGOs and civil society through a comprehensive and strategic country approach? With whom does one engage? Should aid be provided directly to the concerned state; to auxiliary NGO service implementers; to peace alliances, international or domestic; to for-profits; or to partnerships between non-governmental organizations, civil society and state institutions?
4) What is the best balance between local and international inputs to ensure local ownership? How does one organize the requisite intergovernmental and multilateral cooperation?

## Country-level Strategies

Taking into consideration the differing relationships and roles of civil society and the state within the various fragile and failed state environments, it is important to determine the most appropriate mechanisms for implementing development and nation-building interventions at the local as well as the national level. The most daunting questions facing international development organizations in these contexts are often where to start, and how to effectively begin to build institutional capacity. International actors, therefore, need to understand the enabling factors that allow a society to function and then examine how they might facilitate a healthy society-state relationship. In line with the emerging paradigm of diplomatic development, there is a recognized need for international development interventions to be implemented through

more effective mechanisms at both the local and the national level. It is crucial for international actors to analyse and understand the country context and move beyond what might be done at a project level to focus on a country-level impact.

Specifically, international interventions need to identify and build upon the pre-existing relationships and supportive networks within the local environments in the country of interest. In the absence of effective state governments, local actors, institutions and governing structures often develop and can be nurtured through international support to strengthen civil society initiatives at the community level. However, these efforts alone are insufficient to ensure the level of investment and the integrated approach that is necessary to achieve a cohesive and coordinated civil society. A country-level strategy necessitates collaboration amongst donors in the implementation of a harmonized, national implementation strategy to harness effectively the development potential among the broad range of civil society actors. The current development paradigm is not designed to support this type of comprehensive country-level strategy. Consequently, current mechanisms for aid coordination needs to be reviewed to develop and strengthen efforts to create an integrated, cohesive, nation-building strategy for countries identified as '*failed or fragile states*'

## Conclusion

As members of a nation that is striving for a comprehensive vision and approach to working collectively to build security within as well as abroad there are several things that the National Security Strategy as well as the myriad of interagency strategies designed to counter insurgencies and movements within borders that we need to consider. They have less to do with terrorism and more to do with the citizenship of these nations and their access both to government services as well as relationship with their government that allows civil society to strengthen its own support for nation building. These suggestions are not prescriptive, but rather can provide better guidance for more integrated interventions between concerned international engagement and a responsiveness to host country need:

1) *Conflict analysis and mitigation*: understanding better the root causes of conflict, mechanisms for targeted conflict mitigation with key groups/spoilers as well as a process for the implementation of peace and reconciliation that leads to a sense of justice (local justice or a

strengthening of rule of law and human security needs in the country). Militia movements are used as strategies within many nations (Sudan, Uganda, Yemen, Kenya, DRC, Rwanda, etc.)

2) *Citizenship and civil society strengthening*: there is a direct relationship between the concept of citizenship and the role of civil society. You cannot build a nation without understanding that citizens recognize when political, development or humanitarian and military strategies are in direct contrast and conflict with one another. Need for access to services, rights to land and also a sense of security and will always trump political involvement in these settings further entrenching a character of a war and a place for conflict in the political landscape. (Northern Uganda – humanitarian and political/military setting).
3) *Citizens access to government*: there is a direct relationship between strengthening local groups and citizen involvement in service delivery, advocacy and in civic participation. In countries where access to government is limited either by geography or political, social and economic neglect there is a lot of work in increasing access to government. It is not only about decentralization of government services and presence, but also about strengthening citizens' abilities to work directly with government on jointly rebuilding areas that have long been neglected. This process in and of itself is a part of reintegration and reconciliation of fragmented societies long at war.
4) *Community-driven approaches to reconstruction*: providing interventions and projects that support the direct involvement of government with its citizens. More implementation as well as planning, management and monitoring of infrastructure projects and interventions that put a face on government and develop distinct relationships across groups. These efforts can also be used as tangible ways to show implementation of peace agreements and protocols by showing engagement between parties and responsive government involvement with citizens aligned between former rebel/extremist groups and decentralized and responsive government entities. This is an important approach to peace implementation and, in disarmament, demobilization, reintegration and reconciliation, critical (Liberia, DRC, Uganda, Angola, Mozambique, Burundi etc.).

# Chapter Two

# The Effectiveness of the International Community's Response to the Humanitarian Crisis in Darfur: A Legal Assessment

Dunia P. Zongwe

## Introduction

It is blood, adrenaline and tears that water the drought-stricken semi-desert land of Sudan's western region of Darfur. Since July 2000, when attacks on villages surged (Keibida 2006, 43), reports have poured in of raids, bombings, rapes, lootings, the burning of villages and the killing of civilians. Although both government soldiers and Darfur rebels are responsible for the bloodbaths, most observers point accusing fingers at the much dreaded Arab militias, also known as Janjaweed (UNHCR n.d.; Prosecutor's Application).[1] Today, the Darfur conflict has claimed more than 200,000 innocent lives (CIA 2009), displaced at least two million Sudanese,[2] and forced approximately 235,000 people from Darfur to flood 17 refugee camps in neighbouring Chad. In 2006, 1.7 million Sudanese cried out for food assistance after the conflict destroyed the local economy, markets and trade in Darfur (Human Rights Watch 2006).

Global civil society, human rights activists in Sudan and elsewhere, reacted with an outpouring of outrage and indignation, complaining that the international community is not doing enough to alleviate the suffering of people in Darfur. The present chapter attempts to answer the concerns about the effectiveness of the international community's response to the humanitarian crisis. First, it describes the measures taken by various international actors; it then discusses the effectiveness of the measures; it concludes the discussion on the effectiveness of the international response and makes some recommendations for the resolution of the humanitarian crisis in Darfur. Ultimately, the broader contextual issue to which this chapter speaks is: how can the international community effectively intervene in a 'failed' state?

The chapter finds that measures by the International Criminal Court (ICC), the European Union (EU) and United Nations (UN), serve the principle of the state's responsibility to protect people from genocide, crimes against humanity

and war crimes. Nevertheless, it finds that the measures, realistic though they may be in the prevailing political circumstances, have not been very effective in alleviating the suffering of the peoples of Darfur. The basic argument is that the international community has been framing the Darfur crisis more in humanitarian and legal terms,[3] without confronting the internal politics that emasculates the efficacy of the international community's response.

It is against this backdrop that the chapter proposes that, alongside the intermediation of the ICC, the EU, and the UN, the international community should adopt multilateral diplomacy, involve non-state actors and mobilize the global civil society, as measures to help solve the humanitarian crisis in Darfur. Multilateral diplomacy is necessary and imperative because the lack of foreign political will to address the political economy of the Darfur conflict is likely to undermine the measures already taken. The participation of non-state actors and the global civil society can circumvent the lack of political will and its consequences for the situation on the ground (see Claude 2006; Santos 2001).

## Methodology

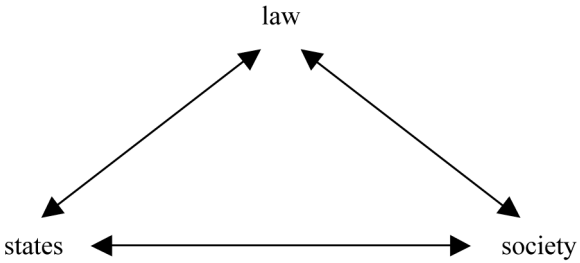
This chapter assumes that politics, whether domestic or international, prevails not only in the formulation of rules and theory but also in the actual practice of states. The chapter is therefore premised on the broad theoretical assumptions of the critical legal studies school of jurisprudence. These assumptions have implications for the methodology of the chapter in that they insist on the role of politics in finding a lasting solution to the humanitarian crisis in Darfur.[4]

Now considered a defunct intellectual movement (see Freeman 2001, 1055), the critical legal studies school of jurisprudence lives on through other legal movements and disciplines that it influenced. Scholars like Martti Koskenniemi, Philip Allott and David Kennedy have investigated and highlighted the part that politics play in traditional public international law (Koskenniemi 2005; Allott 1990; Kennedy 2002). In a nutshell, critical legal scholars submit that law is politics. For these scholars, law does not have an existence independent of the national interests shaping and colouring international law and international relations. This continuity between politics and law is most apparent in the recent debates on the characterization of the Darfur humanitarian crisis as genocide and in the prosecution of the Sudanese President for this crime.[5]

The role played by national interests and political considerations in the international community's response to the humanitarian crisis in Darfur

brings in sharp focus the pertinence of insights from the critical legal studies school of thought. Legal philosophers were too quick to bury critical legal studies jurisprudence. They buried it alive while the ambiguous response of UN members called for its exhumation. The UN is so inexorably replete with internal contradictions, divergent interests and a bureaucratic culture that it has failed to show decisive leadership in several humanitarian crises (see Coicaud 2007), notably in Darfur.

The methodology in this chapter is a triptych – states (politics), international law, and society (the humanitarian crisis in Darfur) – that can be graphically presented as follows:




Accordingly, the methodological point of this chapter is that, in order to be effective, international measures must also define the Darfur crisis in political terms, and not mainly in humanitarian assistance and legal terms as they so often have done (Prunier 2005). All told, however, the assessment carried out in this chapter is largely legal and normative in nature. In this regard, the assessment concentrates on international politics, history, and sociology only insofar as they directly have legal ramifications.

## Failed States and International Human Rights

Sudan, the largest state in Africa, exhibits all the characteristics of what political scientists describe as a 'failed' state. According to the Failed States Index of the Fund for Peace, Sudan is the world's most failed state (Fund for Peace 2009). The Index reveals that demographic pressures, chronic human flight, uneven economic development among group lines, progressive deterioration of public services, and factionalized elites, have rendered Sudan a 'failed' state (ibid.). It also reveals that massive refugees and internally

displaced persons (IDPs) movements, group grievances, state criminalization and deligitimization, widespread human rights violations, security apparatus operating as a state within a state and intervention of external political actors, are singularly acute (ibid.). In addition, Sudan ranks 173rd out of list of 180 countries in terms of transparency (Transparency International 2008). Human development in Sudan is, however, relatively high for similarly situated failed states. Sudan ranks 147th on the UN Development Programme's list of 177 countries by human development (UNDP 2008).

The oft-used concept of 'failed state' is contested and controversial. The concept fails to accurately account for huge disparities within and between regions in a country, painting, as it does, entire countries with the same brush as either weak or strong along graduated scales of institutional efficiency. Most importantly, it fails to provide a reliable paradigm for action or intervention in countries confronted with daunting humanitarian emergencies like Sudan.

Moreover, the concept of 'failed state' does not readily lend itself to legal analyses, nor can it fully integrate existing legal frameworks. In international law, a state, before it can be recognized as such, only needs a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states.[6] Even where one of the above four requirements is not present, once recognized as an independent state, a political entity remains a state. The withdrawal of recognition, for example because a state has descended into anarchy and lawlessness, is a politically unacceptable theoretical possibility without precedent (Dugard 2005, 110).

International human rights law has a less diffuse, more localized, approach when a state is incapable of performing one or more of its core constitutional obligations. Whereas the concept of 'failed state' concentrates on a state's institutional capacity in general, human rights law stresses on a state's capacity to prosecute and ensure accountability for violations as determining factors for intervention. Thus, the basic logical structure of the case for humanitarian intervention is as follows. State sovereignty implies the primary responsibility to protect people from genocide, war crimes and crimes against humanity. If a population is suffering serious harm as a result of internal war, insurgency, repression or state failure, and the state is *unwilling or unable* to avert it, the principle of non-intervention yields to the international responsibility to protect.[7]

In sum, international legal practice is functionalist and acknowledges that the creation of a state is essentially and eminently political. It confirms that a *state may fail* to fulfil one or more, if not all, of its constitutional functions, but a *state may never be failed*, unless and until the international community makes a decision to that effect.

## Darfur: The Humanitarian Crisis

Darfur in western Sudan, Mogadishu in southern Somalia and North Kivu in eastern Democratic Republic of Congo (DRC) form a trilogy of the most tragic, most ignored (BBC 2008) and deadliest (International Rescue Committee 2007) humanitarian situations on the continent, respectively. Allegations that Sudan's President Al Bashir committed genocide by causing serious mental harm to the people of Darfur and by deliberate infliction on them of conditions of life calculated to bring about their physical destruction seal the gravity of the Darfur crisis (Prosecutor's Application).

Although the root causes of the Darfur conflict are complex and multi-layered (Nantulya 2004), two factors have played a prominent role in causing and sustaining the conflict, namely struggles around land and resources, and the marginalization of the peoples of Darfur by the central government (UN High-Level Mission in Darfur 2007).[8] The rebels – mostly from the African tribes of Darfur like the Fur, the Masalit and Zaghawa[9] – pleaded for equality and justice for all Sudanese and not just redress of more narrow tribal interests (ibid., ¶ 25–7). The rebels started to attack the Sudanese government in late 2002, and those attacks accelerated in 2003 (ibid.). Given that the army was being consistently defeated, the Sudanese government military based its response on three elements: military intelligence, the air force and the Janjaweed. The ruling National Congress Party's (NCP) three-pronged counter-insurgency strategy systematically and primarily targeted the civilian populations of Darfur, especially the tribal groups from which the rebels are drawn (ibid.), with disastrous humanitarian consequences. The crisis took on an international dimension when over 100,000 refugees poured into neighbouring Chad, pursued by Janjaweed militiamen, who clashed with Chadian government forces along the border.

Grave and massive violations of human rights and international criminal law occurred in Darfur as well as in other parts of Sudan. On 14 July 2008, the ICC Prosecutor Luis Moreno-Ocampo applied for an arrest warrant for Sudanese President Al Bashir, accusing him on ten criminal charges of genocide, crimes against humanity and war crimes. Prosecutor Moreno-Ocampo accuses President Al Bashir of genocide under the Rome Statute establishing the ICC[10] for killing members of the Fur, Masalit and Zaghawa ethnic groups (Rome Statute art. 6(a)). It also accuses Al Bashir of crimes against humanity for committing, as part of a widespread and systematic attack against the Darfur population with knowledge of the attack, acts of murder (Rome Statute art. 7(1)(a)), extermination (Rome Statute art. 7(1)(b)), forcible transfer of the population (Rome Statute art. 7(1)(d)), torture

(Rome Statute art. 7(1)(f)) and a massive number of rapes (Rome Statute art. 7(1)(g); Prosecutor's Application). The accusatory instrument recalls that the government-backed Janjaweed raped women in front of their mothers and fathers, and that rape is an integral part of the government's destructive pattern to 'kill the will, the spirit and life itself' (Rome Statute art. 7(1)(g)). Finally, Prosecutor Moreno-Ocampo accuses Al Bashir of war crimes for intentionally directing attacks against the civilian population (Rome Statute art. 8(2)(e)(i)) and pillaging towns (Rome Statute art. 8(2)(e)(v); Prosecutor's Application).

The humanitarian situation in Darfur is alarmingly precarious. The situation is marked by high levels of insecurity, poor harvests, difficulties in bringing supplies into Darfur, attacks on humanitarian workers, reduction in the quality of humanitarian services, reduced food rations and overcrowded IDP camps (Darfur Humanitarian Profile 2008). By 1 July 2008, there were over 2 million residents in need of humanitarian assistance in addition to nearly 2.5 million IDPs in Darfur (ibid.), making Sudan the country with the world's largest population of IDPs (Institute for Security Studies n.d.). Unfortunately, the actual scale of those affected by the Darfur conflict is not known because persistent insecurity in Darfur still impedes accurate monitoring.

## Darfur: The International Community's Response

For the purposes of this chapter, 'international community' refers to individual national governments and treaty-based intergovernmental institutions.[11] Best epitomized by the UN system in general, the 'international community' encompasses such intergovernmental institutions as the African Union (AU) and the Inter-Governmental Authority on Development (IGAD), but it excludes the ICC.

Very often, the international community responds to humanitarian crises by deploying peacekeeping troops, under a UN Charter Chapter VII mandate, in countries and areas facing major security threats and humanitarian emergencies. The deployment of peacekeeping troops to protect human rights and put an end to human suffering is an expression of an international democratic culture, developed out of a sense of international solidarity (Coicaud 2007, 6ff). Surely, the UN's endorsement of a peacekeeping operation in Darfur under a Chapter VII mandate – which provides for the use of force when the UN Security Council (SC) determines that a certain situation constitutes a threat to international peace and security[12] – is a projection of such solidarity. As Jean-Marc Coicaud put it (2007, 7), failing

to respond to the 'plight of the other, failing to show solidarity, diminishes the humanity of all'.

The international community responded to the humanitarian crisis in Darfur on three levels: national, continental and global.[13]

## National Measures

National measures are those adopted by individual states to address the humanitarian crisis in Darfur. Both Chad and the US were major players in attempts to resolve the humanitarian crisis in Darfur. However, the measures taken by the US were more robust than those taken by Chad. In 2004, Chad brokered negotiations in N'djamena. The negotiations led up to the signature of a Humanitarian Ceasefire Agreement (Cease Fire Agreement) between the Sudanese Government, the Sudan Liberation Movement/Army (SLM/A), and the Justice and Equality Movement (JEM) on 8 April 2004. The Cease Fire Agreement established a Cease Fire Commission (CFC)[14] that it entrusted with the effective monitoring of the rules and provisions of the cease fire (Cease Fire Agreement art. 4).

The US, on the other hand, issued on 19 August 2006 a threat to Sudan over the 'potential consequences' of the Sudanese government's opposition to the replacement of the 7, 000 AU force with a 17,000 UN force. Moreover, on 13 October 2006, President Bush imposed further sanctions against those deemed complicit in the Darfur atrocities under the 2006 Darfur Peace and Accountability Act.[15] The measures were said to strengthen existing sanctions by prohibiting US citizens from engaging in oil-related transactions with Sudan, freezing the assets of complicit parties and denying them entry to the US. The Darfur Peace Act calls on the US to take a more active role in stopping the genocide that the US alleged took place in Darfur and encourages North Atlantic Treaty Organization (NATO) participation (Darfur Peace Act sec. 6(c)).

It was the sense of the US Congress that the AU should ensure an orderly transition to a UN peacekeeping operation, with a mandate to protect civilians and humanitarian activities (Darfur Peace Act sec. 4(3)). The Congress also understood the role of the UN peacekeeping operation to consist in assisting in the implementation of the 2005 Darfur Peace Agreement (DPA), and deter violence in Darfur (ibid.). Later, the US Congress enacted the 2007 Darfur Accountability and Divestment Act,[16] which requires the identification of corporations that conduct business in Sudan and prohibits government contracts with such corporations.

## Continental Measures

The African Union (AU) took several measures to resolve the humanitarian crisis in Darfur. However, it is important to note that the AU, like the UN yet unlike the US, never defined the crisis as amounting to genocide. Rather, the AU stated that the core of the conflict in Darfur is political and socio-economic in nature (African Union Peace and Security Council 2005). Likewise, neither the EU nor Human Rights Watch backed the Bush administration's conclusion that the atrocities in Darfur constitute genocide (see Hagan and Rymond-Richmond 2009, 31).

On 12 February 2007, the Peace and Security Council (PSC) of the AU decided to dispatch as soon as possible a mission to Chad, the Central African Republic (CAR) and Sudan to undertake a comprehensive assessment of the situation on the ground and identify the obstacles to the implementation of the peace agreements (African Union Peace and Security Council 2007). On 5 May 2005, the AU and the US State Department orchestrated the DPA by the government of Sudan with the faction of the SLA led by Minni Minnawi in Abuja, Nigeria. The accord called for the disarmament of the Janjaweed militia, and for the rebel forces to disband and be incorporated into the army. The AU deployed a 7,000 force, the AU mission in Sudan (AMIS).

In January 2005, under the auspices of the IGAD, the Comprehensive Peace Agreement (CPA) was signed in Nairobi between the Sudanese government and the Sudan People's Liberation Movement (SPLM). The civil war in Southern Sudan, Africa's longest civil war, ended through the CPA. The CPA grants Southern Sudan autonomy for six years followed by a referendum on independence from the rest of Sudan (CPA 2005).

Lately, the EU has also undertaken measures to contribute to the resolution of the humanitarian crisis in Darfur. On 25 September 2007, the SC, acting under Chapter VII, authorized the EU to deploy for a one-year period an operation aimed at supporting the UN in the CAR and Chad (MINURCAT) (SC Res. 1778). The Council of the EU decided to deploy the EU Force (EUFOR) in eastern Chad and in northeastern CAR on 28 January 2008 (2008 J.O. (L 34) 39). In March 2008, the EUFOR troops arrived in Abeche, eastern Chad, to facilitate humanitarian aid and protect refugees and IDPs in camps in a vast volatile region bordering Darfur until 15 March 2009 (*France 24* 2008) (SC Res. 1834), when a UN operation replaced it (*Euronews* 2009).