

THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION AND THE UNITED NATIONS SECURITY COUNCIL: THE CASE OF DARFUR, SUDAN

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1 INTRODUCTION

The protocol establishing the Peace and Security Council of the African Union (AUPSC Protocol) came into force on December 26, 2003,¹ and serves as the continent's first continent-wide, regional collective security system.² It also will form a vital part of the African regional human rights system. The AUPSC joins the Economic Community of West African States Mechanism on Conflict Prevention, Management, and Resolution, Peace-Keeping and Security (ECOWAS Mechanism) and the South African Development Community Organ

- * The first three sections of this article are slightly updated and drawn from a recent publication of the author, 'The Peace and Security Council of the African Union', (2003) 13 *Iowa Journal of Transnational Law and Contemporary Problems* 110.
- 1 See The Protocol on the Peace and Security Council Enters into Force, African Union Press Release 117/2003 (26 Dec. 2003). The Protocol entered into force after the Republic of Nigeria became the twenty-seventh member state of the African Union to deposit an instrument of ratification. It did not become operational, however, until 16 March 2004, when the newly elected AUPSC held its first ministerial meeting in Addis Ababa, Ethiopia.
- 2 See Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002, reprinted in Levitt (ed.), *Africa: Selected Documents on Constitutive, Conflict and Security, Humanitarian, and Judicial Issues* (2003), p. 161, also available at http://www.africa-union.org/News_Events/Calendar_of_%20Events/Lancement%20PSC/Protocol_peace%20and%20security.pdf (last visited 12 Feb. 2005) [hereinafter African Peace Protocol].

on Politics, Defence and Security Cooperation (SADC Organ) as one of three African mechanisms established to manage conflict through military intervention.³

The AUPSC seeks to operationalize and provide structure and an enforcement mechanism for several decisions, declarations, and conventions related to peace, security, stability, and development adopted by the predecessor of the African Union, the Organization of African Unity (OAU), including:

- Declaration on the Establishment of the OAU of a Mechanism for Conflict Prevention, Management, and Resolution (MCPMR);⁴
- Decisions AHG/Dec.141 (XXXV) and AHG/Dec.142 (XXXV) on Unconstitutional Removal of Governments;⁵
- Declaration AHG/Decl.5 (XXXVI) on the Framework for an OAU Response to Unconstitutional Changes of Government;⁶
- Declaration AHG/Decl.4 (XXXVI) on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA);⁷
- The New Partnership for Africa's Development (NEPAD);⁸ and
- Convention on the Prevention and Combating of Terrorism.⁹

3 See Protocol Establishing the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-Keeping, and Security, 10 Dec. 1999, *reprinted in* Levitt, *supra* note 2, at 259 [hereinafter ECOWAS Protocol]; Southern African Development Community (SADC) Protocol on Politics, Defense and Security Cooperation, 14 Aug. 2001, *reprinted in* Levitt, *supra* note 2, at 309.

4 Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 30 June 1993, *reprinted in* Levitt, *supra* note 2, at 219.

5 Decisions on Unconstitutional Changes of Government, AHG/Dec.141 (XXXV Sess.) and AHG/Decl.142 (XXXV Sess.) (12-14 July 1999).

6 Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI Sess.) (10-12 July 2000).

7 Declaration on the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), AHG/Decl.4 (XXXVI Sess.) (10-12 July 2000).

8 See The New Partnership for Africa's Development, Oct. 2001, *available at* <http://www.uneca.org/nepad/nepad.pdf> (last visited 12 Feb. 2005) [hereinafter NEPAD]. See also Declaration on the New Africa Initiative, AHG/Decl.1 (XXXVII Sess.) (9-11 July 2001), *available at* http://www.au2002.gov.za/docs/summit_council/ahg.pdf (last visited 12 Feb. 2005). The New Africa Initiative was later termed the New Partnership for Africa's Development. See NEPAD, *supra*.

9 OAU Convention on the Prevention and Combating of Terrorism, 14 July 1999, *reprinted in* Levitt, *supra* note 2, at 187, also *available at* http://www.africa-union.org/Official_

The AUPSC Protocol was endorsed on 9 July 2002 at the First Ordinary Session of the Assembly of the African Union in Durban, South Africa.¹⁰ It was adopted, pursuant to Article 5(2) of the Constitutive Act of the African Union (Constitutive Act),¹¹ 'as a standing decision-making organ for the prevention, management and resolution of conflicts' and to serve as 'a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa'.¹² The AUPSC Protocol codifies, provides structure to, and operationalizes key provisions in the Constitutive Act, including:

- Article 3(f), concerned with promoting 'peace, security, and stability on the continent';¹³
- Article 4(h), concerning the right of the AU to 'intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity';¹⁴ and
- Article 4(j), concerning the right of the member states of the AU to 'request intervention from the Union in order to restore peace and security'.¹⁵

The AUPSC Protocol also reinforces the AU's NEPAD Peace and Security and Democracy and Political Governance initiatives,¹⁶ particularly its pledge to 'manage all aspects of conflict' through, among other things, 'peacemaking,

documents/Treaties_%20Conventions_%20Protocols/Algiers_convention%20on%20Terrorism.pdf (last visited 12 Feb. 2005).

10 As of September 2003, South Africa, Algeria, Ethiopia, Equatorial Guinea, Mali, Mozambique, Libya, Malawi, Mauritius, Sierra Leone, Zambia, Ghana, the Sudan, and Rwanda had deposited their instruments of ratification of the AUPSC Protocol. Decision of the Operationalization of the Protocol Relating to the Establishment of the Peace and Security Council, Assembly/AU/Dec.16 (II Sess.) (10-12 July 2003), available at http://www.africa-union.org/official_documents/Decisions_Declarations/Assembly%20AU%20Dec%2016%20II.pdf (last visited 12 Feb. 2005).

11 Article 5(2) empowers the AU to establish '[o]ther organs that the Assembly may decide to establish'. Constitutive Act of the African Union, 11 July 2000, art. 5(2), OAU Doc. No. CAB/LEG/23.15 (entered into force 26 May 2001), available at http://www.africa-union.org/About_AU/Constitutive_Act.htm (last visited 12 Feb. 2003) [hereinafter Constitutive Act].

12 African Peace Protocol, *supra* note 2, art. 2(1).

13 Constitutive Act, *supra* note 11, art. 3(f).

14 *Ibid.*, art. 4(h).

15 *Ibid.*, art. 4(j).

16 See NEPAD, *supra* note 8.

peacekeeping and peace enforcement'.¹⁷ Under Article 22 of the AUPSC Protocol, the AUPSC replaces the Cairo Declaration and supersedes the resolutions and decisions of the Central Organ of the OAU MCPMR and affiliated centres.¹⁸ The AUPSC Protocol will significantly impact the AU's role in conflict prevention, management, and resolution by, among other things, conferring on it peacemaking powers unknown to its predecessor; hence, it is necessary to begin considering its effect.

Historically, African states have lacked the political will and capacity to manage interstate and intrastate conflict. This was particularly the case with the OAU, the continent's foremost political organization composed of nearly all African states. As Robert Rotberg notes, civilian-led governments seem to lack 'sufficiently strong political will in Africa, either at the OAU or the sub-regional levels, to direct the generals and their soldiers' to enforce peace.¹⁹ The most audacious interventions have been at the behest of strongmen heads of state – leaders who thoroughly commanded the body politic, whether through popular democracy or autocracy. Former Tanzanian president Julius Nyerere's toppling of Idi Amin's oppressive regime in Uganda in 1979 and the bold interventions of former Nigerian head of state General Sani Abacha in Liberia and Sierra Leone in 1990 and 1997,²⁰ respectively, are cases in point.

The lack of political will and a viable and effective continent-wide peace and security system has meant that many small and preventable conflicts have escalated into full-blown protracted ones with serious regional consequences. From the Mano River region in West Africa to the Great Lakes and Horn of Africa, the last two decades reveal a pattern of brutal and unfettered warfare within and between states.²¹ While the key patron states and transnational corporations of the Cold War have stimulated, manipulated, exacerbated, and

17 *Ibid.*, para. 74.

18 See African Peace Protocol, *supra* note 2, art. 22.

19 R.I. Rotberg, 'African Responses to African Crises: Creating a Military Response', in: Rotberg et al. (eds.), *Peacekeeping and Peace Enforcement in Africa* (2000), p. 98 at 109.

20 J. Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Case of ECOWAS in Liberia and Sierra Leone', (1998) 12 *Temple International and Comparative Law Journal* 333 [hereinafter Levitt, 'Humanitarian Intervention']. See also J. Levitt, 'African Interventionist States and International Law', in: Furley, May (eds.) *African Interventionist States: The Conflict Resolution Brokers* (2001), p. 15 [hereinafter Levitt, 'African Interventionist States'].

21 Report of the Secretary-General to the Security Council on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa (13 Apr. 1998), UN Doc. A/52/871-S/1998/318 (1998).

exploited African conflict for geopolitical and economic gain, African elites generally lacked the political will to adopt concrete measures to prevent and resolve long-standing conflict. The OAU, for its part, did not possess the political mandate, resolve, or resources to manage conflict. On this point, Rotberg notes that the 'OAU has had no effective early warning or early action capacity; nor has it had any military capability'.²²

This article examines how African states chose to evolve the AU regional collective security system. Particular attention is devoted to the concept of conflict management through military intervention in the AUPSC Protocol, with a particular focus on the responses of the AU and the United Nations to the ongoing crises in the Darfur region of the Sudan. Section 2 analyzes key provisions of the Protocol. Section 3 contemplates the impact of the Protocol and the main stumbling blocks that will need to be addressed with respect to the United Nations. Section 4 examines the response of the AUPSC to the crises in the Sudan and suggests ways to strengthen the enforcement aims of the AUPSC within the context of the current African system and that of the United Nations.

2 KEY PROVISIONS IN THE PROTOCOL

It is essential to examine the text of the Protocol in order to appraise its efficacy in Africa's current legal, socio-political, and economic environment. Since it is newly adopted and it will be some time before AU leaders consider adopting another security framework,²³ it is important to reflect on the character of the AUPSC, which has been charged with ensuring peace, security, and stability in a continent of nearly one billion people. This section highlights and examines the central objectives, composition, functions, powers, procedures, and organs of the AUPSC. Let us now consider the normative aspects of the AUPSC Protocol.

22 Rotberg, *supra* note 19, at 101.

23 The signatories of the AUPSC Protocol are legally bound by the treaty and must refrain from any action that defeats its object and purpose. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, arts. 12(1)(b)-(c), 18(a), 1155 UNTS 331 (entered into force 27 Jan. 1980) [hereinafter Vienna Convention].

2.1 AUPSC Objectives, Composition, and Functions

2.1.1 Objectives

The objectives of the AUPSC are not new to the African political landscape. They complement those in Article 3 of the AU Constitutive Act²⁴ and echo the collective security framework proffered in the Draft Kampala Document for the Conference on Security, Stability, Development and Cooperation in Africa in 1991.²⁵ As stated, the AUPSC Protocol was established to be a permanent decision-making, collective security, and early-warning arrangement to facilitate timely and efficient response to conflict and other crises in Africa.²⁶ Its key objectives are to 'promote peace, security and stability'; 'guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development';²⁷ 'anticipate and prevent conflicts';²⁸ 'promote and implement peace-building and post-conflict reconstruction activities';²⁹ 'co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism';³⁰ 'develop a common defence policy';³¹ and 'promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law'.³² These objectives are indeed grand, given the questionable record of the AUPSC's predecessor, the general lack of resources of AU member states, and the acute security challenges facing the continent. In order for the AUPSC to have any semblance of success, African states will need to make realistic commitments about the amount of human and tangible resources needed to 'endow' it.

24 See Constitutive Act, *supra* note 11, art. 3.

25 Draft Kampala Document for a Proposed Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), 22 May 1991, *reprinted in* Levitt, *supra* note 2, at 227.

26 African Peace Protocol, *supra* note 2, art. 2.

27 *Ibid.*, art. 3(a).

28 *Ibid.*, art. 3(b).

29 *Ibid.*, art. 3(c).

30 *Ibid.*, art. 3(d).

31 African Peace Protocol, *supra* note 2, art. 3(e).

32 *Ibid.*, art. 3(f).

2.1.2 Composition

The composition of the AUPSC is not wholly unique. In some ways it emulates the structure of the United Nations Security Council (UNSC), particularly on issues concerning membership, core functions, and voting. This may be, in part, because the AU relied on UNSC staffers as advisers during the drafting of the Protocol. Notwithstanding, the AUPSC is more democratic than its UN counterpart as it does not provide for permanent membership or for any veto power. All decisions are made by consensus.³³ Hence, no member state will be able to deadlock the activities of the AUPSC. Similar to the UNSC, the AUPSC is composed of 15 members who serve two- and three-year terms.³⁴ AUPSC members are 'elected on the basis of equal rights' and according to the 'principle of equitable regional representation and rotation'.³⁵ Prospective members are elected according to numerous criteria, including their ability and willingness to uphold, promote, financially support, and advocate the principles of the Union,³⁶ and actively participate in sub-regional and regional peacemaking and peace support operations.³⁷ Respect for the rule of law, in particular constitutional governance structures, and for human rights are also key criteria for membership.³⁸ How the 'respect for the rule of law' criterion may be quantified in legal terms³⁹ and, if international standards are the means of measurement, how many African states genuinely would be entitled to AU membership are questions that cannot be answered at this time.

2.1.3 Functions

The AUPSC is empowered to carry out several important functions that complement and contradict the other security mechanisms in Africa, including the ECOWAS Mechanism, the SADC Protocol, and the Inter-Governmental Authority on Development (IGAD) conflict mechanism.⁴⁰ The key function of the

33 *Ibid.*, art. 8(13).

34 *Ibid.*, art. 5(1).

35 *Ibid.*, art. 5(1)-(2).

36 African Peace Protocol, *supra* note 2, art. 5(2)(a)-(c), (e), (j).

37 *Ibid.*, art. 5(2)(d)-(e).

38 *Ibid.*, art. 5(2)(g).

39 *Ibid.*

40 There is no provision in the IGAD Mechanism for peacekeeping or peace enforcement. Protocol on the Establishment of a Conflict Early Warning and Response Mechanism

AUPSC is to 'promote peace, security and stability in Africa'.⁴¹ It envisages doing this through early warning, preventive diplomacy,⁴² mediation⁴³ and, perhaps more importantly, peace-support operations, *intervention*,⁴⁴ humanitarian action, disaster management,⁴⁵ 'peace-building and post-conflict reconstruction',⁴⁶ and 'any other function as may be decided by the Assembly'.⁴⁷ While these functions are indeed important, neither the Constitutive Act nor the AUPSC Protocol defines what these terms mean from an operational or policy standpoint. Nevertheless, it is clear that the AUPSC may employ force in multiple contexts, whether to thwart conflict and safeguard human rights, to ensure access to humanitarian agencies, or to deliver humanitarian relief during natural disasters.⁴⁸ The next section provides insight into the proposed operational and policy activities of the AUPSC.

2.2 Powers, Procedures, and Organs

2.2.1 Powers

The AUPSC Protocol sets forth 18 major 'powers' or responsibilities of the Organization. These powers cover the gamut of peacemaking activities, from policy oversight and quality-control responsibilities to full-fledged military intervention. Military intervention includes pre-emptively engaging states that have policies that may lead to genocide and crimes against humanity,⁴⁹ authorizing non-military peace-support missions,⁵⁰ and recommending to the AU Assembly military intervention pursuant to Article 4(h) of the Constitutive Act in respect of grave circumstances, namely war crimes, genocide, and crimes

for the Inter-Governmental Authority on Development (IGAD) Member States, 11 Jan. 2002, reprinted in Levitt, *supra* note 2, at 333.

41 African Peace Protocol, *supra* note 2, art. 6(a).

42 *Ibid.*, art. 6(b).

43 *Ibid.*, art. 6(c).

44 *Ibid.*, art. 6(d).

45 *Ibid.*, art. 6(f).

46 African Peace Protocol, *supra* note 2, art. 6(e).

47 *Ibid.*, art. 6(f).

48 *Ibid.*

49 *Ibid.*, art. 7(1)(a).

50 *Ibid.*, art. 7(1)(b).

against humanity.⁵¹ Furthermore, the AUPSC is charged with, among other things, instituting 'sanctions whenever an unconstitutional change of Government takes place';⁵² 'implement[ing] the common defense policy';⁵³ combating terrorism in accordance with the OAU terrorism convention;⁵⁴ and coordinating and cooperating with sub-regional and regional mechanisms – including the UN – particularly on peace and security issues.⁵⁵ AU member states are bound by the decisions and actions of the AUPSC⁵⁶ and 'shall extend full cooperation to, and facilitate action by the Peace and Security Council for the prevention, management and resolution of crises and conflicts'.⁵⁷

The powers of the AUPSC are more clearly defined than those enumerated in Chapter VII of the UN Charter. In fact, the AUPSC sets out clear bases on which intervention may take place and creates a positive duty to institute sanctions whenever there are unconstitutional changes of government.⁵⁸ From this background, it is quite clear that the functions and powers of the AUPSC were informed by Africa's pressing security challenges and the fact that African leaders established the AUPSC to deal with any and all security issues, whether manmade or acts of God.

2.2.2 Procedures

The AUPSC will meet at the headquarters of the Union in Addis Ababa, Ethiopia.⁵⁹ If a member state invites the AUPSC to meet in its country, that state will defray the additional costs incurred by the AU Commission as a result of holding the meeting away from headquarters.⁶⁰ It will convene 'as often as required at the level of Permanent Representatives, but at least twice a month'.⁶¹ Ministers and heads of state and government will meet at least once a year.⁶² The chairmanship of the AUPSC will rotate annually among its mem-

51 Constitutive Act, *supra* note 11, art. 4(h).

52 African Peace Protocol, *supra* note 2, art. 7(1)(g).

53 *Ibid.*, art. 7(1)(h).

54 *Ibid.*, art. 7(1)(i).

55 *Ibid.*, art. 7(1)(k).

56 *Ibid.*, art. 7(2)-(3).

57 African Peace Protocol, *supra* note 2, art. 7(4).

58 *Ibid.*, art. 7(1)(g).

59 *Ibid.*, art. 8(3).

60 *Ibid.*, art. 8(4).

61 *Ibid.*, art. 8(2).

62 African Peace Protocol, *supra* note 2, art. 8(2).

bers.⁶³ AUPSC meetings will be closed, and any member state that is party to a dispute being considered by the Council may 'not participate either in the discussion or in the decision making process' relating to the dispute.⁶⁴ At least two-thirds of the total AUPSC membership is required to constitute a quorum.⁶⁵ At present, the AU has not developed a comprehensive set of rules of procedure to guide the convening of meetings, conduct of business, or other aspects of its work. However, Article 8(14) requires that it 'submit its own rules of procedure ... for consideration and approval by the Assembly' once the AUPSC becomes operative.⁶⁶

The AUPSC may hold open meetings where a non-AUPSC member state at conflict or party to a situation under Council review 'shall be invited to present its case as appropriate and shall participate, without the right to vote, in the discussion'.⁶⁷ States not at conflict or under review of the AUPSC may be invited to participate in discussions 'whenever that Member State considers that its interests are especially affected'.⁶⁸ International organizations, regional organizations and mechanisms, and civil-society entities party to or interested in a situation under review of the AUPSC may be invited to participate as nonvoting observers.⁶⁹ Furthermore, the AUPSC may hold 'informal consultations' for any and all interested or affected parties to a situation under its consideration.⁷⁰

The Protocol provides civil-society institutions a venue in which to participate directly or to weigh in on matters being considered by the Council.⁷¹ Furthermore, Article 20, 'Relations with Civil Society Organizations', commits the AUPSC to 'encourage' non-governmental organizations and all other forms of community-based entities, particularly 'women's organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa'.⁷² This is a significant development considering the state-centric, gender-biased, and elitist characteristics of its predecessor, the OAU Central Organ/

63 *Ibid.*, art. 8(6).

64 *Ibid.*, art. 8(9). Any party to a dispute may be invited to present its case to the AUPSC. *Ibid.*

65 *Ibid.*, art. 8(8).

66 *Ibid.*, art. 8(14).

67 African Peace Protocol, *supra* note 2, art. 8(10)(a).

68 *Ibid.*, art. 8(10)(b).

69 *Ibid.*, art. 8(10)(c).

70 *Ibid.*, art. 8(11).

71 *Ibid.*, art. 8(10)(c), (11).

72 African Peace Protocol, *supra* note 2, art. 20, at 182.

MCPMR, particularly on peace and security issues. If civil-society entities are permitted to participate in discussions before the AUPSC, African people will have an opportunity to influence and be informed about the policy prescriptions of their governments on critical security issues affecting them.

2.2.3 Organs

The AUPSC Protocol provides for the establishment of three noteworthy operational organs: the Panel of the Wise (Panel), the Continental Early Warning System (CEWS), and the African Standby Force (ASF). The Panel advises and supports the 'efforts of the Peace and Security Council and those of the Chairperson of the Commission, particularly in the area of conflict prevention'⁷³ (including preventive diplomacy and mobilizing public opinion) and on 'all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa'.⁷⁴ It is composed of five eminent African personalities who have made an 'outstanding contribution to the cause of peace, security and development on the continent'.⁷⁵ Panel members are 'selected by the Chairperson of the Commission' upon consultation with the 'Member States concerned, on the basis of regional representation and appointed by the Assembly' for three-year terms.⁷⁶ The Panel 'reports' to the AUPSC and through it to the AU Assembly.⁷⁷ If the Panel is to be a viable mechanism in assisting the AUPSC to avert conflict, its members must be viewed as impartial and must be respected and trusted by all segments of African society. The character of the AUPSC also will impact the way in which parties at conflict regard the Panel.

The CEWS is an appendage of the OAU MCPMR and is being integrated into the AUPSC. It will consist of an 'observation and monitoring centre' that will be referred to as the 'Situation Room', which will be responsible for data collection and analysis.⁷⁸ It is envisaged that the CEWS will be linked to sub-regional conflict mechanisms including the ECOWAS Mechanism, the SADC Organ, and the IGAD conflict mechanism. The CEWS will supply the Commission (AU Secretariat) with timely information and analysis 'to advise the Peace

73 *Ibid.*, art. 11(1).

74 *Ibid.*, art. 11(4).

75 *Ibid.*, art. 11(2).

76 *Ibid.*

77 African Peace Protocol, *supra* note 2, art. 11(5).

78 *Ibid.*, art. 12(2)(a).

and Security Council on potential conflicts and threats to peace' and recommend courses of action with the purpose of taking early action.⁷⁹

The ASF is arguably the most important organ in the AUPSC framework. It will be a rapid deployment force 'composed of standby multidisciplinary contingents, with civilian and military components'.⁸⁰ AU member states will be responsible for establishing standby contingents for AUPSC peace-support operations and intervention.⁸¹ It is sanctioned to conduct several types of operations, including:

1. [O]bservation and monitoring missions;⁸²
2. [O]ther types of peace support missions;⁸³
3. [I]ntervention in a member state in respect of grave circumstances or at the request of a member state in order to restore peace and security, in accordance with Article 4(h) and (j) of the Constitutive Act;⁸⁴
4. [P]reventive deployment in order to prevent (i) a dispute or a conflict from escalating, (ii) an ongoing violent conflict from spreading to neighboring areas or states, and (iii) the resurgence of violence after parties to a conflict have reached an agreement;⁸⁵
5. [P]eace-building, including post-conflict disarmament and demobilization;⁸⁶
6. [H]umanitarian assistance to alleviate the suffering of civilian populations in conflict areas and support efforts to address major natural disasters;⁸⁷ and
7. [A]ny other functions as may be mandated by the Peace and Security Council or the Assembly.⁸⁸

While undertaking these functions, the ASF is supposed to cooperate with the UN and its agencies and other relevant international and regional organizations, national authorities, and nongovernmental organizations.⁸⁹ The strategy and *modus operandi* for ASF missions will be approved by the AUPSC

79 *Ibid.*, art. 12(5).

80 *Ibid.*, art. 13(1).

81 *Ibid.*, art. 13(2).

82 African Peace Protocol, *supra* note 2, art. 13(3)(a).

83 *Ibid.*, art. 13(3)(b).

84 *Ibid.*, art. 13(3)(c).

85 *Ibid.*, art. 13(3)(d).

86 *Ibid.*, art. 13(3)(e).

87 African Peace Protocol, *supra* note 2, art. 13(3)(f).

88 *Ibid.*, art. 13(3)(g).

89 *Ibid.*, art. 13(4).

on the recommendation of the AU Secretariat.⁹⁰ A Special Representative of the Chairman of the Commission will head ASF missions,⁹¹ and a Force Commander, who will report to the Special Representative,⁹² will coordinate and direct ASF operations.⁹³ The AUPSC Protocol also provides for a Military Staff Committee that will provide military and security-related advice to the AUPSC and liaise with the Force Commander.⁹⁴

Although on paper the lines of authority are prescribed in the Protocol, only time will determine whether the AUPSC will be able to deal with the numerous and complex issues involved with managing peace operations, let alone the heated geopolitical antagonisms that often surface in African peacekeeping operations.

3 LIKELY IMPACT AND MAJOR STUMBLING BLOCKS

3.1 Likely Impact

This section considers the impact of the AUPSC Protocol and the main stumbling blocks that will need to be addressed, including transregional conflicts of law.

Although in operational terms it is too early to consider the impact of the AUPSC Protocol on Africa's collective security landscape, it is not premature to assess the efficacy of its proposed structure. There can be no question that the AUPSC will, at least initially, suffer from the same resource and logistical inadequacies as its predecessor, the OAU Central Organ/MCPMR. The new AU law of intervention, which obligates it to forestall conflict – by coercive means if necessary – presents enormous political, economic, and logistical challenges, not to mention issues related to the rate and consistency of intervention that will no doubt surface, given the numerous protracted conflicts that need intervention on the continent. For example, while the AU sought to end the crisis in Burundi in 2002⁹⁵ through preventive diplomacy and peace-

90 *Ibid.*, art. 13(5).

91 *Ibid.*, art. 13(6).

92 African Peace Protocol, *supra* note 2, art. 13(7).

93 *Ibid.*, art. 13(6), (7).

94 *Ibid.*, art. 13(8)–(12).

95 Report of the Secretary-General to the Security Council on the Situation in Burundi (18 Nov. 2002), UN Doc. S/2002/1259 (2002), p. 1.

observation missions, it wrestled with ways and ultimately did very little to diffuse conflict in Liberia during the same period⁹⁶ – while the latter country perhaps was in greater need of intervention. However, if its initial handling of the crisis in Darfur, Sudan is any indication of its evolving capacity and willingness to manage conflict, the AUPSC's future may indeed be promising.

From a structural standpoint, the AU's new collective security framework will have greater longevity and legitimacy than prior OAU conflict mechanisms because of its robust mandate to enforce peace – authority lacking in those organizations that preceded it.⁹⁷ Only nine years after the institution of the OAU MCPMR, the mandate and approach that underpinned its creation was overhauled with the adoption of the AUPSC Protocol in July 2002. Again, this is partly due to the MCPMR's limited mandate – which did not include conflict management or intervention – but also is due to the impact of conflict on African development generally.⁹⁸ African leaders also seem to recognize that new solutions are necessary to curb the devastating effects of civil conflict on African people, and that sovereignty is no longer a shield from intervention when human suffering exists on a great scale. As Nsongurua Udombana rightly points out:

The OAU Central Organ sanctioned many *observer missions* and *neutral investigations* during the past decade with the intention of moving towards a larger U.N. mission as well as to demonstrate an African commitment commensurate with that of the United Nations. But where has all this left Africa? Today, more than a dozen conflicts, both old and new, still ravage the continent, a clear indication that current methods do not sufficiently tackle the problems. Is it not time to try other solutions?⁹⁹

The AUPSC is another solution. African leaders have consciously and willingly contracted away sovereignty for greater aspirations of peace, security, stability, and development. Such a course of action was not imaginable a decade ago.

96 J. Levitt, 'It's Time America Comes to Liberia's Assistance', *Chicago Sun Times*, 6 June 2003, 27A.

97 The OAU Central Organ only permitted and equipped the MCPMR to launch non-military peace observation missions.

98 '[O]nce started, civil wars retard economic and social development and aggravate poverty – completing the vicious circle of conflict poverty, and exclusionary politics.' World Bank, *Can Africa Claim the Twenty-First Century?* (2000), p. 58.

99 N.J. Udombana, 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights', (2002) 17 *American University International Law Review* 1177, 1224 (emphasis added).

The AU's proposed collective security framework is more democratic, transparent, and inclusive than that of its predecessor. Under the AUPSC framework, the regional conflict mechanisms of regional bodies such as ECOWAS, SADC, and IGAD 'are part of the overall security architecture of the Union'.¹⁰⁰ In this context, the AU commits itself to 'harmonize and co-ordinate' and partner with regional mechanisms to achieve peace,¹⁰¹ security, and stability on the continent through the exchange of information and analyses,¹⁰² and the establishment of 'liaison offices' in the regional mechanisms.¹⁰³ It also seeks to work more closely with the UN, particularly the UNSC, and other international organizations in the 'promotion and maintenance of peace, security and stability in Africa'.¹⁰⁴ Better cooperation among African conflict mechanisms and between the UNSC and the AU should fast-track African crises on the UN agenda – which may result in more concerted action.

State actors are not the only beneficiaries of the AU's new security framework. The Pan-African Parliament has gained a type of quasi-oversight function over the AUPSC, requiring the latter to 'maintain close working relations with the Pan-African Parliament';¹⁰⁵ submit reports to the former on request, including a separate annual report on the 'state of peace and security in the continent';¹⁰⁶ and 'facilitate the exercise by the Pan-African Parliament of its powers' under the Protocol to the Treaty establishing the African Economic Community.¹⁰⁷ The AUPSC also seeks 'close cooperation' with the African Commission on Human and People's Rights (Commission) 'in all matters relevant to its objectives and mandate'.¹⁰⁸ The Commission will notify the AUPSC of any information relevant to its objectives and mandate.¹⁰⁹ The

100 African Peace Protocol, *supra* note 2, art. 16(1).

101 *Ibid.*, art. 16(1)(a).

102 *Ibid.*, art. 16(4).

103 *Ibid.*, art. 16(8). Regional mechanisms are also 'encouraged' to establish liaison offices at the Commission. *Ibid.*

104 *Ibid.*, art. 17(1).

105 African Peace Protocol, *supra* note 2, art. 18(1).

106 *Ibid.*, art. 18(3).

107 *Ibid.*, art. 18(3). One of the key objectives of the Pan-African Parliament is to 'promote peace, security and stability' throughout Africa. Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, 2 Mar. 2002, art. 3(5), available at http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oa/treaties/pap_protocol.pdf (last visited 12 Feb. 2005).

108 African Peace Protocol, *supra* note 2, art. 19.

109 *Ibid.*, art. 19. Yet it is unclear how and in what form the Commission will 'bring to the attention' relevant information to the AUPSC.

recognition of the Commission in the AUPSC Protocol is an important development because it recognizes and codifies the link between deadly conflict, human rights violations, the law of intervention, and regional security policy in Africa.

Another important aspect of the AUPSC framework is its commitment to engage with civil-society organizations – and the obligation of the AUPSC to ‘encourage non-governmental organizations’ and any other type of ‘community-based’ organizations, ‘particularly women’s organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa’.¹¹⁰ The recognition of the importance of civil-society actors in the AUPSC Protocol is a progressive development considering that African governments historically have been very wary of them. Taken together, the inclusive approach to conflict management outlined in the AUPSC Protocol may enable it to more easily promote and build institutional trust among stakeholders during conflict, including combatants, the AU, the UN, regional conflict mechanisms, and civil-society institutions.

However, before the AUPSC can function efficiently, it will need to address several structural faults and operational deficiencies. The major structural impediments needing urgent attention concern regional conflicts of law between the UN and the AU on the one hand, and among African regional organizations and the AU on the other. The operational deficiencies concern the severe lack of resources, military assets, and logistics capability of the AU and its member states.

3.2 AU/UN Stumbling Blocks

The major stumbling blocks that have gone virtually unnoticed by the AU leadership concern conflicts of law between the AU and the UN on the *jus ad bellum*. This section will examine two sets of stumbling blocks between the organizations.

The first stumbling blocks between the AU and the UN arise within the AUPSC Protocol. Under Article 16 the AUPSC devolves to itself the ‘primary responsibility for promoting peace, security and stability in Africa’,¹¹¹ but in Article 17 it commits itself to ‘cooperate and work closely’ with the UNSC, seemingly recognizing that the UNSC ‘has the primary responsibility for the

110 *Ibid.*, art. 20. Civil-society organizations may even be invited to address the AUPSC.

111 *Ibid.*, art. 16(1) (emphasis added).

maintenance of international peace and security'.¹¹² These provisions are somewhat contradictory; it is not clear whether the AU has reserved for itself primary responsibility for peace and security in Africa rather than leaving it to the UNSC. Notwithstanding, nothing in the AU Constitutive Act or in the AUPSC Protocol explicitly requires the AU to seek prior authorization from the UNSC before authorizing or launching interventions.¹¹³ The decision not to include such language in the Protocol, according to a senior AU official, 'was a conscious decision by AU leaders due to the debacles in Somalia and Rwanda so the Assembly decided not to bind themselves to rules and systems that have failed Africa, or the policy prescriptions of certain powers'.¹¹⁴ Although AU leaders recognize that in an ideal world the UNSC should take primary responsibility for maintaining international peace and security in Africa, the UN's peacemaking record on the continent has been shamefully poor, particularly with respect to the permanent members of the UNSC.¹¹⁵ Hence, interestingly, Article 17(2) of the AUPSC Protocol, which deals with the relationship between the AU and UN, states:

*Where necessary, recourse will be made to the United Nations to provide the necessary financial, logistical and military support for the African Unions' [sic] activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter ...*¹¹⁶

Although Article 53(1) of the Charter requires that 'no enforcement action shall be taken under regional arrangements ... without the authorization of the Security Council',¹¹⁷ the AU does not directly acknowledge this provision and obligation, but rather acknowledges Chapter VII as a whole. Taken together, Articles

112 *Ibid.*, art. 17(1). Article 24 of the UN Charter stipulates that '[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'. UN Charter art. 24.

113 This is in stark contrast with SADC law, which requires UNSC authorization before embarking on peacekeeping operations.

114 Telephone interview with Senior AU Official, AU Office of the Legal Counsel (4 Feb. 2003).

115 The failure of the UN to forestall conflict in Liberia (1990), Rwanda (1994), Sierra Leone (1997), Central African Republic (1997), Guinea-Bissau (1998), Lesotho (1998), Congo (1998), Guinea (1999), Côte d'Ivoire (2003), and Liberia (2003) are just a few examples.

116 African Peace Protocol, *supra* note 2, art. 17(2) (emphasis added).

117 UN Charter art. 53(1).

4(h) and (j) of the Constitutive Act¹¹⁸ and Articles 4(j) and (k),¹¹⁹ 6(d),¹²⁰ 7(c)-(g),¹²¹ 16(1),¹²² and 17(1) and (2) of the AUPSC Protocol¹²³ reveal that while the AU acknowledges the 'primary' role of the UN in maintaining international peace and security,¹²⁴ particularly in Africa, it reserves the right to authorize interventions in Africa – seeking UN involvement '[w]here necessary'.¹²⁵

The pro-intervention language in the AU Constitutive Act and the AUPSC Protocol presents a dilemma because they arguably conflict with Articles 2(4) and 53(1) of the UN Charter.¹²⁶ This places both AU instruments in conflict with UN Charter Article 103, which states that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.¹²⁷ On the issue of regional intervention and Article 103, Rudolf Bernhardt comments:

[I]f the members of a regional arrangement, or even two States, agree that in case of internal disturbances or other events within one of the States concerned, the other State(s) can intervene with military forces without the consent of the *de jure* or *de facto* government, the compatibility of such a special agreement [e.g., AU Constitutive Act and AUPSC Protocol] with the Charter becomes *doubtful* and must

118 Constitutive Act, *supra* note 11, art. 4(h)-(j).

119 African Peace Protocol, *supra* note 2, art. 4(j)-(k).

120 *Ibid.*, art. 6(d).

121 *Ibid.*, art. 7(c)-(g).

122 *Ibid.*, art. 16(1).

123 *Ibid.*, art. 17(1)-(2).

124 African Peace Protocol, *supra* note 2, art. 17(1).

125 *Ibid.*, art. 17(2). Here, the AU seems to view Article 52 of the UN Charter as an independent provision unhindered by the 'pre-authorization' requirement in Article 53. It also appears to reserve the right to be the sole arbiter of authorizing interventions vis-à-vis other African conflict mechanisms and states. See UN Charter arts. 52-53.

126 Article 2(4) requires that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. UN Charter art. 2(4). Any such conflicts of law between AU law and Article 2(4) may be limited to interstate conflict, because intrastate conflict is arguably out of the reach of the Charter's provision. Yoram Dinstein, *War, Aggression and Self-Defence* (2002), p. 80.

127 UN Charter art. 103. Article 30 of the Vienna Convention on the Law of Treaties also recognizes the supremacy of Article 103 of the UN Charter. Vienna Convention, *supra* note 23, art. 30.

in principle be denied. Here, the territorial integrity of all States and the prohibition of the use of force are at stake. An agreement permitting forceful intervention would hardly be compatible with the Charter and would fall under Article 103.¹²⁸

While Bernhardt may be correct in doubting the compatibility of regional intervention agreements or provisions with the UN Charter, this does not necessarily mean that they are not lawful or valid, nor does it mean that they must in principle be voided or suspended in whole or in part. This is true because African state practice and the resulting intervention-based treaty law developments – particularly Articles 4(h) and (j) of the Constitutive Act and the AUPSC Protocol – are not in fact inconsistent with the Charter's schemata. Both instruments recognize the primacy of the UN in maintaining international peace and security, and both reinforce its core mission: keeping international peace through regional action in accordance with Article 52 of the Charter. Furthermore, acting under its Chapter VII powers, the UNSC has retroactively authorized African regional interventions taken under the authority of hardened regional customary law that has been codified into treaty.¹²⁹

In this sense, the conflicting African interventionist treaty law indefinitely prevails over Article 103 and dependent provisions. Article 103 seems to create an exception for African interventionist treaties¹³⁰ – to argue otherwise is to assert that the UNSC violated Article 103 by authorizing *ex post facto* interventions prohibited under Article 103, a difficult claim to make given the broad discretionary powers of the UNSC. Furthermore, the AU's position fills a gap in UN law and complements Article 2(7) of the UN Charter concerning UN involvement in intrastate conflicts, in which the framers of the UN did not envisage the Organization involving itself. The Charter explicitly prohibits the organization from intervening in 'matters that are essentially within the domestic jurisdiction of any state' without prejudicing the 'application of enforcement measures under Chapter VII'.¹³¹

128 R. Bernhardt, 'Article 103', in: Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (2002), p. 1297 (emphasis added).

129 The retroactive authorizations of ECOWAS to restore peace in Liberia and Sierra Leone through, among others, UNSC Resolutions 788, 866, and 1132, respectively, are cases in point. See generally, Levitt, 'African Interventionist States', *supra* note 20. Moreover, it can be argued that nothing in the *travaux préparatoires* of Article 103 indicates that it applies to codifactory as opposed to legislative treaties.

130 The same logic or analysis applies to ECOWAS law.

131 UN Charter art. 2(7).

The approach taken by the AU is in accord with customary international law use-of-force developments, namely, the hardening and mainstreaming of the doctrine of humanitarian intervention into treaty law and the wider corpus of international law. In the post-Cold War era, this doctrine has largely been generated from African state practice (see Tables 1 and 2);¹³² the UNSC's ratification of African interventions;¹³³ and military action taken by the North Atlantic Treaty Organization (NATO) in Kosovo in 1999.¹³⁴

Table 1: Selected African Military Interventions, 1990-2003

Group ¹³⁵	Place of Intervention	Year of Intervention	Length of Mission*
ECOMOG	Liberia	1990	8 years
MISAB	Central African Republic (CAR)	1997	9 months
ECOMOG	Sierra Leone	1997	2 years
ECOMOG	Guinea-Bissau	1998	1 year
SADC	Lesotho	1998	1 month
ECOMOG	Côte d'Ivoire	2003	present
ECOMIL	Liberia	2003	present

* These are conservative estimates because the ECOWAS and MISAB missions were later converted into UN-sanctioned operations.

Table 2: Non-Humanitarian Legal Forcible Military Interventions by Individual African States

State	Place of Intervention	Year of Intervention	Length of Mission
Nigeria	Sierra Leone	1997	3 months
Senegal	Guinea-Bissau	1998	6 months
Guinea	Guinea-Bissau	1998	6 months

¹³² The ECOWAS interventions in Liberia (1990-97), Sierra Leone (1997-2000), Guinea (2000), Guinea-Bissau (2001), and Côte d'Ivoire (2002); the SADC intervention in Lesotho (1998); and the MISAB and CEMAC interventions in the Central African Republic in 1996 and 2003, respectively.

¹³³ See generally Levitt, 'Humanitarian Intervention', *supra* note 20; Levitt, 'African Interventionist States', *supra* note 20.

¹³⁴ D. Kritslotis, 'The Kosovo Crisis and NATO's Application of Force Against the Federal Republic of Yugoslavia', (2000) 49 *International and Comparative Law Quarterly* 330.

¹³⁵ The acronyms signify the following: Economic Community of West African States Cease-Fire Monitoring Group (ECOMOG); Mission for the Implementation of the Bangui

These interventions have solidified and further evolved the *jus ad bellum*, which the AU has codified in the Constitutive Act and the AUPSC Protocol.

The second set of stumbling blocks is found in the differing laws of intervention prescribed in AU and UN Charter law and customary international law. Under UN law and general and customary international law, the threat or use of force by a state or group of states in another state for purely humanitarian purposes is unlawful and a breach of the target state's political independence and territorial integrity, absent that state's consent or explicit authorization from the UNSC.¹³⁶ Many scholars consider intervention taken outside of these parameters, regardless of its humanitarian motives, to be unlawful.¹³⁷ This is largely because, until recently, states have strictly interpreted and adhered to the international law doctrine of state sovereignty and the principle of non-intervention in the internal affairs of states. On this point, Dino Kritsiotis states:

Constructed as a basic legal proposition, the right of humanitarian intervention – that is, the transnational application of force by states under the banner of humanitarian concern – challenges the fundamental doctrine upon which the contemporary system of international law operates: the doctrine of state sovereignty and the concomitant principle of non-intervention in the internal affairs of states.¹³⁸

Notwithstanding, those who subscribe to the non-interventionist position are at a loss to explain the UNSC's retroactive authorizations of a wave of seemingly illegal humanitarian interventions that have taken place since the end of the Cold War.¹³⁹

As mentioned, Articles 4(h) and (j) of the AU Constitutive Act and Articles 7(c) and (f), among others, of the AUPSC Protocol explicitly empower the AU

Agreement (MISAB); Nigerian Forces Assistance Group (NIFAG); and South African Development Community (SADC).

¹³⁶ See generally H. Lauterpacht (ed.), *Oppenheim's International Law* (1955), vol. 1, § 455 at 305; U. Beyerlin, 'Humanitarian Intervention', in: Dolzer et al. (eds.), *Encyclopedia of Public International Law* (1982), vol. 3, p. 211 at 212; I. Brownlie, *International Law and the Use of Force by States* (1963); R. Higgins, 'Peace and Security Achievements and Failures', (1995) 6 *European Journal of International Law* 445; J. Quigley, 'The "Privatisation" of Security Council Enforcement Action: A Threat to Multilateralism', (1996) 17 *Michigan Journal of International Law* 249, 249-50.

¹³⁷ *Ibid.*

¹³⁸ D. Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention', (1998) 19 *Michigan Journal of International Law* 1005.

¹³⁹ The ECOWAS interventions in Liberia, Sierra Leone, and Guinea-Bissau are cases in point.

Assembly to launch and authorize humanitarian interventions.¹⁴⁰ In contrast, Article 2(4) of the UN Charter forbids states in their 'international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.¹⁴¹ In this context, AU and UN law seem to conflict. As Yoram Dinstein aptly points out, 'the use or threat of force is abolished in Article 2(4) only in the "international relations" of Member States. Intra-State clashes therefore are out of the reach of the Charter's provision'.¹⁴² In the present author's view, the AU and other African regional organizations may lawfully employ force in states to forestall intrastate conflict for two reasons: (1) because general and regional customary international law and treaty law developments permit it; and (2) because such conflict arguably falls outside of the jurisdictional mandate of the UN, and UN law does not forbid it.¹⁴³

Furthermore, as previously mentioned, Article 103 of the UN Charter states that UN Charter law prevails when there is a 'conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement'.¹⁴⁴ The aforementioned 'conflict between obligations' is vital to ascertaining and applying the *jus ad bellum* and to pertinent wider international peace-and-security policy considerations. A simple reading of Article 103 would seem to resolve the issue – meaning that UN Charter law would prevail over the interventionist provisions of AU law. Unfortunately, as demonstrated above, the issue cannot be resolved so easily. AU law is not simply treaty law, but rather codified regional and international custom; hence, the UN Charter would not 'prevail' because Article 103 does not apply to conflicts between the UN and customary law. In fact, during the course of deliberations over Article 103, '[a] formula according to which all other commitments, including those arising under customary law, were to be superseded by the Charter, was ultimately not included'.¹⁴⁵ Ap-

140 The law of ECOWAS maintains a similar position. ECOWAS Protocol, *supra* note 3, art. 25.

141 UN Charter art. 2(4).

142 Dinstein, *supra* note 126, at 80.

143 Although the UN does not forbid it, the author recognizes that it is debatable whether intrastate conflict falls outside of the jurisdictional mandate of the UNSC, given the way in which the UNSC has interpreted its discretionary powers and the language of Article 39 of the UN Charter since the end of the Cold War. However, such interpretations may also be viewed as exceptions to the general rule prohibiting such action.

144 UN Charter art. 103.

145 Bernhardt, *supra* note 128, at 1293.

parently the framers of Article 103 were not comfortable with it superseding conflicting customary law developments.

The fact that the UN Charter is silent on the issue evidences the framers' intent not to limit the legal efficacy of customary law developments. Moreover, again, Article 103 is applicable *only* when there is a 'conflict between obligations', which cannot be found in this case, given the UNSC's consistent pattern or practice of retroactively ratifying African interventions,¹⁴⁶ the majority of which were taken under the authority of customary international law and pro-intervention treaties. How can there be a conflict between obligations of AU and UN law under Article 103 when the UNSC, the guarantor of breaches of international peace and security, routinely ratifies under its Chapter VII powers African state practice that otherwise creates conflicting obligations?¹⁴⁷ Richard Lauwaars argues that the 'only externally binding decisions are decisions of the Security Council concerned with the maintenance of international peace and security. These decisions clearly fall within the strictures of Article 103 and must be observed by Member States and international organizations'.¹⁴⁸ If Lauwaars is correct in asserting that UNSC decisions fall within the purview of Article 103 and must be observed, then pro-interventionist African treaties (e.g., AU and ECOWAS law) that serve as the authority for interventions sanctioned by the UNSC *ex post facto*¹⁴⁹ also must be observed rather than viewed in conflict with Article 103.¹⁵⁰

This background supports an argument that the law of intervention in the UN and the AU form two independent norms of international law, based on the UN Charter on one hand and customary international law and treaty law on the other. In principle, these norms compete and are juxtaposed, creating

146 Levitt, 'Humanitarian Intervention', *supra* note 20, at 373.

147 Nothing in the UN Charter or the *travaux préparatoires* of Article 103 addresses the issue of consequences for breaches of the UN Charter, i.e., 'whether incompatible agreements should be void or merely suspended'. Bernhardt, *supra* note 128, at 1293.

148 R.H. Lauwaars, 'The Interrelationship Between United Nations Law and the Law of Other International Organizations', (1984) 82 *Michigan Law Review* 1604, 1606.

149 The retroactive authorizations of ECOWAS to restore peace in Liberia and Sierra Leone through, among others, UNSC Resolutions 788, 866, and 1132, respectively.

150 It is also important to note that pro-intervention treaties and provisions should not be looked at in isolation but rather in proximity to how they are employed in practice, particularly when such practice is consistent with the UN Charter framework, namely, maintaining international peace and security.

normative friction, but in practice they have proven to be complementary,¹⁵¹ filling an alarming gap in the international system of peace and security. Whatever the case may be, the UN's poor peacemaking record in Africa has been the greatest force in generating competing customary law of intervention norms and pro-intervention treaties. Gross deficiencies in the UNSC system have been the greatest corroder of UN law.

The section that follows will examine the efficacy of the international response to the crisis in Darfur, Sudan by paying particular attention to actions by the AU and the United Nations to ascertain the extent to which, if any, the structural faults and operational deficiencies of the AU, stumbling blocks between the AU and UN, and the UNSC's record of inaction in Africa have impacted their responses to the crisis.

4 THE CASE OF DARFUR, SUDAN

4.1 Background

The Sudan has been immersed in one of the world's most deadly and long-standing internal wars for over 21 years. Although civil war between the Government of Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A), which began in 1983 after the breakdown of the 1972 Addis Ababa agreement, is close to a final resolution,¹⁵² it has claimed over two million lives, internally displaced four million people, and caused over 600,000 others to flee across international borders as refugees. Tragically, large-scale death, destruction, mass internal displacement, refugee flows, famine, disease, and despair have become commonplace in the Sudan. There is no set of indicators that can measure the socio-political, economic, and developmental impact of the war on the people of the Sudan, and on neighbouring countries

151 Again, the UNSC *ex post facto* authorization of and co-deployment with ECOWAS forces in Liberia in 1992 through UNSC Resolution 866 demonstrates this point. See The United Nations and the Situation in Liberia, UN Doc. DPI/1668 (1997), p. 35.

152 On 9 January 2005, the Sudanese government and the Sudan People's Liberation Movement/Army entered into a landmark comprehensive peace agreement theoretically marking an end to over two decades of civil war in the country and the beginning of peace between the north and south. 'Sudan: Southern Agreement Raises Hope for Nationwide Peace', UN Integrated Regional Information Networks (10 Jan. 2005), at <http://www.irinnews.org/report.asp?ReportID=44987> (last visited 12 Feb. 2005).

and the region as a whole; however, it is accurate to conclude that it has devastated in the most horrific ways generations of Sudanese.

Just as peace between the GoS and SPLM/A appeared on the horizon, warfare broke out in Darfur in February 2003,¹⁵³ when two loosely allied, predominantly black African rebel groups, the Sudan Liberation Movement/Army (SLA) and the Justice and Equality Movement (JEM), launched a string of attacks on GoS military installations in the region, particularly in the regional capital of El Fasher.¹⁵⁴ The rebels, who feared being excluded from the power- and wealth-sharing agreements that were being negotiated by the GoS and the SPLM/A ('Naivasha discussions'), took up arms purportedly to seek an end to Darfur's chronic social, political, and economic marginalization by the GoS, and to 'protect their communities against a twenty-year campaign by government-backed militias recruited among groups of Arab extraction in Darfur and Chad. These Arab "Janjaweed" militias have over the past year received greatly increased government support to clear civilians from areas considered disloyal'.¹⁵⁵

Not only has the GoS coordinated and participated (e.g., by aerial bombing) in Janjaweed-led attacks against the SLA and JEM, but it has also armed the former. According to Kenneth Roth, Executive Director of Human Rights Watch, 'the Janjaweed are no longer simply militias supported by the Sudanese Government', rather, 'these militias work in unison with government troops'.¹⁵⁶ A premeditated scorched-earth offensive by the GoS including

153 The Darfur region is 35 times larger than Sierra Leone, which hosts one of the largest UN peace operations.

154 International Crisis Group, *Sudan: Now or Never In Darfur* (23 May 2004), ICG Africa Rep. No. 80 (2004), available at http://www.icg.org/library/documents/africa/horn_of_africa/080_sudan_now_or_never_in_darfur.pdf (last visited 12 Feb. 2005).

155 International Crisis Group, *Darfur Rising: Sudan's New Crisis* (25 Mar. 2004), ICG Africa Rep. No. 76 (2004), available at <http://www.crisisweb.org/home/index.cfm?id=2550&l=1> (last visited 12 Feb. 2005). Traditional conflict between nomadic Arab herders and black African sedentary agriculturalists has been commonplace in Darfur for many years. Although the people of Darfur are predominantly Muslim, the GoS has sought to spur conflict between the Arab and African groups and manipulate ethnic tensions by openly favouring Arab tribes. Given the region's deprived economic and political status, this practice has contributed to popular discontent among Darfur's three primary black African groups: the Fur, Zaghawa, and Messaliet. The dissatisfaction has ripened and the situation has inflamed as the periphery considers itself at the mercy of the tyrannical Khartoum regime, which controls the economic and political assets of the country; moreover, progress being made between the GoS and SPLM/A have made Darfurians become more conscious of the needs of the region.

156 'Darfur's Genocide', *Africa Research Bulletin* 15730 (1-30 Apr. 2004).

attacks by the Janjaweed have caused systematic and indiscriminate killings, massive displacement, mass rape,¹⁵⁷ mass destruction of villages, food crops and water points, and enslavement – all acts prohibited by international human rights law, international criminal law, and humanitarian law, particularly the 1949 Geneva Conventions, the 1977 Additional Protocols, and the 1948 Genocide Convention.

The crisis in Darfur may well have birthed the worst humanitarian crises in the world today.¹⁵⁸ During testimony before the US Congress in May 2004, Charles Snyder, Acting US Assistant Secretary of State for African Affairs, categorized the crisis in Darfur as 'ethnic cleansing on a large scale';¹⁵⁹ however, the State Department was reluctant to declare that the GoS had committed and sponsored acts of genocide even though the circumstances in Darfur merited it. In December 2003, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Jan Egeland referred to the situation in Darfur as 'ethnic cleansing' and a 'systematic depopulation of areas' declaring it the world's worst and most neglected humanitarian crisis.¹⁶⁰

Since February 2003, the crisis in Darfur has claimed 70,000 lives and may claim an additional '350,000 in the next nine months, mainly from starvation and disease. Many more will die if the direct killing is not stopped'.¹⁶¹ The World Health Organization reports that approximately 10,000 Darfurians are dying each month from starvation and disease in shanty Internally Displaced Persons (IDP) camps established by the GoS.

157 Amnesty International, *Sudan: Darfur: Rape as a Weapon of War: Sexual Violence and Its Consequences* (19 July 2004), AI Index AFR 54/076/2004, available at <http://web.amnesty.org/library/index/engafsr540762004> (last visited 12 Feb. 2005).

158 'Waking Up to the Horror of Darfur', Africa Analysis, available at http://web.lexis-nexis.com/universe/document?_m=cdb62111ab5d5ba19be54ab4f56d0814 (last visited 17 Aug. 2004).

159 Acting US Assistant Secretary of State for African Affairs Charles Snyder, 'Ethnic Cleansing in Darfur: A New Front Opens in Sudan's Bloody War', Testimony Before the House International Relations Committee (6 May 2004), available at <http://www.state.gov/p/af/rls/rm/32316.htm> (last visited 12 Feb. 2005).

160 Press Briefing on Humanitarian Crisis in Darfur, Sudan (2 Apr. 2004) available at <http://www.un.org/News/briefings/docs/2004/egelandbrf.DOC.htm> (last visited 12 Feb. 2005). See also 'Sudan: Interview with UN Emergency Relief Coordinator Jan Egeland', UN Integrated Regional Information Networks (2 Apr. 2004), at http://www.irinnews.org/report.asp?ReportID=40412&SelectRegion=East_Africa&SelectCountry=SUDAN (last visited 12 Feb. 2005).

161 Darfur Combatants Still Ignore Sudan Peace Pacts, ABC News International/Reuters (11 Jan. 2005), available at <http://abcnews.go.com/International/wireStory?id=403613> (last visited 5 Feb. 2005). See also International Crisis Group, *supra* note 154.

Approximately 1.7 million people, out of approximately 6.5 million in the Darfur region, have been forced from their homes into inadequately managed and maintained government-controlled IDP camps in Darfur, where they are scarcely protected from attack by the Janjaweed and lack basic relief supplies. In addition, the approximately 230,000 people that have been forced to flee across the border into Chad as refugees are not safe either as the 'Janjaweed have followed them, and the resulting clashes with Chad's army threaten to destabilize that country and produce a full-scale international war'.¹⁶²

The conflict in Darfur not only threatens to destabilize the region and destroy or permanently shift the delicate social and cultural fabric of seven million Muslim Darfurians, but it has also created three 'multiple intertwined conflicts. One is between government-aligned forces and rebels; in a second government militia raid civilians; yet a third involves a struggle among Darfur communities themselves'.¹⁶³ The geopolitical implications of the conflict are very serious as they threaten the stability of the regimes and peoples in Sudan and Chad, and have the 'potential to inspire insurgencies in other parts of the country'.¹⁶⁴ If significant progress is not made in solving the crisis in Darfur, several hundred thousand more civilians will die from violence, disease, and starvation, and the world will bear witness to one of the most horrific manmade humanitarian catastrophes in history.

4.2 International Responses to the Darfur Crisis¹⁶⁵

The international response to the conflict in Darfur has been slow and incremental, particularly considering that many nations, including the United States, have declared the situation in Darfur a genocide, and given the cataclysmic nature of the crisis. The Darfur crisis is the first major test for the African Union and its Peace and Security Council. It also presents a challenge for the United Nations in the wake of its disgraceful response to the genocide in Rwanda. The UN has sought to resolve the Darfur crisis; however, the UNSC has not taken any decisive action. Although the United States has shown some zeal in mobilizing international support for the African Union mission in the

¹⁶² *Ibid.*

¹⁶³ International Crisis Group, *supra* note 155.

¹⁶⁴ *Ibid.*

¹⁶⁵ This section will not be fully developed until more information and data become available about the precise scope and character of ongoing AU and UN activities in Darfur.

country, China and Russia have undermined US action on the Security Council by allowing strategic economic interests to take precedence over the grave humanitarian situation in Darfur.

4.2.1 *The African Union*

The crisis in Darfur may prove to be a watershed in cooperation between a regional organization, the AU, and the UN as originally envisioned in Article 53 of the UN Charter, given the partnership that has emerged in seeking an end to the conflict in the country. Nevertheless, the UN Secretariat has not been able to muster the necessary international support or diplomatic muscle to forestall the crisis.

The Executive Council of the Ministers of the AU formally became appraised of the crisis in Darfur in March 2004, and immediately supported mediation efforts undertaken by Chad to resolve the conflict. Without delay the AU dispatched its Special Envoy for the Sudan to support the Chadian mediation team. On 8 April 2004, under the auspices of President Déby of Chad and the chairperson of the AU Commission, the GoS, SLA, and JEM signed a comprehensive Humanitarian Ceasefire Agreement on the Conflict in Darfur (HCACD) and a Protocol on the Establishment of Humanitarian Assistance in Darfur (PEHAD).¹⁶⁶

The HCACD, among other things, provided for a cessation of hostilities, including the neutralization of armed militias by the GoS; the creation of a Joint Commission and a Ceasefire Commission with international participation; the release of all prisoners of war and other detained persons; and the creation of the conditions for the free flow of humanitarian assistance to displaced persons and other civilian victims of the war.¹⁶⁷

166 Humanitarian Ceasefire Agreement on the Conflict in Darfur, 8 Apr. 2004, available at http://www.darfurinformation.com/cf_ceasefire_agreement.shtml (last visited 12 Feb. 2005) [hereinafter HCACD]; Protocol on the Establishment of Humanitarian Assistance in Darfur, 8 Apr. 2004, available at <http://www.iss.co.za/AF/profiles/Sudan/humanprot.pdf> (last visited 12 Feb. 2005) [hereinafter PEHAD]. The AU and Chadian Mediation Team negotiated other important agreements that reiterated and reinforced the HCACD and PEHAD, including the 25 April 2004 Agreement between the GoS and the SPLM and JEM, and the 28 May 2004 Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in the Darfur.

167 HCACD, *supra* note 166, provision 18.

The PEHAD binds the warring parties to abide by the international rule of law, including human rights law, refugee law, and international humanitarian law norms. The Protocol stresses the imperative that the GoS, SPLM/A, JEM, and relief agencies recognize and adhere to humanitarian and human rights principles, along with the corollary international principles of impartiality, neutrality, accountability, and transparency. The PEHAD also stresses the importance of the free movement of and access to humanitarian relief workers, the return of displaced persons and refugees and, perhaps most important, the institution of protective measures to ensure that victims are not deprived of humanitarian assistance or made the subject of attacks.¹⁶⁸

Although the HCACD and PEHAD seem to have brought some semblance of hope and peace and security to Darfur, the situation continued to worsen as the GoS, through the Janjaweed militias, intensified its scorched-earth policy against the blacks of Darfur. In response, AUPSC issued a communiqué on 25 May 2004, requesting the Ceasefire Commission to 'take all steps deemed necessary to ensure an effective monitoring of the Humanitarian Ceasefire Agreement of April 8, 2004, in particular, through the deployment of an Observer Mission, with the required civilian component and, if necessary, the protection element, to support the work of the Ceasefire Commission'.¹⁶⁹ The 25 May communiqué clearly interprets the 'protection element' as both force protection and the protection of civilians in harm's way in accordance with Article 8 of PEHAD. On 4 June 2004, the various stakeholders in the Darfur crisis entered into the Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC), which is primarily concerned with coordinating investigations, verifications, monitoring compliance in accord with the HCACD and PEHAD, reporting on violations of the Agreement and, if necessary, force protection.¹⁷⁰ After the establishment of the CFC, the AU began to play a prominent and decisive role in managing the crisis in Darfur – largely due to the skill of AU mediators, the respect they had amongst the warring parties and, albeit small, their constant presence on the ground.

168 See PEHAD, *supra* note 166.

169 See Report of the Chairperson of the Commission on the Situation in Darfur (The Sudan) (4 July 2004), PSC/MIN/2(XII), available at http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/centorg/PSC/040704darfurrep.pdf (last visited 12 Feb. 2005).

170 Agreement on Humanitarian Ceasefire on the Conflict in Darfur–Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC) (4 July 2004) (on file with author).

In June 2004, the AUPSC assumed the leadership role in seeking an end to the crisis in the Sudan; on 4 July 2004, it issued a communiqué expressing its concern about violations of human rights by the Janjaweed and reiterating the need to bring to justice human rights violators.¹⁷¹ By July 2004, the conflict in Darfur had caused the deaths of approximately 30,000 black Darfurians, the majority being civilian women and children. Unfortunately, during this same period the AUPSC tragically and incorrectly noted that 'even though the crisis in Darfur is grave, with the attendant loss of lives, human suffering and destructions of homes and infrastructure, the situation cannot be defined as genocide'.¹⁷² On 5 July 2004, Sam Ibok, director of the AU's Peace and Security Division, commented that 'we [the AU] cannot describe what was happened in Darfur as genocide, but it has the potential of deteriorating or degenerating into something quite serious'.¹⁷³ The unwillingness of the AU even to declare – let alone 'describe' – the crisis in Darfur as genocide was again reiterated by the Assembly of the AU, the Union's foremost political organ, at its Third Ordinary Session in July 2004, in Addis Ababa.

Nonetheless, in a 27 July 2004 communiqué, the AUPSC interpreted previous agreements, communiqués, and understandings of the AU to include within the mandate of the protection force 'the protection, within the capacity of the Force, of the civilian population'.¹⁷⁴ Most important is the request of the AUPSC to the Ceasefire Commission Chairperson to design a plan that entails the launching of a 'full-fledged peacekeeping mission with the requisite mandate and size to ensure the effective implementation of the Ceasefire Agreement, with particular emphasis on the disarmament and the *neutralization* of the Janjaweed militia, the *protection of the civilian population* and the facilitation

171 See Communiqué of the Twelfth Meeting of the Peace and Security Council (4 July 2004), PSC/MIN/Comm.(XII), available at http://www.africa-union.org/AU%20summit%202004/excl/Communiqu%C3%A9%20_Eng.pdf (last visited 12 Feb. 2005).

172 *Ibid.*

173 A. Mitchell, 'Group to Send Peacekeepers to Sudan Area', *Associated Press Stories*, 5 July 2004, available at http://myhero.com/myhero/hero.asp?hero=Sudan_Peacekeepers, AP (last visited 12 Feb. 2005). See also 'Sudan: African Union to Send Protection Force to Darfur', UN Integrated Regional Information Networks (6 July 2004), available at <http://www.globalsecurity.org/military/library/news/2004/07/mil-040706-irin01.htm> (last visited 12 Feb. 2005).

174 Communiqué of the Thirteenth Meeting of the Peace and Security Council (27 July 2004), PSC/PR/Comm.(XIII), para. 8, available at <http://splmtoday.com/modules.php?name=News&file=print&sid=2843> (last visited 12 Feb. 2005) [hereinafter Thirteenth Meeting Communiqué].

tion of the delivery of humanitarian assistance'.¹⁷⁵ The aforementioned request is bold because the GoS has rejected the notion of any AU-expanded mandate to include peacekeeping, on the basis that it is solely responsible for protecting its citizens. Hence, the AU has diplomatically skirted around the issue by using the term 'protection force' rather than peacekeeping force.

On 30 July 2004, the UNSC adopted Resolution 1556 demanding that Sudan disarm the Janjaweed militias.¹⁷⁶ The Resolution placed a comprehensive weapons and ammunition embargo on the country and endorsed AU plans to deploy a protection force. The AUPSC in turn requested the CFC Chairperson to, among other things, submit a plan to 'bring to justice the perpetrators of human rights violations'.¹⁷⁷ In September 2004, as part of the CFC operation and the African Union Mission in the Sudan (AMIS), the AU deployed approximately 125 AU monitors, supported by a protection force of 310 troops comprised of soldiers from Rwanda (155 troops) and Nigeria (155 troops).¹⁷⁸ The United States hired a private contractor to set up the AMIS mission base and provided it with logistical support.¹⁷⁹ Nevertheless the AU recognizes that, although 'AMIS' initial deployment has been useful, its effectiveness has been constrained by its small size as well as logistical challenges'.¹⁸⁰ The AMIS has not been able to forestall the on-again, off-again fighting and ceasefire violations of the GoS, Janjaweed militias, SPLM/A, and JEM, making the humanitarian relief effort difficult.

Between September and December 2004, the CFC issued over a dozen ceasefire violation reports. The reports indicate that the bulk of violations have been committed by the GoS and its Arab militias.¹⁸¹ As a result of the numer-

175 *Ibid.*, para. 9 (emphasis added).

176 SC Res. 1556, UN Doc. S/RES/1556 (2004).

177 Thirteenth Meeting Communiqué, *supra* note 174, para. 11.

178 Report of the Chairperson of the Commission on the Situation in Darfur, Sudan (20 Oct. 2003), para. 17, PSC/PR/2(XVII), available at http://www.africa-union.org/News_Events/Communiqu%C3%A9s/Report%20-%20Darfur%2020%20oct%202004.pdf (last visited 12 Feb. 2005) [hereinafter Commission Chairperson Report]. See also US Secretary of State Colin L. Powell, 'The Crisis in Darfur', Testimony Before the Senate Foreign Relations Committee (9 Sept. 2004); 'East Africa: Eleven Nations to Provide Troops to AU Standby Force', UN Integrated Regional Information Networks (10 Sept. 2004), at http://www.irinnews.org/report.asp?ReportID=43125&SelectRegion=East_Africa,%20Great_Lakes&SelectCountry=EAST%20AFRICA (last visited 12 Feb. 2005).

179 Commission Chairperson Report, *supra* note 179, para. 21.

180 *Ibid.*, para. 64.

181 African Union Ceasefire Commission Reports (Sept.-Dec. 2004), available at <http://www.africa-union.org/DARFUR/homedar.htm#> (last visited 12 Feb. 2005).

ous ceasefire violations, on 17 September 2004 the AUPSC adopted a communiqué urging the GoS, JEM, and SPLM/A to comply with the HCACD and cooperate fully with the African Union.¹⁸² The communiqué also requested the CFC to move quickly to develop a plan for the expansion of the AMIS. The UNSC followed suit by adopting Resolution 1564 on September 18, expressing 'grave concern at the lack of progress' with the security situation and the 'protection of civilians', 'disarmament of the Janjaweed militias and identification and bringing to justice Janjaweed leaders for human rights and international humanitarian law violations in Darfur'.¹⁸³ Resolution 1564 also declared that the GoS had not fully complied with its obligations under UNSC Resolution 1556 and earlier ceasefire agreements, and threatened to levy additional sanctions against it.¹⁸⁴

On 20 October 2004, the AUPSC adopted yet another communiqué empowering the AMIS to 'monitor and observe compliance' with the HCACD and all other relevant agreements, 'assist in the process of confidence-building' and 'contribute to a secure environment for the delivery of humanitarian relief' and the 'improvement of the security situation throughout Darfur'.¹⁸⁵ This includes, among other things, ceasefire monitoring, the investigation of ceasefire violations and, most importantly, the protection of civilians 'under imminent threat and in the immediate vicinity'.¹⁸⁶ What is more, the AUPSC authorized the expansion of the AMIS mission 'to consist of 3,320 personnel, including 2,341 military personnel, among them 240 observers, and up to 815 civilian police'.¹⁸⁷

On 9 November 2004, the GoS, SPLM/A, and JEM entered into two AU-brokered protocols relating to the improvement of the humanitarian and security situations in Darfur. The protocol on the improvement of the humanitarian situation in Darfur recognizes that assistance from the international community

182 Communiqué of the Sixteenth Meeting of the Peace and Security Council (17 Sept. 2004), PSC/PR/Comm.(XVI), available at http://www.africa-union.org/News_Events/Communiqu%C3%A9s/17%20Sept%20Communiqu%C3%A9.pdf (last visited 12 Feb. 2005).

183 SC Res. 1564, UN Doc. S/RES/1564 (2004), pmbi.

184 *Ibid.*, para. 1.

185 Communiqué of the Seventeenth Meeting of the Peace and Security Council (20 Oct. 2004), para. 4, PSC/PR/Comm.(XVII), available at http://www.africa-union.org/News_Events/Communiqu%C3%A9s/Communiqu%C3%A9%20_Eng%2020%20oct%202004.pdf (last visited 12 Feb. 2005).

186 *Ibid.*, para. 6.

187 *Ibid.*, para. 7.

is essential to ending the conflict, and provides for the free movement and access of humanitarian works to vulnerable populations and the protection of civilians – especially IDPs and refugees – against attacks, threats, and intimidation.¹⁸⁸ The protocol also calls for the strengthening of the AMIS mission, appeals to donors to increase assistance to the UN and other humanitarian organizations, and welcomes the deployment of UN human rights monitors in the country.¹⁸⁹ The parties at conflict also agree to establish a Joint Humanitarian Facilitation and Monitoring Unit under the authority of AMIS (comprising UN and Joint Commission members) to ensure that the provisions of the protocol are implemented and to seek ways to build trust and confidence among combatants.¹⁹⁰

The protocol on the improvement of the security situation in Darfur obligates the warring parties to ensure an effective ceasefire by refraining from all hostilities and military actions and by sharing information (i.e., transparency) with the CFC/AMIS.¹⁹¹ Under the protocol the parties also commit themselves to release all detained persons; cooperate with the International Committee of the Red Cross and adhere to international humanitarian law; and build confidence and trust among themselves and local communities.¹⁹² The protocol requires the GoS to 'neutralize and disarm the Janjaweed/armed militias',¹⁹³ and refrain from recruiting children as soldiers or combatants.¹⁹⁴ In this context, the GoS, SPLM/A, and JEM agree to cooperate with the AU in the enhancement of AMIS operations.

As of January 2005, the AU had yet to deploy an expanded AMIS and the warring parties had not abided by the terms of the N'Djamena agreement or

188 Protocol Between the Government of the Sudan (GoS), The Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) on the Improvement of the Humanitarian Situation in Darfur (9 Nov. 2004), paras. 1-2, available at http://www.globalsolutions.org/programs/peace_security/peace_ops/conflicts/Sudan_Articles/Darfur_HumanitarianAccess_Protocol.pdf (last visited 12 Feb. 2005).

189 *Ibid.*, para. 3.

190 *Ibid.*, para. 4.

191 Protocol Between the Government of the Sudan (GoS), The Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) on the Enhancement of the Security Situation in Darfur in Accordance with the N'Djamena Agreement (9 Nov. 2004), para. 1, available at http://www.globalsolutions.org/programs/peace_security/peace_ops/conflicts/Sudan_Articles/Darfur_Noflyzone_Protocol.pdf (last visited 12 Feb. 2005).

192 *Ibid.*, paras. 4, 6.

193 *Ibid.*, para. 5.

194 *Ibid.*, para. 8.

subsequent protocols and accords. From this background it is clear that although the AUPSC has taken the appropriate procedural steps to manage the crisis, it has not taken the necessary political actions (e.g., by declaring that GoS actions in Darfur amount to genocide) to establish an effective operational presence on the ground.

4.2.2 *The United Nations*

At the behest of the United States, the United Nations has played and continues to play a critical role in resolving the crisis in Darfur.¹⁹⁵ It has provided vital support to the implementation of the comprehensive peace agreement between the GoS and the SPLM/A, and is currently providing political, economic, and logistical support for the AMIS.

The first major step taken by the UN was to enter into a joint communiqué with the GoS, which it did on 3 July 2004, that seeks to build on the HCACD. In the communiqué, the UN pledged to assist the affected populations of Darfur and those refugees that have fled to Chad; assist the quick deployment of AU ceasefire monitors; use its good offices to assist in the mediation process; and support the resolutions of the Security Council, including the implementation of peace agreements and the possible deployment of peacekeepers in Darfur.¹⁹⁶

In return, the GoS pledged to allow humanitarian agencies and human rights workers to have unimpeded access to and from Darfur; suspend all restrictions on the importation of humanitarian relief materials including vehicles, aircraft, and communications equipment; cease all hostilities; investigate all cases of human rights violations and bring any perpetrators to justice swiftly; establish a complaint system respectful of local tradition that allows abused women to make formal charges against alleged perpetrators; deploy a strong and credible police force in all IDP areas as well as those areas prone to attack; train police

195 As of 2 September 2004, the United States had provided over US\$211 million to the humanitarian relief effort in Darfur, Sudan. 'This includes \$112 million in food assistance, \$50 million in non-food assistance, \$36 million for refugees in Chad, \$5 million for refugee programs in Darfur, and \$6.8 million for the African Union mission'. Powell, *supra* note 178. As of December 2004, the US government had committed US\$373,485,243 in humanitarian assistance to Darfur in fiscal year 2003-05. See http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/countries/sudan/fy2005/darfur_he_fs14_12-30-2004.pdf (last visited 12 Jan. 2005).

196 Joint Communiqué Between the Government of Sudan and the United Nations (3 July 2004), available at http://www.passievoorvrede.nl/upload/afsudan/040703_visit_secretary_general.pdf (last visited 12 Feb. 2005).

in human rights law and ensure that they abide by it; keep the militias away from IDP camps; disarm the Janjaweed and other militia groups; institute confidence-building measures to allow displaced persons to return home; and seek a political solution to the crisis that is amicable to all parties in the conflict.¹⁹⁷

The GoS and the UN also established a Joint Implementation Mechanism (JIM) mandated to 'closely follow and appraise developments and periodically report on the progress in the implementation' of the communiqué to its stakeholders.¹⁹⁸ The JIM is co-chaired by the Minister of Foreign Affairs of the Sudan and the Special Representative of the UN Secretary-General for the Sudan.

These efforts were followed by the adoption of the US-sponsored UNSC Resolution 1556 on 30 July 2004,¹⁹⁹ which welcomes the creation of the JIM and the Darfur Plan of Action (5 August 2004), setting forth indicators to assess whether or not the GoS is complying with Resolution 1556. The UN also dispatched a team of experts to meet with AU and GoS officials in Addis Ababa and Khartoum, respectively, to assist in the development of a comprehensive plan for an expanded AMIS. While the protection of civilians is theoretically the responsibility of the GoS, the AU and UN envisage that the 'AMIS protection element would protect civilians whom it encounters under imminent threat and in the immediate vicinity, within its capability', making it an operation with a quasi-peace-enforcement component.²⁰⁰

Given the UNSC's spotty record of maintaining international peace and security in Africa, its adoption of Resolution 1556 and its declaration under Chapter VII of the UN Charter that the situation in Sudan constitutes a threat to international peace and security is a crucial development, as the Resolution clearly endorses the protection force envisioned by the African Union and urges the international community to support it.²⁰¹

Resolution 1556 also 'condemn[s] all acts of violence and violations of human rights and international humanitarian law by all parties to the conflict',

197 *Ibid.*

198 *Ibid.*

199 SC Res. 1556, *supra* note 176.

200 Report of the Secretary-General Pursuant to Paragraphs 6 and 13 to 16 of Security Council Resolution 1556 (30 Aug. 2004), para. 57, UN Doc. S/2004/703 (2004).

201 SC Res. 1556, *supra* note 176, para. 2. The UNSC comprehensively debated whether or not to levy sanctions on Sudan. Russia and China opposed sanctions as the former is a principal arms supplier to the Sudan and the latter a principal operator of and investor in Sudanese oil fields.

but regrettably does not make specific reference to violations by GoS, only the Janjaweed.²⁰² It rather demands that the GoS disarm the Janjaweed militias and 'apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and international humanitarian law violations', and encourages an independent investigation of human rights and humanitarian law violations in Darfur.²⁰³ It also fails to explicitly authorize the use of military force or sanctions against the GoS, nor does it specifically reprimand the GoS for committing and/or sponsoring acts of violence, let alone genocide.

The failure of the UNSC to take decisive action against the GoS is striking given that, by late July 2004, well-documented and verifiable evidence was produced by humanitarian relief agencies, human rights organizations, and governments that unambiguously showed that the GoS was pursuing a policy of ethnic cleansing against Darfur's black population and arguably had committed acts of genocide against the former.

Notwithstanding, Resolution 1556 does recognize the illegal and deplorable human rights violations of the GoS-backed Janjaweed militias and places what amounts to an arms embargo against the latter by prohibiting the 'sale or supply, to all non-governmental entities and individuals, including the Janjaweed ... of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts'.²⁰⁴ It also 'expresses its intention' to consider additional measures including those provided for in Article 41 of the UN Charter against the GoS, if it fails to comply with the Resolution.²⁰⁵

On 9 September 2004, US Secretary of State Colin Powell articulated the US position on the Sudan by declaring that the killings, rapes, and destruction of homes in Darfur amounted to genocide and called on the UNSC to take immediate corrective action.²⁰⁶ On 18 September 2004, the UNSC adopted Resolution 1564, which expressed grave concern at the lack of progress in creating a secure environment for the protection of civilians, disarmament of the Janjaweed, and the bringing to justice of the Janjaweed leadership responsible for violating human rights and humanitarian law.²⁰⁷ The Resolution

202 *Ibid.*, pmbi.

203 *Ibid.*, para. 6.

204 *Ibid.*, para. 7.

205 *Ibid.*, para. 6.

206 Powell, *supra* note 178.

207 SC Res. 1564, *supra* note 183.

demanding that the GoS submit to the AMIS, for verification documentation, particularly the names of Janjaweed human rights abusers, and insists that all parties to cease fighting and cooperate with humanitarian relief and monitoring efforts.²⁰⁸ Resolution 1564 concluded with the threat of 'taking additional measures as contemplated in Article 41' of the UN Charter including 'actions to affect Sudan's petroleum sector' and actions against the GoS or individuals in order to obtain full compliance with its resolutions.²⁰⁹

From this background it is clear that the UN has played a supportive and supplemental role to the AMIS. Nevertheless, UNSC resolutions have been ineffective because they have not sanctioned the GoS for being the referent object of oppression in Darfur. The UN and the AU have, in my view, mistakenly considered the GoS as a partner in peace when the facts clearly indicate otherwise. For example, UN calls for the GoS to apprehend and bring to justice GoS-supported Janjaweed militia responsible for committing atrocities is tantamount to asking the fox to police hens.²¹⁰

5 FINAL THOUGHTS

Despite laudable efforts by the AU, the UN, and the United States, the situation in Darfur demonstrates that the international community has learned very little from the Rwanda catastrophe as it 'lacks the institutions, procedures, and political unity necessary to respond [to genocide] in a timely way. The global response to rapidly developing conflicts is still the same: painfully and tragically slow'.²¹¹ The lack of an established mechanism in the 1948 Genocide Convention that could authoritatively determine when genocide has occurred has left

208 *Ibid.*, paras 9-10.

209 *Ibid.*, para 14.

210 The UN and AU's flaccid approach to the Darfur crisis was influenced by the need to foster a final resolution to the 20-year civil war between the GoS and southern Sudan People's Liberation Movement/Army. Many UN and AU officials were under the presumption that peace could not occur in Darfur absent an end to the North-South conflict.

211 C.O. Igiri, P.N. Lyman, 'Giving Meaning to "Never Again": Seeking an Effective Response to the Crisis in Darfur and Beyond', *CSR No. 5* (Council on Foreign Relations), Sept. 2004, 23, available at <http://www.cfr.org/pdf/NeverAgainSudanCSR.pdf> (last visited 12 Feb. 2005).

'both the substantive and the procedural questions open to debate and delay' ultimately paralyzing rather than galvanizing international action.²¹²

Moreover, initially the failure of African (except for Rwanda) and European states to publicly criticize the GoS allowed it to continue military operations in Darfur with impunity.²¹³ The AU's aversion to declaring genocide in Sudan in the wake of the clear positive duty to prevent and punish acts of genocide under the AU is disconcerting and raises serious questions about its ability to manage conflict on the continent. The unwillingness of the UN Secretary-General to make a definitive pronouncement of genocide and boldly condemn the GoS is even more negligent.

The failure of the international community, namely the UN, to take preventive action when the state of affairs in Darfur clearly indicated that ethnic cleansing was afoot allowed genocide to unfold unchecked. As of January 2005, the UNSC had yet to authorize serious sanctions against the GoS, in part due to opposition by China, Russia, and several African and Arab states. Hence, UNSC demands that the GoS rein in the Janjaweed militias and its lacklustre threats of additional measures under Article 41 of the UN Charter are ludicrous, given that they ignored the role of the GoS in arming the Janjaweed and launching unlawful aerial and ground attacks against civilian communities in Darfur.

On the other hand, the AU leadership is working hard to make the AUPSC a viable and credible conflict mechanism. The crisis in Darfur will undoubtedly test the AU's resolve and serve as the standard by which it is judged for years to come. While its aspiring principles and operational objectives are indeed progressive, they are useless absent the political will to act and a serious financial commitment from AU member states and the international community as a whole. The AU operation in Darfur has wide international support and a mandate to deploy a robust 'protection force' in the region, yet it lacks sufficient resources to do so.

The AU's response to the conflict in Darfur signals a progressive shift and willingness of African leaders to serve as first-responders to African crises. The cooperative character of relations that has emerged between the AU and the UN concerning Darfur is refreshing and will undoubtedly serve as a model for future peace operations in Africa. In this context, there have been few

212 *Ibid.* at 20.

213 If the AU would have made an authoritative pronouncement of genocide in Darfur, Sudan, while simultaneously underscoring the multifarious and nuanced political dynamics that underlie the conflict, international support for ending the crisis would have been significantly more forthcoming.

operational 'stumbling blocks' because the roles are well defined; the AU is the primary keeper of the peace and the UN its sanctioning authority.

Whether or not the UN and the international community will make available to the AMIS the necessary resources it needs to manage the crisis in Darfur is uncertain, but if recent developments are any indicator, more black Darfurians will need to die before the guilt and shame of silence and ambivalence awaken the consciousnesses of political elites in foreign capitals. I remain cautiously optimistic.