

**AFRICAN REGIONAL PEACE AND SECURITY UNDER THE AU'S
CONSTITUTIONAL FRAMEWORK: CONFLICT OR COMPATIBILITY
WITH THE UN AND INTERNATIONAL LAW?**

By JAMES NGANGA KARIUKI MUIRURI

Thesis submitted to the Department of Law at the University of Sheffield, for the
degree of Doctor of Philosophy, August 2008.

Volume II

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**Part Three: Present
Challenges and Future
Prospects**

Chapter Nine

Case Study: The Darfur Conflict in the Sudan

A: Introduction

At the turn of the 21st century, the UN's record in African read like an indictment. Yet, as the Secretary General stood at a Memorial Conference in 2004 to mark the 10th anniversary of the 1994 Rwandan genocide and express his deep sense of remorse on behalf of the world,¹ a somewhat similar catastrophe was underway in the Darfur region in the Sudan.² In a conflict labelled as the 'world's worst humanitarian crisis,'³ the people of Darfur witnessed the commission of international crimes.⁴ Indeed, the catastrophe combined 'the worst of everything: armed conflict, extreme violence, sexual assault, great tides of desperate refugees⁵—without even the unleavened bread of a desperate escape, hunger, and disease, all uniting with an unforgiving desert climate.'⁶ And given that the start of the conflict raised the real possibility of it being the first genocide⁷ of the new millennium, its escalation only ten years after the Rwandan massacre aroused disconcerting questions, particularly with regard to the lessons learnt by the UN Security Council.

Nonetheless, the conflict also presented significant prospects for the advancement of peace and security. Firstly, the unfolding tragedy in Darfur gave the international community yet another chance to shed off its past image and take new opportunities that came along with the new millennium. Secondly, for the AU, the crisis in Sudan became the first obvious case for the implementation of the 'overall security

¹ See Secretary-General Kofi Annan's remarks at the Memorial Conference on the Rwanda Genocide, UN Press Release, SG/SM/ 9223/AFR/870, HQ/631, New York, 26 March, 2004.

² See also Hugo Salim, 'Dithering over Darfur? A Preliminary View of the International Response', *International Affairs*, vol. 80, no. 5, pp. 811-828(18), (2004). See also International Crisis Group, 'Sudan: Now or Never in Darfur', *Africa Report N°80*, 23 May 2004.

³ See Secretary-General's statement to the Security Council on Sudan, New York, 9 May 2006, available at <http://www.un.org/apps/sg/sgstats.asp?nid=2024>. See also Gérard Prunier, *Darfur: The Ambiguous Genocide*, (Cornell University Press, 2005), p. 124-148.

⁴ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, UN Doc S/2005/60, 25th January 2005.

⁵ On Darfur refugees, see M. Rafiqul Islam, 'The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable', *International Journal of Refugee Law* (2006) 18(2):354-385.

⁶ Nsongurua J. Udombana, 'When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan', *Human Rights Quarterly* 27.4 (2005) 1149-1199.

⁷ See the Darfur Peace and Accountability Act 2006 (US). See also The US Secretary of State Colin L. Powell, 'Testimony Before the Senate Foreign Relations Committee', Washington, DC September 9, 2004. See also, 'Powell declares genocide in Sudan', *BBC News*, Thursday, 9 September, 2004.

architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.’⁸ Finally, the conflict formed the platform through which the legality and application of emerging norms, such as the AU’s right to intervene and the UN’s doctrine of responsibility to protect, could be conclusively examined. Therefore, for these reasons, the present chapter investigates the steps taken by the relevant organs of the UN and the AU, as well as by other actors, individually and by way of concert, to halt the carnage in Sudan. In doing so, it also highlights the lessons that can be unearthed from the evolving relationship between the two organisations in the promotion and maintenance of regional and international peace and security.

B: Aims, Purpose and Structure

The main objective of the chapter is to bring to light the interplay of the major legal-political issues discussed in the foregoing chapters and their relation with the crisis. In order to do so, the chapter is divided into three main sections. The first part offers the factual and historical background and introduces the main players in the Darfur conflict. It also explores the legal aspects surrounding the nature of the crisis and the rights and duties of Sudan as a sovereign state. Thereafter, the section examines the legality and application of the responsibility to protect, discussed in the last chapter. Part two of the chapter analyses the UN Security Council’s approach to Darfur and demonstrates the manner through which geopolitics, rather than the duty to restore peace and security, continue to influence the Council’s decision making process.

Having done so, a major focus is given to the AU’s own response to Sudan’s failure to protect Darfuris from the ongoing tragedy. In doing so, this section shall uncover the AU’s attitude towards the conflict and the circumstances leading to the deployment of peace operations, as opposed to an outright military intervention. Finally, the rest of the chapter looks at the evolving relationship between the AU and the UN, including the deployment of a hybrid force in Darfur, which marked a watershed in the promotion and restoration of regional and international peace and security.

⁸ See Article 16 of the Protocol establishing the Peace and Security Council (PSC) of the African Union. See also *The Role of the Regional Economic Communities (RECs) as the Building Blocks of the African Union*, Available at <http://www.dfa.gov.za/docs/2003/au0815.htm>.

I.1 Establishing the Background to the Conflict in Darfur

In order to fully understand the Darfur conflict, it is important to promptly review the broader context associated with the crisis before focussing on the conflict in western region of Sudan. Briefly, Sudan⁹ lies at the Horn of Africa¹⁰ and is the largest country in the continent with a total territory of 2.5 million square kilometres. It borders Egypt in the North, the Red Sea, Eritrea and Ethiopia in the East, Uganda, Kenya and the Democratic Republic of Congo in the South, and the Central African Republic, Chad and Libya in the west.¹¹ Sudan is a member of key organisations such as the UN, AU, the Arab League, the Organization of the Islamic Conference and is an ACP state of the EU.

Sudan possess a population of 39 million inhabitants of which approximately 32% are urban, 68% are rural and about 7% are nomads.¹² The North of Sudan predominantly consists of Muslims while Christians and other African religious groups mostly inhabit the South.¹³ The country has a federal system of government with multiple levels of administration consisting of 26 states (Wilayaat) subdivided mostly on racial groupings into approximately 120 localities (Mahaliyaati).¹⁴ Although Arabic is considered to be a '*lingua franca*' for most Sudanese, the population is composed of a variety of tribes with inhabitants speaking more than 130 languages.¹⁵

Sudan is categorised as a Least Developed Country (LDC) and is ranked 147th in the UNDP's Human Development Index.¹⁶ Since 1983, a 21-year civil war ensued between the North and South of Sudan which in turn impacted on Darfur, as shown below.¹⁷ The Sudanese government and the main rebel army in the south, the Sudan People's Liberation Movement /Army (SPLM/A), engaged in peace talks under the

⁹ On facts about Sudan, see <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html>.

¹⁰ The term refers to the North- Eastern African region containing the countries of Sudan, Eritrea, Djibouti, Ethiopia and Somalia. See Peter Woodward, *The Horn of Africa: Politics and International relations*, (I. B. Tauris, 2002).

¹¹ See Appendices 1.

¹² *Report of the International Commission of Inquiry on Darfur*, *supra* note 4.

¹³ Francis M. Deng, 'Sudan - Civil War and Genocide: Disappearing Christians of the Middle East,' *Middle East Quarterly*, (2001).

¹⁴ *Report of the International Commission of Inquiry on Darfur*, *supra* note 4.

¹⁵ *Ibid.*

¹⁶ See the UNDP 'Least Developed Countries Report, 2007,' available at <http://hdr.undp.org/en/reports/global/hdr2007-2008/>.

¹⁷ On the civil war, see Julie Flint & Alex De Waal, *Darfur: A Short History of a Long War*, (London: Zed, 2005); Alex De Waal, ed., *War in Darfur and the Search for Peace*, (Cambridge, MA: Harvard University, 2007).

auspices of the Inter-Governmental Authority on Development (IGAD) which resulted in agreements that led to the signing of the Comprehensive Peace Agreement (CPA)¹⁸ in Nairobi, Kenya on 9th January 2005.¹⁹ Although the CPA formally ended the civil war in Sudan,²⁰ a serious weakness with the agreement was that it did not cover the fighting in Darfur. However, 'some thought that Darfur had to be sacrificed in the short-term so that the CPA could live.'²¹

1.2 The New Conflict in Darfur (2003): The Background and Key Players in the Crisis

Also known as the 'land of the Fur,'²² Darfur is the largest region in Sudan and is situated in the western part of the country bordering Libya to the north-west and to the west, Chad.²³ The vast area which covers 250,000 square kilometres consists of an estimated population of 6 million inhabitants and is divided into three parts, namely, the North, West and South Darfur.²⁴ The region, which consists of desert and savannah, remains underdeveloped and is remote from the capital city of Khartoum.²⁵ Darfur has historically been prone to droughts and desertification²⁶ and this, coupled with poverty, ecological pressure, generalised lawlessness and ethnic manipulation has pitted Arab tribes of northern Darfur against their neighbours – sedentary farmers with whom they used to live with in close social and economic association.²⁷

¹⁸ See the Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/ Sudan people's Liberation Army, Nairobi, Kenya 9 January 2005.

¹⁹ On the CPA, see Crisis Group Report, 'Sudan's Comprehensive Peace Agreement: Beyond the Crisis,' *Africa Briefing* No. 50, 13 March 2008; 'The Khartoum-SPLM Agreement: Sudan's Uncertain Peace,' *Africa Report* No. 96, 25 July, 2005.

²⁰ See Martin Meredith, *The State of Africa: A History of Fifty Years of Independence*, (London: Free Press, 2006), p. 598.

²¹ Western diplomat quoted in Kristiana Powell, 'The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on the Responsibility to Protect', *North-South Institute Working Paper*, (May 2005). For UK position on the matter, see UK House of Commons International Development Committee, *Darfur, responsibility to protect*, Fifth Report of Session 2004-2005, (London: House of Commons), p. 36.

²² Alex de Waal, 'Counter-Insurgency on the Cheap', *London Review of Books*, Vol. 26 No. 15, 5 (August 2004). See also generally, Mohammad, Mohamed Suliman, *Darfur: New Perspectives*, (Cambridge: Cambridge University Press, 2004).

²³ See Appendices.

²⁴ M.W. Daly, *Darfur's Sorrow: A History of Destruction and Genocide* (Cambridge, Cambridge University Press 2007).

²⁵ Alex de Waal, 'Counter-Insurgency on the Cheap,' *supra* note 22.

²⁶ See Alex de Waal, *Famine that Kills: Darfur, Sudan*, (Oxford: Clarendon Press, 1989).

²⁷ For more on the background to the Darfur conflict see Alex de Waal, *War in Darfur and the search for peace*, *supra* note 18; Julie Flint and Alex de Wall, *Darfur*, *supra* note 18; S. Power, 'Dying in Darfur', *The New Yorker*, 10 September 2004.; International Crisis Group, 'Unifying Darfur Rebels: A Prerequisite for Peace', *African Briefing*, no.32, (October 2005). See also Crisis Group Africa Briefing

These factors ensured that the issue of land historically remained of contentious character giving rise to tension and clashes.²⁸ The ensuing stress escalated in the 1980s between the tribes consisting of the Fur and a number of nomadic Arabs increasing the significance of the 'Arab' and 'African' distinctions.²⁹ This division was exacerbated by 'marginalisation, competing economic interests and political polarisation,' which had previously been merely 'passive' but was now further aggravated by increased access to weapons.³⁰

More recently, the escalation of the conflict led to its infamous labelling by the UN as the 'world's worst humanitarian crisis.'³¹ Furthermore, its roots were described as 'complex' both by the Human Rights Council (2007)³² and the earlier UN Commission of Inquiry on Darfur (2005)³³ led by Antonio Cassese.³⁴ Although it is often stated that the conflict broke out in February 2003, the fighting in Darfur actually began on 21 July 2001, when a group of Zaghawa and Fur met in Abu Gamra and swore oaths on the Qur'an to work together to defend themselves against

No. 39, 'Darfur's Fragile Peace Agreement', 20 June 2006; Crisis Group, *Africa Report* No105, 'To Save Darfur', 17 March 2006; and Crisis Group, *Africa Briefing* No28, 'The AU's Mission in Darfur: Bridging the Gaps', 6 July 2005. See also Ahmed, Abdel Ghaffar M. *Understanding the Crisis in Darfur: Listening to Sudanese Voices*, (Bergen, Norway: BRIC, University of Bergen, 2006); Burr, J. Millard and Robert O. Collins. *Darfur The Long Road to Disaster*, (Princeton, New Jersey); Markus Wiener, 2006; Marlowe, Jen, Aisha Bain, Adam Shapiro, and others. *Darfur Diaries: Stories of Survival*, (New York: Nation Books, 2006); Daly, M. W. *Darfur's Sorrow: A History of Destruction and Genocide*, (Cambridge; New York: Cambridge University Press, 2007); Kasfir, Nelson. 'Sudan's Darfur: Is it Genocide?' *Current History* 104, no. 682 (May, 2005): 195; Leaning, Jennifer, 'Diagnosing Genocide - the Case of Darfur.' *The New England Journal of Medicine* 351, no. 8 (Aug 19, 2004): 735; Luban, David. 'Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report.' *Chicago Journal of International Law* 7, no. 1 (Summer, 2006): 303; Ludtke, Melissa. 'When Genocide is a Story Left Largely Untold.' *Nieman Reports* 59, no. 2 (Summer, 2005), p. 111.

²⁸ A. Mosely Lesch, *The Sudan-Contested National Identities* (Bloomington and Indianapolis, Indiana University press (1998).

²⁹ For an insightful analysis of race and identity in Darfur, see Alex De Waal, 'Who are the Darfurians? Arab and African Identities, Violence and External Engagement', *African Affairs* 104, 415 (2005), pp. 181-205; See also Alex De Waal, *Famine that kills*, *supra* note 27, p. xiv; and Gerard Prunier, *Darfur*, *supra* note 3, p. 4-8. See also Harold A. Michael, *A History of the Arabs in Sudan: Some of the People Who Preceded Them and the Tribes Inhabiting Darfur* (New York: Barnes & Noble, 1967); J.D. Fage & W. Tordoff, *A History of Africa*, (London & New York: Routledge, 4th ed., 2002).

³⁰ UN Commission on Darfur *supra* note 4. See also Alex de Waal, 'Counter-Insurgency on the Cheap', *supra* note 22.

³¹ See Secretary-General's statement to the Security Council, *supra* note 3; Gérard Prunier, *Darfur*, *supra* note 3, p. 124-148.

³² *Report of the High-Level Mission on the situation of human rights in Darfur in pursuant to Human Rights Council decision S-4/101, A/HRC/4/80*, Human Rights Council Fourth Session, March 2007. See also Alex de Waal, 'I will not Sign', *London Review of Books*, vol., 28 no 23, 30 November 2006.

³³ *Report of the International commission of Inquiry on Darfur*, *supra* note 4.

³⁴ For a discussion of the UN Commission's finding of fact and law, see the symposium 'The Commission of Inquiry on Darfur and its Follow-up: A Critical View', (2005), *JICJ* 539.

government-sponsored attacks on their villages.³⁵ These rebels had the support of the local population since commencing their military activities against the government and the predominantly *janjaweed* militia,³⁶ who were alleged to have backing from the Sudanese government since late 2002.³⁷ Alex De Waal states that the government of Sudan 'consistently franchised its counter-insurgency operations to the [*Janjaweed*] militia'³⁸ providing them with arms, intelligence and air support, allowing them to operate with complete impunity and thereby creating an 'ethnic-free zone.'³⁹

This point is highly significant and relevant with regard to the principles of state responsibility because Sudan's support of the militia provides the causal connection between the injury caused and the official acts or omissions of its obligations.⁴⁰ However, the actual attributability of the acts of the *Janjaweed* to the Sudanese government would depend on whether the latter had 'effective control' over the latter as discussed by the ICJ in *Bosnia v Serbia [2007]*⁴¹, which followed the ruling in *Nicaragua v United States [1986]*.⁴² On this point, it is worth noting that the report of the prosecutor of the ICC in June 2008 brought to the world's attention the fact that the 'whole state apparatus' of Sudan was implicated in the crimes committed in

³⁵ Julie Flint and Alex de Waal, *Darfur*, *supra* note 17, p. 76-77

³⁶ A term translating to a 'man (a devil) on a horse.' See Steidle, Brian and Steidle Wallace, Gretchen *The Devil Came on Horseback: Bearing Witness to the Genocide in Darfur*, (PublicAffairs, 2007),

³⁷ See Human Rights Watch News, 'Sudan: New Darfur Documents: Ties Between Government and Janjaweed Militias Confirmed', July 20, (2004); Nsongurua J. Udombana, 'Still Playing with Lives: Darfur and Security Council Resolution 1706', *Third World Quarterly*, Vol. 28, No. 1, pp. 97-116, (2007).

³⁸ See Alex De Waal, 'Briefing: Darfur, Sudan: Prospects for Peace' *African Affairs* 104, no 414 (2005), p. 219.

³⁹ *Ibid.* See also *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Situation of Human Rights in the Darfur Region of the Sudan*, 7 May 2004, UN Doc. E/CN.4/2005/3, para. 6. See also Eric Reeves, 'Death in Darfur', *Guardian Unlimited*, 18 October 2006, at http://commentisfree.guardian.co.uk/eric_reeves/2006/10/reeves.html; Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 37; Craig Timberg, 'In Darfur, Terror from the Air: Sudan Intensifies Use of Helicopter Gunships and Bombs, Driving More Villagers from their Homes,' *Washington Post*, 9 September 2006; 'Sudan Flouting Peace Treaty, Annan Charges,' *Washington Post*, 12 September 2006; John McCain and Bob Dole, 'Rescue Darfur Now,' *Washington Post*, 10 September 2006; Craig Timberg, 'Rebels Say They May Abandon Darfur Pact; Faction Commanders Demand a Strong International Force,' *Washington Post*, 14 September 2006.

⁴⁰ See article 8 of the I.L.C. Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the 53rd Sess., ILC (2001), G.A.O.R. 56th Sess., Supp. 10.*

⁴¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* I.C.J, Rep. 2007. On this ruling, see Mark Gibney, 'Genocide and State Responsibility,' *Human Rights Law Review* (2007) 7: 760-773.

⁴² *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)*, Merits Judgment, ICJ Reports 1986, 4 at para. 115. However, see *Prosecutor v Tadic*, Appeals Chamber Judgment, IT-94-1-A (2001).

Darfur.⁴³ A similar conclusion had also been reached by the UN Human Rights Council (2007), which, in its report, found that that Sudanese '[g]overnment forces often acted in concert with *Janjaweed*/militia, including in violations of human rights.'⁴⁴ This backing of the *janjaweed* is attributed to the reason that the Khartoum government had an established relationship and liaison with Arab tribes whom it called upon to assist in dealing with the increasing rebellion in Darfur launched by the two rebel movements in early 2003.⁴⁵

With the distinction between the so-called African and Arab tribes remaining at the forefront, and the tribal identity of individuals increasing in significance, the conflict intensified amidst peace negotiations over the 21-year-old civil war between the government of Sudan and the SPLM/A, as mentioned earlier. In particular, the *janjaweed* militia targeted several 'African'⁴⁶ ethnic groups including the Fur, Masalit, and Zaghawa⁴⁷ with human rights violations that were said to amount to war crimes and crimes against humanity, as the attacks were 'deliberately and systematically' directed against civilians on account of their ethnicity.⁴⁸ In particular:

..government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis [...] The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called 'African' tribes.⁴⁹

Having found that the grave crimes committed in Darfur 'may be no less serious and heinous than genocide,' the UN Commission strongly recommended that the Security Council refer the situation to the International Criminal Court (ICC) to hold those

⁴³ See Office of the Prosecutor, *Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593*, 5 June 2008, (posted on the ICC website). See also 'Whole State Behind the Crime in Darfur,' *BBC News*, 5 June 2008.

⁴⁴ See *Human Rights Council Darfur Report*, *supra* note 32. See also Alex de Waal, 'I will not Sign,' *supra* note 32.

⁴⁵ See *Human Rights Council Darfur Report*, *ibid.*

⁴⁶ The terms 'African' and 'Arab' have been termed as emanating from political ideology denoting cultural differences. See Alex de Waal, 'Counter-Insurgency on the Cheap,' *supra* note 22.

⁴⁷ Various other groups were also subject to attack such as the Tama, Eringa, Berti, Bergit, Dorok and Tunjur. See Human Rights Watch <<http://hrw.org/backgrounder/africa/darfur0105/1.htm>>.

⁴⁸ *UN Commission on Darfur* *supra* note 4.

⁴⁹ *Ibid.* See also Alex de Waal, 'Counter-Insurgency on the Cheap,' *supra* note 22.

most responsible to account.⁵⁰ Consequently, the Council, having already determined that the situation in Darfur constituted a threat to peace and security, accepted this recommendation by way of resolution 1593 (2005),⁵¹ amidst strong opposition from Sudan.⁵²

As shown further below, although the Sudanese government, the SPLM/A and the Justice Equality Movement (JEM) signed various documents, the flaws⁵³ in the said agreements ensured that the conflict in Darfur went on unabated. In particular, the Agreement on Humanitarian Ceasefire on the Conflict in Darfur (N'Djamena Ceasefire Agreement)⁵⁴ and the Agreement on the Modalities for the Establishment of a Ceasefire Commission and the Deployment of Observers in Darfur⁵⁵ of 2004 were violated on several occasions.⁵⁶ It was not until 5 May, 2006 that the Darfur Peace Agreement (DPA)⁵⁷ was signed in Abuja, Nigeria under the auspices of the AU between Sudan's government and the Sudan Liberation Army (SLA/MM) led by Minni Arkou Minnawi. However, the document contained serious flaws, and two of the three rebel delegations did not accept it, including the SLA faction of Abdel Wahid Mohamed Nur (SLA/AW) and the JEM.⁵⁸

⁵⁰ *UN Commission on Darfur, supra* note 4.

⁵¹ Security Council resolution 1593 was adopted by 11 votes to none with abstentions from Algeria, Brazil, China and the USA. See SC Res 1593 (2005) 31 March 2005. See also UN Press Release SC/8351, 31/03/2005.

⁵² See Security Council, Minutes, 5158th Meeting (31 March 2005) UN Doc S/PV. 5158,4.

⁵³ On some of the flaws, see the International Crisis Group, 'Sudan,' *supra* note 2; Paul D. Williams, 'The Responsibility to Protect and the Darfur Crisis', *Security Dialogue*, Vol. 36, No. 1, 27-47 (2005).

⁵⁴ See Agreement on Humanitarian Ceasefire on the Conflict in Darfur, 8 April 2004.

⁵⁵ Agreement on the Modalities for the Establishment of a Ceasefire Commission and the Deployment of Observers in Darfur, 28 May, 2004.

⁵⁶ See *Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur pursuant to paragraph 21 of Security Council Resolution 1769 (2007)*, UN Doc. S/2008/249, 14 April, 2008; *Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur pursuant to paragraph 6 of Security Council resolution 1769 (2007)*, UN Doc. S/2008/196, 25 March 2008; *Report of the Secretary-General on the Sudan pursuant to paragraph 15 of Security Council resolution 1564 (2004) and paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004)*; *Report of the Secretary-General on the Sudan*, UN Doc. S/2004/881, 2 November (2004). See also Alex de Waal, 'Counter-Insurgency on the Cheap', *supra* note 22.

⁵⁷ For information on the DPA, see Ademola Abass, 'The Darfur Crisis: The Role of the African Union in Darfur', *Utrecht Journal of International and European Law*, Vol. 24. No. 65; Justice Africa, 'Explaining the Darfur Peace Agreement', *Review of African Political Economy* - Vol. 33 No. 108; Alex de Waal, 'Sudan: Leadership for Implementing the DPA', *allAfrica.com*, 14 July 2006; Alex de Waal, 'Sudan: The CPA, the DPA and the EPA', *allAfrica.com*, 14 July 2006; International Crisis Group, 'Darfur's Fragile Peace Agreement', *Africa Briefing* No. 39, 20 June 2006.

⁵⁸ See Kessler, Glenn and Emily Wax. 'Sudan, Main Rebel Group Sign Peace Deal', *The Washington Post*, 2006, May 5; see Laurie Nathan, 'No Ownership, No Peace: the Darfur Peace Agreement',

It was therefore hardly surprising that the level of atrocities against innocent civilians increased subsequent to the signing of the Darfur Peace Agreement.⁵⁹ The 'grave crimes' committed in Darfur constituted some of the grounds for intervention under Article 4(h) of the AU's Constitutive Act (AU), discussed in detail in chapter seven. It is against the backdrop of intense violence that Sam Ibok, director of the AU PSC expressed the AU's 'right to intervene to take action without any authorisation from the Sudanese government.'⁶⁰ This is because the disturbing crimes committed in Darfur were held to be 'serious enough' to warrant military intervention.⁶¹ Therefore, in providing troops to the AU, Rwanda's president Paul Kagame stated that they would use force to protect civilians if necessary.⁶² He later reminded both African and world leaders that his 'forces [would] not stand by and watch innocent civilians being hacked to death like the case was here in Rwanda in 1994.'⁶³

However, for reasons explained further below, rather than embarking on intervention that is permissible under article 4 of the Constitutive Act of the AU,⁶⁴ the Union chose to engage in peace operations that were only possible at the invitation of the Sudanese government. Having identified the key players and set the background to the conflict in Darfur, this chapter now addresses the legal aspects surrounding the nature of the conflict and the legal factors brought about by Sudan's rights and duties as a sovereign state.

Crisis States Research, September 2006. See also International Crisis Group, 'Darfur's Fragile Peace Agreement, *ibid.* See also Alex de Waal, 'I will not Sign', *supra* note 32.

⁵⁹ Julie Flint, 'Where is the African Union in Darfur?', *The Daily Star* (Lebanon), 12 July 2006; 'Sudan Military Reported To Be Aiding Rebel Attacks', *Sudan Tribune*, 12 July 2006; International Crisis Group, 'Darfur's Fragile Peace Agreement' *ibid.*, p. 5; and 'Darfur conflict has reached new level of violence, says UN report', *The Canadian Press*, 2006, May 23; Paul D. Williams, 'The Responsibility to Protect and the Darfur Crisis', *supra* note 52.

⁶⁰ Irin News Addis Ababa, 13 Sep 2004 <http://www.irinnews.org/report.asp?ReportID=43135>.

⁶¹ *Ibid.*

⁶² See Human Rights Watch, 'Darfur: Rwandan Troops to Protect Civilians', *Human Rights News*, New York, August 17, 2004.

⁶³ See Roberta Cohen and William G. O'Neil, 'Last Stand in Darfur', *Bulleting of the Atomic Scientists*, (March-April 2006).

⁶⁴ See chapter seven on the AU framework of intervention.

1.3 The Nature of the Conflict in International Law and the Sovereignty Debate

It will be recalled that the sovereign equality of all states ensuring the non-interference in their internal affairs has been the cornerstone of the international legal system.⁶⁵ However, before embarking on the privileges, right and duties of Sudan as a signatory to the UN Charter and the Constitutive Act of the AU, it is crucial to make mention of the legal status of the Darfur conflict. From the onset it should be made clear that Darfur represented the typical characteristics of modern conflicts in Africa; an internal war with the potential to destabilise an entire region.⁶⁶

Its classification as an internal conflict has particular significance in international law.⁶⁷ Despite the horrendous scale of modern African conflicts, such as that in Rwanda (1994), it will be recalled that a key problem with the UN's rules is that they prohibit the use of force by states in 'international relations' and therefore do not specifically address regional conflicts that emanate from intra-states wars, such as the Darfur conflict.⁶⁸ In this regard, even though some Sudanese rebels made incursions into Chad, almost toppling the government in April 2006, they were for the most part countered by 'self-defence' groups living on the Chad-Sudan border rather than repelled by the Chadian army.⁶⁹ These incidents coupled with the massive displacement and inflow of tens of thousands of refugees to Chad did not give the latter the right of self-defence under article 51 of the UN Charter. This is because they failed to meet the threshold of an 'armed attack' as articulated in the *Nicaragua Case*,⁷⁰ as shown in chapters three and four.

Therefore, although serious, the Darfur conflict fell short of the status of an internationalised armed conflict as was the case in the Democratic Republic of Congo (DRC) where intervention was undertaken by Rwanda, Uganda, Namibia, Burundi, Angola and Zimbabwe in support of opposing sides of the internal conflict since

⁶⁵ See Article 2 (1) and (7) of the UN Charter. See also chapters two, three and five.

⁶⁶ *Report of the International Commission of Inquiry on Darfur*, *supra* note 4; Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 37.

⁶⁷ See generally, Lindsay Moir, *The Law of Internal Armed Conflict*, (Cambridge University Press, 2002).

⁶⁸ See chapter three.

⁶⁹ Nick Grono, 'Darfur: The International Community's Failure to Protect', *African Affairs*, (2006), 105: 621-631. See also Human Rights Watch, 'Sudan: Darfur Atrocities Spill into Chad', *Human Rights News*, 22 June, 2004.

⁷⁰ *Nicaragua v USA*, *supra* note 40 (Merits).

August 1998.⁷¹ In this regard, the DRC has been described as representing ‘the epitome of the collapsed state, whose descent to hell has set loose a congeries of rival factions fighting wars on behalf of half a dozen states.’⁷² Instead, the violence in Darfur created ‘three multi intertwined conflicts. One between government-aligned forces and rebels; in a second government militia raid on civilians; yet a third involves a struggle among Darfur communities themselves.’⁷³

Given that the crisis in Sudan remained an internal conflict in international law, it is important to recall that states are obliged to refrain from intervention, ‘directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state.’⁷⁴ This point was reiterated when the Security Council met in June 2004 to unanimously pass resolution 1547, which expressed the Council’s willingness, to authorise a peace operation designed to over-see the Comprehensive Peace Agreement in Sudan.⁷⁵ In particular, Pakistan reminded the Council of Sudan’s privileges as a sovereign state:

The Sudan is an important member of the African Union, the Organization of Islamic Conference and the United Nations. As a United Nations Member State, the Sudan has all the privileges incumbent under the United Nations Charter, including to the sovereign, political independence, unity and territorial integrity- the principles that form the basis of international relations.⁷⁶

African support of Sudan’s sovereignty was similarly expressed by Algeria during its term as a nonpermanent member of the Council. Despite assurances to the contrary, it rejected US proposals of over flights to verify a cease-fire, calling it ‘unacceptable

⁷¹ See Phoebe Okowa, ‘Congo’s War: The Legal Dimension of a Protracted Conflict’ 77 *British Yearbook of International Law* 203 (2006) and ‘Congo’s Rebels and the Responsibility of Non-State Groups in Situations of Armed Conflict’, *Paper*, International Law Association, A More Secure World: Our Shared Responsibility – What is the Role for International Law? University of Sussex, April 20 & 21, 2007. See also M. Shaw, ‘From the Rwandan Genocide of 1994 to the Congo civil war.’ <http://www.sussex.as.uk/Users/hafa3/rwanda.htm>.

⁷² Rene Lemarchand, *The Democratic Republic of Congo: From Collapse to Potential Reconstruction*, *Occasional Paper* (Copenhagen: Centre for African Studies, 2001).

⁷³ International Crisis Group, *Darfur Rising: Sudan New Crisis*, ICG Africa Report N°76, 25 March 2004.

⁷⁴ GA Res. 2131 [1965] on the *Inadmissibility of Intervention*. See also GA Res. 375 [1949] on the *Rights and Duties of States* and the *1970 Friendly Relations Resolution*.

⁷⁵ See SC Res. 1547 (2004), 11 June 2004.

⁷⁶ UNSC 4988th Meeting, S/PV.4988. June 11, 2004, p. 4.

assaults on Sudan's sovereignty.'⁷⁷ As it turned out, the veracity of these statements was confirmed by all Council resolutions on Darfur which reaffirmed 'its commitment to the sovereignty, independence and unity of Sudan,'⁷⁸ 'which would be unaffected by transition to a United Nations operation in Darfur.'⁷⁹

However, it will be recalled that the principle of intervention embodied in article 2 (7) of the UN Charter does not prejudice Council from making a determination of an existence of a threat to peace under article 39, which itself falls within Chapter VII UN Charter.⁸⁰ Hence, although the Council resolutions on Darfur discussed below explicitly guarantee Sudan's sovereignty, they were all passed under Chapter VII authority.⁸¹ This conclusion is supported by evidence from the Council's practice which holds that what amounts to a threat to peace and security has evolved over the years from being strictly interstate to include intra states conflicts.⁸²

Hence the Council made a link between the threat to peace and humanitarian crises and gross human rights violations with respect to African conflicts in Somalia (1992)⁸³ Rwanda (1994),⁸⁴ Central African Republic (1997),⁸⁵ Liberia (1991),⁸⁶ Sierra Leone,⁸⁷ Sudan⁸⁸ and the DRC (2000).⁸⁹ As shown in chapter three, this practice was supported in *Prosecutor v Tadic*, whereby the ICTY observed that there 'there is a common understanding manifested by the subsequent practice of the members of the United Nations at large, that the threat to peace under Art. 39 may include, as one of

⁷⁷ UNSC 5040th meeting, S.PV/5040, September 18, 2004, pp. 2-3.

⁷⁸ See SC Resolutions 1769 (2007), of 31st July 2007; 1706 (2006) of 31 August 2006; 1679 (2006) of 16 May 2006; 1665 (2006) of 29 March 2006; 1663 (2006) of 24 March 2006; 1593 (2005) of 31 March 2005; 1591 (2005) of 29 March 2005; 1590 (2005) of 24 March 2005; 1574 (2004) of 19 November 2004; 1564 (2004) of 18 September 2004 and ; 1556 (2004) of 30 July 2004.

⁷⁹ See SC Res. 1706 (2006), 31 August, 2006.

⁸⁰ See chapter three.

⁸¹ *Ibid.*

⁸² N. D White, *Keeping the Peace. The United Nations and the Maintenance of International Peace and Security* (Manchester: Manchester University Press, 1993) p. 26. On this point, see also chapter three.

⁸³ SC Res. 794 (1992) of 3 December 1992 and SC Res. 746 (1992) of 17 March 1992.

⁸⁴ SC Res. 918 (1994) of May 1994 and SC Res. 955 (1994) of 8 November 1994.

⁸⁵ SC Res. 1125 (1997) of 6 August 1997.

⁸⁶ SC Res. 788 (1992) of 19 November 1992.

⁸⁷ SC Res. /1132 (1997) of October 08 1997.

⁸⁸ SC Res. 1591 (2005) of 29 March 2005.

⁸⁹ SC Res 1304 (2000) of 16 June 2000.

its species, internal armed conflicts.’⁹⁰ Therefore, although it is suggested that a finding of violation of international law is not ‘an indispensable pre-requisite’ for the Security Council to resort to enforcement measures,⁹¹ the application of Chapter VII resolutions on Sudan were accompanied by a determination of a threat to peace caused by human rights violations, which in themselves raised fundamental issues relating to the rules of state responsibility.

1.4 Sudan’s Responsibility as a Member of the UN and AU under International Law: The International Human Rights Context

It will be recalled from the opening chapter that the failure by a state to observe international obligations may give rise to state responsibility, a well established principle of international law.⁹² That Sudan is signatory to various international human rights instruments conveys its acceptance of its human rights obligations.⁹³ In particular, it is a state party to the International Convention on Civil and Political Rights (1966); the International Convention on Economic, Social and Cultural Rights (1966); the Convention on the Rights of the Child (1989); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); and the four Geneva Conventions of 1949. Similarly, it is also party to the African Charter on Human and Peoples’ Rights (1981)⁹⁴ and the Constitutive Act of the AU,⁹⁵ all which seek to uphold human rights and protect individuals from their rights violation.

However, the international human rights laws listed above contain a paradox in their implementation and enforcement. Chapter one showed that the key human rights are declared to be universal, ‘yet state responsibility for their violations is limited by

⁹⁰ *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 2 October 1995, para. 30.

⁹¹ On this point, see Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, (Manchester University Press, 2006), p.8. See also V. Gowlland-Debbas, Security Council Enforcement Action and Issues of State Responsibility’, 43 *ICLQ* (1994) 55, p.63.

⁹² See article 1 of the I.L.C. Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 40, Chap 1. See also A. Cassese, *International Law*, (Oxford: Oxford University Press, 2005), p. 262; H. Lauterpacht, *International Law and Human Rights*, (London: Stevens & Sons Limited, 1950), pp. 40-41; I. Brownlie, ‘*The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, (The Hague, Kluwer, 1998), p. 79. On the international community and its relationship with the law of state responsibility, see Erika de Wet, ‘The International Constitutional Order’, *International and Comparative Law Quarterly*, (2006) 55: 51-76.

⁹³ See articles 18 of the Vienna Convention on the Law of Treaties 1969.

⁹⁴ For a brief mention of the African Charter on Human and People’s Rights, see chapter five.

⁹⁵ On the principles and purposes of the Constitutive Act, see chapters five, six and seven.

territoriality as well as by citizenship.⁹⁶ However, the foregoing chapters also showed that the doctrine of sovereignty has also been interpreted in view of, and combined with, general principles of international law, such as those prohibiting genocide, war crimes and crimes against humanity.⁹⁷ Therefore, the relevant fundamental human rights are not only binding upon the Sudan due to it being a state party to the various international instruments, they are also of ‘peremptory’ nature.⁹⁸ This means that, being norms of *jus cogens*, these rules are ‘accepted and recognised by the international community of States as a whole’ for which no derogation is permitted.⁹⁹ Moreover, ‘in view of the importance of the rights involved, all States can be held to have a legal interest in their protection,’ and hence ‘they are obligations *erga omnes*.’¹⁰⁰

Indeed, article 40 of the Articles of State Responsibility ‘applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law’ and ‘breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil its obligation.’¹⁰¹ However, although the violations in Darfur may attract responsibility on Sudan, these Articles do not in themselves allow for a right to intervene in cases of breach by states, as pointed out in chapter one.¹⁰² Instead, the rules simply create an obligation of cessation¹⁰³ and require the defaulting state to pay

⁹⁶ See Mark Gibney, Katarina Tomaševski & Jens Vedsted-Hansen, ‘Transnational State Responsibility for Violations of Human Rights’, *Harvard Human Rights Journal*, Vol. 12, (1999).

⁹⁷ See chapters one, two, three, five, six and eight. On the limitations of sovereignty point, see generally, PCIJ, Advisory Opinion, *Nationality Decrees Issued in Tunis and Morocco*, 1923, Series B, No. 4, p. 24.

⁹⁸ Article 53 of the 1969 Vienna Convention on the Law of Treaties of 1969. See chapter one.

⁹⁹ *Ibid.*

¹⁰⁰ *Case Concerning Barcelona Traction, Light and Power Co. Ltd., Belgium v. Spain*, ICJ Reports [1970] 3, at 33. See also *Case Concerning East Timor, Portugal v. Australia*, ICJ Reports [1995], at 102; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia*, ICJ Reports [1996] 616.

¹⁰¹ See article 40 (1) and (2) of the Articles of State Responsibility, *supra* note 40. On the law of state responsibility for peremptory norms, see Iain Scobbie, ‘The Invocation of Responsibility for the Breach of ‘Obligations under Peremptory Norms of General International Law’, *EJIL*, Vol. 13, (2002) No. 5; Eric Wylter, From ‘State Crime’ to Responsibility for ‘Serious Breaches of Obligations Under Peremptory Norms of General International Law’ *EJIL*, Vol. 13, (2002) No. 5; Christian J. Tams, Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State? *EJIL*, Vol. 13, (2002) No. 5; Pierre Klein, Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law’, *EJIL*, Vol. 13, (2002) No. 5

¹⁰² See article 41 (1), (2) and (3) of the Articles of State Responsibility, *supra* note 40.

¹⁰³ Articles 29 and 30 (a).

reparations.¹⁰⁴ Nevertheless, the obligations deriving from these duties has led to the assertions of an 'emerging norm' entailing 'a collective responsibility to protect'¹⁰⁵ citizens from genocide, mass killing, and massive and sustained human rights violations,¹⁰⁶ discussed in chapter eight. Therefore, given Sudan's violation of the international human rights and criminal law legislation listed above, the next section looks at the applicability of the international community's responsibility to protect in the Darfur.

1.5 Darfur and the International Community's Responsibility to Protect

Reeling from the failure to prevent and punish the 1994 genocide, it was in the shadow of the Darfur conflict, more than a decade after Rwanda, that the UN *World Summit* in 2005 brought together about 170 governments, including Sudan.¹⁰⁷ The participating states reaffirmed their readiness and willingness to take 'collective action' through the Security Council to protect populations where governments failed to do so.¹⁰⁸ This formulation was subsequently approved by the Security Council in its resolution 1674 on the Protection of Civilians in Armed Conflict in April 2006¹⁰⁹ and reference to the new doctrine was also acknowledged in Council resolutions 1679¹¹⁰ and 1706¹¹¹ on Darfur.

Therefore, the tragedy in Darfur formed the first obvious case for the application of the emerging doctrine of responsibility to protect and a platform from which the legality of the nascent norm could be tested.¹¹² And with the Sudanese government

¹⁰⁴ Articles 31 and 34.

¹⁰⁵ See also Secretary General's report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UNGA Doc A/59/565, para. 203.

¹⁰⁶ See 2005 World Summit, Sept 11-16, 2005, 2005 *World Summit Outcome*, 138, U.N. Doc. A/60/L.1. (Sept 20, 2005) See also Secretary General's report, *In Larger Freedom*, *ibid*.

¹⁰⁷ See chapter eight.

¹⁰⁸ 2005 World Summit, Sept. 14-16, 2005, 2005 *World Summit Outcome*, para 138&139, *supra* note 104. See chapter eight.

¹⁰⁹ SC Res 1674 (2006), 28 April 2006.

¹¹⁰ SC Res 1679 (2006), 16 May 2006.

¹¹¹ SC Res 1706 (2006), 31 August 2006.

¹¹² Alex de Waal, 'Darfur and the failure of the responsibility to protect', *International Affairs*, Volume 83, Number 6, (November 2007), pp. 1039-1054(16); Thomas G. Weiss 'The Sunset of Humanitarian Intervention? The Responsibility To Protect in a Unipolar Era', *Security Dialogue* 35(2) (2004), 135-154; N Grono, 'Briefing-Darfur: The international community's failure to protect', *supra* note 69; Hugo Slim (2004) 'Dithering over Darfur?', *supra* note 2; Alex J. Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq', *Ethics & International Affairs*, Volume 19, Issue 2, Page 31-54, (2005); Alex J. Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', *Ethics & International Affairs*,

not only clearly failing in its responsibility but also committing atrocities against its own citizens, the obligation to protect automatically flowed to the international community.¹¹³ Therefore, as hoped, on 30 July 2004, acting under Chapter VII of the UN Charter, the Council determined by way of resolution 1556 that the humanitarian crisis in Darfur posed ‘a threat to international peace and security.’¹¹⁴

This resolution was significant given that it was the first comprehensive resolution on Darfur, a year after the outbreak of hostilities. Also for the first time, Council members referred to the responsibility to protect during their deliberations on the conflict. However, although the text of the resolution did not explicitly refer to the doctrine, the Council placed the responsibility to respect the human rights of the suffering Darfur civilians firmly on the Sudanese government. Yet, it was difficult to see how the Darfuris could be protected from crimes that were committed against them primarily by their own government and its allied militias. Therefore, while it was generally agreed that the governments bore the primary responsibility to protect their citizens, questions emerged with regard to the situation where a regime commits or actively condones atrocities against its own population.

Specific difficulty also arose with regard to precisely how Sudan’s failure to protect would be acted upon by the international community. According to the UN’ special representative for Sudan, Jan Pronk, ‘If you cannot do it [protect your population] then you have to ask [for]international support. It’s an obligation.’¹¹⁵ On the other hand, speaking shortly after the Council passed resolution 1556, the ambassador to Philippines stated that the failure of a state to protect its people meant that ‘the international community has the responsibility to help that state reach such capacity and such will and, in extreme necessity, to assume such responsibility itself.’¹¹⁶

Volume 20, Issue 2, Page 143-16, (2006); Roberto Belloni, ‘The Tragedy of Darfur and the Limits of the ‘Responsibility to Protect,’ *Ethnopolitics*, Vol. 5, No. 4, (2006) , pp. 327 – 346;

¹¹³ See chapter eight.

¹¹⁴ See SC Res. 1556 (2004) of 30 July 2004.

¹¹⁵ See ‘Sudan obliged to ask for help in Darfur - UN envoy’, *Reuters* [Khartoum], September 23, 2004.

¹¹⁶ See also International Commission on Intervention and State Sovereignty, *The responsibility to protect*, (Ottawa: International Development Research Centre, 2001), p. VII.

Surprisingly, it also became relatively unclear as to who exactly, within the international community, bore the primary responsibility when Sudan failed to fulfil its duty. On this point, the UK representative ‘underlined the Council’s commitment to ensure that governments fulfil that most basic of obligations, the duty to protect their own citizens.’¹¹⁷ However, the language in this statement failed to suggest that ‘the responsibility ought to pass from the Sudanese government to the Security Council.’¹¹⁸ As it turned out during the Council deliberations, in July 2004, the United States, the UK, Germany, Chile, and Spain pointed to the AU as bearing primary responsibility should the government of Sudan continue to fail.¹¹⁹

However, this position stood in sharp contrast to the doctrine as envisaged at the *2005 World Summit*. It will be recalled that in such circumstances, a clear preference was placed on the Council acquiring the responsibility to protect and little was said on the role that regional organisations were to play in this area.¹²⁰ Furthermore, by placing the burden on the AU, these states went against the AU’s own conditionality when it signed up to the emerging doctrine. Indeed it will be recalled from the previous chapter that the AU affirmed that the concept ‘should not undermine the responsibility of the international community to protect.’¹²¹

As shown further below, despite ‘expressing its determination to do everything possible to halt a humanitarian catastrophe,’¹²² the Council’s pitiful response were its first signs of failure to halt the horror that would continue to unfold on Darfur. Significantly, its practice in this instance not only confirmed the serious doubts that arose relating to whether the doctrine emanated from a legal rule, it also strongly suggested that the responsibility to protect remained merely a moral one. The frustration at the continued ambivalence towards the conflict in Darfur was evident in the words of Kofi Annan, in regard to the world’s responsibility to protect;

¹¹⁷ See Security Council 5015th Meeting (AM), UN Press Release SC/8160, 30/07/04.

¹¹⁸ Alex J. Bellamy (2005), ‘Responsibility to Protect or Trojan Horse,’ *supra* note 112.

¹¹⁹ UNSC 5015th meeting, S/PV.5015, July 30, 2004, pp.10-12.

¹²⁰ See chapter eight.

¹²¹ African Union Executive Council, *The Common African Position on the Proposed Reform of the United Nations*, ext/EX.CL/2(VII), Addis Ababa, March 7–8, 2005, section B(i).

¹²² SC Res. 1556 (2004), 30 July 2004.

To judge by what is happening in Darfur, our performance has not improved much since the disasters of Bosnia and Rwanda. Sixty years after the liberation of the Nazi death camps, and 30 years after the Cambodian killing fields, the promise of 'never again' is ringing hollow.¹²³

In the wider context, even the states which endorsed the concept of sovereignty as responsibility showed little inclination to protect the Darfur civilians suffering at the hands of the Sudanese government,¹²⁴ despite the leeway to act described in chapter eight.¹²⁵ And although the US and the UK remained a sole voice in calling for a more decisive action, their belated humanitarian justifications in the Iraq invasion (2003) had 'almost choked at birth, what many were hoping was an emerging new norm justifying intervention on the basis of the principle of 'responsibility to protect.'¹²⁶

Most surprisingly, Canada, the principal architect and advocate of doctrine remained quiet on the matter. Meanwhile in March 2007, the Human Rights Council concluded that the situation of human rights in Darfur remained 'grave.'¹²⁷ Noting that Sudan had manifestly failed in its responsibility to protect its citizens, and that the government had in fact orchestrated crimes on its own population, it further called on the international community to take up the solemn obligation to protect which had become 'evident and urgent.'¹²⁸

2.1 The Darfur Conflict Reaches the United Nations: UN Security Council Measures on the Crisis

In spite of its escalation in February 2003, it was not until 11 June 2004, subsequent to symbolic trips by Kofi Annan and Colin Powell to Sudan, that the first Security Council resolution (1547) mentioning Darfur was passed.¹²⁹ However, this resolution did not specifically deal with Darfur conflict. Instead, it concerned itself with the peace process between the Sudanese government and the SPLM/A, in order to end the

¹²³ See the Secretary General Address to Mark the International Human Rights Day, New York City, 8 December 2006.

¹²⁴ See Paul D. Williams & Alex J. Bellamy, 'The Responsibility To Protect and the Crisis in Darfur,' *supra* note 53.

¹²⁵ See Alicia L. Bannon 'The responsibility to Protect: The U.N. World summit and the Question of Unilateralism' *Yale LawJournal*, 1157 (2006).

¹²⁶ Gareth Evans, 'When is it Right to Fight?' *Survival* 46, no. 3 (2004), p. 41.

¹²⁷ See *Human Rights Council's Report on Darfur*, *supra* note 32.

¹²⁸ *Ibid.*

¹²⁹ However note that on 26th May 2004, in a Presidential statement, the Security Council expressed 'its grave concern over the deteriorating humanitarian and human rights situation in the Darfur regions.' See statement of the President of the Security Council, UN Doc S/PRST/2004/18, 26th May 2004.

two decades-old civil war in Southern Sudan, described earlier. Nevertheless, the resolution called ‘upon the parties to use their influence to bring an immediate halt to the fighting in the Darfur region.’¹³⁰

As mentioned above, the first comprehensive resolution concerning the situation in Darfur was passed on 30 July 2004 when the Council adopted resolution 1556.¹³¹ And even during this time, the conflict brought about divisive debates in the Council, in similar fashion to Rwanda and many other African conflicts. As will be shown below, the disagreements centred on the differences between the permanent members where on one hand, China and Russia put a high emphasis on the concept of sovereignty while on the other, the US and UK insisted on the primacy of human rights over the notion of sovereignty. However, acting under Chapter VII of the UN Charter, these states agreed that the situation in Sudan constituted ‘a threat to international peace and security and stability in the region.’¹³² In doing so, this resolution meant that Sudan’s absolute sovereignty was no longer of much relevance in any subsequent action taken by the Council, as stated earlier.

Furthermore, the resolution condemned ‘all acts of violence and violations of human rights and international humanitarian law committed by all parties to the crisis, in particular by the *Janjaweed* militia.’¹³³ Amongst other things, resolution 1556 imposed an arms embargo on the region of Darfur, supported the deployment of the AU Protection Force and gave the Sudanese government 30 days to disarm the *janjaweed*.¹³⁴ In addition, the resolution also expressed the determination of the Council ‘to do everything possible to halt a humanitarian catastrophe, including by taking further action if required.’¹³⁵ However, confusion arose as to what these terms meant because the wording of resolution 1556 was changed during the negotiation phase from explicitly referring to sanctions to the broader notion of ‘measures as provided for in Article 41’ of the UN Charter.¹³⁶

¹³⁰ See SC Res. 1547 (2004), 11 June 2004.

¹³¹ SC Res. 1556 (2004), 30 July 2004.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.* See also SC Res. 1564 (2004), 18 September 2004; SC. Res 1574 (2004), 19 November 2004; SC Res. 1591 (2005), 29 March 2005 which directed the Sudanese government to disarm the *janjaweed* militia.

¹³⁵ SC Res. 1556 (2004), 30 July 2004.

¹³⁶ *Ibid.*

Nevertheless, the call by the Council was made despite the fact that the Sudanese government lacked the capability and/or political will to quickly disarm the *janjaweed* by force, as they persistently breached their undertaking, including the one contained in the Darfur Peace Agreement.¹³⁷ And although resolution 1556 ensured the continued monitoring of the conflict, it was subject to much criticism as it had ‘failed to adopt measures that are urgent and essential to address the appalling human rights situation’ and represented ‘the abandonment of the people of Darfur and an abdication of the Council’s role as a human rights enforcing agent.’¹³⁸ Its failure to take more decisive action was attributed to the negotiations behind the scenes which represented a mixture of past practices, including that in Rwanda when secret meetings were held as the genocide took place.¹³⁹ As the next section shows, the actions of key members of the Council were more readily justifiable on grounds of national interests, as opposed to furthering the restoration of peace and security in Darfur.

2.2 The Practice of the Permanent Members in the Council: History Repeats Itself

It has already been demonstrated how the veto power possessed by permanent members of the Council has further reinforced their seemingly unfettered discretion in pursuit of their national interests, often to the detriment of peace and security, including during grave circumstances.¹⁴⁰ For a start, a tragic irony was identified relating to the US reaction to Darfur when compared to its response to Rwanda a decade earlier.¹⁴¹ Although the US now termed the tragedy in Darfur as genocide, it will be recalled from chapter five:

¹³⁷ See also N’Djamena ceasefire agreement of 8 April 2004; the N’Djamena agreement of 25 April 2004; the 3 July 2004 communiqué signed with the UN; the 5 August 2004 Plan of Action signed with the UN; and the 9 November 2004 Protocol on Security Arrangements signed at the AU-led Abuja talks, as well as the 2004 ceasefire of 19 December signed with the National Movement for Reform and Development (NMRD).

¹³⁸ See Amnesty International available at <http://news.amnesty.org/index/engaf540922004>. Also see David Aaronovitch, ‘Into Africa,’ *The Observer*, 1 August 2004.

¹³⁹ See Linda Melvern, ‘The Security Council: Behind the Scenes’, *International Affairs*, Vol. 77, No. 1, 2001, pp. 101-112(12) Linda Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide* (London; Zed Books, 2000). See also chapters five and eight.

¹⁴⁰ See chapters three and eight.

¹⁴¹ Heinze, Eric A. ‘The Rhetoric of Genocide in U.S. Foreign Policy: Rwanda and Darfur Compared.’ *Political Science Quarterly* 122, no. 3 (Fall, 2007): 359. See also chapters five and eight.

...the administration did everything it could to avoid calling Rwanda a genocide-engaging in all sorts of semantics to avoid making that judgement, fearing that it would have to take far stronger action than it was prepared to. This time around, there has been little hesitation in labeling Darfur a genocide, in light of a far more ambiguous evidence—apparently for the cynical grounds that doing so did not impose any commensurate obligation to intervene.¹⁴²

However, having concluded that ‘genocide has been committed in Darfur and that the government of Sudan and the *Janjaweed* bear responsibility,’¹⁴³ the US passed the Darfur Peace and Accountability Act,¹⁴⁴ which restated its position and called for further action. Behind the scenes, US oil firms repeatedly emphasized the potential significance of Sudan’s oil fields for the US economy.¹⁴⁵ In the meantime, other permanent members rejected the imposition of sanctions on their ally; the Khartoum government, and moved to protect their own political and economic interests.¹⁴⁶

Although Russia and China had largely been uninterested in the Rwandan genocide, this situation would change significantly in the case of Darfur.¹⁴⁷ In particular, China’s reliance on Sudanese oil¹⁴⁸ and Russia’s supply of weapons to the government¹⁴⁹ were said to now influence the actions of these states within the

¹⁴² Nick Grono, ‘Darfur’, *supra* note 69; See also Paul D. Williams, ‘The Responsibility to Protect and the Darfur Crisis’, *Security Dialogue*, *supra* note 53.

¹⁴³ The US Secretary of State Colin L. Powell, ‘Testimony Before the Senate Foreign Relations Committee’, *supra* note 7. See also, ‘Powell declares genocide in Sudan’, *supra* note 7.

¹⁴⁴ Darfur Peace and Accountability Act 2006, (H.R. 3127/S. 1462).

¹⁴⁵ Paul D. Williams, ‘The Responsibility to Protect and the Darfur Crisis’, *supra* note 53.

¹⁴⁶ Nick Grono, ‘Darfur,’ *supra* note 69. See also Scott Peterson, ‘Sudan’s Key Ties at the UN’, *Christian Science Monitor*, August 31, 2004, p 5; Human Rights Watch, ‘The United Nations and Darfur’, at <http://www.hrw.org/wr2k5/darfur/3.htm>; Jeremy L. Levitt, ‘The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan’, in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force: Theory and Reality - A Need for Change?* (Martin Nijhoff, 2005), pp. 213-251; Thalif Deen, ‘Oil, arms stymie United Nations effects on Sudan’, *Inter Press Service* (Johannesburg), 5 November 2004.

¹⁴⁷ Gerald Caplan, ‘From Rwanda to Darfur: Lessons Learned?’, *Pambazuka*, 12 January, 2006.

¹⁴⁸ See Human Rights Watch, *Sudan Oil and Human Rights, Brussels*, (London, New York, Washington, DC, 2003); Opheera McDoom, ‘China’s Interests in Sudan Bring Diplomatic Cover’, *Reuters*, 17 December, 2005; Peter S. Goodman, ‘China Invests Heavily In Sudan’s Oil Industry: Beijing Supplies Arms Used on Villagers’, *The Washington Post*, 23 December, 2004; Page A01; Ian Taylor, ‘China’s oil diplomacy in Africa’, *International Affairs*, Volume 82, Issue 5, Page 937-95, (2006).

¹⁴⁹ See Lionel Martin, ‘In Sudan Russia Chooses Money Over Humanitarianism’, *Eurasia Daily Monitor* Volume 1, Issue 60 (July 27, 2004). See also ‘Sudan and Russia Forging New Ties Around Oil and Arms’, *Stratfor*, 22 January, 2002.

Council deliberations.¹⁵⁰ Furthermore, their position against intervention was said to be tied to the potential precedent it would set given their domestic issues with regard to Chechnya¹⁵¹ and Tibet¹⁵² respectively. Meanwhile, France on its part initially opposed sanctions on the basis they would 'push [the Sudanese] back to their misdeeds of old.'¹⁵³ Although its policy on Darfur remained relatively unclear, its dispute of the US allegation of genocide in Darfur led to suggestions that it merely sought to check American power, as it had done in Iraq (2003).¹⁵⁴ In addition, it was also put forward that the French sought to protect their vast oil interests in Sudan.¹⁵⁵

It is worth noting that a decade earlier, the UK had sponsored the resolution at the Council to withdraw the small UN peace force in Rwanda in 1994.¹⁵⁶ However, on a positive note, it now shed its past image, described in the previous chapter, and amongst others, co-sponsored and voted in favour of Resolution 1706 that envisaged a robust AU/UN force in Darfur.¹⁵⁷ It also embarked on incentives that would entice Sudan to comply with its obligations, such as dealing with some of its debt, ending the suspension of some development aid and lifting sanctions.¹⁵⁸ Furthermore, in apparent acknowledgement of the politics and inaction of the Council, in July 2007, the UK representative reminded its members that the 'catastrophe of Darfur will not be ended by the raising of 15 hands in this Chamber. The suffering will not be ended by our vote. But today's decision and the actions that flow from it offer the prospect of a new start for Darfur.'¹⁵⁹

¹⁵⁰ Jeremy L. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 146.

¹⁵¹ Paul D. Williams, 'The Responsibility to Protect and the Crisis in Darfur,' *supra* note 53. On Russia's stance on Chechnya, see Tony Wood, *Chechnya: The Case for Independence*, (London-New York: Verso, 2007).

¹⁵² Matthew E. Chen, 'Chinese National Oil Companies and Human Rights', *Orbis*, Vol. 51, No. 1, 2007, pp. 41-54; Nick Grono, 'Darfur,' *supra* note 67.

¹⁵³ See 'France opposes UN Sudan sanctions', *BBC News*, International Version, 8 July, 2004.

¹⁵⁴ Shurkin, Michael, *France and the Darfur Crisis* (Washington, DC: Brookings Institution Center on the United States and Europe, 2005). On this point, see *MJ Glennon*, 'Why the Security Council Failed', *Foreign Affairs*, (May/June 2003).

¹⁵⁵ Shurkin, Michael. *France and the Darfur Crisis*, *ibid.*

¹⁵⁶ See SC Res.912 (1994), 21 April 1994.

¹⁵⁷ See SC Res. 1706, (2006), 31 August 2006. See Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 37; Ademola Abass, 'The United Nations, the African Union and Darfur Crisis: Of Apology and Utopia', *Netherlands International Law Review*; vol. 54, afl. 3, (2007) pp. 415-440.

¹⁵⁸ See 'Pressure mounts for Sudan to allow African Union to stay on', *IRIN News*, 19 September, 2006.

¹⁵⁹ Sir Emyr Jones Parry, UK Representative to the Security Council, S/PV.5227, 31 July 2007.

Meanwhile, non-permanent states, as such Pakistan, joined China in abstaining on resolution 1556 and expressed its concern that the resolution went too far in threatening economic and diplomatic sanctions and rejected the need for 'mandatory measures' against Sudan.¹⁶⁰ Similarly, certain states forming the Arab League, of which Sudan is a member, issued statements expressing their strong opposition to the imposition of sanctions under any circumstances. In their view, sanctions 'would only result in negative effects for the whole Sudanese people and complicate the crisis in Darfur.'¹⁶¹

2.3 Shifting Alignments and Distribution of Peace and Security Functions in Darfur

By the time that the Security Council convened in September 2004 during its historic meeting in Kenya,¹⁶² it had toned down the possibility of sanctions on the government of Sudan and instead, adopted resolution 1564.¹⁶³ Here, the Council, while expressing concern over Sudan's failure to meet its obligations and the violation of cease-fire agreements, as well as militia attacks on civilians, requested the Secretary General to rapidly establish an international commission of inquiry in order to immediately establish human rights violations and to determine also whether the acts of genocide had occurred.¹⁶⁴

In November, the Council later unanimously passed resolution 1574¹⁶⁵ declaring its strong support for the efforts of the government of Sudan and the SPLM/A to reach a Comprehensive Peace Agreement.¹⁶⁶ This resolution seemed to be a complete turnaround given its previous threats to take further action. The lack of more robust action by the Council led to accusations that its role had been largely limited to

¹⁶⁰ See UNSC 5015th Meeting, S/PV.5015, July 30, 2004, p.10.

¹⁶¹ Quoted in Amil Khan and Mohamed Abdella, 'Arab League Rejects Sudan's Embargo', *Reuters*, August 9, 2004.

¹⁶² The UN is headquartered in New York but reconvened outside its premises for the first time in 14 years and just the fourth time in half a century in its meeting in Kenya. See UN News Centre, 'Sudan Government and southern rebels sign peace pledge before Security Council', 19 November 2004.

¹⁶³ SC Res. 1564 (2004), 18 September 2004.

¹⁶⁴ SC Res. 1574 (2004), 19 November 2004.

¹⁶⁵ *Ibid.*

¹⁶⁶ See Memorandum of understanding signed in Nairobi on 19 November 2004 entitled 'Declaration on the conclusion of IGAD negotiations on peace in the Sudan.'

entreaties, investigations, veiled threats, and support for an AU force.¹⁶⁷ Furthermore, the Council was criticised for seeking to place most of the burden of carrying out the goals contained in resolutions, such as in 1556 and 1564, on the shoulders of the AU.¹⁶⁸

Measured against this background, it was not surprising then that the security situation deteriorated soon after resolution 1564 was passed. During this time, Jan Pronk informed the Council of ceasefire breaches by all parties and *janjaweed* militia attacks on civilians.¹⁶⁹ On his part, the Secretary General in his monthly report¹⁷⁰ advised that the 'Council may wish to consider creative and prompt action,' in order to compel Sudan to adhere to its demands.¹⁷¹ Meanwhile, in response to previous warnings by the Council, in July 2006, a senior Sudanese official is quoted as saying

¹⁶⁷ Michael Clough, *Darfur: Whose Responsibility to Protect?* January 2005. Available at <http://www.hrw.org/wr2k5/darfur/1.htm>

¹⁶⁸ *Ibid.*

¹⁶⁹ See 'Press Statement by the Special representative of the Chairperson of the African Union Commission, on the Deteriorating Security Situation in Darfur, Khartoum, 1 October 2005. See also *Report of the Secretary-General on the Sudan pursuant to paragraph 15 of Security Council resolution 1564 (2004) and paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004)* UN Doc. S/2004/947; Human Rights Watch, 'Darfur: Donors Must Address Atrocities Fuelling the Crisis' *Human Rights News*, New York, September 2004.

¹⁷⁰ Other reports of the Secretary General regarding the situation in Darfur include *the Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004)*, 4 October 2004, UN Doc. S/2004/787; *Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004)*, 2 November 2004, UN Doc. S/2004/881; *Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and paragraph 17 of Security Council Resolution 1574 (2004)*, 3 December 2004, UN Doc. S/2004/947; *Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004)*, 7 January 2005, UN Doc. S/2005/10; *Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004)*, 4 February 2005, UN Doc. S/2005/68; *Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004)*, 4 March 2005, UN Doc. S/2005/140; *Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004)* 12 April 2005, UN Doc. S/2005/240.

¹⁷¹ *Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004)*, *ibid.*, paras. 5 and 16.

that 'the United Nations Security Council has threatened us so many times, we no longer take it seriously.'¹⁷²

However, the Council began to take a more active approach as was evident in the month of March 2005 where it passed three resolutions on Darfur. In its resolution 1590 (2005),¹⁷³ it requested that the UN Mission in Sudan (UNMIS), which had been mandated by the UN to monitor and support the implementation of the CPA in Sudan,¹⁷⁴ coordinate with the AU Mission in Sudan (AMIS), observe the cease-fire agreements, protect civilians and to use force if necessary.¹⁷⁵ In addition, although abstained on by China and Russia, the Council passed resolution 1591¹⁷⁶ which, *inter-alia* imposed smart sanctions in the form of a travel ban on suspected war criminals.¹⁷⁷

However, given the US opposition to the ICC,¹⁷⁸ what surprised many was the passing of resolution 1593.¹⁷⁹ This resolution referred the situation in Darfur to the Prosecutor of the ICC, a move that was met with stiff opposition from the Sudanese government.¹⁸⁰ However, threatened by a US veto, the resolution was passed on

¹⁷² John Prendergast, 'A dying Deal in Darfur' *Boston Globe*, 13 July 2006.

¹⁷³ See SC Res. 1590 (2005), 24 March 2005.

¹⁷⁴ See SC Res. 1547 (2004), 11 June 2004.

¹⁷⁵ On this resolution 1590, see Ademola Abass, 'The United Nations, the African Union and Darfur Crisis,' *supra* note 157.

¹⁷⁶ SC Res 1591 (2005) of 29 March 2005.

¹⁷⁷ On smart sanctions, see Matthew Craven, 'Humanitarianism and the Quest for Smarter Sanctions', 13 *EUR. J. INT'L L.* 43 (2002); Mariano Aznar-Gómez, 'A Decade of Human Rights Protection by the UN Security Council: A Sketch of Deregulation?', 13 *EUR. J. INT'L L.* 223 (2002); Gary Hufbauer & Barbara Oegg, 'Targeted Sanction: A Policy Alternative?' 32 *L. & POL.* 11 (2000).

¹⁷⁸ For literature on the US and the ICC, see John R. Bolton, 'Courting Danger: What's Wrong With the International Criminal Court,' *The National Interest*, (Winter 1998/1999), 54, pp. 60; Bartram S. Brown, 'US Objections to the Statute of the International Criminal Court: A Brief Response,' 31 *NYU Journal of International Law and Politics*, 855 (1998-1999); Bartram Brown, 'Unilateralism, Multilateralism, and the International Criminal Court,' *Multilateralism and US Foreign Policy*, pp. 333; Robert C. Johansen, 'The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity', *Human Rights Quarterly*, vol. 28, no. 2, (May 2006), pp. 301-331; Henry T. King and Theodore C. Theofrastous, 'From Nuremberg to Rome: A Step Backward for US Foreign Policy,' *Case Western Reserve Journal of International Law*; (Winter 1999); 31, 1; pp. 47; William K. Lietzau, 'The United States and the International Criminal Court: Concerns from a US Military Perspective,' 64 *Law and Contemporary Problems* 119, Winter 2001; Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court: National Security and International Law*, (Lanham, MD: Rowman & Littlefield Publishers, August 2000). Ruth Wedgwood, 'Fiddling in Rome: America and the International Criminal Court', *Foreign Affairs*, vol. 77, no. 6, (November/December 1998) p. 20. Marten Zwanenburg, 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?', *EJIL*, Vol. 10, (1999), pp. 124-143.

¹⁷⁹ See SC Res. 1593 (2005) of 31 March, 2005.

¹⁸⁰ On Sudan and the ICC, see Robert Cryer, 'Sudan, Resolution 1593 and International Criminal Justice', *Leiden Journal of International Law* 19 (2006) 1, 195-222. See also David Mozerky,

condition that that it gave blanket immunity to designated personnel from prosecution.¹⁸¹ The immunity would cover alleged acts or omissions arising out of, or related to 'operations in Sudan established or authorized by the Council or the African Union.'¹⁸² In passing this resolution, the Council was leaving open the possibility that the AU could authorise such operations. However, by this time and amidst the world's failure to protect Darfuris, the AU had already begun to pick up the pieces left behind by a deficient UN system.

2.4 The AU's Leadership Role and Cooperation with the UN in Darfur: A Shift towards a Decentralised Regional Peace and Security?

The AU's role in Darfur formed a platform by which its purported transformation from the OAU could be tested. In line with the shift from non-intervention to that of non-indifference, the AU began issuing Communiqués in April 2004 expressing 'its concern and preoccupation over the grave humanitarian situation in the Darfur region' and decided to 'remain actively seized with the problem in Darfur.'¹⁸³ Although its action came a year into the conflict, the sudden upsurge in the violence led the Chair person of the AU Commission¹⁸⁴ to dispatch an AU assessment mission to Darfur in May 2004 to assess the security situation and advise him on the establishment of a Ceasefire Commission (CFC). As mentioned earlier, this occurred amidst significant doubts as to who, between the UN and the AU, bore subsidiary responsibility to protect the people of Darfur in lieu of Sudan's abdication of its primary responsibility in the province.

'Accountability in Darfur', *Institute for War and Peace Reporting*, 27 February 2007; 'Darfur: International Criminal Court Prosecutions Welcomed, Those Responsible Warned', *Crisis Group Media Release*, 27 February 2007; Nick Grono and David Mozersky, 'Sudan and the ICC: A Question of Accountability' *Open Democracy*, 31 January 2007; Gareth Evans, 'Genocide or crime? Actions speak louder than words in Darfur', *European Voice*, 18 February 2005.

¹⁸¹ For discussion on the question of immunity and the relationship between the Security Council and the ICC, see Neha Jain, 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court', 16 *EJIL*, (2005), 239. See also Robert Crier and Nigel D. White, 'The Security Council and the International Criminal Court: Who is feeling Threatened?' (2002) 8 *Yearbook of International Peacekeeping* 141 and Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)', (2003) 14 *EJIL* 85.

¹⁸² See SC Res. 1593 (2005) of 31 March, 2005. (Emphasis added).

¹⁸³ See Communiqué: Peace and Security Council, Fifth Session, PSC/PR/Comm. (V), 13 April, 2004, Addis Ababa, Ethiopia.

¹⁸⁴ On the role of the AU Chairperson, see chapter six.

Notwithstanding the Security Council's primary responsibility for the maintenance of peace and security,¹⁸⁵ the AU took it upon itself to take the lead role in Darfur and merely requested the UN and the wider international community to support the CFC to 'ensure the scrupulous compliance' of the cease-fire agreements.¹⁸⁶ In particular, in August 2004, the AU PSC reiterated the 'need for the AU to continue to lead the efforts' aimed at solving the Darfur conflict and only listed the UN as one amongst other organizations, including the EU, the League of Arab States and the bilateral Partners that had given assistance.¹⁸⁷

Similarly, in July 2004, African Heads of State and governments had declared that 'the African union should continue to lead [...] efforts to address the crisis in Darfur and that the international community should continue to support this effort.'¹⁸⁸ During this period, whilst the UN Charter vests its Council with primary responsibility for peace and security, the Council relegated itself to playing an assistance role. The Secretary-General seemed to acknowledge this character in his report to the Council under the heading of 'Assistance to the African Union Mission in Darfur.'¹⁸⁹ In yet another report, Kofi Annan noted that the 'AU was now firmly in the driving seat on the Darfur peace process.'¹⁹⁰

More significantly, the Council was itself more explicit. In its resolution 1556 (2004),¹⁹¹ the Council welcomed 'the leadership role and the engagement of the African Union to address the situation in Darfur and express[ed] its readiness to support fully those efforts.' The Council also endorsed the deployment of monitors and the protection forces of AMIS while expressing 'its full support for the African Union-led ceasefire commission.'¹⁹² Furthermore, resolution (1564) expressed its

¹⁸⁵ See chapters three and four.

¹⁸⁶ See the 5th Session of African Union Peace and Security Council, "Communiqué", 13 April 2004, PSC/PR/Comm (V).

¹⁸⁷ African Union Peace and Security Council, 'Communiqué', 9 August 2004, PSC/PR/Comm.(XIV), para. 5. Emphasis in the original.

¹⁸⁸ Assembly of the African Union 'Decision on Darfur', Third Ordinary Session, 6-8 July 2004 Assembly/AU/Dec.54 (III). available at <http://www.africa-union.org>

¹⁸⁹ Report of the Secretary-General of 30 August 2004, on the Sudan (2004), UN Doc. S/2004/703, 30 August 2004, para. 54.

¹⁹⁰ Report of the Secretary-General on the Sudan, UN Doc. S/2004/787, 4 October 2004, paras. 56 and 47-52. See also Report of the Secretary-General on the Sudan, S/2004/881, 2 November 2004, para. 60

¹⁹¹ SC Res. 1556 (2004), 30 July 2004, preamble and paras. 1, 3, and 16.

¹⁹² *Ibid*

support for 'the efforts of the African Union aimed at a peaceful conclusion of the crisis and the protection of the welfare of the people of Darfur.'¹⁹³

Certainly, the emerging development of practice by the AU and the UN in Darfur became of noteworthy significance in the evolution of collective peace and security. However, as was shown in the foregoing chapters,¹⁹⁴ the possibility of a regional organisation taking the lead in regional peace and security had been envisaged much earlier. Indeed, in allowing the AU to take the leading role, the UN policy was in line with the *Agenda for Peace* which, in 1992 had stated that:

And should the Security Council choose specifically to authorize a regional arrangement or organization to take the lead in addressing a crisis within its region, it could serve to lend the weight of the United Nations to the validity of the regional effort.¹⁹⁵

This document placed emphasis on the idea that regional arrangements could 'render great service' and that they also 'possess a potential that should be utilized in serving the functions' of the UN.¹⁹⁶ Significantly, '[r]egional organizations participating in complementary efforts with the United Nations in joint undertakings would encourage States outside the region to act supportively.'¹⁹⁷ The approach found support during, *inter alia*, Council debates such as that on resolution 1556 where Romania stated that the international response 'shows that cooperation between the United Nations and regional organisations is now bolder and more innovative and less impaired by artificial lines of separation.'¹⁹⁸ Similarly, Algeria stated that the actions of the Council should 'compliment and support the efforts of the African Union.'¹⁹⁹ Moreover, this advancement of peace and security also found favour with various UN resolutions and key reports.²⁰⁰

¹⁹³ SC Res 1564 (2004) 18 September 2005 para. 3.

¹⁹⁴ See chapters four, six, seven and eight.

¹⁹⁵ See *An Agenda for Peace*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 - S/24111, 17 June 1992, para. 65.

¹⁹⁶ *Ibid* at para 64.

¹⁹⁷ *Ibid* at para 65.

¹⁹⁸ UN doc. S/PV.5015, 30 July 2004, 6.

¹⁹⁹ *Ibid*.

²⁰⁰ UN General Assembly and Security Council, *Report on the Panel on United Nations Peace Operations*, UN Doc. A/55/505-S/2000/809, 21 August 2000; *Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN doc.

Indeed, as shown further below, the evolving relationship between the AU and the UN demonstrates the importance of defining the nature of collaborative partnerships in distributing responsibilities in peace and security between the UN and regional organisations under Chapter VIII of the UN Charter, as explained earlier in the thesis.²⁰¹ Such formal arrangements may allocate regional organisations robust roles and at the same time ensure that the Security Council acts, as opposed to abrogating, on its primary responsibility for peace and security. This point is of singular importance, particularly given that allowing the AU to take the sole lead with little coherence with the UN in Darfur had dire consequences as shown in the next section. Meanwhile, despite the AU Assembly's expression of the need to address the crisis 'with utmost urgency to avoid further escalation,'²⁰² its approach to the conflict reawakened past memories.

2.5 The AU Assembly and the Test of Leadership: Old Wine in a New Bottle?

It was mentioned in chapter five that despite the renewed commitment to peace and security, serious questions arose as to whether the AU's constitutive framework was an old wine in new wineskin and, in particular, if the AU amounted to a reincarnation of the former OAU.²⁰³ This concern clearly manifested itself amidst the violence in Darfur when African leaders converged in Khartoum, Sudan in January 2006 on the occasion of the sixth summit of the AU. For a start, the very holding of the meeting itself seemed to contradict the Rules of Procedure of the Assembly of the Union, which stipulate that a member state 'offering to host the Assembly shall not be under sanctions' and must provide 'adequate logistical facilities and a conducive political

A/59/565, 29 November 2004; Kofi Annan, *In Larger Freedom*, *supra* note 105 and the *World Summit Outcome Document*, *supra* note 106.

²⁰¹ See mainly chapters four, six, seven and eight.

²⁰² Assembly of the African Union 'Decision on Darfur', Third Ordinary Session, 6-8 July 2004 Assembly/AU/Dec.54 (III). available at <http://www.africa-union.org>

²⁰³ Ademola Abass, 'The United Nations, the African Union and Darfur Crisis,' *supra* note 157. N.J. Udombana, 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights', Vol. 17 *American University International Law Review*, (2002) p.1177. See also Adekeye Adebajo, 'The Curse of Berlin: Africa's Security Dilemmas', *IPG* 4/2005.p 85; Adejo, Dr. Armstrong Matiu 'From OAU to AU: New Wine in Old Bottle?' *Paper* prepared for presentation at the 10th CODESRIA General Assembly, Nile International Conference Centre, Kampala, December 8-12, 2002; Cameron Duodu, 'Give Unity a Chance', *News Africa Magazine*, July 29, 2002, pp.20-21; Jakke Cilliers, 'Towards the African Union', *African Security Review*, vol.10, No.2, (2001), p.106; Tim Murithi, 'Institutionalising Pan-Africanism: Transforming African Union Values and Principles into Policy and Practice', *ISS Paper* 143, (June 2007).

atmosphere.’²⁰⁴ However, as mentioned above, the targeted sanctions imposed on Sudanese individuals were by the UN and not the AU and some believed the summit could be a positive step towards ending the tragedy in Darfur.

What was more controversial was Sudan’s communication to the AU of its intention to assume the Chair of the AU Assembly²⁰⁵ on three occasions, first in 2005, in 2006 and again in 2007.²⁰⁶ However, with the issue of human right abuse high on the AU agenda, the majority of African leaders declined to hand the Chair of the AU to Sudan under the prevailing circumstances. In particular, there was the fear that allowing the Sudanese government ‘to lead the AU would damage the AU’s credibility, especially its commitment to respect human rights, democracy and good governance.’²⁰⁷ Furthermore, the AU faced pressure from states such as Chad, which threatened to leave the AU if Sudan led the Union.²⁰⁸

This stance indicated the AU’s efforts in living up to its newly acquired norms and principles.²⁰⁹ Significantly, its position stood in sharp contrast to the OAU’s attitude in 1975, when it ‘defied all logic and common sense and ordained Field Marshall Idi Amin as its Chairman at the Kampala Summit, despite his woeful human rights record and opposition by few African countries.’²¹⁰ However, despite the change in approach, the AU Assembly failed to castigate Sudan’s failure to protect Darfuris.²¹¹ Instead, in 2006, African leaders ‘expressed their appreciation for the initiative taken by HE President Omar Hassan Al-Bashir to accept the postponement of his term of Chairmanship,’ a gesture which they considered ‘to be a true reflection of the great sense of responsibility and leadership.’²¹² It was then not surprising that African

²⁰⁴ Rules of Procedure of the Assembly of the Union, Assembly of the AU, 1st Ord. Summit, Durban, South Africa, Rule 5(3), A.U. Doc. ASS/AU/2(I)-a (2002).

²⁰⁵ For more on AU Chairmanship, see chapter six.

²⁰⁶ ‘African snub to Sudan over Darfur’, *BBC News*, International Version, Monday, 29 January 2007.

²⁰⁷ Patrick Runkhumise, ‘Civilian (in) Security in the Darfur Region of Sudan’, *ISS Paper* 123, (March 2006).

²⁰⁸ See ‘African snub to Sudan over Darfur’, *BBC News*, International Version, Monday, 29 January 2007.

²⁰⁹ Tim Murithi, ‘Institutionalising Pan-Africanism,’ *supra* note 203.

²¹⁰ Nsongurua J. Udombana, ‘When Neutrality is a Sin,’ *supra* note 6.

²¹¹ Ademola Abass, ‘The Darfur Crisis,’ *supra* note 57.

²¹² Declaration by the Assembly of the AU, AU Assembly 6th Ordinary Session, AU Doc. Assembly/AU/Decl.2(VI), January 2006.

leaders were accused of ‘unwittingly playing a game sketched in Khartoum or, for that matter, wittingly showing solidarity with a much maligned ‘African brother.’²¹³

Meanwhile, it may have been thought that persistent impunity in Darfur would have served as a catalyst for these leaders to implement ‘the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa.’²¹⁴ However, in spite of acknowledging the need to address the crisis ‘with utmost urgency to avoid further escalation,’²¹⁵ African leaders failed to invoke article 4 (h) or (j) of the Constitutive Act of the AU, which would allow for intervention in ‘grave circumstances’ namely: war crimes and crimes against humanity,²¹⁶ which were present in Darfur.

Instead, the African Heads of State and Governments argued that the humanitarian situation in Darfur was improving, despite conflicting evidence of widespread violence and claims of an ongoing genocidal massacre.²¹⁷ In fact the AU Assembly and UN had conflicting evidence and different interpretation about the gravity of the Darfur conflict.²¹⁸ For instance, the AU explained that that ‘even though the humanitarian situation in Darfur is serious, it can not be defined as genocide.’²¹⁹ On the other hand, the UN Commission in Darfur found that the grave crimes committed

²¹³ Nsongurua J. Udombana, ‘When Neutrality is a Sin,’ *supra* note 6.

²¹⁴ See Article 16 of the Protocol establishing the Peace and Security Council (PSC) of the African Union. See also The Role of the Regional Economic Communities (RECs) as the Building Blocks of the African Union, Available at <http://www.dfa.gov.za/docs/2003/au0815.htm>.

²¹⁵ Decision on Darfur, A.U. Ass. 3rd Ord. Sess., Addis Ababa, Ethiopia, 6–8 Jul. 2004, ¶ 2, Assembly/AU/Dec.54 (III).

²¹⁶ See chapter seven.

²¹⁷ See the Darfur Peace and Accountability Act 2006 (US); see also Milton Leteinberg, ‘Death in Wars and Conflicts in the 20th Century’, *Occasional Paper*, no. 29, 3rd ed, Peace Studies Program, Cornell University (2006), pp. 34-60; Nicholas D. Kristof, ‘Genocide in Slow Motion’, *New York Review of Books*, vol.53, no.2, February 2006; the US Secretary of State Colin L. Powell, ‘Testimony Before the Senate Foreign Relations Committee’ and ‘Powell declares genocide in Sudan’, *supra* note 7. See also Ardenne-vanderHoeven, Agnesvan. *Explaining Darfur: Lectures on the Ongoing Genocide*, edited by Salih, Mohamed Abdel Rahim M. (Mohamed Abdel Rahim Mohamed) Grono, NickMéndez, (Juan E. Amsterdam: Vossiuspers UvA, 2006); Cheadle, Don and John Pendergrast. *Not on our Watch: The Mission to End Genocide in Darfur and Beyond*, (New York, New York: Hyperion, 2007); Prunier, Gerard. *Darfur*, *supra* note 3; Totten, Samuel and Eric Markusen. *Genocide in Darfur: Investigating the Atrocities in the Sudan*, (New York, NY: Routledge, 2006); Crook, John R. ‘President and Secretary of State Characterize Events in Darfur as Genocide’, *The American Journal of International Law* 99, no. 1 (Jan, 2005): 266; Howard-Hassmann, Rhoda E. ‘Genocide and State-Induced Famine: Global Ethics and Western Responsibility for Mass Atrocities in Africa,’ *Perspectives on Global Development and Technology* 4, no. 3,4 (2005): 487.

²¹⁸ Alex J. Bellamy, ‘Whither the Responsibility to Protect?’, *supra* note 112.

²¹⁹ Assembly of the AU, 3rd Ordinary Session, 6–8 July 2004, Addis Ababa, Ethiopia, Assembly/AU/Dec.54 (III), para. 2. See also PSC/ MIN/Comm. (XII), 1, 4 July, 2004.

in Darfur 'may be no less serious and heinous than genocide.'²²⁰ The AU also disputed the UN's findings that senior government officials were implicated in widespread and systematic war crimes and crimes against humanity.²²¹

As it turned out, in addition to lack of political will to act decisively, as shown below, the AU lacked the logistics and financial capability for a proper response, as some of its key institutions were not yet operational, such as the African Standby Force.²²² It was primarily due to these reasons that the application of the relevant provisions relating to the AU's right to intervene²²³ were rendered redundant with regard to the Darfur conflict.²²⁴ Therefore, the rest of this chapter explores the specific actions of the AU and UN which were at the invitation of Sudan. As shown in the next section, the approaches taken in a complex conflict within an area the size of France meant that these efforts were, from the start, bound to fail.

2.6 The Regionalisation of Peace Operations: The Mandate of the AU Mission in Sudan (AMIS)

It will be recalled from chapter six that the AU framework empowers the AU PSC to 'authorize the mounting and deployment of peace support mission.'²²⁵ However, given the level of the tragedy in the province, even the more notable efforts of the AU in Darfur were deeply flawed.²²⁶ This is because of the fact that instead of taking a decisive action in Darfur, the AU PSC could only agree to the deployment of an Observer Mission. Furthermore, the document creating the African Mission in Sudan (AMIS), then known as the Ceasefire Commission (CFC), in April 2004²²⁷ was 'badly drafted.'²²⁸ Indeed, the weakly mandated contingent contained only 80 military

²²⁰ *Report of the International Commission of Inquiry on Darfur*, *supra* note 4.

²²¹ Alex J. Bellamy, 'Whither the Responsibility to Protect?', *supra* note 112.

²²² On the timeframe for the set up of the African Standby Force, see chapter six.

²²³ For a discussion of the specific provisions relating to the AU's right to intervene, see chapter seven.

²²⁴ Ademola Abass, 'The United Nations, the African Union and Darfur Crisis,' *supra* note 157.

²²⁵ Article 7(c) of the Protocol Establishing the Peace and Security Council 2002.

²²⁶ Ademola Abass, 'The Darfur Crisis,' *supra* note 57.

²²⁷ See Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Development of Observers in the Darfur, 28 May 2004.

²²⁸ Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 37.

observers that was 'lightly armed'²²⁹ and only consisted a protection force of 300 troops.²³⁰

However, in July 2004, the AU PSC, while emphasising 'the need for the AU to continue to lead the efforts to resolve the crisis in Darfur,'²³¹ later issued AMIS with a broader mandate which nevertheless was clearly limited only to 'protect civilians who it encounters under imminent threat and in the immediate vicinity, within resources and capability, it being understood that the protection of the civilian population is the responsibility of the [government of Sudan].'²³² Furthermore, AMIS was to provide visible military presence by patrolling and establishing temporary outposts in order to deter uncontrolled armed groups from committing hostile acts against the population.²³³ In spite of its shortcomings, the inclusion of protection of endangered civilians as part of the AMIS mandate raised the possibility of an emerging norm which recognises a duty to use force to protect populations from genocide, crimes against humanity and war crimes, during peace operations.²³⁴

While this point is picked up in the discussion regarding the deployment of UNAMID further below, it was difficult to see how such a small number of personnel could carry out such a mandate in a region the size of Darfur. Nevertheless, during the 10th anniversary of the start the Rwandan genocide, President Paul Kagame had told the Rwandese people and the world that if any country ever suffered genocide, Rwanda would willingly come to its aid.²³⁵ Although the occurrence of genocide was disputed, Rwanda drew on its past harrowing experience and was the first African country to deploy its troops.²³⁶ However, there would be more problems. In particular, controversy arose over the interpretation of the mandate of AMIS.

²²⁹ Article II.6 of the Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Development of Observers in the Darfur, 28 May 2004.

²³⁰ See Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Development of Observers in the Darfur, 28 May 2004.

²³¹ See African Union Peace and Security Council, "Communiqué", 27 July 2004, PSC/PR/Comm.(XIII), para. 9.

²³² African union Peace and Council Communiqué PSC/PR/Comm. (XVII), Peace and Security Council, 17th Meeting, October 20, 2004, Addis Ababa, Ethiopia, para.6. p. 2.

²³³ *Ibid.*

²³⁴ On this point, see Breau, Susan C, 'The Impact of the Responsibility to Protect on Peacekeeping' *Journal of Conflict and Security Law*, Vol. 11, Issue 3, (2006), pp. 429-464.

²³⁵ Roméo Dallaire, 'Looking at Darfur, Seeing Rwanda,' *New York Times*, 4 October, 2004.

²³⁶ See Darfur Integrated Task Force (DITF), *Information Update No. 2* (26 July 2005), available at <http://www.african-union.org>.

On one hand, Kagame asserted his forces' intention to use force to protect civilians if necessary.²³⁷ Meanwhile, the majority rejected this interpretation of the mandate, including Nigeria's president Obasanjo who stated his troops would only operate with the consent of the Sudanese government.²³⁸ Naturally, the latter view found favour with Sudan's foreign minister, Abdelwahad Najeb, who vehemently disputed Kagame's interpretation and reiterated that the 'mission of those forces is very clear: protection of monitors. As far as the civilians [are concerned], this is the clear responsibility of the government of Sudan.'²³⁹

This interpretation also had the support of the AU Assembly of Heads of States and Government who, despite the ongoing tragedy, welcomed the apparent willingness of the Sudan government to cooperate with the AU Protection Force and its commitment to provide overall protection to the mission.²⁴⁰ However, it was not long before it became clear that the size and mandate of AMIS needed to be strengthened. Hence, on 20 October 2004, the AU PSC decided that 'AMIS shall consist of 3,320 personnel, including 2,341 military personnel, among them 450 observers.'²⁴¹ It was later agreed; in April 2005 that AMIS' presence was to be increased to a target of 6,171 military personnel and 1,560 civilian police (and staff) by the end of September 2005.²⁴² Although the envisaged increment to 'some 12,300 military, police and civilian personnel by spring 2006,'²⁴³ was not achieved, the expansion of AMIS received international support, including that of the Security Council and Sudanese government, which formally expressed its full cooperation and support.²⁴⁴

²³⁷ See Human Rights Watch, 'Darfur: Rwandan Troops to Protect Civilians', *Human Rights News*, New York, 17 August 2004.

²³⁸ Human Rights Watch, 'Darfur: African Union Must Insist on More Troops', *Human Rights News*, New York, 20 August 2004.

²³⁹ See Eric Reeves, 'The Deployment of New African Union Forces in Darfur: What it Does and Doesn't Mean', *Sudan Tribune*, October 25, 2004.

²⁴⁰ See AU Assembly of Heads of State and Government, Third Ordinary Session, Decision on Darfur, 8 July 2004. AU/Dec.54 (III).

²⁴¹ See *Communiqué*, 20 October 2004, PSC/PR/Comm. (XVII), AU PSC 17th meeting.

²⁴² Report of the Chairperson of the Commission on the Situation in the Darfur Region of the Sudan, April 28, 2005, PSC/PR/2 (XXVIII), paragraph 103)

²⁴³ *Ibid.*

²⁴⁴ See Communiqué, 20 October 2004, PSC/PR/Comm. (XVII), AU PSC 17th Meeting. See also *Report of the Secretary General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraph 6.13, and 16 of Security Council Resolution (1556) (2004)*, UN doc S/2004/881, 2 November 2004, para 54.

Furthermore, on 9 November 2004, the Sudanese government and the warring parties concluded a Protocol on the Improvement of the Humanitarian Situation in Darfur²⁴⁵ where parties vowed to cooperate fully with the Ceasefire Commission. However, in spite of the undertaking to 'extend full cooperation to the AU to that end,'²⁴⁶ the cease-fire agreements were violated with impunity.²⁴⁷ As mentioned earlier, it was not surprising that the weak mandate amidst the continued persistence of the Darfur conflict and its devastating effects on civilians led to the failure of AMIS, a fact acknowledged by the AU PSC.²⁴⁸ Furthermore, there were documented attacks on humanitarian organisations and most disturbingly, the AU force itself.²⁴⁹

This scenario led the Secretary General's Special Representative for Sudan to call for a transition from an AU force to a UN force in early January 2006.²⁵⁰ The justification for the transition from AMIS to a UN force was 'based on the UN's greater experience and capacity in conducting a multidimensional mission to oversee a comprehensive peace agreement.'²⁵¹ This call subsequently received the support of the AU PSC in its Communiqué of 12th January²⁵² and reaffirmed on 10th March 2006.²⁵³

2.7 The AU Force versus UN Troops Debate: The Confrontation with Sudan

The call for transition from an AU to UN was heeded by the UN in August 2006 through Security Council resolution 1706 (2006).²⁵⁴ This resolution decided that a more sizable, better equipped 22,500 UN peacekeeping force was to be established in

²⁴⁵ Protocol on the Improvement of the Humanitarian Situation in Darfur, 9 November 2004.

²⁴⁶ *Ibid*, para 3. The AU decided to increase the strength of AMIS in April 2005. See Communiqué, PSC/PR/Comm. (XXVIII), AU PSC 28th Meeting, 28 April 2005.

²⁴⁷ See *Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur pursuant to paragraph 21 of Security Council Resolution 1769 (2007)*, UN Doc. S/2008/249, 14 April, 2008; *Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur pursuant to paragraph 6 of Security Council resolution 1769 (2007)*, UN Doc. S/2008/196, 25 March 2008; *Report of the Secretary-General on the Sudan pursuant to paragraph 15 of Security Council resolution 1564 (2004) and paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004)*; *Report of the Secretary-General on the Sudan*, S/2004/881, 2 November (2004); Alex de Waal, 'Counter-Insurgency on the Cheap', *supra* note 22.

²⁴⁸ Communiqué, PSC/PR/Comm. (XXVIII), AU PSC 28th meeting, 28 April 2005.

²⁴⁹ See below.

²⁵⁰ C. Lynch, 'Official Pushes for UN Force in Sudan', *Washington Post*, 14 January 2006, A16.

²⁵¹ See 'UNAMID: AU/UN Hybrid Operation in Darfur', *Peace Operations Fact Sheet Series 2007*, The Henry Stimson Center 2007. Available at

www.stimson.org/fopo/pdf/AU_UN_Hybrid_Fact_Sheet_Aug_07.pdf.

²⁵² See Communiqué, 12 January 2006, PSC/PR Comm. (XLV) AU PSC, 45th meeting.

²⁵³ Communiqué, 10 March 2006, PSC/MINComm. (XLVI) AU PSC, 46th meeting, para.2

²⁵⁴ See SC Res. 1706(2006) of 31 August 2006.

September 2006.²⁵⁵ Bearing in mind that resolution 1706 was not implemented, this section does not discuss its mandate but restricts itself to the political debates that unearthed the continued tension amongst Council members and the wider international community, as horror unfolded on innocent civilians. Also, in a broader context, these debates highlighted the uneasy relationship between regionalism and universalism, as shown in the foregoing chapters. Predictably abstained on by China and Russia, as well as Qatar, resolution 1706 ‘invited the consent of the Sudanese government’ for the deployment of troops.²⁵⁶ Interestingly, this arrangement was met with stiff opposition by the Khartoum government, which held that it amounted to ‘unjustifiable hostility against Sudan.’²⁵⁷

In particular, the Sudanese president, Al Bashir termed ‘the so-called Darfur conflict’ ‘an invention by foreign interests.’²⁵⁸ Having sworn that there would not be any international military intervention in Darfur as long he was in power, he went on to affirm that ‘Sudan, which was the first country south of the Sahara to gain independence, cannot now be the first country to be recolonized.’²⁵⁹ And although resolution 1706 had emphasized the ‘African character’ of the peace operations,²⁶⁰ Al Bashir further raised the spectre of an international jihad²⁶¹ against any ‘UN colonisation forces.’²⁶² In justifying this stance, the president also warned that ‘we do not want Sudan to turn into another Iraq.’²⁶³ As it turned out, not only did Sudan vow to resist all Council resolutions calling for the deployment of international troops, it

²⁵⁵ Ademola Abass, ‘The United Nations, the African Union and Darfur Crisis,’ *supra* note 157.

²⁵⁶ On resolution 1706, see Nsongurua J. Udombana, ‘Still Playing with Lives,’ *supra* note 37.

²⁵⁷ See ‘Countdown to Sudan Carnage’, *Scotland on Sunday*, 3 September 2006; ‘Sudan security chief rejects UN force, calls for martyrdom,’ *Sudan Tribune*, June 30, 2006.

²⁵⁸ John Prendergast and Colin Thomas-Jensen, ‘Matching Rhetoric with Action in Darfur,’ *allAfrica.com*, 17 March 2006.

²⁵⁹ See ‘No Western troops in Darfur – president’, *Thestar.co.za*, 21 June 2006.

²⁶⁰ See preamble to the resolution 1706 (2006) of 31 August 2006. See also Communiqué, 10 March 2006, PSC/MINComm. (XLVI) AU PSC, 46th meeting, para 6.

²⁶¹ See ‘UN Faces Threat over Darfur Plan’, *BBC News*, 20 June, 2006.

²⁶² See Alfred De Montesquiou, ‘Sudan rejects U.N. ‘colonization’ forces’, *Chicago Sun Times*, December 5, 2006. See also ‘Sudan Rejects UN Resolution on Darfur Peacekeeping’, *Voice of America*, August 31, 2006.

²⁶³ ‘We don’t want Sudan to turn into ‘another Iraq’ in the region - al-Bashir’, *Kuwait News Agency*, 21 September 2006.

threatened to use force against peacekeepers.²⁶⁴ Furthermore, similar sentiments were also expressed by the opposition to the Sudanese government.²⁶⁵

In the end, due to lack of agreement, resolution 1706 was not implemented, leaving little choice but resort to the repeated extension of AMIS' mandate amidst the rapidly escalating conflict.²⁶⁶ As it turned out, this position played into the hands of the Sudanese government whose rhetoric fell short of 'logic and long on mass psychology' but which nevertheless 'cowed the Security Council and prevented it from taking robust action.'²⁶⁷ Rather than agreeing to a UN force, Sudan's demands at a Council meeting included that 'the authority, capacities and forces of the AU should be enhanced- financially and operationally- so that it can complete its deployment and undertake the tasks of monitoring the ceasefire and putting an end to the security incursions that have cast a long shadow over the humanitarian efforts to achieve a peaceful political settlement.'²⁶⁸

Almost five years into the conflict, and three years after the Council first expressed concern over the crisis, the details of the arrangement were still being discussed with the government of Sudan, as the situation in Darfur deteriorated.²⁶⁹ By this time, it was observed that not only were the AMIS troops unmotivated, they were also unable to culturally identify with the Muslim population in the region and also had little sympathy for Darfurians.²⁷⁰ Furthermore, this situation was worsened by the fact that the AU troops were ultimately under the control of the Sudanese government.²⁷¹

However the month of June 2007 witnessed a significant breakthrough. The high-level technical consultations between the Sudanese government, the AU and the UN

²⁶⁴ See 'Darfur: will they be rescued?', *The Economist*, 23 September 2006, p 60; 'Australia May Join Darfur Mission', *Daily Telegraph*, 28 July 2004, p. 8.

²⁶⁵ A spokesman for the SPLM/A Farouk Aba Eissa is quoted as saying, 'we are against foreign military intervention in Darfur. We have before us the Case of Iraq. We do not want a similar situation to develop in Darfur, or Sudan'. See Gamal Nkrumah, 'Darfur in Flames' *Ahram* (Cairo), April 29 – May 5, 2004.

²⁶⁶ E.g. see SC Res. 1663 (2006) of 24 March, 2006; SC Res 1714 (2006) of 6 October, 2006; See also 'AU will not abandon Darfur - AU chairman', *Reuters*, October 2, 2006.

²⁶⁷ Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 37.

²⁶⁸ See the 5120th Meeting of the UN Security Council, Reports of the Secretary General on Sudan, 8 February 2005, p. 6.

²⁶⁹ See Human Rights Report on Darfur, *supra* note 33.

²⁷⁰ Tomo Krizner, 'Sudan sees UN intervention as an invasion', *Independent*, 4 October 2006, p. 29, available at 2006 WLNR 17139892.

²⁷¹ *Ibid.*

led to Sudan's unconditional acceptance of the AU/UN hybrid peace operations after months of violence and negotiations.²⁷² Nevertheless, despite the relief and optimism, the previous stance of the Khartoum government led some to question its renewed commitment to peace.²⁷³ It was thus not surprising that the UK²⁷⁴ and the US²⁷⁵ declared their intention to pay close scrutiny to Sudan's action and impose sanctions if necessary. Meanwhile, the AU PSC, at its 22 June 2007 meeting, also endorsed the AU/UN hybrid mission but nevertheless extended the AMIS mandate until December 2007 to ensure a smooth transition between the two operations.²⁷⁶ In doing so, although some states such as China, India and Pakistan, considered sending troops to Darfur,²⁷⁷ the AU PSC particularly called on AU members to contribute troops and personnel to ensure 'the predominantly African nature of the operation.'²⁷⁸

3.1 Cooperation between the AU and UN in Practice in Darfur: The Mandate and Status of the AU/UN Hybrid Peace Operation

Finally, following a 15-vote, the UN Security Council unanimously passed resolution 1769 on 31 July, 2007, which authorized the establishment of the AU/UN Hybrid force in Darfur.²⁷⁹ Although the transfer of authority from AMIS to UNAMID was to occur in December 2007, the force's full deployment was not expected before mid-2008.²⁸⁰ Under this arrangement, AMIS force was to be merged into UNAMID and the operation, now under UN command, managed under UN standards, principles and established practices.²⁸¹ UNAMID consists of 19,555 military personnel and up to

²⁷² See UN Department of Public Information, Daily Press Briefings, 18 June 2007, www.un.org/News/briefings/docs//2007/db070618.doc.htm.

²⁷³ Kwasi Kpodo, 'Help for Darfur may be derailed, African summit told,' *Associated Press*, 2 July 2007.

²⁷⁴ See 'US, UK threaten Sudan with sanctions over Darfur,' *Reuters*, 18 April 2007.

²⁷⁵ See 'U.S. imposes new sanctions on against Sudan,' *CNN*, 29 May 2007.

²⁷⁶ African Union Peace and Security Council, Communiqué on the situation in Darfur, 79th meeting, PSC/PR/Comm(LXXIX), 22 June 2007.

²⁷⁷ See '3 Asian countries considering contributing to Darfur force,' *Sudan Tribune*, 3 July 2007,

²⁷⁸ See 'UNAMID: AU/UN Hybrid Operation in Darfur,' *supra* note 251.

²⁷⁹ See SC Res. 1769 (2007), S/RES/1769, 31 July 2007.

²⁸⁰ Security Council Report Website, Monthly Forecast Report: Darfur/Sudan, July 2007, www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2876593/k.5476/July_2007brSudanDarfur.htm. See also See Barbara Schoetzau, 'UN Secretary-General Presses for Quick Action on Darfur,' *VOA News*, 16 July 2007, www.voanews.com/english/2007-07-16-voa65.cfm.

²⁸¹ See paragraph seven of SC Resolutions 1769 (2007), of 31st July 2007. See also High Level Consultation on the Situation in Darfur: Conclusions, available at <www.AmisSudan.org/PSCCommunique/061116_Conclusions%20of%20the%20High%20Level%20Consultation%20on%20the%20Situation%20in%20Darfur.doc>. For a discussion of the prospects and problems of the current arrangement under UNAMID, see 'UNAMID: AU/UN Hybrid Operation in Darfur,' *supra* note 251.

3,772 police, along with a further '19 formed police units comprising up to 140 personnel each.'²⁸² Resolution 1769 was particularly significant as it confirmed 'that co-operation between the UN and the regional arrangements in matters relating to the maintenance of peace and security is an integral part of collective security as provided for in the Charter of the United Nations.'²⁸³

However, although the Council resolution paved way for a more efficient cooperation in Darfur, there remained strong grounds for concern.²⁸⁴ Firstly, in spite of the overwhelming evidence, the resolution barely condemned Sudan's attacks on civilians nor did it make reference to violations of arms embargoes. Furthermore, unlike the resolutions referred to above, it failed to require the Secretary General to report breaches to the Council and contained no threat of tougher sanctions. However, for reasons outlined above, such stringent requirements would not have impressed China and Russia, nor would Sudan have given its approval for the deployment given its previous stance on the matter.²⁸⁵ Nevertheless, major questions also arose regarding the command and control of the force, troop contributions, the timetable for deployment, funding and Sudan's resort to delaying tactics.²⁸⁶ However, it was the nature the UNAMID mandate that was most concerning.

Under paragraph 15 of resolution 1769, UNAMID, acting under Chapter VII of the UN Charter, is 'authorised to take the necessary action [...] in order to:(i) protect its personnel, facilities, installations and equipment, and to ensure the security and freedom of movement of its own personnel and humanitarian workers, (ii) support early and effective implementation of the Darfur Peace Agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan.'²⁸⁷

²⁸² See SC Res. 1769 (2007), 31 July 2007.

²⁸³ *Ibid.* (preamble).

²⁸⁴ E.g. Ademola Abass, 'The United Nations, the African Union and Darfur Crisis,' *supra* note 157; David Clark, 'Khartoum is no friend of this fresh resolve on Darfur', *The Guardian*, 2 August, 2007.

²⁸⁵ See 'Sudan 'Accepts' UN Darfur Package', *Global Policy Forum*, 27 December 2006.

²⁸⁶ Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 37; Ademola Abass, 'The United Nations, the African Union and Darfur Crisis,' *supra* note 157.

²⁸⁷ UN Security Council Resolution 1769 of 31 July 2007 available at <http://www.un.org/News/Press/docs//2007/sc9089.doc.htm>

The mandate of UNAMID creates an interesting dynamic. It will be recalled from chapter eight that the rules with regard to peace operations are grounded on consent and cooperation of the host state and are normally limited by the concept of impartiality as well as by certain restrictions in regard to the use of force.²⁸⁸ However the Council authorised UNAMID to take all necessary action, which may be interpreted as including the use of force, in order to carry out its mandate.²⁸⁹ However, UNAMID was not the first peace operation to be authorised by the Council under chapter VII to use force beyond self defence and to allow the mission to carry out its mandate.²⁹⁰

In fact, the mandate of recent peace operations, such as those in Liberia²⁹¹ (the United Mission in Liberia-UNMIL), Ivory Coast²⁹² (the United Nations Mission in Cote d'Ivoire-UNOCI), Burundi²⁹³ (United Nations Operation in Burundi-ONUB) and Haiti²⁹⁴ (the United Nations Stabilization Mission in Haiti-MINUSTAH), were all

²⁸⁸ See *UNEF: Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, UN GAOR, Thirteenth Session, Annex 1, Agenda Item 65, UN doc. A/3943 (1958); *The Blue Helmets: A Review of United Nations Peacekeeping-Operations* (3rd edn., 1996) 7; *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, A/47/277 – S/24111 (1992), paras. 11–12; *Supplement to an Agenda for Peace*, A/50/60 – S/1995/1 (1995), para. 33; *Report of the Panel on United Nations Peace Operations of 21 August 2000*, UN doc. A/55/305, S/2000/809, (Brahimi Report), para 48; *Report of the Special Committee of Peacekeeping*, UN Doc. A/56/767, 28 March, 2003, para 46. See also N.D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester: Manchester University Press, 1997, pp. 232-244; Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', *Journal of Conflict and Security Law*, Volume 11, Number 3, (2006), pp. 465-482 and; M. Goulding, 'The Evolution of United Nations Peacekeeping', 69 *Int Aff* (1993), 451 at 455; Christine Gray, *International Law and the Use of Force: Foundations of Public International Law*, (Oxford University Press, 2nd edition), 2004, p. 201-251.

²⁸⁹ See chapter three on interpretation of Security Council mandates. See also M.C. Wood, 'The Interpretation of Security Council Resolutions', 2 *Max Planck Yearbook of United Nations* (1998) 73; R. Cryer, 'The Security Council and Article 39: A Threat to Coherence?', 1 *Journal of Armed Conflict Law* (1996); M. Golding, 'The Use of Force by the United Nations', 3 *International Peacekeeping* (1996) 1; G. Gaja, 'Use of Force Made or Authorized by the United Nations', in C. Tomuschat (ed.), *The United Nations at Age Fifty: A Legal Perspective* (1995); See E. Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis', 56 *ICLQ* (2007) p. 83; C. Gray, 'Security Council Resolution 1441 on Iraq's Final Opportunity to Comply with Disarmament Obligations', in *ASIL Insights* (Nov. 2002), available at <asil.org>; P. McLain, 'Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force', 13 *Duke JCIL* (2003) p. 233.

²⁹⁰ Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, 'supra note 146.

²⁹¹ SC Res. 1509, (2003), 9 September 2003.

²⁹² SC Res. 1528, (2004), 27 February 2004.

²⁹³ SC Res. 1545 (2004), 21 May 2004.

²⁹⁴ SC Res. 1542, (2004), 30 April 2004.

adopted with a chapter VII element.²⁹⁵ As mentioned earlier, this trend raised the possibility of an emerging duty imposed on deployed troops to use force in order to protect populations from genocide, crimes against humanity and war crimes.²⁹⁶ Therefore, despite the failure of the doctrine of the responsibility to protect as envisaged by its original drafters,²⁹⁷ the practice of the UN peace operations is rapidly developing 'into robust peacemaking actions with a positive responsibility to protect civilians within the field of operations.'²⁹⁸

However, what deserves special attention in relation to Darfur is that resolution 1769 also recognised the sovereignty of Sudan within the same paragraph that authorised the limited use of force. This observation is particularly important given that the Sudanese government is known to have attacked its own civilian population. Furthermore, under paragraph 9 of the UN resolution, UNAMID is also mandated to 'monitor whether any arms or related material are present in Darfur in violation in of the Agreements and the measures imposed by paragraphs 7 and 8 of resolution 1556 (2004).' It therefore follows that should the UNAMID forces encounter a violation of any of the above by the Sudanese forces, any use of force could potentially amount to enforcement action against the Sudan. Such a scenario would in turn lead to a blur between peace operation and Chapter VII enforcement, as was the case of UNISOM II in Somalia and UNPROFOR in the former Yugoslavia in the 1990s.²⁹⁹

However, this possibility is limited because although the mandate of UNAMID contains a Chapter VII element, it does not allow its forces to go out and proactively protect civilians and can only do so when they are being attacked in the visibility of its operations, which itself would also be subject to possessing sufficient troops. Nevertheless, it is worth noting that despite Sudan's assurances that the targeting of UN troops would not be repeated, UNAMID faced unprovoked attacks by Sudanese's

²⁹⁵ Ralph Zacklin, 'The Use of Force in Peacekeeping Operations', in Niels Blokker and Nico Schrijver, *Security Council and the Use of Force*, *supra* note 146. See also Breau, Susan C., 'The Impact of the Responsibility to Protect on Peacekeeping,' *supra* note 234.

²⁹⁶ Breau, Susan C., 'The Impact of the Responsibility to Protect on Peacekeeping,' *ibid.*

²⁹⁷ See chapter eight.

²⁹⁸ Breau, Susan C., 'The Impact of the Responsibility to Protect on Peacekeeping,' *supra* note 234.

²⁹⁹ See chapters five and eight.

Armed Forces immediately after its deployment in January 2008.³⁰⁰ And although it did not return fire in self-defence, such scenarios bring alive the real possibility of UNAMID taking enforcement action against Sudan in order to carry out its mandate.

It should also be mentioned that being the largest UN operation since its missions in the former Yugoslavia and Somalia, UNAMID is the first of its kind in the 21st century and thereby the most expensive ever authorised.³⁰¹ Hence, it faced major financial, political, operational, security and environmental challenges.³⁰² Firstly on the financial front, soon after the handover transpired in January 2008, it soon emerged that UNAMID was 'severely under-resourced' to fulfil its mandate to provide adequate protection, given the deteriorating security environment in Darfur.³⁰³ Secondly, despite Sudan's consent, it previously reneged on its prior commitments, including the demand for AU withdrawal in 2006,³⁰⁴ at a time when it intensified violations of human rights,³⁰⁵ as well as its failure to crack down on the *janjaweed* militia, all of which cast doubts on its political will to restore peace.³⁰⁶ Thirdly, the vast joint force with a single chain of command required extensive coordination and cooperation, as well as commitment between the AU and the UN.³⁰⁷ On this important issue, the commander of the UN peacekeeping force (UNAMIR)

³⁰⁰ See *Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur pursuant to paragraph 21 of Security Council Resolution 1769 (2007)*, UN Doc. S/2008/249, 14 April, 2008, para 6-7.

³⁰¹ Security Council Report Website, Monthly Forecast Report: Darfur/Sudan, June 2007; Ademola Abass, 'The United Nations, the African Union and Darfur Crisis,' *supra* note 157.

³⁰² See 'UNAMID: AU/UN Hybrid Operation in Darfur', *supra* note 251.

³⁰³ See UN Department of Public Information, 8 February 2008. Available at <http://www.un.org/News/Press/docs/2008/sc9243.doc.htm>.

³⁰⁴ Opheera McDoom, 'Sudan: African Union Must Quit Darfur Region,' *Washington Post*, September 4, 2006; Lydia Polgreen, 'Sudan Gives African Union an Ultimatum,' *New York Times*, September 5, 2006; Lydia Polgreen, 'Africa Monitors Threatening to Quit Sudan,' *New York Times*, September 6, 2006; Lydia Polgreen, 'With Little Authority, African Union Force Struggles with Its Mission in Darfur,' *New York Times*, 9 September 2006; Lydia Polgreen, 'Darfur Trembles as Peacekeepers Exit Looms,' *New York Times*, 10 September 2006.

³⁰⁵ Craig Timberg, "Sudan's Offensive Comes at Key Time; Push in Darfur Seen as Effort to Preempt Deployment by UN," *Washington Post*, 5 September 2006; Craig Timberg, "In Darfur's Death Grip: Villagers Tell of Three Days of Brutality and Killing as Sudanese Troops, Allies Step Up Attacks," *Washington Post*, 6 September 2006; Craig Timberg, "For Darfur Women, Survival Means Leaving Camp, Risking Rape," *Washington Post*, 16 September 2006.

³⁰⁶ Kpodo, 'Help for Darfur may be derailed, African summit told,' *Associated Press*, 2 July 2007.

³⁰⁷ Julian Borger, 'Be Prepared for Betrayal, UN Darfur Force Warned', *The Guardian*, 17 September, 2007.

during the Rwandan genocide drew on his experience and issued a particular caution to UNAMID's new head of command.³⁰⁸

Also, the UN has yet to secure the cooperation of all of Darfur's rebel groups, which will be crucial to UNAMID's success, as evidenced by problems that resulted from the failure to get all factions on board with regard to the DPA, discussed earlier. This is highly significant given the increased violence on civilians, aid workers, convoys and other banditry attacks that increased further security challenges for UNAMID.³⁰⁹ In particular, these attacks extended to AMIS and UN personnel who have been subject to increasing ambushes, hostage taking and armed attacks.³¹⁰ Finally, in June 2007, a report published by the United Nations Environment Programme (UNEP) pointed out that the factors mentioned above and their relation to the displacement, desertification, deforestation and other concerns, raise critical issues that will require attention with regard to peacebuilding.³¹¹

Nevertheless, Secretary General Ban Ki-moon's vision of 'unity of purpose as the foundation of Africa's partnership with the United Nations'³¹² brought to the fore the potential opportunities that the evolving relationship between the AU and UN would bring in order to meet challenges posed by peace and security dynamics. However, although UNAMID formed the first fully fledged AU/UN operation on the African continent in which a pattern of cooperation between the UN and the AU was relatively clear, the collaborative nature of the relationship between the UN and the African organisations and other international players had begun much earlier. In particular, the UN and ECOWAS had also collaborated in Liberia, Sierra Leone and

³⁰⁸ See Open letter from Romeo Dallaire to UNAMID commander General Martin Agwai, September 16, 2007.

³⁰⁹ See *Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur pursuant to paragraph 21 of Security Council Resolution 1769 (2007)*, UN Doc. S/2008/249, 14 April, 2008, para.59. On increase in criminal activities, see the UN Department of Public Information, Press Conference by the International Committee of the Red Cross, 12 June 2007, www.un.org/News/briefings/docs/2007/070612_ICRC.doc.htm.

³¹⁰ See 'Darfur Rebels Attack Base, Kill 10 Peacekeepers', CNN, 30 September, 2007; 'U.N. Peacekeeper Is Killed in Darfur,' *Wall Street Journal*, 26 May 2007; 'Peacekeepers die in Darfur ambush', *BBC News*, 8 October 2005.

³¹¹ See *Sudan: Post-Conflict Environmental Assessment*, (UNEP, June, 2007). See also Lucie Peytermann, 'UN: Environmental woes a cause of Sudan conflict,' *Mail&GuardianOnline*, 22 June 2007.

³¹² See Secretary General, 'Through the Unity of Purpose, "There is No Limit that We Can Achieved"', SG/SM/10861, AFR//1493, 29 January 2007.

Cote d'Ivoire.³¹³ More recently, the AU's strategic collaboration with the UN in Burundi was based on the understanding that the deployment of AMIB was a holding operation pending the deployment of a UN mandated peace operation.³¹⁴ However, with the lessons learnt from past practices and the new measures coming in too late, Darfur was on the brink of becoming yet another Rwanda.

3.2 The International Community's Failure to Protect: 'Looking at Darfur and Seeing Rwanda',³¹⁵

It will be recalled from the opening chapter that the international community 'represents a normative entity, characterised by shared norms and understandings, common sensibilities and a shared feeling of collective destiny.'³¹⁶ However, the people of Darfur, in similar fashion to the citizens in Rwanda, were shunned and abandoned by all levels of the international community, amidst the full glare of the media.³¹⁷ Firstly, already disfranchised by their own government, the communities in Darfur added to the statistics most associated with Africa: millions of deaths, despair, destitution, poverty, disease, and more displacement than in any other continent.³¹⁸

Meanwhile, the UN, which possesses the primary responsibility for their security was grounded by the geopolitical concerns of key states and the international community's fear of direct confrontation with the Sudanese government, which exploited the situation and slowed progress.³¹⁹ In the end, already suffering from fatigue, the Security Council was restricted to passing pledges that were 'mostly lame'³²⁰ and for most part, which 'all but plagiarized the resolutions on Rwanda.'³²¹ Instead of taking

³¹³ Christine Gray, 'The Use of Force and the International Legal Order', in Malcolm N. Shaw, *International Law*, (OUP Oxford; 2 edition, 2006), p. 614.

³¹⁴ Festus Agoagye, 'The African Mission in Burundi: Lessons Learnt from the First African Union Peacekeeping Operation' *ISS* (2004). Available at www.issafrica.org/pubs/Other/CT2_2004%20PG9-15.pdf. See also Security Brief - *African Security Review* Vol 12 No 2, (2003).

³¹⁵ Phrase borrowed from article title by Roméo Dallaire, 'Looking at Darfur,' *supra* note 315.

³¹⁶ See Nicholas Tsagourias, 'International Community, Recognition of States and Political Cloning', in Colin Warbrick and Stephen Therny, 'Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law', *British Institute of International and Comparative Law*, 2006, p. 211.

³¹⁷ Linda Melvern, 'Rwanda and Darfur: The Media and the Security Council', *International Relations*, Vol. 20, No. 1, 93-104 (2006).

³¹⁸ The Organisation of African Unity (OAU), Assembly of Heads of State and Government, Declarations, Resolutions and Decision. Yaounde Declaration (Africa: Preparing for the 21st Century), AHG Decl. 3, pmb. para. 2, OAU AHG/Res. 247-257 (XXXII) (8-10 July 1996).

³¹⁹ See Hugo Salim, 'Dithering over Darfur?', *supra* note 2. ; Ademola Abass, 'The United Nations, the African Union and Darfur Crisis,' *supra* note 157.

³²⁰ Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 37.

³²¹ Roméo Dallaire, 'Looking at Darfur, Seeing Rwanda', *supra* note 235.

decisive action, the Council resorted to referring the situation to the ICC, in similar fashion to a decade earlier when it established the International Criminal Tribunal for Rwanda,³²² as a face-saving alternative to the necessary enforcement action required to halt the devastating catastrophe facing the communities of Darfur.

Furthermore, the lack of international support from the Arab League and the Organisation of Islamic countries (OIC),³²³ of which Sudan is a member, was depressing. Indeed, the 'Arab League's strong criticisms of US military action in Falluja and of Israeli military action in the Palestinian occupied territories in 2003 and early 2004 made a stark contrast to its silence over the violations in Darfur.'³²⁴ Rather than use its influence, its silence remained tied to its member states' xenophobic opposition to a Western led intervention in Africa and also being strongly protective of one of its own.³²⁵

In the end, it was left to the AU and other humanitarian agencies to pick up the pieces of a devastating conflict. It deserves mention that, though falling short of what was necessary to save Darfur, the mediation and the enhancement of AMIS, only became possible through huge financial and logistical support, largely from the US,³²⁶ the EU³²⁷ and the G8³²⁸ countries. Furthermore, the AU did receive support from other regional organisations, such as NATO, that following a request, assisted the AU to expand its peace operations in Darfur by providing airlift for additional AU troops into the region and by training AU personnel.³²⁹

However, the slow pace of this assistance ensured that the efforts remained inadequate for solving a conflict whose seriousness remained 'invisible to the

³²² See SC Res. 955 (1993), 8 November 1994. See also chapter five.

³²³ For a brief mention of the IOC and the Arab League, see chapter two.

³²⁴ See Hugo Salim, 'Dithering over Darfur?', *supra* note 2.

³²⁵ Nick Grono, 'Darfur,' *supra* note 69.

³²⁶ US Department of State, 'America: Helping the people of Sudan,' Factsheet, 9 April 2007, www.state.gov/r/pa/scp/76189.htm.

³²⁷ European Council, 'EU Support to the African Union Mission in Darfur,' European Union Factsheet, May 2007; 'EU digs into pocket for new AU Darfur funding,' *Reuters*, 25 May 2007; 'Spain, EU pledge peacekeeping, humanitarian aid for Sudan,' *Sudan Tribune*, 26 June 2007.

³²⁸ African Union, Annual Consultation between the African Union (AU), the Regional Economic Communities (RECs)/Regional Mechanisms for Conflict Prevention, Management and Resolution, The G8 Member Countries and Other Parties: Communiqué, Addis Ababa, 14 May 2007. See also 'AFRICA: New funds to support peacekeepers,' *IRIN*, 16 May 2007.

³²⁹ NATO, 'NATO's assistance to the African Union for Darfur,' 24 April 2007.

obdurate and politically motivated doubters.’³³⁰ And typical of African conflicts, the Darfur crisis spread to other states in the region, such as Chad and the Central African Republic.³³¹ As it turned out, in a similar fashion to that of the 1994 Rwandan genocide, Darfur became yet another example of world’s failure to protect citizens in Africa. Indeed, yet again, the international community ‘delayed and dithered. Once engaged, it also fumbled and took far too long to achieve a united and a sufficiently assertive response.’³³²

C: Conclusion

This chapter explored some of the major political-legal issues explored throughout the thesis and highlighted their relevance to the case study. Firstly, it began with an analysis of the conflict in the Darfur region and demonstrated Sudan’s ‘retreat from humanism, the ugly story of a failed state’ and which served as a ‘reminder that a peaceful order is still a far cry in Africa.’³³³ However, the chapter also showed the manner through which the crisis also bestowed the UN a unique opportunity to test its ‘commitment to the mantra ‘never again.’’³³⁴ Indeed the tragedy in Darfur presented the international community with an opportune chance to rebuild its confidence, as well as legitimacy, that had broken down after the disillusionment of Rwanda.³³⁵ But instead, Darfur became the next ‘Again.’³³⁶ And despite notable efforts, the international community seemed to be willing to settle for a ‘low intensity conflict in Sudan’ as it had done many times in Africa, ‘leaving it to humanitarian agencies to keep millions alive in Darfur at a subsistence level.’³³⁷

Indeed, the world’s failure to intervene in this case represented a paradox. Sudan did not matter enough for the international community to act and at the same time mattered too much for some states to permit any intervention that would destabilise

³³⁰ Nsongurua J. Udombana, ‘Still Playing with Lives,’ *supra* note 37.

³³¹ *Ibid.*

³³² See Hugo Salim, ‘Dithering over Darfur?’, *supra* note 2. See also Kithure Kindiki, ‘Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives’, Monograph 131, in *Rethinking the Role of the United Nations and the African Union in Darfur*, *Institute of Security Studies*, May (2007).

³³³ Nsongurua J. Udombana, ‘Still Playing with Lives,’ *supra* note 37.

³³⁴ Ademola Abass, ‘The United Nations, the African Union and Darfur Crisis,’ *supra* note 157.

³³⁵ Nsongurua J. Udombana, ‘When Neutrality is a Sin,’ *supra* note 6.

³³⁶ Milton Leitenberg, ‘Beyond the ‘Never Agains,’’ *Asian Perspective*, Vol. 30, No. 3, (2006), pp. 159-165.

³³⁷ Nick Grono, ‘Darfur,’ *supra* note 69.

their national interests.³³⁸ And as Darfur ‘hibernates between sympathy and apathy,’³³⁹ the Security Council was said to be ‘busy playing dice with lives, holding endless closed-door meetings and passing countless often self-serving, but utterly meaningless resolutions.’³⁴⁰ Overall, the UN’s propensity to resort to apology for its failures, such as that in Rwanda and now in Darfur, as well as its preference of criminal tribunals, threatened the functioning of the collective system.³⁴¹

Meanwhile, as expected, the conflict acted as a test for the AU which, despite the late deployment, led the peace operations from the outbreak of hostilities. Fortunately, some of its actions clearly marked a departure from the practice of the Organisation of African Unity (OAU). However, the ‘pseudo-brotherhood’ attitude taken by the AU Assembly with regard to Sudan’s government led some to perceive ‘the AU as naturally jinxed being a phoenix of a largely nothing-doer predecessor, the Organization of African Unity (OAU).’³⁴² Indeed, the continued suffering of the people in Darfur in the open glare of wide media reports and publicity demonstrated the yawning gap between the formal adoption and implementation of its principles, including that of intervention.³⁴³

But the conflict in Darfur must not only be looked upon by assessing the case for intervention but by also focussing on its obstacles.³⁴⁴ The concept of sovereignty remains very much intact in Africa despite the recognised need to halt systematic violations of human rights. This was clear in the deployment of AMIS, which was only possible at the invitation of Sudan. Nonetheless, despite its overall failure in Darfur, the AU took on a leading role that all other international actors, including the Security Council, consciously avoided. Furthermore, evidence suggests that AMIS’

³³⁸ *Ibid.*

³³⁹ Nsongurua J. Udombana, ‘Still Playing with Lives,’ *supra* note 37.

³⁴⁰ *Ibid.*

³⁴¹ Ademola Abass, ‘The United Nations, the African Union and Darfur Crisis,’ *supra* note 157. On the use of apology in international law, see R.B. Bilder, ‘The Role of Apology in International Law and Diplomacy,’ 46 *Virginia JIL* (2006) p. 433.

³⁴² Ademola Abass, ‘The Darfur Crisis,’ *supra* note 57; Ademola Abass, ‘The United Nations, the African Union and Darfur Crisis,’ *ibid.*

³⁴³ Nick Grono, ‘Darfur,’ *supra* note 69.

³⁴⁴ On some of the obstacles to intervention, see Paul D. Williams, ‘The Responsibility to Protect and the Darfur Crisis,’ *supra* note 53.

involvement in Darfur made a positive contribution to the region's peace security.³⁴⁵ However these efforts only proved to be a useful station between military intervention and inaction. In the end, the African force was grounded by its own flaws and looked 'more like a something between a lacklustre Boys Scouts contingent and a maleficent civil defence corps,'³⁴⁶ which was relegated to 'watching helplessly while civilians are slaughtered.'³⁴⁷

It remained the case that despite the AU's good intentions, regional politics, lack of sufficient troops and personnel, logistics and lack of expedience available to the west makes it an easy target for criticism of its shortcomings.³⁴⁸ Furthermore, some doubt the sincerity of the AU's claim of inability to 'assemble and finance an effective Africa force to keep the peace in Darfur.'³⁴⁹ They argue that the AU would not succeed even if it had 'inexhaustible pot of money and tons of humans to deploy, and it was crystal clear what it should do in Sudan.'³⁵⁰ This is because the political dispensation at the time would ensure it failed all the same. Meanwhile, an analysis of the Darfur conflict against the background of Rwanda formed a platform through which the major norms of regional and international law could be tested. Firstly, the toning down of the relevance of the concept of humanitarian intervention in Darfur confirmed its failure to achieve a status in international law.³⁵¹ Similarly, despite key UN³⁵² and government reports,³⁵³ which reiterated the responsibility to protect, its failure in Darfur meant that it risked being rendered as merely 'aspirational, not operational, and 'never again' will be 'yet again' once again.'³⁵⁴

³⁴⁵ See William G. O'Neill and Violette Cassis, *Protecting Two Million Internally Displaced: The Successes and Shortcomings of the African Union in Darfur*, (Brookings-Bern Project on Internal Displacement, November 2005); Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 38.

³⁴⁶ Ademola Abass, 'The Darfur Crisis,' *supra* note 57.

³⁴⁷ Michael Clough, 'Darfur: whose responsibility to protect?', *supra* note 167.

³⁴⁸ Tim Murithi, 'Institutionalising Pan-Africanism,' *supra* note 201. See also AU Multi-Dimensional Missions: Lessons Learnt from the African Mission in Sudan (AMIS) for the African Stand-by Force (ASF), seminar organised by the International Peace Academy (IPA) and the Kofi Annan International Peacekeeping Training Centre (KAIPTC), Ghana, Accra, 10-12 October 2006.

³⁴⁹ Nsongurua J. Udombana, 'Still Playing with Lives,' *supra* note 38. See also Nsongurua J. Udombana, 'When neutrality is a sin,' *supra* note 6.

³⁵⁰ Ademola Abass, 'The Darfur Crisis,' *supra* note 57.

³⁵¹ On the rejection of humanitarian intervention as a legal concept, see chapter three.

³⁵² E.g. see the Secretary-General, *In Larger Freedom*, *supra* note 105; UN High Level Panel Report, *A More Secure World*, *supra* note 200.

³⁵³ See the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, *supra* note 116. See also House of Commons International Development Committee, *Darfur, Sudan: The responsibility to protect*, Fifth Report of the Session 2004-2005, vol 1, 30 March 2005, the Stationery Office Limited, London, p. 3.

³⁵⁴ Nick Grono, 'Darfur,' *supra* note 69.

However, there are positive messages that can be unearthed from the approach of the AU and UN in Darfur. Firstly, in spite of the doctrine's failure as originally intended, the inclusion of a responsibility to protect civilians in peace operations, including the AMIS and UNAMID missions in Darfur, has the potential to redraw international law on the nature of mandates and deployment of troops.³⁵⁵ Indeed, there is a clear shift from traditional peace operations³⁵⁶ to where troops are required to engage in much more robust actions with the potential use of force, in order to protect civilians as an integral part of their missions.³⁵⁷

Furthermore, the entry of the UN troops in Darfur and subsequent transition of AMIS to an AU/UN hybrid force portrays an emerging practice whereby the AU would act as a holding operation pending the deployment of a robust UN force. Here, the UN Security Council has clearly taken 'note of lessons learned from practical cooperation between the United Nations and the African Union, in particular the transition from the African Mission in Burundi (AMIB) to the United Nations Operation in Burundi (ONUB) and the African Mission in Sudan (AMIS) to the United Nations-African Union Mission in Darfur (UNAMID).'³⁵⁸

In the end, given their cooperation, particularly as expected in Somalia, 'such clarity of intentions can enhance role-playing and distribution of responsibilities between the organisations.'³⁵⁹ However, what is clear is that a proper division of labour should be formalised between the two bodies whereby regional organisations would act on a duty to promote regional peace and security whereas the UN retains its role of maintaining international peace and security. Such an arrangement would go a long way not only in saving lives but also towards a position in which international law would develop practical forms of cooperation in order to better promote regional and universal values.

³⁵⁵ Breau, Susan C., 'The Impact of the Responsibility to Protect on Peacekeeping,' *supra* note 234.

³⁵⁶ See chapter eight.

³⁵⁷ Breau, Susan C., 'The Impact of the Responsibility to Protect on Peacekeeping,' *supra* note 234.

³⁵⁸ See SC Res. 1809 of 16 April 2008.

³⁵⁹ Ademola Abass, 'The United Nations, the African Union and Darfur Crisis,' *supra* note 157.

Chapter Ten

Conclusion-A Way Forward

This thesis has presented a rounded picture of the main building blocks of African regional security and brought its relationship with the UN and international law to the fore. It did so by exploring the legal-political issues surrounding the actual and potential capabilities of the AU mechanisms in the promotion of regional peace and security. Amongst its findings, a major conclusion of the thesis is that, despite the assertions to the contrary, the AU framework is committed to an approach that is based on cooperation rather than competition with the UN. Indeed, when the AU engages in regional action, it perceives itself as contributing to the maintenance of peace and security under Chapter VIII of the UN Charter and therefore seeks to strengthen the principles and purposes of its Charter. In this context, the AU framework envisages a relationship that is based on a division of responsibilities with the UN, in order to better promote regional peace and security.

Indeed, the adoption and development of regional norms by the AU, such as the right to intervene, gives the organisation a unique potential to redraw the landscape of international law with significant ramifications for the UN, member states and other regional organisations. Given that each of foregoing chapters consists of concluding remarks, this end stage presents an overview of the challenges and prospects that the AU framework holds in developing specific mechanisms through which it can enhance cooperation with the UN under Chapter VIII, as well as provide important lessons for other regional organisations. Divided into two main parts, the first section of the discussion herein draws out the main themes that inform the study and it is here that some controversial aspects found in the study, particularly with regard to African regional intervention, will be revisited and clarified.

Having expounded on the peace and security dynamics within the AU and UN framework, it will be recalled that a major aim of the thesis has been to identify and develop a framework with the view to strengthen the AU's ability to contribute to the UN's primary function, which is that of maintaining international peace and security. Therefore, in light of the foregoing, the final part of the chapter proposes the desirable

improvements that the AU and the UN ought to put in place, in order to concertedly address present and future challenges.

1.1 The Relationship between Universalism and Regionalism in Promoting and Maintaining Community Values

Part one of the thesis introduced a key theme of the study which identifies the ties that bind the international community. Here it was shown that despite the diversity in regional interests, the world community is bound by certain fundamental values which are, mainly but not exclusively, dominated by the purposes and principles of the UN. In doing so, the opening chapter rejected the doctrine of unilateralism in the achievement of these values and acknowledged the primacy of the UN Security Council in the enforcement of international law. However, it at the same time switched focus to other institutions which may possess the legality and sufficient legitimacy to promote, as well as enforce, key peremptory norms that relate to the protection of human rights, particularly where the Security Council is unwilling or unable to do so.

In suggesting the role that regionalism could play in filling the existing gaps left by a deficient UN system, chapter two took a historical approach and demonstrated the function of regionalism in the development of the international legal system, from the Westphalian phase to its current cosmopolitan outlook, which is based on active trans-regional cooperation. It became clear from this chapter that, shaped by its own flaws rather than its progress, the journey of international law from its European origins to universal application in the other regions, remains tied to the challenges of the First and Second World Wars, as opposed to those facing the international community in the new millennium. This point was picked up in chapter three, as well as developed in subsequent chapters, which addressed the strengths and shortcomings of the UN collective security system, including its restrictive rules on intervention and other limitations on regionalism in its framework.

In this context, chapter four introduced and showed the manner through which the dramatic proliferation and modification of regional organisations in recent years possesses the potential to act as a robust response to the deficient inter-state rules of the UN Charter, which previously acted as a hindrance to a proper reply to the

challenges of the Cold War era. By demonstrating how regionalism continues to work in a manner that was unforeseen by the drafters of the UN Charter, chapter four also offered insights with regard to the complimentary function of regional organisations in the legal-political evolution of the UN legal system, and thereby set the stage for a proper analysis of the AU's new approach to peace and security in part two of the thesis.

Overall, the origins, dynamics and institutionalisation of African regional norms, as well as the modification of the AU peace and security roles, authenticated Africa's contribution to the development of Chapter VIII of UN Charter and wider international law. In doing so, it challenged the common assumption that Europe, with its established architecture of security, is best placed to offer lessons at the regional level. Indeed, the thesis argued that the regionalisation of African peace and security offers valuable lessons for the UN and the international community, particularly with regard important areas including 1) the use of force, 2) collective peace and security, 3) the norm of non-intervention, 4) the question of UN reform and, 5) the impact of the AU/UN practice of cooperation in norm making, as described below.

1.2 The Constitutive Act of the AU and the UN Charter: The Relationship between the Right to Intervene and the Prohibition on the Use of Force

In demonstrating some of the major finding of the thesis, chapter seven addressed the legal challenges raised by the controversy surrounding the AU's framework of regional peace and security when measured against the more established rules within the UN system of collective security. Here it was argued that the AU's provisions, including those relating to enforcement, do not contravene those of the UN Charter. On the contrary, and as will be emphasised here, the AU's framework sits in harmonious resonance with the Charter and general international law. This interpretation is based on a more humane approach to the UN Charter, which at the same time creates room for other recent developments, particularly the unfolding relationship between the UN Security Council and regional organisations in the promotion of community values and human rights.

Understandably, the AU's right to intervene remains contentious, particularly given the peremptory nature of the UN's prohibition against the use of force, as explained in chapters three and seven. Furthermore, the ongoing debate is attributable to the fact

that the seemingly vague and abstract nature of the AU's right to intervene appears to fly in the face of Chapter VIII of the UN Charter (see chapter four), as well as contradicted in the proposed UN reforms (chapter eight), which seek to centralise the use of force in the Security Council. However, these concerns, though genuine, are flawed and based on misinterpretation of the principles and purposes of the Constitutive Act of the AU, which deserve further clarification.

Firstly, read together, both the Constitutive Act of the AU and the UN Charter expressly affirm the prohibition of the use of force. Their compatibility is further clear from the fact that any recourse to force outside the framework of articles 42 and 51 of the UN Charter, as well as article 4 (h) of the AU Constitutive Act, is prohibited under the AU framework, as explained in the *African Common Policy on UN Reform*, which was discussed in chapter eight. Thirdly, the legality of the AU's right to intervene is based upon an emerging interpretation of the UN Charter that is in line with international criminal law, particularly the tenets that prohibit genocide, war crimes and crimes against humanity. Here, it is worth mentioning that the acknowledgement of these rules by the international community, for example through creation of the International Criminal Court and adoption of the responsibility to protect, demonstrates the emerging shift in international law to a new position where, in grave circumstances, the sovereignty of states has to yield to the protection of peoples.

While the latter point is explained in more detail in the next section, further evidence of the complimentary nature of the AU framework to that of the UN is clear from the theme of cooperation that runs throughout the former's constitutive instruments, as shown in part two of the thesis and demonstrated in chapter nine on Darfur. Finally, the AU also agrees with the UN on the need to promote peace, stability and international co-operation, as shown below. Thus, despite the earlier scepticism, the key provisions in the AU Charter, including the right to intervene, interpreted both narrowly or permissively, have developed to be in harmony with established normative rules, including those contained in article 2 (4) and Chapter VIII of the UN Charter. Furthermore, African states, by their agreement to the Constitutive Act of the AU, have consciously contracted to intervention as a prescribed method of curbing the violations of human rights.

With regard to the possibility of taking regional action, it is submitted that an overview of the existing AU/UN framework can be summarised as follows. Firstly, the UN Security Council remains the preferred institution for the authorisation of legal intervention and other operations of the AU. As explained in chapter seven, the security institutional set up of the AU, by containing the right to intervene, is designed to be readily prepared to act upon future Council mandates. It should be mentioned here that the Council's authorisation of AU's action should preferably be express, in order to ensure the clarity of mandates as well as guarantee the support of the UN and the international community. However, such authorisation would also include the Council's tactical acceptance 'after the fact,' where the Council fails to act during emergency situations, including where war crimes, genocide and crimes against humanity are occurring or are threatening to occur. This interpretation is based on the Council's practice with regard to past regional action in Africa starting with its acquiescence of the ECOWAS operations in West Africa, a position that the AU expressly adopted in both the Constitutive Act of the AU and its *Common Policy on UN Reform*.

Thus an AU operation in the absence of an explicit Security Council authorisation of the use of force would be valid when later endorsed by the Council, there making it legal. However, in such instances, the AU should immediately seek *ex post facto* authorisation from the Council. Despite the controversy that such an action might arouse, a perusal of recent practice of the Council in expressing retroactive support of every major African operation quietens any concerns there may be in the legitimacy of regional action. And although a strict reading of the Charter may arguably discount such a possibility, it must also be recalled that a regional organisation's right to intervene is determined not just by its constitutive instruments, or simply by the nature of the organisation, but by the position taken and subsequent practice of the Security Council.

Therefore, the AU framework of peace and security creates an interesting dynamic; it calls for cooperation with the UN and recognises the Council's primacy over its activities but at the same time does not have to wait for the latter's authorisation before embarking on any intervention in situations requiring urgent action. However, having said that, it is important to bear in mind the risk of opening of the floodgates

for other organisations, such as the OAS and NATO. Accordingly, it needs to be emphasised here that the legality of the right to intervene by the AU under its constitutional framework is permissible only under clearly defined circumstances listed in its Constitutive Act. Furthermore, its validity in Africa does not suggest that its application is open to other organisations.

Indeed, the right to intervene is contained in the Constitutive Act of the AU, which is a multilateral treaty that was consciously and unanimously ratified by the 53 members of the AU. Furthermore, its practice and adoption confirms the right as a significant part of *African* regional law that does not extend to other regions. Therefore, the legal intervention of the AU may not be misinterpreted as evidence of a general right to intervene but a special African customary law backed by *opinio juris*. In evidence of this assertion, it will be recalled that in contrast to the regional actions of NATO, which brought serious division within the Security Council and the wider international community, ECOWAS and the AU operations exhibit a more acceptable approach to regional peace and security and have gained legitimacy finding favour with the UN Security Council and a large majority of the international community.

1.3 Strengthening Cooperation under Chapter VIII of the UN Charter and Devising a Relationship based on a Division of Responsibilities between the AU and UN

It will be recalled that a major argument of the thesis is that the AU framework strengthens many of the fundamental principles of the UN, including its reinterpretation of the doctrine of sovereignty to be conditional upon governments adhering to the codes of good governance, democratic principles and respect for human rights. However, although noble, the gap between AU's formal recognition and implementation of its constitutional framework remains its greatest challenge as explained in chapter six and demonstrated in chapter nine with respect to Darfur. Broadly speaking, this shortcoming is mainly attributed to lack of relevant experience, financial resources, regional politics, credibility and operational capacity.

In this context, although the thesis argued for the strengthening of the AU in peace and security functions, it also takes the premise that the aphorism of only 'African solutions to Africa's problems' is fundamentally flawed. This is because the mantra is

founded on a contradiction between the AU's aspiration for local resolution and the lack of indigenous security capacity available to its institutions. Moreover, in an interconnected world, the policy of active participation and cooperation between the AU and the UN is not only desirable, it must also be stretched within the permissible legal limits, in order to meet the security demands of a continent that has traditionally been torn apart by conflicts and civil strife.

Therefore, the thesis highlighted the pressing need to strengthen Chapter VIII of the UN Charter in whose framework the relationship between the AU and the UN could be better achieved and also generally lead to the development of collective peace and security. Indeed, the thesis showed that this strategy could be based on existing practice between the AU and the UN. The unfolding relationship demonstrates an emerging trend of support and co-operation between the two organisations and in particular, where the UN Security Council is willing to allow the AU PSC to take the leading role. Although this development was present in earlier African interventions, chapter nine showed that this maturity is most notable in the Darfur conflict where the Council consistently expressed its acceptance and support of the AU's leadership role.

However, while permitting peace and security roles to be carried out by the AU under Chapter VIII of the UN Charter may be well meant, it could prove to be potentially dangerous as placing such a burden on the organisation could further marginalise Africa and lead to abrogation by the Council of its duty to exercise primary responsibility for peace and security. Therefore, this thesis suggests that in order to allow better planned, consistent and reliable responses to African conflicts, there is a profound need to develop an interconnected link between the UN Security Council and the AU PSC. In this context it is submitted that a division of responsibilities would strengthen the promotion and maintenance of regional and international peace and security, as suggested in chapter four and reinforced in chapters seven and eight.

Indeed such a system would not only compensate and play on each organisation's weaknesses and strengths but also, a formalised structure detailing specific powers and obligations of the AU and UN would provide new opportunities for other regional organisations to develop their cooperation with the UN under Chapter VIII of its Charter. This would in turn lessen the Council's burden as well as boost its legitimacy

by providing a more balanced participation in decision making from regions with different cultural, religious and historical backgrounds. In this context, a formal and more coordinated system of cooperation between the AU and the UN would guarantee a more systematic relationship in promoting regional stability and maintaining international peace and security.

Certainly, the general lessons and uncertainties that emerge in cooperation between the AU and UN in the form of the deployment of UNAMID in Darfur confirm a central argument of this thesis which is that it is not at what level the area of peace and security, regional or universal, is best placed, but rather on the direction that the relationship between regionalism and universalism must take in order to meet the challenges brought about by contemporary threats and challenges. However, as the next section shows, in addition to the relevant law, there is a pressing need to equip the relevant institutions with the requisite political will in order to improve the specific working methods and approaches of the AU and the UN to African conflicts.

1.4 The Lessons from Darfur: Rectifying Institutional Deficiencies in Support of Emerging Norms

The failure of the Sudanese government to protect the citizens of Darfur from gross human rights violations challenged the AU and UN's principles which, as further shown below, are based on the assertion that the sovereignty of states is, at least on paper, conditional on the willingness and ability to protect their citizens. Therefore, the AU's involvement in Darfur formed the first critical test of Africa's ability to assume responsibility for regional conflict and also gave the UN yet another chance to redeem its image after its catastrophic failure in Rwanda. However, as it turned out, the whole of the security strategy of both organisations was, from the start, deeply flawed in their deployment of AMIS and UNAMID peace operations. This is because of the fact that, rather than embarking on the decisive measures legally permissible under article 4 of the Constitutive Act of the AU, as well as in Chapters VII and VIII of the UN Charter, the AU and the UN chose to engage in negotiating with a government that was chiefly responsible for gross violation of human rights against its own citizens.

Furthermore, their failure to intervene dealt a heavy blow for the eagerly awaited development of emerging norms. In this context, despite attaining prominence amidst

the shadow of the Darfur conflict, the much topical concept of responsibility to protect, whose legality was termed as 'emerging slowly,' remains ambiguous and has not crystallised into well established state practice nor attracted sufficient *opinio juris* to acquire the status of international law. Instead, although much more widely accepted than the presently redundant concept of humanitarian intervention, the nascent doctrine of responsibility to protect, for the moment, remains largely of academic debate centring on the uneasy relationship between law, politics and morals.

However, the failure of the responsibility to protect in Darfur had other significant ramifications relevant to international law. This includes an interesting paradox that was brought about by the UN Security Council's own references to the concept in its resolutions on Darfur, yet equally matched by its failure to take the necessary action under Chapter VII of the UN Charter. This irony ensured that the Council's authority on the issue was undermined in two ways. First, its failure to act could be interpreted that its reference to the doctrine amounts to rhetorical support only and that the Council is unable or unwilling to act decisively on its responsibility to protect. And secondly, its inability or unwillingness to take vital action on the concept raised the possibility of a regional organisation taking action without Security Council authorisation, as elaborated in chapter eight, particularly given that the circumstances in Darfur clearly required urgent action in order to protect civilians. In this regard, it might have been thought that the tragic lessons from the Council's failure to protect citizens in Africa would give African leaders an impetus to decisively act in Darfur. However, although it was clear that the AU could no longer solely rely on the UN in times of grave peril, the AU failed to act on the principles embodied in article 4 of its Constitutive Act. This was in spite of its numerous statements expressing its determination to end the conflict

The point mentioned above highlighted yet another contradiction in terms which further raises the real possibility of the AU framework being the disease that purports to be the cure. Although the AU was partly borne out of the frustration at the UN's failure to act decisively in Africa, its working methods are remarkably identical to that of the Security Council. This indication is clear from the fact that, in similar fashion to the Security Council authority under Chapter VII of the UN Charter, the AU's powers under the Constitutive Act of the AU were not designed to burden the regional organisation with any specific obligation but rather a broad discretion to intervene.

As Darfur shows, the AU's failure to intervene is unlikely to be influenced by the legal rights and duties with regard to intervention under the African Constitutive Act and the UN Charter. Instead, it is the amount of political will on the part of African leaders that will most often determine the effectiveness of the AU. Meanwhile, as it turned out, the regional politics much associated with Africa meant that Sudan escaped the legal measures permissible under the Charters of the AU and the UN. And despite its good intentions, the AU's slow deployment of AMIS troops in Darfur was faced with immense challenges: weak mandates, financial and logistical setbacks and other institutional shortcomings of a new regional organisation.

Although its leadership role in Darfur had a positive impact on peace and security, the failure of African leaders to take more decisive action could ultimately set the stage for a long series of bitter and divisive debates over the paradox brought about by their own unwillingness or inability to act on the very principles they seek to uphold, including the pledge to intervene in the grave circumstances as outlined in the Constitutive Act of the AU. Having said so, as stated in chapter nine, the conflicts such as those raging in Africa must not only be looked upon by assessing the legal case for intervention but by also focussing on the practical obstacles to intervention. With this regard, the debate regarding to the appropriate action to be taken in Darfur demonstrates that the concept of sovereignty remains very much intact in practice despite the rhetoric in various government statements which recognised need to halt systematic violations of human rights.

However, the overall picture of the AU's approach to peace and security provides important opportunities for the development of modern international law in crucial areas. Indeed, it must also be acknowledged that the AU framework and its practice in Darfur demonstrates a clear move from the previous African regional norm of non-interference in the affairs of member states to that of non-indifference, which in turn may have major ramification for the UN and its member states for reasons explained below.

1.5 The Impact in International Law of Africa's Shift from the Norm of Non-Interference to that of Non-Indifference

It became clear from chapters three and five that the formation of the UN (1945) and the later Organisation of African Unity (1963) were not designed to protect human and individual rights but were calculated to promote the realist interests of states. And although the concern of gross violations has partly been addressed through the rapid development of international criminal law, the formal amendment to the UN Charter, in order to meet contemporary challenges, is complex due to competing interests of member states, as shown in chapter eight. This means that the modification of the UN system has only partly been achieved, albeit in an indirect manner, through the establishment of institutions such as the International Criminal Court (1998) and other subsequent practice.

Indeed the very establishment of the AU in 2001 was premised on the dire need to amend the international legal system. This observation is of particular significance because Africa's transformation from the former OAU to the AU brought with it a shift in focus from the traditional paradigm of the Westphalian state to a modern trans-boundary system that seeks to protect community values, as stated above. In this context, the regional norms contained in the Constitutive Act of the AU not only reiterate the legality of the principles and values discussed in chapter one but also erodes some aspects of the once sacrosanct doctrine of sovereignty.

As shown in chapter five, the new thinking by African leaders was brought by an overwhelming consensus; that if human suffering and horror, such as that in Rwanda, were to be consigned to the ignominy of history, a new interpretation of the doctrine of sovereignty had to be found. Given their previous strict interpretation of the doctrine of sovereignty, Africa's makeover possesses the potential to redraw the landscape of international law. This is particularly true given that the practice of the AU, whose 53 member states constitutes over twenty five percent of the membership of the UN, will undoubtedly have ramifications in the gradual erosion of sovereignty as a fundamental norm. Indeed the impact of this change of position by the AU is visibly clear in its immense contribution towards the adoption of the responsibility to protect and the Peacebuilding Commission, which were the only real major achievements of the 2005 World Summit, as shown in chapter eight.

While appreciating Africa's restriction of the sovereignty principle, in order to enforce the fundamental values of the international community, it is worth noting here that in contrast to the previous references to the natural law as the justification for the need for *jus cogens* norms, the prevailing rationale for Africa's protection of these norms is borne out of the realisation of the spill-over effects of interconnected security threats, which transcend the geopolitical dimensions and encroach on regions far away from the original challenges. This alteration of approach is largely attributable to lessons learnt from the repercussions brought about by other internal wars, such as that in the 1994 Rwandan massacre where the war crimes, genocide and crimes against humanity triggered a conflict at the heart of Africa that touched at least one third of the countries within the African continent.

However, as shown in chapter five, the driving forces behind the establishment of the AU went beyond the renewed consciousness aroused by Rwanda, and it cannot also be conclusively stated that it is merely the UN's failure to act on its legal obligation under its Charter that compelled African leaders to rethink their past attitudes on non-intervention. Instead, the changing international political, economic and cultural setting that came with the entry of post-Cold War era triggered the African continent to adapt itself to the challenges of 21st century. Nevertheless, with conflicts acting as an impediment to development and economic prosperity, the marginalisation of the continent brought about by the emerging geopolitical realignments dictated that the continent had to rise up to the new tests facing the international community in the context of globalisation. Therefore, although reflective of an ongoing Pan-African project, the AU also continues to be shaped and reflect the evolving international climate.

2.1 Looking into the Future: A Way Forward

In the broader context, the study showed that the international legal system continues to change and adapt to the evolving needs of the international community. Therefore, as shown in chapters one and two, its constituent principles describe regional fundamental values to the interdependent world at large, which in turn, mirrors the perceptions of others to it and thereby of itself. And as the prevailing perceptions continue to develop as well as shape international law, it is inevitable that the changing priorities within the international system means that the traditional

paradigms will continue to shift. In this context, as with the past, the ongoing dialogue between the various subjects of international law and their response to the emerging realities will continue to dictate and reflect the new international political and legal environment within which the AU and UN must operate.

In light of the foregoing, the rest of this chapter focuses on a way forward for the African region in the dissemination and development of best practices, in order to enhance its effectiveness in the promotion of regional peace and security. What is clear is that Africa's acknowledgement and contribution to the ongoing change in focus from the Westphalian state system to an international legal system that seeks to protect the individual ought to be matched by the eradication of the barriers that previously curtailed the enforcement of human rights. This can be achieved in a number of ways.

Firstly, despite the doctrine's failure in Darfur, there needs to be a programme that is intended to formally implement the responsibility to protect within the AU framework in similar fashion to the New Partnership for African Development (NEPAD) and the African Peer Review Mechanisms (APRM), whose partial success was shown in chapter seven and reiterated below. In this context, in order to alleviate fears of an interventionist approach, the concept would be proactive and need not entail military action. In this regard, account should be taken of the progress that can be achieved through other strong African traditions, such as mediation, conciliation and other non-forcible measures, which equally meet the objective behind the emerging doctrine. Importantly, chapter nine showed that careful negotiations and mediation, even with stubborn governments such as Sudan, are likely to lead in agreements that include robust mandates, which provide peace operations with a responsibility for the protection for civilians in conflict areas as demonstrated in the deployment of AMIS and UNAMID in Darfur.

Undoubtedly, there will be situations where politics, diplomacy and other means short of military intervention, despite being preferable, will be insufficient. In these instances, the UN and other international partners should be prepared to support and contribute to the deployment of AU troops and provide them with the necessary training, funding and logistics. As suggested in chapter eight, during this period, the

permanent members of the Security Council should undertake not to engage in the threat or use of veto in situations of clear grave circumstances, which require urgent attention. Such an agreement would serve to enhance prompt action when necessary and at the same time remove any legal obstacles that would otherwise prevent the UN and, or the AU from intervention as a last resort.

In order to achieve this objective, a formalised legal norm of active cooperation needs to be established between the AU and the UN with the aim of outlining the operational and financial details of regionalised peace and security functions, as suggested above. The UN's relationships with the African operations in Liberia, Burundi and Darfur have shown the valuable potential that a division of labour between Africa and the UN may offer. And borrowing from the opportunities provided under Chapter VIII of the UN Charter, the UN should thus develop systems that allow it to act in concert and in cooperation with regional organisations where there is apprehension about human rights violation and regional instability. These efforts may initially be aimed at protection of civilians, rapid humanitarian assistance, increased accountability of human rights violators, and the effective implementation of existing legislative measures. Other steps would also include the dispatch of fact finding missions and diplomats to resolve disputes and the facilitation of peace talks.

Meanwhile, the UN and AU should be in constant dialogue with other organisations such as NATO, EU, the Arab League and OAS, whose political and economic influence could be a major asset in the prevention and bringing to a halt of atrocities, as shown in chapter nine with respect to Darfur. Specifically, these organisations should contain special units specifically designed to act in concert with the AU Standby Force in the prevention and halting of gross violations of human rights. Furthermore, these regional mechanisms should conduct regular training exercise and when necessary assist by providing troops to serve in the AU force, a hybrid AU-UN force or an all UN force, as occurred in Sudan albeit belatedly. Finally these organisations should also commit permanent staff at a designated AU and international partners' mission and formally recognise the AU's principles of non-indifference as well as adopt common policies on the responsibility to protect.

In the end, given that the AU states will normally possess the immediate interest in the maintenance and promotion of regional peace and security within African borders, it remains the fact that despite its limited capacity, the AU will be more suited in addressing the context behind the regional conflicts in the continent. In turn, the AU's success, or failure, in achieving its principles and objectives, will be determined by African leaders' political will and ability to uphold the pledges which they have committed themselves to. Therefore, these rulers must therefore abide by the AU's constitutional framework and adhere to democratic principles, good governance and respect for human rights. Here, to paraphrase the ruling in the *Admissions Case* of 1948, it ought to be emphasised that that the political character of the AU Assembly cannot release it from the observance of the treaty provisions contained in the Constitutive Act of the AU, particularly when they provide guidance and criteria for its judgement.

As shown in chapter seven, the successful impositions of sanctions against Togo and Mauritania demonstrated the progress that can be made by putting pressure on regimes that fail to follow the AU's principles and also promote peace as a prerequisite for the execution of economic development and integration programme of the continent, described in chapter five. Therefore, the AU should create a system that guarantees that Africa leaders obey their domestic constitutions, including the clauses that bar them from serving for more than the allowable terms in office. In this regard, the NEPAD and APRM programmes should be strengthened and supported in order to advance political, economic values, codes and standards, as well as set established legal norms amongst African governments.

Furthermore, as shown in chapter six, in order to achieve the overall aims of the AU, there needs to be a clear partnership of cooperation and system of hierarchy and more harmonisation to accelerate efforts between the AU and its internal mechanisms. The key institutions must also be supported with the political will and financial capabilities to carry out mandated tasks. Given the envisaged roles, this is particularly true for the AU Peace and Security Council and the African Standby Force. In this regard, the AU should continue to petition for external support, particularly from the UN in order to build its peace and security framework.

With regard to the decision to intervene, it is clear that the AU may only intervene having followed the constituent requirements of the Constitutive Act. Here, not only must a framework be set out to ensure that the decision to intervene is restricted to the grounds of war crimes, genocide and crimes against humanity as well as situations that amount to a threat to legitimate order, it must also be enacted upon. In addition to the rules described in the previous section, such a structure must also be regulated under the wider rules of international law. Firstly, in reaching the decision to intervene, it must be shown that the government of the state in question is unable or unwilling to exercise the responsibility to protect its citizens, as stated in the World Summit Document.

Secondly, in line with the Constitutive Act of the AU and the UN Charter, all available peaceful settlement procedures must have been exhausted and the primary purpose of the intervention must be strictly limited to averting human suffering and there must exist the reasonable prospects of success. Furthermore, the use of force by the AU must be proportional to the humanitarian issue at hand and in accordance with international humanitarian law and the guarantee to embark in peacebuilding and post conflict reconstruction. Here, it is recognised that the chronic lack of resources on the part of the AU means that any resort to the measures described above are close to the bounds of possibility. However, as suggested above, this shortcoming of the AU also brings the potential to open new opportunities and possibilities through the support and cooperation with the UN.

Finally, In the broader context, the African region must be fully engaged in all significant international debates in order to build and develop a workable agenda for the promotion of mutually agreed values which unify the international community. Importantly, institutional, administrative, logistical, financial and operational structures must be strengthened, in order to adapt to prevailing challenges and opportunities. Fortunately, the developing approach of the AU, through its constitutional framework and the obligation placed upon member states to adhere to agreed principles and the rule of law, has the potential to act as a useful incentive, as well as reward, for peace and security and the development of regional and universal norms.

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